



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

July 8, 2020

VIA CM/ECF

Molly C. Dwyer, Clerk
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, CA 94103

Re: IAM District 751 v. NLRB
9th Cir. Nos. 19-71501, 19-71804, 19-71766
Board Case Nos. 19-CA-203455 & 19-CA-203586
Oral Argument Scheduled: July 8, 2020

Dear Ms. Dwyer:

I write to address IAM District 751's July 7, 2020 letter requesting that the Board amend its certified list and agency record to include Counsel for the General Counsel's Brief in Support of Cross-Exceptions. Given that the oral argument is scheduled for later today, the Board is advising the Court that it will not seek to amend its certified list and record because, per agency regulations, that document is not part of the agency record. Notably, IAM District 751 has not stated a reason for its last-minute request.

Specifically, Section 102.45(b) of the Board's Rules and Regulations defines the documents comprising the "agency record" and makes it clear that, while a party's exceptions (or cross-exceptions) to the administrative law judge's decision is part of the record, a brief in support is not. It states that:

The charge upon which the complaint was issued and any amendments, the complaint and any amendments, Notice of Hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and *exceptions, and any cross-*

exceptions or answering briefs as provided in section 102.46, constitutes the record in the case.

29 C.F.R. § 102.45(b) (emphasis added). Reviewing courts recognize that briefs in support of exceptions are not part of the record before the Board or on appeal. *United Parcel Serv., Inc. v. NLRB*, 706 F.2d 972, 979 n.16 (3d Cir. 1983) (“brief filed in support of exceptions not included in record of case”) (citing predecessor to Section 102.45(b)), *vacated on other grounds*, 464 U.S. 979 (1983); *A.H. Belo Corp. (WFAA-TV) v. NLRB*, 411 F.2d 959, 967 (5th Cir. 1969) (exceptions “brief is not made a part of the record on appeal”). The Board therefore properly filed a certified list that listed the Counsel for the General Counsel’s cross-exceptions and not the separate brief in support.

Federal Rule of Appellate Procedure 16 defines the record on appeal as the materials before the Board. Fed.R.App.P. 16(a) (record on appeal consists of the order, any underlying findings or report, and “the pleadings, evidence, and other parts of the proceedings *before the agency*” (emphasis added)). The corresponding Advisory Committee Note states that “[t]here is no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same.” Advisory Comm. Note, Fed. R. App. P. 16(a). *See also NLRB v. Fred Meyer Stores, Inc.*, 466 F. App’x 560, 562 (9th Cir. 2012) (under Rule 16, “the record in an enforcement proceeding before the Court of Appeals is the same as the record before the agency”). Accordingly, because the requested document is not part of the record before the Board or on appeal, the Board will not seek to amend the certified list or record.

Very truly yours,
David Habenstreit
Assistant General Counsel

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cc: all counsel (via CM/ECF)