

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-38901

WILFREDO PLACERES, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-39168

DUSTIN PORTER, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

**CASES 8-CA-39297
8-CA-39388**

BEN FANNIN, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-39334

MIKE WILLIAMS, AN INDIVIDUAL

**BRIEF IN SUPPORT OF RESPONDENT MIDWEST TELEPHONE SERVICES, INC.'S
MOTION FOR PARTIAL RECONSIDERATION**

MORROW & MEYER, LLC.

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I. BACKGROUND AND THE BOARD'S SEPTEMBER 21, 2012 ORDER.

A. Procedural History.

In these consolidated cases, the NLRB filed an Amended Consolidated Complaint and Notice of Hearing based on the charges of Wilfredo Placeres, Dustin Porter, Ben Fannin, and Mike Williams. The Amended Consolidated Complaint alleged violations of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the National Labor Relations Act (the "Act"). A trial on the allegations of the Amended Consolidated Complaint commenced on October 11, 2011 in Cleveland, Ohio and ended on October 13, 2011.

On December 28, 2011, the ALJ issued his Decision and Order dismissing most of the unfair labor practices alleged in the Amended Consolidated Complaint (including those relating to Dustin Porter and Wilfredo Placeres) but affirming some others. Some of those charges related to Respondent's termination of Ben Fannin. Specifically, the ALJ found that: "Respondent [had] engaged in an unfair labor practice in violation of Section 8(a)(4), (3), and (1) of the Act by discharging Ben Fannin because Fannin and other employees engaged in union activities and because Fannin filed an unfair labor practice charge under the Act."

On January 25, 2012, Respondent filed its Exceptions to the ALJ's decision and its Brief in Support of its Exceptions. Acting General Counsel filed her Answering Brief on February 17, 2012, and Respondent filed its Reply on March 2, 2012. The Board issued its Decision and Order on September 21, 2012.

B. The Board's September 21, 2012 Decision and Order.

In its Order, the Board stated that "[n]o exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(4) by discharging employee Ben Fannin." But, examination of the record demonstrates that Respondent took exception to the judge's finding

that Respondent terminated Ben Fannin in violation of the Sections 8(a)(1), 8(a)(3) and 8(a)(4). Accordingly, Respondent respectfully requests that the Board modify its decision to reflect that Respondent took exception to the judge's finding that it discharged Ben Fannin in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act.

II. ARGUMENT.

It has consistently been held that the ground for an exception need "not be stated explicitly in the written exceptions filed with the Board." *See J&J Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041 (D.C. Cir. 2009). Instead, the ground for the exception must be raised in a manner sufficient to put the Board on notice of the arguments the party seeks to advance on review. *Id.* Here, the alleged 8(a)(4) violation relating to Ben Fannin's termination was raised before the Board on numerous occasions by both Respondent and by Acting General Counsel. Thus, the Board had adequate notice of Respondent's intention to argue that Ben Fannin's termination did not violate Section 8(a)(4) on review.

For example, Respondent specifically requested in its Brief in Support of its Exceptions that the Board reverse the ALJ's findings that the Acting General Counsel established a prima facie case under *Wright Line* that Respondent "discharged Ben Fannin in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act." (Respondent's Brief in Support at page 16). And, in response, the Acting General Counsel urged the Board to find that the ALJ "correctly concluded, using a *Wright Line* analysis, that Respondent violated Sections 8(a)(1), (3) and (4) when it terminated Fannin" (Answering Brief at page 10). Moreover, in its Reply Brief, Respondent argued that the ALJ's suggestion that Ben Fannin's unfair labor practice charge was

a potential reason for Ben Fannin's termination was not based on the evidence.¹ (Reply Belief at page 2).

This case is similar to the case of *NLRB v. United States Postal Service and American Postal Workers Union*. 833 F.2d 1195 (6th Cir. 1987). In that case, the Sixth Circuit held that inclusion of an issue in briefs that were filed within the Board "was a matter 'included in exceptions'" that should have been reviewed by the Board.

Here, as in the *United States Postal Service* case, Respondent unmistakably argued to the Board that ALJ erred in finding that Ben Fannin was terminated in violation of Section 8(a)(4). The Acting General Counsel launched counter-arguments in response. Accordingly, Respondent respectfully requests that the Board modify its September 21, 2012 Order to: (1) reflect that Respondent filed an exception to the ALJ's finding that Respondent violated Section 8(a)(4), 8(a)(3) and 8(a)(1) by terminating Ben Fannin; and, (2) reflect the Board's decision based on the record of whether Respondent violated Section 8(a)(4) by terminating Ben Fannin.

¹ Indeed, as was argued in the Reply Brief, the A.L.J.'s only finding of anti-union animus was the alleged fact that Ben Fannin was terminated after George Vaughn, Jr. allegedly learned of a meeting he had scheduled with the IBEW. Therefore, this knowledge could be the only basis of the ALJ's determination that George Vaughn, Jr. bore some animus as a result of Ben Fannin filing a charge, as the record is devoid of any evidence of any other adverse employment action against Mr. Fannin following the filing of his charge. To the contrary, Midwest brought Mr. Fannin back to work after he filed his charge. And, Midwest only terminated Mr. Fannin's employment after he told George Vaughn, Jr. to "go fuck himself," which was several months after he filed his charge. Thus, as with the 8(a)(1) and (3) allegations, the Acting General Counsel failed to meet her *Wright Line* burden to establish a prima facie case of an 8(a)(4) violation.

III. CONCLUSION.

For all the foregoing reasons, Respondent respectfully requests that the Board modify its September 21, 2012 Order to: (1) reflect that Respondent filed an exception to the ALJ's finding that Respondent violated Section 8(a)(4), 8(a)(3) and 8(a)(1) by terminating Ben Fannin; and, (2) reflect the Board's decision based on the record of whether Respondent violated Section 8(a)(4) by terminating Ben Fannin.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief in Support of Respondent's Motion for Partial Reconsideration as sent this 19th day of October, 2012 to the following via e-mail and regular mail to:

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