

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

**BASHAS', INC., d/b/a BASHAS',
FOOD CITY, AND A.J.'S FINE FOODS**

and

**Cases 28-CA-21435
28-CA-21501**

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

and

**Cases 28-CA-21590
28-CA-21592
28-CA-21639
28-CA-21640
28-CA-21646
28-CA-21676**

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION**

**Cases 28-CA-21739
28-CA-21785
28-CA-21803**

**GENERAL COUNSEL'S REPLY BRIEF TO
RESPONDENT'S ANSWERING BRIEF**

I. INTRODUCTION

On December 21, 2009, Counsel for the General Counsel (CGC) filed Cross-Exceptions and a Brief in Support of Cross-Exceptions to the Decision of Administrative Law Judge William L. Schmidt [JD(SF) 29-09] (ALJD), which issued in this matter on September 24, 2009.¹ On January 4, 2010, Respondent filed an Answering Brief to CGC's

¹ Bashas', Inc., d/b/a Bashas', Food City, and A.J.'s Fine Foods is referred to herein as Respondent. The United Food and Commercial Workers Union, Local 99, is referred to as the Union. References to the ALJD show the applicable page number. "Tr. ____" refers to pages of the transcript of proceedings for the hearing held between April 15 and August 14, 2008. "GCX ____" refers to exhibits introduced by General Counsel at the hearing. "RX____" refers to exhibits introduced by Respondent at the hearing. "UX____" refers to exhibits introduced by the Union at the hearing.

Cross-Exceptions. Pursuant to Section 102.46(h) of the Board's Rules and Regulations, CGC files this Reply Brief to Respondent's Answering Brief.

II. CGC'S CROSS-EXCEPTIONS AND RESPONDENT'S ARGUMENT

A. CGC's Cross-Exceptions Regarding Ramon de la Torre

CGC argued in its cross-exceptions that the ALJ erred in failing to find that Respondent's written warning and suspension issued to Ramon de la Torre (de la Torre), and subsequent statements by Warehouse Manager Mel Kelley (Kelley) and Human Resources Manager Steve Schrade (Schrade), violated Section 8(a)(1) and (3) of the Act. Respondent has offered nothing new in its Answering Brief to these Cross-Exceptions.

1. De la Torre's October 10, 2007, Suspension

In its Answering Brief, Respondent does not address the ALJ's failure to address key testimony in his decision regarding de la Torre's suspension. Rather, Respondent argues that Supervisor Juan Grano (Grano) had warned de la Torre not to use the stand-up forklift. However, the record shows that Grano never reported that conversation to anyone at Respondent until a meeting in October 2007 -- after Respondent had already made the decision to place de la Torre on Decision Making Leave. (Tr. 2686) Additionally, Respondent argues that testimony from de la Torre that lead man David Lizarraga (Lizarraga) told de la Torre he could continue to use the stand-up forklift was not credible, ignoring the fact that the ALJ did not discredit that testimony. (Tr. 815)

2. Kelley's October 15, 2007, Interrogation of de la Torre

Respondent argues that Kelley's questioning of de la Torre as to whether the Union had prepared his response to Respondent's discipline was not unlawful interrogation because it was not coercive. Respondent's argument is without merit. The circumstances surrounding

Kelley's questioning of de la Torre were highly coercive. More specific, de la Torre, a baler in the warehouse, was called into the office of a high ranking manager, Kelley, who asked him whether the Union had prepared a response de la Torre submitted. Kelley expressed his displeasure concerning that response because it argued that the suspension was not justified given all the circumstances. (Tr. 863, 915) Respondent fails to address or attempt to refute the fact that an analysis of the *Bourne*² factors in this case establishes that the interrogation was unlawful. Instead, Respondent attempts to analogize its coercive questioning of de la Torre concerning discipline to cases involving an employer questioning known union adherents about union fliers. See Respondent's Answering Brief at p. 11. Respondent's suggestion that, because Respondent knew de la Torre was a Union supporter, its questioning of him regarding his Union activities cannot be violative of the Act is without merit.

Finally, it is telling that Respondent fails to address in its Answering Brief the fact that the alleged interrogation by Kelley took place after he had already suspended de la Torre and expressed strong displeasure that de la Torre had sought assistance from the Union.

3. Schrade's Refusal to Accept Union-Prepared Submission and Threat of Discharge

Respondent argues that the ALJ was correct in finding that Schrade could lawfully threaten de la Torre with termination regarding de la Torre submission of the Union-prepared response to his suspension because Respondent would have fired de la Torre if he had submitted a response that did not reflect de la Torre's taking responsibility for his conduct. As shown in CGC's Cross-Exceptions Brief, such an analysis ignores the fact that Respondent's refusal to accept the document prepared by the Union occurred within the context of the unlawful interrogation by Kelley, described above.

² *Bourne v. NLRB*, 332 F. 2d 47 (3d Cir. 1964)

Moreover, in the context of the circumstances presented, Respondent's threat to discharge de la Torre if he insisted on submitting the Union-prepared statement, which occurred only after Respondent unlawfully interrogating de la Torre, amounts to an unlawful threat to terminate an employee for obtaining and utilizing union assistance. See *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1284 n. 1, 1288-89 (2001).

B. CGC Cross-Exceptions Regarding June 1, 2007, Letter

CGC filed cross-exceptions regarding the ALJ's failure to find that Respondent's June 1, 2007, letter barring Union representatives from all of its stores for all purposes was violative of Section 8(a)(1) and (5) of the Act. Respondent answers by arguing that the ALJ was correct in determining that the letter could be interpreted only one way -- to bar the Union from engaging in ordinary solicitation and distribution activities that are organizational rather than representational. (ALJD at 16). The letter, however, is unequivocal and overly broad when it states that the Union's "...license and invitation to enter any Respondent store **for any purpose** is permanently revoked" (emphasis added). (GCX 70) Respondent's letter fails to make mention of or specifically address organizational activity, and does not limit the breadth of the letter so as to permit the Union's lawful entry to stores for representational purposes.

Respondent incorrectly states that CGC has conceded that Respondent wrote this June 1, 2007, letter in response to the Union's organizing activities. There has been no such concession. The record shows that Respondent issued the letter after the Union re-asserted its collective-bargaining rights (in May 2006); continued to engage in conduct related to its representational duties; filed charges against Respondent over unilateral changes; and

requested to bargain over changes to the health-care benefits of represented employees.³ Moreover, the testimony of Union representative Lillian Flores, (Flores), and the record as a whole shows that Respondent's letter amounts to a unilateral change, as well. Specifically, Flores' testimony shows that the Union was going into Store 124 on a more frequent basis in late 2006 to discuss upcoming changes to the health benefits with represented employees. (Tr. 1875-1876)

Finally, Respondent's suggestion that the Union's May 2007 "blitz" privileges it to unilaterally ban all Union access to its stores is without merit. Respondent has failed to establish or submit support for such a contention.

C. CGC Cross-Exceptions Regarding "Night Crew Infestation" Statement

CGC filed cross-exceptions to the ALJ's failure to find that statement of supervisor Balthazar Rincon (Rincon) that union supporters were referred to as the "night crew infestation" was a disparaging remark in violation of Section 8(a)(1). Respondent argues that Section 8(c) protects such expressions of personal opinion that are not accompanied by threats, reprisal or force or promise of benefit.

Respondent fails to address or distinguish case law where terms referring to vermin have historically been used to threaten and disparage union supporters. See *Jorgensen's Inn v. Bartenders, Culinary Workers and Motel Employees Union Local 158, AFL-CIO*, 227 NLRB 1500, 1501 (1977) (union supporters referred to as cockroaches), *enfd* 588 F. 2d 822 (1978); *Tetrad Co., Inc.*, 125 NLRB 466, 475 (1959) (manager referred to union representatives as "cockroaches and communists.") The use of the word "infestation" has a clear, commonly understood meaning which summons images of its actual meaning, i.e., "a spread or swarm of a troublesome manner." Merriam-Webster's Collegiate Dictionary, Tenth

³ See *Bashas' Inc.*, 352 NLRB 391 (2008).

Edition. If Respondent was attempting to be positive about the Union's gathering of support among employees, as suggested by the ALJ and Respondent, Rincon would not have used a word with such negative connotations.

Respondent attempts to minimize the fact that this same supervisor, Rincon, had earlier interrogated this same group of employees -- a violation sustained by the ALJ (ALJD at 37-38) -- should be rejected by the Board. The use of the word "infestation" in the context presented, including the fact that it was uttered close in time to an unlawful act of interrogation by the same Respondent agent, disparaged Union supporters in violation of Section 8(a)(1) of the Act.

D. CGC Cross-Exceptions Regarding Manager Hansen's Statements

CGC filed cross-exceptions to the ALJ's failure to find that the questioning by manager John Hansen (Hansen) of employee Arturo Mendoza (Mendoza), to wit, "what you employees mad about" and "[y]ou guys get paid good, you guys get good benefits, what do you guys want?" (Tr. 501-502), constituted solicitation of employee complaints and implied promises to improve terms and conditions of employment. (ALJD at 81) Respondent argues that these questions were lawful because Mendoza was a known Union supporter.

Respondent's argument ignores the fact that the ALJ failed to find that Mendoza was a known Union supporter. Further, the ALJ credited Mendoza's version as to what occurred (ALJD at 80, fn. 92) and found that Hansen unlawfully interrogated Mendoza about his support for the Union. (ALJD at 81)

Respondent also argues that there is no link between Hansen's questions and Union activities. Respondent's argument is disingenuous. The record shows that Hansen was directed by Schrade to go out into the warehouse and find out how employees felt about the

Union. (ALJD at 80) Hansen started his conversation with Mendoza by asking about his involvement with the Union. The record shows not only that Respondent's suggestion that its questioning of employees was not linked to Union activity is without merit, but more importantly that the questions and implied promises at issue were, even without examining the issue of Respondent's intent, objectively coercive and violative of the Act. The record shows that in the context presented, it is reasonable to conclude that employees would understand that Hansen was attempting to ascertain what was driving them to the Union and how Respondent could remedy such concerns.

E. CGC Cross-Exceptions Concerning the Proposed Remedy

1. Posting of the Notice

CGC filed cross-exceptions to the ALJ's recommended order that Respondent post three separate Notices to Employees, to be posted only at certain locations of Respondent, rather than more comprehensive Notices available to all employees. Respondent argues that employees at unrepresented stores would be "confused" by a Notice remedying violations at the represented stores and that the violations are not well-known among all employees so that a company-wide posting is not necessary.

Respondent ignores the fundamental reason behind Notice postings. The purpose of a Notice posting is not only to inform employees of their rights under the Act, but to set forth publicly and in clear language a respondent's remedial obligations. Casehandling Manual, Compliance Procedures, Section 10518. To argue that employees might be "confused" is not a valid basis for limiting the remedy imposed for the serious unfair labor practices involved in this case or otherwise limiting information presented to employees. Notice postings are

written in clear and unequivocal language to advise employees of their rights under the Act and the respondent's obligations to remedy violations of the Act.

Further, contrary to Respondent's suggestions, the record shows that knowledge of the Union's campaign and Respondent's response is well-known to employees. For example, Respondent required all employees at the Distribution Center and its retail stores to attend anti-union meetings, complete with a video presentation from the owner, Eddie Basha, as to why employees should not support the Union. (Tr. 500, 594-595, 2096)

It is respectfully submitted that the Board should reject Respondent's arguments and order Respondent to post one Notice to Employees, encompassing all unfair labor practices found, at all of its facilities. As stated in CGC's Cross-Exceptions, in the alternative, the Board should order Respondent to post a complete Notice to Employees at its Distribution Center, all represented stores, and the five additional unrepresented stores set forth in the ALJD. (ALJD at 95)

2. Compound Interest

CGC filed cross-exceptions to the ALJ's failure to order that interest on backpay be compounded on a quarterly basis. Despite Respondent's argument that it is a longstanding Board president that interest on backpay be simple interest, CGC urges that the only way to make adjudged discriminatees fully whole for their losses is to compound the interest. CGC has provided ample legal authority for this request in its cross-exceptions.

III. CONCLUSION

Based upon the foregoing and the entire record in this matter, it is respectfully submitted that the Board should grant CGC's Cross-Exceptions and find that Respondent further violated Section 8(a)(1), (3), and (5) of the Act as described in such cross-exceptions.

Further, it is respectfully submitted that the Board should amend the ALJ's recommended Order to provide the appropriate remedies, including an order requiring Respondent to post one complete Notice at all stores and compound interest on all backpay awarded.

Dated at Phoenix, Arizona, this 15th day of January 2010.

/s/ Sandra L. Lyons

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF in BASHAS, INC., Cases 28-CA-21435, et al., was served by E-Gov, E-Filing, E-mail, and overnight delivery via Federal Express on this 15th day of January 2010, on the following:

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