

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 627**

and

Case 17-CB-072671

STACY M. LOERWALD, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

Counsel for the General Counsel (General Counsel), pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, files the following answering brief opposing International Union of Operating Engineers, Local 627's (Respondent) exceptions to the January 29, 2019, Supplemental Decision by Administrative Law Judge (ALJ) Charles J. Muhl.

The ALJ's decision is amply supported by evidence in the record and free of any tangible error. Accordingly, The Board should adopt the ALJ's findings, conclusion, and proposed Order.

I. Statement of the Case

This compliance case was heard before the ALJ on October 11, 2018. The ALJ issued a Decision and Order on January 29, 2019, finding that Respondent owed Charging Party Stacy Loerwald (Loerwald) \$23,275, plus interest, to make her whole for unfair labor practices it committed. On February 26, 2019, Respondent filed exceptions to the ALJ's decision.

II. Analysis

A. Contrary to Respondent's exceptions, the ALJ was properly appointed and properly exercised his discretion

In its exceptions, Respondent renews the argument raised in its Answer to the Complaint that the ALJ was not properly appointed pursuant to the Appointments Clause of the United States

Constitution. As the ALJ correctly noted in footnote 1, the Board decided this issue in *Westrock Services, Inc.*, 366 NLRB No. 157 (2018), and found that the agency's administrative law judges are appointed by a Head of Department, and thus pass constitutional muster.¹ The Board should dismiss Respondent's arguments about the propriety of the ALJ's appointment.

Respondent further argues that its counsel received unfair or unequal treatment from the ALJ during the hearing. The Board accords judges significant discretion to control the hearing and direct the creation of the record. *Parts Depot, Inc.*, 348 NLRB 152, 152 fn. 6 (2006), *enfd.* Mem. 260 Fed.Appx. 607 (4th Cir. 2008). Each of the examples of purported unequal treatment cited by Respondent, from summarizing the underlying unfair labor practice decision to various reprimands of Respondent's counsel, fall within the wide discretion accorded to an administrative law judge to control a hearing.

Respondent contends that the ALJ "testified" that an objected-to document was complete and came from Respondent. In fact, the ALJ responded to Respondent's objection to the admissibility of a document by noting that the witness had testified that the document came from Respondent and was complete. (Tr. 32). Respondent was able to test the veracity of this assertion through later cross examination. It was not error for the ALJ to respond to an objection by restating the witness's testimony about the document. To the extent that the testimony about the document's provenance was mistaken, there is no evidence that the ALJ relied on any of the purported misstatements about the document's origin in making the decision.

In fact, Respondent does not cite to any specific erroneous rulings by the ALJ or misstatements of fact in the ALJ's supplemental decision. Absent specific exceptions to actual rulings, there is nothing for the Board to review. Thus, Respondent's exceptions concerning unfair

¹ Judge Muhl was appointed in September 2014, a time when the Board had a properly-constituted quorum.

treatment by the ALJ lack merit. *See Napleton 1050, Inc.*, 367 NLRB No. 6, n. 1 (September 28, 2018).

B. Contrary to Respondent's exceptions, the ALJ properly applied the most accurate formula to determine the make-whole remedy.

Respondent further contends that the ALJ erred in adopting General Counsel's proposed method for computing the make-whole remedy over Respondent's method. However, any fair reading of the supplemental decision establishes that the ALJ conducted a comprehensive review of the parties' competing formulas. The ALJ considered the strengths and weakness of each formula, even noting that Respondent's proposed formula could, in theory, be more accurate. However, the ALJ reasoned that, in practice, Respondent's formula was "speculative and unreliable." Respondent's method could not be used to determine an accurate make-whole remedy because the documents necessary to support its calculation were unreliable and missing critical information. Further, even if the records had been complete, the ALJ noted that Respondent offered inconsistent explanations about the order of referrals it would have made absent discrimination, undercutting Respondent's assertion that its method reflected reality.

In contrast, the ALJ properly concluded that General Counsel's projection method was both reasonable and the more accurate formula in these circumstances. The ALJ fully explained why the General Counsel made reasonable decisions in determining the make-whole remedy. This included omitting 2011 from the average of Loerwald's hours worked because Respondent admittedly did not strictly follow the hall rules and bylaws during significant portions of that year. The ALJ's findings on the appropriate make-whole formula are both reasonable and fully supported by evidence in the record.

C. Contrary to Respondent's exceptions, the ALJ properly found that Respondent did not meet its burden regarding mitigation of damages.

Respondent had the burden of establishing that Loerwald failed to mitigate her damages. The ALJ correctly found that it failed to meet this burden. In its exceptions, Respondent rehashes the same argument it made during underlying unfair labor practice hearing and tried to raise during the compliance hearing. Essentially, Respondent argues that Loerwald failed to mitigate the damage caused by Respondent's unlawful hiring hall operation when she did not specifically ask Respondent to stop discriminating against her.

The ALJ correctly ruled that this line of argument was directly addressed during the underlying unfair labor practice hearing. Respondent cannot relitigate an issue that was considered and decided by arguing that it is now a matter of "mitigation" instead of a matter of determining when the discrimination ended. Respondent's argument on mitigation is simply a fresh coat of paint on an old, discredited argument as an attempt to argue that it is new. The argument is not new, and the ALJ correctly found that Respondent did not meet its burden of proving a failure to mitigate damages.

III. Conclusion

General Counsel respectfully requests the Board to affirm the administrative law judge's findings, conclusions, and recommended Order.

March 7, 2019

Respectfully submitted,

/s/ Bradley A. Fink

Bradley A. Fink, Counsel for the General
Counsel

National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829

CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.114, a true and correct copy of the foregoing Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was e-filed with the National Labor Relations Board and served via electronic mail on this 11th day of March 2019, on the following parties:

STEVEN R. HICKMAN, Attorney
FRASIER, FRASIER & HICKMAN, LLP
Email: frasier@tulsa.com

STACY LOERWALD
Email: mothergoose76148@yahoo.com

Respectfully submitted,

/s/ Bradley A. Fink
Bradley A. Fink, Counsel for the General
Counsel
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829