

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

ASARCO LLC

and

**Cases 28-CA-255235
28-CA-263409
28-CA-267000
28-CA-275742
28-CA-275930
28-CA-278164
28-CA-278169
28-CA-283192
28-CA-283228
28-CA-283897**

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC**

and

**Cases 28-CA-255412
28-CA-263590**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 104, GENERAL TEAMSTERS
(EXCLUDING MAILERS), STATE OF ARIZONA**

and

Case 28-CA-255460

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 518**

and

Case 28-CA-255482

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 428**

and

Case 28-CA-255487

**THE UNITED ASSOCIATION OF JOURNEYMAN &
APPRENTICES OF THE PLUMBING, PIPEFITTING
& SPRINKLER FITTING INDUSTRY OF THE U.S.
AND CANADA, LOCAL 469**

and

Case 28-CA-255492

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 602**

and

Case 28-CA-255862
28-CA-263369

**INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS**

and

Case 28-CA-255862
28-CA-263369

**INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, LOCAL 627**

and

Cases 28-CA-265710
28-CA-271017

JEFF PUHARA, an Individual

and

Case 28-CA-27051

MARCOS ECHERIVEL, an Individual

**RESPONDENT’S OPPOSITION TO “MOTION TO PERMIT THE USE OF THE WORD
SCAB AS APPROVED BY THE SUPREME COURT”**

Respondent ASARCO LLC, through its attorneys Richard A. Russo and Paul H. Burmeister of the law firm of Davis & Campbell LLC, hereby responds to the International Brotherhood of Boilermakers, Local 627’s “Motion To Permit the Use of the Word Scab As Approved by the Supreme Court.” As set forth below, the Motion should be denied with respect to questioning of any witnesses: (1) who were employees of ASARCO who did not participate in the strike, or (2) who were employed as replacement employees by ASARCO on or after the date the strike began.

The Motion cites as sole authority the United States Supreme Court’s decision in Letter Carriers v. Austin, 418 U.S. 264 (1974), stating that the word “is consistently and commonly used as part of labor disputes” (Motion, page 2) and that the term “is protected by the speech and petitioning clauses of the First Amendment.” (Motion, page 3).

However, this proceeding is not “part of a labor dispute” at issue in Letter Carriers v. Austin. It is an administrative proceeding of the federal government, which is not a party to any

“labor dispute”.

In addition, the issue in Letter Carriers v. Austin was “the extent to which state libel laws may be applied to penalize statements made in the course of labor disputes without undermining the freedom of speech which has long been a tenet of federal labor policy.” (418 U.S. at 269). Letter Carriers v. Austin did not determine what should, and what should not be, allowed by a judicial officer in a formal administrative proceeding. Rather, Section 102.35(a)(6) of the Board’s Rules and Regulations grants the Administrative Law Judge the authority to “regulate the course of the hearing.”

As stated above, the Motion should be denied with respect to questioning of any witnesses who were employees of ASARCO who did not participate in the strike, and to any witnesses who were employed as replacement employees by ASARCO on or after the date the strike began, for the following reasons. Clearly the only reason to use the word is to insult and intimidate the witness, as Respondent is quite sure the Administrative Law Judge understands the concept without the need for extra dramatic effect.

First, employees of ASARCO who did not participate in the strike, and employees who were employed as replacement employees by ASARCO on or after the date the strike began, had the federally protected right under Section 7 of the Act to engage in those actions. Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 436 (1989) and N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938). ASARCO objects to any attempt to malign such individuals when on the witness stand for the exercise of their Section 7 rights.

Secondly, referring to a witness on the stand as a “scab” has been found in the context of that proceeding to be objectionable by at least one court. In State v. Johnson, 171 Wash. 388, 18 P.2d 35 (1933), an attorney in his examination of a witness posed the question: “You are a scab, aren’t you, Mr. Walters”? The presiding judge sustained an objection, stating to the questioning

attorney: “[Y]ou have no right to use names which tend to insult the witness.” (Id. at 389, 36) The attorney stated to the judge, among other things, “It was just a matter of designating a person who worked at the mill after the strike had started” and further stated he “broached it, your Honor, just to show his bias, and that is the only reason I broached it.” (Id. at 390, 36) In a subsequent written order, the court stated that the question had been made “in a manner insulting to the witness”, and further stated that the questioning attorney was monetarily fined “because of use of such name as would tend to insult the witness[.]”. (Id. at 391-392, 37)

Affirming the finding of contempt, the Supreme Court of Washington on appeal stated:

“Without going into a technical analysis of the meaning of the word ‘scab’ as applied to one who has accepted an employment relinquished by a striker, we are of the opinion that the word is, as so employed, a term of contempt and reproach. *State v. Christie*, 97 Vt. 461, 123 A. 849, 34 A. L. R. 577; *393 *U. S. v. Taliaferro* (D. C.) 290 F. 214; *Prince v. Socialistic Co-operative Pub. Ass’n*, 31 Misc. 234, 64 N. Y. S. 285.” (Id. at 392-393, 37)

The Court upheld the trial court’s ruling based upon the trial court’s finding that the language had been used “in a manner insulting to the witness.” (Id. at 394, 38)

In *State v. Dugan*, 96 Wash. App. 346, 979 P.2d 885 (1999), the court referenced the *State v. Johnson* case (referring to it as “*State v. Zioncheck*”) as being in the body of case law which “describes particularly egregious conduct.” (Id. at 352, 888).

WHEREFORE, ASARCO LLC requests that the Motion be denied with respect to the questioning of any witnesses who were employees of ASARCO who did not participate in the strike, and to any witnesses who were employed as replacement employees by ASARCO on or after the date the strike began.

ASARCO, LLC

Respondent,

By: s/Richard A. Russo
One of its Attorneys

Richard A. Russo
Paul H. Burmeister
Abby J. Clark
Davis & Campbell L.L.C.
401 Main Street, Suite 1600
Peoria, IL 61602
Tele: (309) 673-1681
Fax: (309) 673-1690
rarusso@dcamplaw.com
phburmeister@dcamplaw.com
ajclark@dcamplaw.com

CERTIFICATE OF SERVICE

I hereby state that on July 28, 2022 , I served a copy of the foregoing Response to the “Motion To Permit the Use of the Word Scab As Approved by the Supreme Court.” via electronic mail to: rspillers@gslaw.org, bfickman@usw.org, zhebert@usw.org, gbarrett@wardkeenabarrett.com, ibew518@cableone.net, mike.lee@iuoe428.com, abutler@ualocal469.org, erosenfeld@wkclegal.com, stan@rosenblattgosch.com, melton@ibew602.org, whaller@iamaw.org, drosenfeld@unioncounsel.net, jacob@boilermakers627.com, karla.schumann@teamsterslocal104.com

and by depositing same in envelopes addressed as follows:

Ryan Spillers, Attorney at Law
Gilbert & Sackman, A Law Corporation
3699 Wilshire Boulevard, Suite 1200
Los Angeles, CA 90010

David R. Jury, General Counsel
Bruce Fickman Associate General Counsel
Zachary Hebert, Assistant General Counsel
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC
Legal Department, 60 Boulevard of the Allies
Five Gateway Center, Room 807
Pittsburgh, PA 15222-1214

Gerald Barrett, Attorney
Ward Keenan & Barrett, PC
3838 North Central Avenue, Suite 1720
Phoenix, AZ 85012-1994

Larry Griffin, Business Manager
International Brotherhood of Electrical Workers Local No. 518, AFL-CIO, CLC
P.O. Box 88
Globe, AZ 85502-0088

Karla Schumann, Secretary/Treasurer
Teamsters, Local 104
1450 South 27th Avenue
Phoenix, AZ 85009

Mr. Jacob Evenson
International Brotherhood of Boilermakers,
Local 627
2345 West Thomas Road
Phoenix, AZ 85015

Aaron Butler, Business Manager
United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of
the United States and Canada Local No. 469, AFL-CIO
3109 North 24th Street
Phoenix, AZ 85016

Elizabeth Rosenfeld, Attorney
Wohlner Kaplon Cutler Halford & Rosenfeld
16501 Ventura Boulevard Suite 304
Encino, CA 91436

Stanley M. Gosch, Attorney
Rosenblatt & Gosch, PLLC
8085 East Prentice Avenue
Greenwood Village, CO 80111-2705

Michael P. Lee, Business Representative
International Union of Operating Engineers,
Local No. 428
6601 North Black Canyon Highway
Phoenix, AZ 85015-1027

Robert Melton, Business Representative
International Brotherhood of Electrical Workers, Local 602
200 South Fannin Street
Amarillo, TX 79106-8247

William H. Haller, Assoc General Counsel
IAMAW
9000 Machinists Place, Suite 202
Upper Marlboro, MD 20772-2687

David A. Rosenfeld, Attorney
Weinberg, Roger & Rosenfeld
1375 55th Street

Emeryville, CA 94608

Jeff Puhara
1486 East Maple Street
Globe, AZ 85501

Marcos Echerivel
6851 West Oklahoma Street
Tucson, AZ 85735

and by delivering same by first class mail, postage prepaid.

s/Richard A. Russo

Richard A. Russo
Davis & Campbell L.L.C.
401 Main Street, Suite 1600
Peoria, IL 61602
Tele: (309) 673-1681
Fax: (309) 673-1690
rarusso@dcamplaw.com