

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

TRANSPORTATION SERVICES OF ST. JOHN, INC.	)	CASE NO: 12-CA-202248
	)	
and	)	
	)	
UNITED, INDUSTRIAL, SERVICE, TRANSPORTATION, PROFESSIONAL AND GOVERNMENT WORKERS OF NORTH AMERICA, OF THE SEAFARERS INTERNATIONAL UNION OF NA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT/NMU, AFL-CIO	)	
_____	)	

**TRANSPORTATION SERVICES OF ST. JOHN, INC. REPLY BRIEF AND  
OPPOSITION TO MOTION TO STRIKE RESPONDENTS EXCEPTIONS**

Transportation Services of St. John, Inc., (“Transportation Services” or “the Employer”), submits this reply brief in opposition to General Counsel’s Answering Brief (the “Answering Brief” or “GC’s Brief”) in response to the Employer’s exceptions (“the Exceptions”) to the administrative law Judge’s decision (the “Decision”) and in opposition to its motion to strike. In this matter, a small, family business, on a small island, faces the unlimited resources of an international union, unquestioningly supported by the NLRB General Counsel, so that the resources of the latter are arrayed to overwhelm the limited capacity of this small business to defend itself. The General Counsel’s brief is effectively a procedural attack, mounted with those unlimited resources, that avoids the substantive defects in the proceedings below and seeks to silence the voice of the small business with a flood of technical objections. None of the objections have actual legal merit, and the Decision must be reversed.

**I. OBJECTION TO GENERAL COUNSEL’S MOTION TO STRIKE**

General Counsel claims that Transportation Service's exceptions are procedurally defective, in violation of CFR Section 102.46(c)(1), (2), and (3). However, no such sections exist in the published regulations. There is a Section 102.46(c), however, it has no subsection 1, 2, or 3. Moreover, Section 102.46(a) (1)(i)(A), (B), and (C), which may be the section the GC's Brief meant to cite, states that each exception must specify the questions of procedure, fact, law, or policy to which exception is taken; Identify that part of the Administrative Law Judge's decision to which exception is taken; and, provide precise citations of the portions of the record relied on. 29 C.F.R. § 102.46. Transportation Services' written exceptions clearly stated the procedures, facts, laws, and policies to which its detailed exceptions were taken, identifying each aspect of the ALJ's decision (the "ALJ Decision") to which exception was taken and the basis for the exception. Furthermore, the written exceptions specifically reference the ALJ's Decision for each exception made. Lastly, Transportation Services exceptions cite to the portions of the record relied upon. Clearly, the Exceptions provided the GC a sufficiently detailed statement of the Employer's objections to permit preparation of an answering brief. It should be noted that unlike the NLRB General Counsel, however, Transportation Services was not provided with any transcript of the proceedings, and therefore had to identify the portions of the record objected to, and relied upon, by citing the substance of the proceedings, and acknowledgement of those proceedings in the contested decision.

Moreover, General Counsel claims that Transportation Services attached documents that were not admitted into evidence at the hearing and are therefore not a part of the record. This claim, while technically -- but only partially -- accurate, fails to take into account the argument in the exceptions that the ALJ erred in her decision to not allow some documents into evidence.<sup>1</sup> Plainly, wrongful exclusion of evidence can properly be raised on appeal, and the fact that the

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<sup>1</sup> See Section II of the present brief.

evidence was wrongfully excluded cannot serve as a basis to then exclude consideration of that ruling on appeal. Moreover, attaching to the Exceptions a copy of the Employer's Post-Hearing Brief that was timely filed, but ignored by the ALJ, cannot be said to be attaching a document that is "not part of the official record" because it was "not admitted in evidence", as the post-hearing brief was never intended to be evidence. Its disregard by the ALJ, however, was clear error, as indicated in the exceptions, and more fully explained below. Moreover, this error in excluding relevant evidence by the ALJ is material in nature and prevented Transportation Services from fully responding to General Counsel's use of unfounded claims wherein Transportation Services request that pleadings filed with the NLRB in the previous proceedings involving the same Union and the very same employee, demonstrated clearly that some of the claims in this matter were untimely, had been previously rejected or dismissed, and were not offered in good faith in these proceedings, when the General Counsel sought to revive them to bolster a meritless claim.<sup>2</sup>

In summary, the Employer's Exceptions fully and fairly itemize its objections to the ALJ Decision, and the GC's effort to avoid responding to the merits of the Exceptions by reliance on this technicality – itself suffering from a technical defect – should not be allowed.

**II. General Counsel arguments that the Administrative Law Judge's decision to exclude relevant evidence submitted by the Respondent was appropriate are belied by the ALJ's decision to admit similar evidence submitted by the General Counsel.**

Sections 3 and 6 of the Answering Brief, make contradictory claims on the admissibility of evidence that would produce an unequal application of the law. Under Section 6 of the General Counsels brief, it is claimed that the ALJ was correct in admitting evidence pertaining to

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<sup>2</sup> See Employer's Post Hearing Brief, attached as Ex. A to the Exceptions, at p. 2-3, re 12-CA-186255,

grievance 008-17 even though the grievance was time barred and not a part of the instant action. General Counsel then sought to use this grievance as proof of a pattern of conduct on the part of Transportation Services of St. John's alleged failure to follow the arbitration selection process. However, it would be illogical and futile to expect Transportation Services of St. John to enter into an arbitration process for a grievance that was known to be time barred and facially invalid. The Answering Brief is claiming that Transportation Services should have entered into arbitration proceeding on a grievance claim that should never have been filed in the first place, and expended the costs of doing so, when it was known at the outset the matter would have to be dismissed. Moreover, the fact that Transportation Services did not enter into arbitration for this facially invalid claim is certainly not proof of a pattern of conduct on the part of Transportation Services in refusing to participate in valid and timely arbitration proceedings, and is not a reasonable response to an invalid and time barred claim. Yet the GC Brief argues that even as the ALJ was correct to admit his evidence about that same time-barred matter, she did not err in refusing to admit filings in the same matter offered by the Employer to more fully document the false and arbitrary nature of the claims in these proceedings. That one-sided procedural posture on the part of the ALJ was plainly improper, arbitrary and capricious, and constituted a denial of due process of law.

Section 3 of the Answering Brief argues the ALJ was correct in denying Transportation Services request to enter into evidence a position statement that would contest the argument that Transportation Services was engaged in a pattern of conduct, namely failing to choose an arbitrator. This decision by the ALJ is argued to be appropriate because the position paper, which proves that Transportation Services has entered into arbitration proceeding on prior occasions, should not be admitted because the proffered evidence was "in response to a charge...not related

to the instant matter and not included in the instant complaint”. So, in one instance the admittance of evidence on behalf of the General Counsel from an unrelated case is said to be appropriate to show a pattern of conduct, but the admittance of evidence on behalf of Transportation Services from the same case involving the Union is said to be completely inappropriate. This effort to insulate the ALJ’s decision from challenge is internally inconsistent and without merit. Here, the General Counsel is seeking to have two sets of rules imposed, wherein General Counsel is allowed to invoke the rules to ensure his evidence from an unrelated case is admitted but to exclude rebuttal evidence from Transportation Services.

Moreover, General Counsel claims in Section 5 of his brief that Transportation Services never referred to the record in support of exceptions 5, 20, 27, 30, 31, and 32. However, General Counsel then makes arguments against and cites sections 2, 3, 9, 10, 12, 14 and 15, all of which have citations to the decision as required by 29 C.F.R. § 102.46. Moreover, the sections of the Employer’s Exceptions that General Counsel claims do not have citations, specifically cite to the appropriate Code Sections and official record that support Transportation Services arguments. In Section 5, Transportation Services cites to JX1, Art. 11 re time requirements, Section 20 cites to Grievance No. 008-17 and 12-CA-186255, Section 27 Article XI, Section 1 of the CBA and JX1, Art. 11, Section 30 cites to *Koppers Co.*, 163 NLRB 517 (1967), Section 31 cites to the May 19, 2017 Letter from John J. Merchant, Associate Counsel, Union, and Section and September 21, 2016 email from Eugene Irish to Maria Hodge in regards to 12-CA-186255 and Grievance #008-17, and Section 32 cites to 12-CA-186255, the CBA contract, and Grievance 008-17. General Counsel, seeks to confuse the Board with dishonest and illogical arguments that should be admonished by the Board, as every Section General Counsel claimed lacked proper citation or

reference thereto, actually had citations to the record and evidence that was admitted at the hearing.

**III. THE ANSWERING BRIEF'S CLAIM THAT A POST HEARING BRIEF WAS NEVER FILED BY TRANSPORTATION SERVICES IS UNTRUE.**

As explained in Transportation Services Exceptions Brief, a post hearing brief was electronically filed in the same manner as every other pleading filed by Transportation Services during the entirety of this case. At the inception of this appeal, for example, after receiving the original complaint from the NLRB, Transportation Services filed its Answer with the NLRB by express mailing the Answer to the NLRB. Counsel for Transportation Services was contacted by telephone by the NLRB explaining that the answer needed to be electronically filed and provided an extension to permit the filing electronically. That was done. In earlier phases of the case, Transportation Services filed all pleading through the method provided by the NLRB, including its answer to the complaint, which was before the ALJ. The Employer provided proof of filing its Post Hearing Brief with the Exceptions. At no time was Transportation Services contacted after filing the Post Hearing brief for which a receipt was issued confirming its timely receipt by the NLRB. No one suggested that the NLRB website to which the brief was submitted was not the proper portion of the site for the specific filing of the post-hearing brief. Indeed, the receipt expressly confirms receipt (See Exceptions, Exhibit B), with no indication whatever that the filing received must be sent to some other computer destination. It was not until the present General Counsel brief that anyone has suggested that Transportation Services Post Hearing Brief should have been submitted in another manner. At no time was Transportation Services contacted after filing their Post Hearing brief to suggest that the electronic filing method used and accepted by the NLRB was in any way improper or incomplete, nor was it given the opportunity to re-file the brief in a different manner. Moreover, it is disingenuous to claim that

Transportation Services never provided a Post Hearing brief, when General Counsel admits to receiving the brief and proof of filing was attached to Transportation Services Post Hearing Brief. Plainly, the ALJ should have been aware the post-hearing brief was filed with the NLRB, and it appears certain she made no meaningful effort to determine if there was some technical issue, before opining that no such brief had been filed. This is particularly inexcusable, because the ALJ conducted several pre-hearing telephone conferences with the parties, and plainly had a simple means of communicating with them to correct her erroneous belief that no brief was filed.

#### **IV. THE ANSWERING BRIEF PROVIDES A MISLEADING AND INCOMPLETE SUMMARY OF THE FACTS IN THE CASE.**

Given the strict page limits on the Employer's Reply Brief under the NLRB Rules, in response to the General Counsel's "Statement of the Facts", which omit or mischaracterize much of the history of the proceedings, the Employer respectfully adopts and incorporates its Statement of Facts from its post-hearing brief, improperly excluded by the ALJ, and attached to the Exceptions as Exhibit A, at pp. 1-5 and the facts as set forth in the Exceptions. In particular, it is not true that the Respondent insisted on considering the undeniably onerous cost of bringing an arbitrator from the United States to the Virgin Islands to hear a grievance in person, regarding a matter of a two week suspension, *as a factor to "consider whether to appoint an arbitrator and to comply with the contractual arbitration procedure"*, as the GC Answering Brief states at p. 12. Rather, the Employer clearly and repeatedly argued that the cost involved in that procedure could and should be moderated by following a procedure where, if a stateside arbitrator was to be named, the proceedings could be conducted before him or her remotely, using video-conferencing or similar commonly adopted methods of proceeding, in a modern world, rather than flying the lawyer from the continental US to the Caribbean at an hourly fee that would render the entire dispute impossible to resolve in a reasonable and affordable manner. Thus, the

mischaracterization offered by the Union, copied by the General Counsel, found its way into the erroneous decision of the ALJ, who parroted this distortion. The Employer did not insist that the overwhelming cost of the procedure warranted refusing to proceed, but instead insisted that the cost warranted requiring that the parties follow the implied covenant of good faith and fair dealing implied in every contract in the Virgin Islands, and consistent with the laws of the NLRB, that the parties approach performance and compliance with the terms of their contract in a reasonable way. That the Union arbitrarily refused to agree to any reasonable procedures to conduct the arbitration, whether by using a local arbitrator or using modern technology to conduct the arbitration remotely if there was to be a stateside arbitrator, was a breach of the contract's duty of good faith – not a breach or unlawful action on the part of the Employer.

**V. THE ANSWERING BRIEF RESURRECTS THE IMPROPER RELIANCE UPON A GRIEVANCE FILED BY THE UNION AND DISMISSED BECAUSE IT WAS MERITLESS AND UNTIMELY.**

In a deeply disturbing argument, under section D of the Answering Brief, it once again purports to rely upon a legally baseless claim filed by the Union in 2016, and dismissed by the NLRB after the Employer pointed out its total lack of merit. (This involved grievance No. 008-17 which was dismissed by the NLRB in case 12-CA-186255, as confirmed by the evidence. See Employer's Post Hearing Brief, Ex. A to Exceptions, at p. 2-3, and Exhibits 3 and 4 to hearing transcript). This untimely and utterly baseless grievance against the Employer claimed it had wrongfully refused to pay the same employee to attend a negotiation session, although he was admitted no longer the shop steward and had no right to such payment. After the Employer filed its answer with the NLRB to a complaint about that grievance, the Union conceded and withdrew the charge. (See *Id.*) Yet in the Answering Brief it is suggested that somehow the Union was being cooperative in offering to combine that dismissed and untimely charge in a

combined arbitration with the same stateside arbitrator. (GC Brief, p. 16-17). Stating that the Union “ended-up not pursuing [that] grievance”, when the evidence made clear it did not pursue the claim because it was wholly baseless and untimely, is at best a mischaracterization of the record. The very suggestion that it was justified to layer this dismissed charge on the only one actually pending arbitration is plainly erroneous. The Answering Brief claims the ALJ correctly found there had been two grievances where Respondent refused to arbitrate, because it sought to moderate costs. (GC Brief, p. 26), Yet the GC Brief concedes that the ALJ somehow did not “rely” upon the fact that the two grievances were not of the same kind of class – as required by the NLRB to constitute an unfair labor practice. (GB Brief, P. 23, Whiting Roll Up Door Mfg. Corp. 257 NLRB 734 (1981). Put another way, the NLRB has said that an employer’s refusal to take “all or even most grievances” to arbitration, constitutes a violation of 8(a)(5). (GC Brief, p. 22). Yet, here the evidence showed, at most, only a single case in which the employer disputed the Union’s insistence on an in-person arbitration with a stateside arbitrator, and one insistence in which the arbitration had been concluded. It follows as a matter of law that the ALJ erred in her finding of a violation.

In effect, the GC needed two refusals to arbitrate to make its case, and the ALJ found there were not two, but that somehow she could foresee the Employer would refuse to arbitrate in the future. Yet the GC continues to rely upon the meritless and dismissed grievance to sustain its position. In a plainly contradictory argument, the GC’s Brief argues that excluding the Employer’s offer of evidence from 12-CA-186255, was justified because it was “a case not related to the instant matter” (GC Brief, p. 28), yet it relies upon this same grievance as a basis for purportedly satisfying the “two refusals” test. The argument that this was relevant to this proceeding because the Employer allegedly assumed the same position regarding cost (GC Brief,

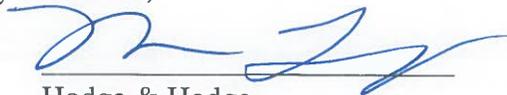
p. 32), is not only internally inconsistent with its argument of irrelevance elsewhere in the brief, but also false on the record, as the evidence established the demand for arbitration was withdrawn by the Union, because it was untimely – not that the matter did not proceed because the Employer objected to the cost of arbitration. (GC Brief, P. 32, citing the ALJ Decision at p. 13, n. 10).

## VI. CONCLUSION

The Employer respectfully refers to the arguments and authorities cited in its Exceptions to the Decision of the ALJ, and submits that they demonstrate the errors in the Answering Brief, as well as the errors in the ALJ Decision. Similarly, the Employer respectfully refers to and incorporates the arguments and authority cited in its post-hearing brief, wrongfully and erroneously omitted from consideration by the ALJ, attached to the Exceptions as Exhibit A. In summary, the record below, at best, identifies a single instance in which a small family business objected to proceeding to arbitration in the Virgin Islands with a stateside arbitrator traveling to the Caribbean at great expense, to hear a minor grievance, and proposed in the alternative that the proceedings be done by normal remote means, such as video-conference, or by use of a qualified Virgin Islands arbitrator. That reasonable proposal for proceeding in the arbitration of one grievance, about a single employee's two week suspension, would not constitute an unfair labor practice under NLRB rulings. No other alleged refusal to arbitrate was shown, and the decision below finding such a violation on this record, was erroneous under NLRB rulings.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing was served, via U.S. Mail, postage prepaid, with a copy via email, on July 29, 2019, to:

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A handwritten signature in blue ink, appearing to be "John J. Merchant", is written over a horizontal line.