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March 26, 2012

Office of the Executive Secy.
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

Federal Express

Re: Rose Fence, Inc.
29-CA-30485
29-CA-30537

Dear Sir:

Pursuant to extension granted on February 10, 2012, enclosed please find eight copies of Exceptions and Brief in Support of Exceptions, submitted on behalf of Rose Fence, Inc. The undersigned hereby certifies that copies of each of these documents have this day been sent by Federal Express to Brent Childerhose, Esq. counsel for the General Counsel and to William K. Wolf, Esq. counsel for the charging party, at the addresses previously furnished by such counsel in the proceedings below.

If there are any questions with respect to the foregoing, please contact the undersigned immediately.

Very truly yours,

SI/bm
Encl.
Cc: Brent Childerhose, Esq.
William K. Wolf, Esq.

15967.ltr

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

ROSE FENCE, INC.

And

Cases 29-CA-30485
29-CA-30537

LOCAL 553, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

## EXCEPTIONS

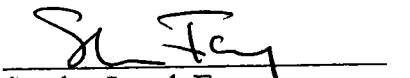
PLEASE TAKE NOTICE that Rose Fence, Inc. ("Rose") hereby excepts to the January 27, 2012 Decision of Administrative Law Judge Mindy E. Landow ("ALJ"), as follows:

1. Excepts to the conclusion that the decision to lay off individual employees was made by Leverich p.10, l.11, and such decisions are the sort of employer action to which the statutory duty to bargain applies, p.10, l.25[1].
2. Excepts to the citation/reference to the decision of the Administrative Law Judge in Consolidated Printers, when the result in that case was rather predicated upon the Board's ruling that there was no duty to bargain over layoffs, p.11, l.1.
3. Excepts to the finding that Vandalia is not dispositive of the issues, p.11, l.34.
4. Excepts to the finding that the Union's failure to object is not tantamount to a waiver, p.12, l.19.

[1] "p" and "l" designations refer to pages and lines in the Decision.

5. Excepts to the finding that the so-called "ambiguous" seniority rules, is besides the point, p.12, l.27.
6. Excepts to the finding that "The most one can conclude from the evidence here is that in the event the Employer was amenable either to the proposed contract as a whole (which at the time, it was not), or at the very least to the Union's "Seniority" proposal in its entirety (a proposal Respondent expressly rejected), the Union would then agree to layoffs "determined by the employer... according to background, skills and prior training," p.12, l. 46.
7. Excepts to the finding that the evidence falls short of showing that these matters were fully discussed and consciously explained during negotiations or that there was a clear and unmistakable waiver of the Union's right to bargain over this mandatory subject, p.13, l.3.
8. Excepts to the finding that Respondent has not met its burden of proving waiver, p.13, l.7.
9. Excepts to the finding that American Diamond Tool is distinguishable, p.13, l.46.
10. Excepts to the finding that economic layoffs was not fully bargained and that the Union never "expressly signaled" a willingness to permit unilateral layoffs, p.13, l.51.
11. Excepts to the finding that Respondent violated Section 8 (a) (1) and (5) of the Act, p.13, l.9.
12. Excepts to Conclusion of Law No. 4, p.15, l.35 and No. 5, p.15, l.40.
13. Excepts to the Remedy ordered by the ALJ for the allegedly unlawful layoffs found by the ALJ, p.16, l.14, and p.16, l.36 through p.18, l.2.
14. Excepts to the "Notice to Employees".

Dated: March 22, 2012



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

**ROSE FENCE, INC.**

**And**

**Case No. 29-CA-30485**
**Case No. 29-CA-30537**

**LOCAL 553, INTERNATIONAL**
**BROTHERHOOD OF TEAMSTERS**

# BRIEF OF ROSE FENCE, INC. IN SUPPORT OF EXCEPTIONS

# INDEX

## TABLE OF CASES AND AUTHORITIES

## PART I

## STATEMENT OF THE CASE
## THE SOURCE OF THE EVIDENCE

The sole witnesses to testify at the two (2) day hearing were Scott Rosenzweig, the principal of Respondent Rose, called as witness by the General Counsel, and Brian Cinque, a key managerial employee of Respondent. Both were fully familiar with the history, decisions and business of Respondent and the negotiations with the Union. Neither the General Counsel nor the Charging Party presented any witness to question, contradict or rebut any testimony of Messrs Rosenzweig or Cinque. As such, their testimony stands uncontradicted. General Counsel and the Charging Party had access to bargaining unit employees who had been with the Respondent for many years, if they wished to challenge the Rosenzweig and Cinque testimony, or if they had any doubt as to its accuracy, p. 36, L.10.[1] They called no such employees as witnesses.

## THE UNCONTRADICTED TESTIMONY
## AS TO THE NATURE OF THE RESPONDENT'S BUSINESS,
## AND DECISIONS THAT PREVIOUSLY BEEN MADE BY RESPONDENT.

Much of the record is devoted to testimony that the work performed by the Respondent is very seasonal, largely April, May, June and part of July, see for example pp. 23, 24, 26, 30, 32, 38, 40, 80 and 95. Indeed, General Counsel, after hearing the testimony with regards to the seasonality of the business, conceded the point:

[1] p.L. references are to transcript pages and lines.

> Your Honor, I think it is clear that it is
> a seasonal business. It is not in dispute.
> p. 92 L23.

As the uncontradicted testimony of seasonality unfolded, the further uncontradicted testimony was that the reduction and then elimination of (a) overtime hours and then (b) regular hours, necessarily followed; then followed by the layoff of employees; and finally followed by the recalls which would begin as the "busy season" began the following year, see for example pp. 24, 25, 26, 30, 38, 39, 40, 59, 60 and 61. The uncontradicted testimony was that the seasonality of the business had always existed, but that up to approximately eight (8) to ten (10) years ago, Respondent did not lay off employees in the off-season; however, starting at that point, it could no longer financially afford to keep employees on the payroll during the off-season (to "make inventory"), so that at that point, Respondent made a decision to commence laying off employees in the off-season, pp. 89-91, and as cited herein, to continue to do so each and every year thereafter.

To the extent the Amended Consolidated Complaint alleged a wrongful laying off of employees since August 3, 2010 without bargaining to impasse or reaching an agreement, aside from the above mentioned decision to lay off employees each year, what was the uncontradicted testimony as to what work the employees would have performed and/or what they would have done, had the Respondent not laid them off, but rather required to pay them after August 3, 2010? The testimony by Mr. Cinque was that they would have been doing nothing. Nothing! Upon inquiring as to what he meant by "nothing", Mr. Cinque responded:

> Exactly what me and you are doing right
> here, nothing. Be sitting here. They come
> to work. I wouldn't have work for them
> to do. They would be doing nothing.
> p. 120 L.13.

## THE EVIDENCE AS TO THE NEGOTIATIONS

The Union was certified as the collective bargaining representative on June 3, 2010. General Counsel Exh. No. 3. The first bargaining session was held on August 3, 2010. There is no evidence of the Union having requested that any session take place before August 3, 2010. At that meeting, the Union presented its proposals in a document entitled UNION'S PROPOSALS, Resp. Ex. No. 2. That very first document contained no reference to, much less any limitation on, the Respondent's right to lay off employees.

Sometime thereafter, in the course of the face-to-face and E-Mail negotiations, the Union presented revised proposals in a document entitled NEGOTIATIONS DRAFT, Resp. Exh. No. 3. This document was in fact, a proposed collective bargaining agreement. Section 9 of Resp. Exh. No. 3, by its express terms, recognized the right of the Respondent, in its discretion, to lay off employees. Somewhat ambiguous seniority rules were proposed for layoffs and recalls, but no provision called for any limitation on, or prohibition of, the right of the Respondent to lay off employees, or called for bargaining in the event of, and prior to, any layoff of employees by Respondent.

Succeeding and successive Union proposed complete collective bargaining agreements:

| | |
|---|---|
| Union Proposal Draft 2 | Resp. Exh. No. 4 |
| Union Proposal Draft 3 4/12 | Resp. Exh. No. 5 |
| Union Proposal Draft 4 5/13 | Resp. Exh. No. 6; and |
| Union Proposal Draft 5 6/1 | Resp. Exh. No. 8 |

are essentially the same in all material respects as Resp. Exh. No. 3. While the parties disagreed on the seniority provision in paragraph 9, the disagreement related only to the use of seniority in the event of recall from layoff, not to the right to lay off; and it is the right of Respondent to lay

off employees without bargaining over the same, that is an issue; not how to implement a recall from layoff.

All of the foregoing appears to have been credited by the ALJ and appears in her decision, either explicitly or implicitly.

## ARGUMENT

The Decision of the ALJ finding that Respondent violated its 8 (a) (5) obligations by laying off employees, without first bargaining with the Union over the layoffs (and thereafter not bargaining with the Union over the effects of the same) is in error for three (3) fundamental reasons. The first is that the parties have in fact bargained over this matter. The second is that even if the Respondent is found not to have so bargained, the Union has clearly indicated no desire to so bargain, and thus effectively waived its right to so bargain, and the third is that under the circumstances presented in this case, the parties, under existing Board law, were not, in fact, even required to so bargain, since the decision to implement the challenged layoffs had been made by the Respondent before the Respondent became obligated to bargain with the Union.

### THE PARTIES HAVE BARGAINED OVER THE SUBJECT OF THE ALLEGEDLY WRONGFUL 8 (a) (5) LAYOFF ACTIONS OF THE RESPONDENT.
(In support of Exceptions 5, 6, 7, 10, 11, 12, 13 and 14)

As previously stated, the issue of layoffs was raised by the Union in its various drafts submitted by it to the Respondent in the course of the negotiations between the two parties. While the parties had only a handful of face to face negotiating sessions, written proposals, Resp. Exh. No.2, and five (5) draft Collective Bargaining Agreements were submitted to the Respondent by the Union, and responded to by the Respondent. The "Union's Proposals" Resp. Exh. No 2, which included wages, overtime compensation, a seniority list, medical benefits,

subcontracting, traffic violations, sick days, bereavement days, insurance and a Union Shop, made absolutely no mention of layoffs. Significantly, the "Union's Proposals" contained the following additional statements:

> "Additional standard contract language shall be included (such as a procedure to settle disputes, etc.) in an agreement and will be provided in advance."
>
> "Local 553, I.B.T. reserves the right to add to, or modify the above list of proposals."

True to its word the Union did subsequently provide four (4) additional drafts of proposed Collective Bargaining Agreement, and did add to and modify the original written proposals, Resp. Exh.Nos. 4, 5, 6 and 8. These four (4) drafts modified the "Union's Proposals" in a most significant manner. They made express reference to layoffs, but not one of them contained any express or implied limitation upon the Respondent's right to lay off employees. Rather the Union's draft proposed Collective Bargaining Agreements went in precisely the opposite direction. Each and all, in Section 9 Seniority, stated as follows:

> "All layoffs shall be determined by the Employer, that is, employees will be reviewed as to background, skills, and prior training when being considered for layoffs." (emphasis supplied)

Thus, it is clear that the Union not only proposed no limitation on the Respondent's right to lay off employees, it expressly conceded the Respondent's right to do so in its (the Respondent's) own unfettered discretion. Indeed, this Section 9 Seniority provision did not even propose that recalls from layoffs be on a seniority basis. The provision did call for work to be assigned on a seniority basis, but only for those employees not laid off. That requirement was rejected during the negotiations by the Respondent. The foregoing makes it abundantly clear

that both parties were aware of the significance of layoffs insofar as the Respondent's business was concerned, negotiated over the same, came to an agreement over the underlying fundamental issue of the Respondent's right to lay off employees, and then moved on to the ancillary related issues.

What then, one must ask, was Respondent required to bargain over with respect to layoffs? The Union had already proposed and conceded that the Respondent could lay off employees and that it, the Respondent, could in its discretion, determine which employee or employees would be laid off. The Union proposed no limitation on the Respondent's right to lay off employees. It proposed no condition precedent to any such layoff. It proposed no consequence, nor penalty, for any such layoff. Was Respondent supposed to bargain over a subject that the Union had already conceded, supposed to bargain over a subject that had already been agreed upon?

The ALJ has incorporated much of the foregoing into her decision, but nevertheless concluded that Respondent violated its 8(a) (5) [and (1)] obligations by failing to bargain over the layoffs and the effects of the layoffs. Unfortunately, the ALJ seems to have confused the issue of whether the parties did in fact bargain over the layoffs, with the issue of whether the parties were required to bargain over the layoffs, and then the further issue of whether , assuming, Respondent was otherwise legally required to so bargain, whether the Union waived its right to require the Respondent to so bargain.

The ALJ's conclusions that "past practice" is not a defense to a failure to bargain claim, and that the existence of discretionary decisions and action is the sort of employer action to which the statutory duty to bargain applies, does not begin to address the question of whether the required bargaining did, or did not, take place. The existence of bargaining requires a fact driven

analysis, and as we herein have demonstrated, the record amply demonstrates that bargaining over layoffs did in fact take place.

THE UNION HAS CLEARLY INDICATED NO DESIRE TO FURTHER BARGAIN OVER THE SUBJECT OF THE LAYOFFS AND THUS EFFECTIVELY WAIVED ITS RIGHT TO SO BARGAIN.
(In support of Exceptions 3, 4, 5, 7, 8, 9, 11, 12, 13 and 14)

It is well settled, that where a Union is given the opportunity to bargain, but fails to so bargain with due diligence, it waives the right to do so Vandalia Air Freight, Inc., 297 NLRB 1012 (1990). In the instant matter, the Union had every opportunity to engage in bargaining with the Respondent over the allegedly violative 8 (a) (5) layoff actions, (or the effects of the same) but rather explicitly consented to such actions.

The ALJ, while acknowledging Vandalia, found it not dispositive. She stated waiver can occur by express contract language, by conduct (including bargaining history), or by a combination of the two; and that the waiver issue is properly decided on evidence of the parties' conduct. It is unimaginable how in light of the Union's conduct in the negotiations, including the submission of five (5) draft collective bargaining agreements, each explicitly granting/allowing the Respondent to lay off employees, at the Respondent's sole discretion, without any pre or post layoff conditions or consequences, the ALJ could conclude that the Union's conduct did not constitute a clear and unmistakable waiver of its right to bargain. One would be hard pressed to think of a clearer statement of the Union's desire not to bargain over layoffs or the effects of layoffs, than the Union's (not the Respondent's) insistence/proposals over the period August 2010 to June 2011 that layoffs be permitted, that layoffs be determined solely by the Respondent, and layoffs be without any conditions or bargaining of any kind. The Decision of ALJ citing cases where the Union failed to object to an employer's actions because

the Union had not been given notice of the contemplated employer action, are inapposite. We are not here basing a claim of waiver upon the Union's failure to object; rather the claim of waiver is based upon the Union's explicit and unconditional written consent (as contained in its written proposals during the course of the bargaining negotiations).

EVEN IF ONE WERE TO ASSUME (ARGENDO) THAT RESPONDENT AND THE UNION HAD NOT BARGAINED OVER THE ALLEGEDLY VIOLATIVE LAYOFF ACTIONS, OR THAT THE UNION HAD NOT INDICATED THAT IT HAD NO DESIRE TO BARGAIN OVER THE ALLEGEDLY VIOLATIVE LAYOFF ACTIONS, OR THAT PRIOR TO AUGUST 3, 2010 THE UNION HAD NOT BEEN GIVEN NOTICE OF THE ALLEGEDLY VIOLATIVE LAYOFF ACTIONS, AND HENCE HAD NOT HAD THE OPPORTUNITY TO BARGAIN WITH RESPECT TO THE SAME (OR THE EFFECTS OF THE SAME), THOSE ACTIONS WERE NEVERTHELESS NOT VIOLATIVE OF 8 (a) (5), SINCE THE DECISION TO IMPLEMENT THOSE ACTIONS HAD BEEN MADE BY THE RESPONDENT BEFORE IT BECAME OBLIGATED TO BARGAIN WITH THE UNION.
(In support of Exceptions 1, 2, 11, 12, 13 and 14)

As we have pointed out on page 5 of this Brief, approximately eight (8) to ten (10) years ago, due to the seasonality of the business, when taken in conjunction with the financial condition of the Respondent, Respondent made a decision to reduce and then eliminate overtime hours in the off season, commenced reducing hours in the off season, and commenced laying off employees in the off season, and in furtherance of that decision continued to do so each and every year thereafter, continuing through 2010 and 2011. That decision has been implemented with such regularity and frequency, that employees could and did reasonably expect the decision to be implemented on a regular and consistent basis. Not even the March 2010 storm, dramatically increasing Respondent's volume of business in the 2010 busy season,

interrupted the implementation of the earlier decision to reduce overtime hours, to reduce hours, and to lay off employees, once the 2010 busy season came to an end. Thus starting eight (8) to ten (10) years ago, the Respondent made the decision to implement the reduction of overtime hours, the decision to implement the lay offs, all annually and all as the Respondent's busy season started to end in July of each year. Clearly the decision to lay off employees, alleged to be violative of 8 (a) (5), was made many, many, years ago; certainly well before the Union appeared on the scene, and certainly well before the Respondent became obligated to bargain with the Union (whether that date be May 21, 2010, the date of the election, June 3, 2010, the date of certification, or August 3, 2010, the date of the first negotiating session, or some date between those dates)

In Starcraft Aerospace, Inc., 346 NLRB 1228 (2006). The Board stated as follows at p. 1230:

> "We find the Respondent did not violate Section 8 (a) (5) and (1) of the Act by laying off the unit employees. In general, an employer violates Section 8 (a) (5) and (1) by unilaterally implementing changes in the terms and conditions of employment of its represented employees without satisfying its bargaining obligation. If, however, an employer makes a decision to implement a change before being obligated to bargain with the union, the employer "does not violate Section 8 (a) (5) by its later implementation of that change". SGS Control Services, 334 NLRB 858, 861 (2001); accord: Consolidated Printers Inc., 305 NLRB 1061 fn. 2, 1067 (1992). Emphasis supplied

The above is the law; the cited cases have not been reversed or overruled, or in any way rendered inapplicable.

Indeed Starcraft Aerospace, Inc., did not announce any new proposition of law; rather it reaffirmed existing law. As pointed out, it cited the earlier cases of SGS Control Services and

Consolidated Printers Inc. These two earlier cases also made clear that the date of a decision (made prior to the creation of the bargaining obligation) need not be established with precision. As we have pointed out, the layoff decisions here challenged as being violative of 8 (a) (5), were made some eight (8) to ten (10) years ago and implemented year after year after year. This suffices for the purpose of Starcraft Aerospace, Inc. A more precise date of the initial decisions is not required:

> As set forth in Consolidated Printing, supra, it is not essential that the precise date of the decision be established, 305 NLRB at 1061 fn.2. The critical fact is whether the employer's decision predated the election. SGS Control Services, p861,fn..3.

The ALJ, while acknowledging Starcraft, Consolidated Printers, and SGS Control Services, largely disregards them, apparently reasoning that (i) the Respondent is not relying upon a pre-bargaining obligation decision it had made years ago, but rather on a mere "prior practice" it has engaged in, and (ii), discretion has been involved in the Respondent's past practice. The ALJ is wrong in both her conclusions and analysis.

As we have set forth herein, Respondent has not merely engaged in a "prior practice", but rather made a decision with respect to layoffs and how they were to be handled on a go forward basis; and has at all times thereafter adhered to that original decision. The Respondent is not relying in this proceeding, nor acting on, something as non concrete as a past practice. Thus the cases cited by the ALJ to establish the principal that "past practice" is not a cognizable defense to an 8 (a) (5) allegation of failure to bargain over layoffs, have no relevance, as long as Starcraft, Consolidated Printers and SGS Control Services remain Board law. Adair Standish Corp., 292 NLRB 890 (1989), is inapposite since the employer's claim in Adair was not that the layoff decision, was made before the bargaining obligation arose; rather it was simply that it had

a "past practice" of instituting economic layoffs because of lack of work. In Eugene Iovine, Inc., 356 NLRB No. 134 (2011), the Board reached a similar decision, but did not reverse, overrule or in any way modify its 2006 decision in Starcraft. Starcraft, Consolidated Printers and SGS Control Services, remain as vital and controlling Board precedent, fully consistent with Adair Standish Corp., and the 2011 Board decision in Eugene Iovine, Inc. The first three Board rulings deal with an employer decision made prior to the time the employer was obligated to bargain with the Union; the last two cases, deal with an entirely different situation, namely one in which the employer has not made a decision, albeit, one that continues on into the future, but rather relies entirely on its "past practice" as giving justification for similar later actions. Surely, the Board mindful of its 2006 decision in Starcraft, while making its 2011 ruling in Eugene Iovine, Inc. would have overturned the Starcraft ruling, had it intended to do so. It did not! Nor is there the slightest intimation in Starcraft, Consolidated Printers, or SGS Control Services that the decisions being referred to therein need be immediate "one time" decisions. Indeed, as set forth on page 13 of this Brief, SGS Control Services holds to the contrary.

Finally it appears that because a management employee (Leverich) decided on who was to be laid off, the ALJ concluded that such layoffs were "discretionary", despite the Respondent's earlier decision to lay off employees, and thus do not fall within the rulings of Starcraft, Consolidated Printers and SGS Control Services. There is nothing whatsoever in any of these cases, to indicate that a pre bargaining obligation decision to lay off employees, is excepted from those rulings, because the name of the employee who will be laid off first, or the day of the week on which such employee will be laid off, or any one of other details will have to be decided when the time of the layoff gets closer. If that were the Board's intent in Starcraft, Consolidated Printers or SGS Control Services, the Board need not/would not have rendered the

ruling it did, since some elements of discretion remain in virtually any layoff situation. The statement by the ALJ that "these discretionary decisions are the sort of employer action to which the statutory duty to bargain applies" is not found in any Board decision covered by its rulings in Starcraft, Consolidated Printers or SGS Control Services. Rather it is general non specific language, neither controlling, dispositive or even meaningful in the present case.

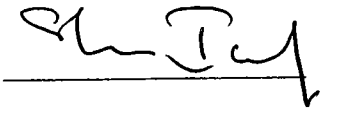
Indeed the ALJ recognized the foregoing in that portion of her Decision recommending a dismissal of the allegations in the Amended Consolidated Complaint relating to the reduction of hours.[2] The fact is that a great deal of discretion was exercised by the Respondent in the daily reduction of hours, p.38, L.5 et. seq. Yet the ALJ found this not to be an impediment to the dismissal, citing Starcraft and Consolidated Printers, along with other authorities, such as Long Island Day Care Services, Inc., 303 NLRB 112, 114 (1991) and Embossing Printers, Inc., 268 NLRB 710 Fn.2 (1984). The earlier decision to first reduce hours and then lay off employees, required some degree of management discretion in actual implementation of both (although far more discretion is involved in the implementation of the reduction in hours). Yet the ALJ found the lesser degree of discretion in the layoff situation, a bar to the application of the Starcraft et. al. rule, but did not find the far greater degree of discretion in the reduction of hours situation, such a bar. The ALJ was correct in her analysis of the reduction of hours situation, and incorrect in her different treatment and analysis of the layoff situation.

## CONCLUSION

For all of the reasons set forth herein, the Respondent respectfully requests the Exceptions simultaneously herewith filed by the Respondent, be adopted by the Board and the Decision of the ALJ be adopted by the Board except to the extent set forth in the said Exceptions and this Brief.

[2] No Exceptions have been filed by either the General Counsel or the Charging Party to the recommended dismissal.

Dated: March 22, 2012



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