

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Applicant,

v.

No. 20-9531

SMITH'S FOOD AND DRUG CENTERS, INC.

Respondent.

**ANSWER TO APPLICATION
FOR ENFORCEMENT OF AGENCY ORDER**

Respondent Smith's Food and Drug Centers, Inc., ("Smith's") answers the application for summary enforcement submitted by the National Labor Relations Board as follows.

1. This matter is before the Court for enforcement of an order ("Order") entered upon Smith's default in responding to an unfair labor practice complaint ("Complaint") issued by the Board.

2. Had Smith's not defaulted, it would have shown in response to the Complaint that:

a. The underlying charge of an unfair labor practice was filed by the Bakery, Confectionery, Tobacco Workers and Grain Millers BCTGM Local #351, AFL-CIO-CLC ("Union") on February 11, 2019, alleging that Smith's had failed to furnish information requested by the Union only twelve days before.

(Second Mot. Transfer & Continue Matter Before Board & Second Mot. for Default J., filed July 3, 2019, Atch. GCX 1.)

b. The resulting Complaint issued by the Board on June 4, 2019, recites that on or about January 30, 2019, the Union requested in writing from Smith's ten items of information relating to alleged discipline of Diliah Markey and that Smith's "unlawfully refused to provide" the first nine items of information listed and "unlawfully delayed in providing" the tenth item listed. (Id., Atch. GCX 3.)

c. On February 17, 2019, Smith's responded to the January 30, 2019, request for information by the Union by either providing the requested item of information, showing that the requested item was irrelevant to the grievance at issue, stating that the requested item did not exist, or asking for clarification of the request. Though invited to do so if the information provided was not sufficiently responsive, the Union expressed no dissatisfaction with Smith's response. See Declaration of Elbert Cordova, attached hereto.

d. Consequently, at the time the Complaint was issued there was no factual basis for the allegations recited in it.

e. As best Smith's can determine, the Union appears to have been unaware of Smith's response to the Union's request for information and, were it aware of the response, should have withdrawn the February 11, 2019, charge.

3. Smith's recognizes that in the absence of extraordinary circumstances, 29 U.S.C. § 160(e) operates as a "jurisdictional bar to consideration of objections not presented to the Board," Pub. Serv. Co. of N.M. v. NLRB, 692 F.3d 1068, 1076 (10th Cir. 2012), and ordinarily stands as a barrier to avoiding enforcement of a Board order on grounds not raised before the agency, see id.

4. Nevertheless, "equitable considerations impact" the Court's determination of whether extraordinary circumstances permit consideration of matters first raised in opposition to enforcement of a Board order. NLRB v. King Soopers, Inc., 275 F.3d 978, 981 (10th Cir. 2001).

5. Extraordinary circumstances exist in the present case. It would be inequitable to enforce an order entered on a Complaint which Smith's, through inattention, failed to defend where the Complaint rests on a charge that the Union, apparently through inattention, failed to withdraw after the information had been provided to the Union's apparent satisfaction.

6. The Court should not give greater significance to Smith's inattention to the Complaint than to the Union's inattention to Smith's response to the information request. Enforcement of the Order should be denied on equitable grounds. At a minimum, the Court should modify the Order, see 29 U.S.C. § 160(e), to eliminate the incorrect statements in the notice required by paragraph

2(b) of the Order that Smith's "violated federal labor law" and that it will furnish to the Union information "requested" and "not already provided."

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN &
ROBB, P.A.

s/ Edward Ricco

By _____

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**CERTIFICATE REGARDING
DIGITAL SUBMISSIONS**

1. All required privacy redactions have been made to this document and, with the exception of those redactions, this document and any other document(s) submitted in Digital Form or scanned PDF format are an exact copy of any written document(s) required to be filed with the Clerk.

2. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Endpoint Protection, version 14.2.4814.1101, last updated June 12, 2020) and, according to the program, are free of viruses.

RODEY, DICKASON, SLOAN, AKIN &
ROBB, P.A.

s/ Edward Ricco

By _____

Edward Ricco

CERTIFICATE OF SERVICE

I certify that on June 12, 2020, I filed the foregoing pleading electronically through the CM/ECF system, which caused all other parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Docket Activity.

RODEY, DICKASON, SLOAN, AKIN &
ROBB, P.A.

s/ Edward Ricco

By _____
Edward Ricco



February 17, 2019

Mr. Andrew Gutierrez
President/Business Agent
BCTGM Local #351
1608 Truman Street SE
Albuquerque, NM 87108

RE: RFI Response to Grievance #8

Dear Mr. Gutierrez:

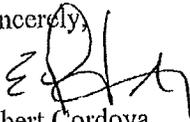
I'm writing in response to your email letter dated 1/30/2019 requesting additional information regarding the grievance filed on behalf of Ms. Diliah Markey at Smith's store #424.

1. Proof of classification of all BCTGM members at store #424. **I have enclosed a copy of the seniority list for all employees covered by BCTGM Local #351. This list includes employees at Smith's store #424.**
2. Proof of classification of all BCTGM members at store #424. **I have enclosed a copy of the seniority list for all employees covered by BCTGM Local #351. This list shows the classification of each employee at Smith's store #424.**
3. Proof of all disciplinary action issued to Diliah Markey dating back to 2/27/2018. **I have enclosed a copy of recent discipline issued to Ms. Markey. It should be noted that this was not a disciplinary matter.**
4. Proof of Diliah Markey's inability to perform any of the classifications covered by the CBA. **The issue at hand has nothing to do with whether Ms. Markey can perform the work or not.**
5. Proof of all bakery schedules dating back to 2/27/2018. **I've enclosed a copy of the bakery work scheduled for the period requested.**
6. Proof of Diliah Markey's refusal to work in a different classification. **There is no claim that Ms. Markey refused to work in a different classification.**

7. Proof of Diliah Markey's refusal to work in a different classification. **Please see my response to request No. 6.**
8. Proof of Diliah Markey's action plan. **This question is vague. I'm not sure what the union is seeking with this question. If you can be clearer with your question, I will try and respond to your request.**
9. Proof of adequate staffing to complete assigned workload in the bakery department at store #424. **The store is currently fully staffed, and the available hours are scheduled in accordance with the parties CBA.**
10. Proof of just cause for the discipline of Diliah Markey on or about 1/24/2019 including proof of all substantial evidence or guilt, proof of all investigatory notes, proof of all investigative files, proof of all reports, proof of witness statements, proof of photographs, proof of all audio or video footage, proof of all correspondence, proof of all Company meeting minutes, and proof of all Supervisor's or Store Director's notes. **Ms. Markey was not disciplined. The Union's grievance does not claim any such violation. There is no evidence of guilt, there are no investigative files, notes, meeting minutes, video or audio footage, etc.**

I trust that the attached information is responsive to your information request. If you need any additional information, please let me know.

Sincerely,



Elbert Cordova
Labor Relations Specialist