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Attorneys for Charging Parties

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

REGION 32

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION (PACIFIC CRANE
MAINTENANCE COMPANY, INC.),

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 190, LOCAL
LODGE 1546 and DISTRICT LODGE 160.

Case 32-CB-005932

Motion for Reconsideration

The Charging Parties hereby file this Motion for Reconsideration from the ruling of the Executive Secretary denying the previous Motion to Strike the Exceptions of the Respondent, International Longshore and Warehouse Union. The decision of the Administrative Law Judge was served on July 9 on all parties. Exceptions are only timely if they are filed and served within 28 days of the service of the decision of the Administrative Law Judge. See Section 102.46(a) of the Board's Rules and Regulations.

The Sur-Reply submitted by the ILWU proves that ILWU counsel got the Decision on July 9 at 1:00 p.m. at the same time as the other parties.

The Executive Secretary concluded, without citing any evidence and certainly nothing in the record, that the documents were not served on July 9.

If the Executive Secretary had not reacted so quickly and allowed a response, the following self-evident fact would have been pointed out. Attached to the Declaration of Emily M. Maglio in Sur-Reply to Motion to Strike Exceptions is Exhibit 7. It is a log of incoming emails that were blocked. Look closely. On July 9 at precisely 13:00 (1:00 p.m.) a document was served on lnicholas@leonardcarder.com. That is exactly the time the ALJ's Decision was served on the Charging Party and Charging Party's Counsel. See Exhibits A and B to the Motion to Strike. This log proves that counsel Lindsay Nicholas was served at the same exact time.¹

Significantly, as noted in that same email, it was the Leonard Carder firm who *blocked* the emails, which caused the problem, not the service by the Board. "Yeah not [*sic*, probably "note"] incoming email that is blocked can't be delivered after the fact, Well, I whitelisted this email address so they will come in now. You should get the next one." This was dated July 22. This explains exactly what happened. The firm blocked the email address.²

¹ Presumably, Counsel for the General Counsel was served at the same time, but she has only submitted that she was served on July 9 without specifying the time.

² This had been an ongoing problem to some degree. Their IT consultant apparently never bothered to check the blocked email log before that date.

The sur-reply filed by the ILWU now concedes that the problem was with the Leonard Carder server and not with service by the Board. The sur-reply admits that the Leonard Carder system was blocking the emails, not quarantining them.

Leonard Carder's system blocked the email on July 9, 2020, containing the service of the Decision of the Administrative Law Judge, the Affidavit of Service and the Notice Transferring the Case to the National Labor Relations Board. As Ms. Maglio explains, the IT Consultant determined that the emails were being blocked rather than quarantined. See paragraph 7 of her Declaration. This explains why Ms. Maglio could not locate the emails on her system, because they were blocked by her law firm's server.³ Blocking means the emails don't get through at all. If they get through, they are quarantined. The IT consultant figured that out apparently on July 22.

Outlook describes blocking as preventing emails from coming to the inbox. See <https://support.microsoft.com/en-us/office/block-senders-or-mark-email-as-junk-in-outlook-com-a3ece97b-82f8-4a5e-9ac3-e92fa6427ae4>. Quarantining is different. Emails that are quarantined are not blocked but stored separately for review. See https://www.google.com/search?rlz=1C1GCEU_enUS828US828&sxsrf=ALeKk00rSiIAbWGiQr1rlqanPo9y_1HPhw:1597511044102&q=What+does+it+mean+when+an+email+is+quarantine+d%3F&sa=X&ved=2ahUKEwiTs7uy2J3rAhVLRJ4KHXIKCkAQzmd6BAgMEBU&biw=1561&bih=931.

It is now indisputable that Leonard Carder got the decision at 1:00 p.m. on July 9. It is proven by their own electronic records. It was served correctly by the Division of Judges.

The Executive Secretary ignores this evidence. The Executive Secretary issued her letter without giving the Charging Party a chance to respond to the ILWU's evidence. It is plain as

³ The consultant indicated that lots of emails were blocked. See email of July 22 at 11:04 a.m. Ms Maglio should have known on that date, at least, that the correct date of service was July 9.

day. But, as noted, the evidence presented by the ILWU now establishes it was the server which blocked the email service in this case.⁴

On July 10, 2020, counsel for the ILWU knew that the Decision, Affidavit of Service and the Notice Transferring the Case to the National Labor Relations Board had all been served on July 9, 2020.⁵ They were aware of service on July 10, 2020.

Under the Board's rules, consistent with the Federal Rules of Civil Procedure, the date for action depends upon service not upon receipt.

A contrary rule in this case would allow the vagaries of the rules to depend upon the quarantine/blocking or other software used by a law firm, which could filter or delay the receipt of emails. For example, law firms could delay the receipt of emails by four hours, thus changing the date of receipt and thus, under the theory advanced by ILWU, changing the date for action to be taken. That is why the Board's rule consistently applies the same principle: It's the date of service, not the date of receipt.

Now that the record is clear that the Leonard Carder law firm, for reasons that are irrelevant, was blocking the emails rather than quarantining them. Thus, the problem here falls entirely upon the law firm representing the ILWU in this matter.

It is worth noting, in this regard, that the counsel knew on July 10, 2020, that the decision had issued. They knew the date of service. Nothing is explained why they waited 28 days from

⁴ Note, moreover, that the ALJ had issued prior orders, none of which counsel claims she did not receive. This includes the Second Amended Compliance Specification. Nexgen will reflect those prior Orders.

⁵ There is one further explanation, which the Executive Secretary noted but did not explain the significance. Exhibit 1 to the Declaration of Emily Maglio (not the Sur-Reply Declaration) is an email from Kirsten Donovan. It attached the public notification of the ALJ Decision on the next day, not the service of the Decision on the parties. Ms Maglio, as an experienced practitioner, should have seen it was not a service copy but the public announcement, which is always a day later. She should not have calendared any date from that date. And the public announcement dates the decision the day before. Footnote 1 of the Executive Secretary's letter acknowledges that it is not the service of the ALJ Decision. Ms. Maglio and Ms. Donovan should have known that.

receipt to file the exceptions when the Board rule clearly states that the deadline is 28 days from service, not receipt.⁶

There is nothing in the affidavit of Ms. Maglio or in the memorandum that explains why any party waits until 28 days from receipt to file exceptions rather than 28 days from service.

The Board has clearly established a date of service rule. That is the only way to maintain consistency. See *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426 (2002). See also *ILWU (Pacific Maritime Association)*, Case 19-CB-169296, 2017 WL 4071125 (NLRB) (Sept. 13, 2017) (denying Motion for Permission to File Late Pleading by ILWU).

Under the Board's rules, untimely exceptions must be rejected. See Section 102.48(a) of the Board's Rules and Regulations (requiring the filing of "timely..." exceptions).

For these reasons, the Charging Party files this Motion for Reconsideration.

The Motion should be presented to the Board. It should be a ruling of the Board, not the Executive Secretary's Office. Nor should it be based on undisclosed but false claims. There is evidence of actual service on July 9, which is proved by Exhibit 7 to Ms. Maglio's Declaration at 1:00 p.m. No doubt about it. Counsel received the Decision on July 9.

The Sur-Reply clarifies exactly why the Exceptions must be rejected. This case is now 15 years old. It is time to end it. Several of the workers have died who are entitled to dues reimbursement. Further delay is not acceptable.

Dated: August 17, 2020

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
 DAVID A. ROSENFELD

Attorneys for Charging Parties

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⁶ Ms. Maglio's explanation that she assumed the Decision was served on July 10 was wrong, and she cannot rely on the public announcement sent to Ms. Donovan as service.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On August 17, 2020, I served the following documents in the manner described below:

MOTION FOR RECONSIDERATION

- BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Ms. Emily M. Maglio
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 17, 2020, at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw