

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

PESSOA CONSTRUCTION COMPANY

and

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA

Cases: 5-CA-34547
5-CA-34761
5-CA-35083

**GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR CLARIFICATION OF JUDGE'S DECISION**

On February 5, 2010, Pessoa Construction Company, herein referred to as Respondent, filed a Motion requesting that the Board partially remand the above-captioned Cases to the Administrative Law Judge to obtain clarification of the Judge's analysis concerning the Section 8(a)(3) allegation. Counsel for the General Counsel opposes the motion and asserts that a remand is wholly unnecessary and that any objections to the Judge's decision may be appropriately addressed through the filing of exceptions.

The issues presented in these Cases involve Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act: coercive statements to employees intended to dissuade them from associating with the union, creating the impression that employees' activities at a union meeting were under surveillance, the discharge of an employee who spoke out against the company at a union meeting, a unilateral change, and a refusal to negotiate in good-faith a collective-bargaining agreement. The Laborers' International Union of North America, herein referred to as the Union, began organizing Respondent's employees in the summer of 2008. The efforts culminated in an election on July 14, 2008, and the

Union's certification on July 28, 2008. Respondent discharged William Membrino, its employee, on October 23, 2008.

Administrative Law Judge Arthur J. Amchan presided over a hearing in the Cases, in Washington D.C., on October 19th to the 23rd and November 2nd to the 4th, 2009. The parties submitted briefs to the Administrative Law Judge on January 6, 2010, and the Judge issued a decision on January 26, 2010. The Judge found that Respondent violated: Section 8(a)(1) of the Act by creating an impression of surveillance and indicating that it was closely monitoring the extent of an employee's union involvement; Sections 8(a)(3) and 8(a)(1) by changing William Membrino's working conditions by requiring him to report for work at the jobsite rather than at the yard and to leave his truck at the jobsite; Sections 8(a)(5) and 8(a)(1) by unilaterally changing the work conditions of William Membrino and Nicholas Cappetta concerning reporting to the jobsite and leaving the trucks at the jobsite; and Sections 8(a)(3) and 8(a)(1) by discharging William Membrino, following an accident involving a company truck, operated by Mr. Membrino, and a gradall, operated by another employee.

In its motion, Respondent requests that the Board partially remand the Cases to the Administrative Law Judge on the issue of the Section 8(a)(3) discharge of William Membrino because the Judge purportedly failed to address any legal standards or law. Respondent further contends that the Judge did not cite or discuss the burdens of proof pertaining to an 8(a)(3) allegation and that the Judge did not address Respondent's defenses. It cites *Faurecia Exhaust Systems, Inc.*, 353 NLRB No. 34, slip op. (2008), and argues that the case should be partially remanded because the Judge purportedly

failed to identify, in his *Wright Line* analysis, whether he relied on a dual motivation or pretext analysis.

A complete reading of the Judge's decision shows that the Judge clearly set forth the *Wright Line* analysis, identified the facts that supported each element of the analysis, unambiguously identified the source of Respondent's motive for discharging Mr. Membrino, and explained his basis for concluding that Respondent's asserted reasons for the discharge were either false or not in fact relied upon.

Contrary to Respondent's assertions, the Judge did cite and discuss the applicable burdens of proof for a Section 8(a)(3) discharge. On page 6 of his decision, in connection with discussing the Section 8(a)(3) allegation concerning the change in Mr. Membrino's work conditions, the Judge stated as follows:

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and anti-union animus are often established by indirect or circumstantial evidence. JD-06-10 at page 6.

Having already set forth the analysis, as quoted above, the Judge did not repeat it when he discussed the Section 8(a)(3) discharge of Mr. Membrino on pages 12 and 13 of the decision.

Respondent's reliance on *Faurecia Exhaust Systems, Inc.*, to argue that these Cases should be remanded, is inapposite here. In *Faurecia Exhaust Systems, Inc.*, the Board found ambiguity in the Administrative Law Judge's identification of the motive for

the alleged 8(a)(3) discipline. 353 NLRB No. 34, slip op. (2008). The employee at issue in that case was disciplined for “surreptitiously attempting in May [2007] to obtain employees’ names, addresses, and phone numbers from individuals who were not authorized to release this information” in order to give the information to the Union during an organizing campaign. *Id.* at page 2. Prior to that, in December of 2006, the employee, whose last name was Blue, had also solicited union support among employees. *Id.* The Employer defended the 8(a)(3) allegation by stating that the employee’s conduct in May was unprotected and that he had been disciplined for disregarding a company policy prohibiting the unauthorized disclosure of confidential personnel information. *Id.* The Judge concluded that the employee’s conduct in May was protected activity and that Respondent violated the Act by disciplining him for that activity. *Id.* However, the Judge went on to identify two possible motives for the discharge of the employee: his conduct in May and the prior conduct in December. The Board found it was unable to discern whether the Judge relied on a dual-motive analysis or a pretext analysis. The dual-motive analysis would apply if the Judge found that “Respondent’s motive for disciplining Blue was based *both* on his allegedly unprotected conduct in May and on his ‘undeniably protected’ soliciting activity in December.” *Id.* at page 3. However, the pretext analysis would apply if the Judge found that “Respondent’s asserted reason for disciplining Blue—his May conduct—was ‘false or not in fact relied upon.’” *Id.*, citing *SFO GoodNite Inn, LLC*, 352 NLRB No. 42, slip op. at 2 (2008). Because of this ambiguity, the Board remanded the issue to the Administrative Law Judge.

There is no such ambiguity in Judge Amchan's decision. He clearly identified that Respondent's motive for discharging Mr. Membrino stemmed from its animus towards Mr. Membrino's attendance at the September 30th union meeting and his questioning, while at the meeting, about whether he was entitled to be paid more for travel time from Respondent's yard to the jobsites than he was receiving and whether the owner's statements to him that he could not grant Mr. Membrino a wage increase because of the Union were correct. The Judge cited to no other motive. Moreover, unlike in *Faurecia Exhaust Systems, Inc.*, Respondent here never claimed that Membrino's conduct at the union meeting was unprotected or that it actually discharged Mr. Membrino because of that conduct. Respondent presented an alternate reason for the discharge. Thus, the dual-motive analysis had no application here. Finally, the Judge's decision makes it clear that he relied on a pretext analysis. The Judge cited to evidence of disparate treatment, that Respondent took action against Mr. Membrino on the basis of policies without giving him prior notice of those policies, and that Respondent fired Mr. Membrino before giving him the opportunity to defend his conduct in finding that Respondent had not, in fact, relied on its asserted reason to discharge Mr. Membrino.

Another difference between the two cases is that *Faurecia Exhaust Systems, Inc.* was before the Board because the Respondent filed exceptions. No exceptions have yet been filed here.

For these reasons, Counsel for the General Counsel respectfully requests that the Board deny Respondent's Motion and asserts that any objections to the Judge's decision may be appropriately addressed through the filing of exceptions.

Respectfully submitted on February 11, 2010,

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CERTIFICATE OF SERVICE

I hereby certify that General Counsel's Opposition to Respondent's Motion for Clarification of Judge's Decision was electronically filed on February 11, 2010, and, on that same day, copies were electronically served on the following individuals by email:

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