

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

PESSOA CONSTRUCTION COMPANY,	)	
	)	
Respondent,	)	
and	)	Case Nos. 5-CA-34547
	)	5-CA-34761
LABORERS' INTERNATIONAL	)	5-CA-35083
UNION OF NORTH AMERICA,	)	
	)	
Charging Party.	)	

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

Respondent Pessoa Construction Company ("Pessoa" or "Employer") files this short Reply to the General Counsel's opposition to its Motion for a limited remand to the Administrative Law Judge to obtain a clarification of the Section 8(a)(3) portion of his Decision (JD-06-10).

Importantly, the Opposition argument vividly illustrates that the ALJ failed to discuss the evidentiary proof required by the findings he made under extant caselaw.

1. As set forth in the Motion, the ALJ did not identify at all how the burdens of proof shifted from each party and/or were supported by the facts. Under Wright Line, 251 N.L.R.B. 1083 (1980), the Board stated that "an employer can avoid the finding it violated the Act by demonstrating by a preponderance of the evidence it would have taken the action even if the union had not been involved." Moreover, the question of antiunion animus that the General Counsel must show must be substantial or motivating factor in the employer's decision to make the adverse employment decision. And, NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), highlights the fact that antiunion animus cannot prevent a discharge for cause. 452 U.S. at 398. This is done by producing evidence of legitimate nondiscriminatory reasons for the employer's action. Hyatt Hotels Corp., 296 N.L.R.B. No. 36 (1989).

2. To be sure, the ALJ here fails to identify the employer's legitimate reason for the discharge, *i.e.*, Mr. Membrino's reckless damage to Pessoa's property in support of an unsafe act. The Judge also fails to consider whether the Employer's antiunion motive he finds is "substantial" under the law (*i.e.*, known attendance of Mr. Membrino at a single union meeting), the impact of an employer's guaranteed Section 8(c) right to make statements, whether in any other discharge situation a Pessoa employee was not discharged who was involved in over \$8,000.00 in damages to Company property, G. C. Ex. 103, and the efficacy of Pessoa's following its established employment policy manual.

3. Rather, the Judge's ruling is an exceptional decision in counsel's thirty years of practice. Here, the ALJ fails to even identify as the General Counsel's Opposition reveals, what Pessoa even offered as evidence of its *legitimate business reasons* for the action taken against Mr. Membrino. Where is it? How can the Board determine what the employer's reason is from the ALJ's decision? How can the Board begin to evaluate that legitimate business reason on Exceptions?

4. The General Counsel recognizes the severity of the ALJ's omission. Counsel for the General Counsel also recognizes the gross omission in the evaluation process made by the ALJ. Moreover, Counsel for the General Counsel has informed the Board in the Opposition that she knows that Pessoa presented a legitimate business reason on record and that the ALJ failed to discuss it at all.

The answer to the Judge's omission is found on page 5 of the Opposition, where counsel for the General Counsel states that "Respondent presented an alternate reason for the discharge." Unfortunately, the ALJ does not discuss this "alternate reason" at all—which is in fact Pessoa's only articulated reason for the discharge *i.e.*, Mr. Membrino's reckless conduct causing

substantial property damage allegedly undertaken in support of an unsafe act.

5. Consequently, counsel for the General Counsel argues here that “the Judge’s decision makes it clear that he relied on a pretext analysis.” Opp. at 5. Of course, that has to be the General Counsel’s answer since no other basis in the recommended Decision could ever support the ALJ’s conclusion. But, there is no evidence in the record that the evidence of disparate treatment reviewed by the ALJ was even comparable to an event involving gross reckless action resulting in multiple thousands of dollars of property damage, that the ALJ avoids discussing at all while finding disparate treatment. He never even stated that Mr. Membrino’s discharge was a “pretext.” And, Judge Amchan never even uses the word “pretext” at any point in his Decision at all. So, there is no basis to claim a pretext analysis was in fact employed in these circumstances when the Wright Line defense is not explained and “pretext” is not found.<sup>1</sup>

6. Whether the Board should wait as it did in Faurecia Exhaust Systems, Inc., 353 N.L.R.B. No. 354 (2008), to remand the matter back to the Judge for failure to explain fully his decision as counsel for the General Counsel seems to advise, is not an appropriate posture to facilitate the resolution of this case. If the Board were to consider a remand at all possible in these circumstances, it should do so. If counsel for the General Counsel believes that the ALJ Decision is fine as it stands, then any doubt on Exceptions should be resolved against counsel for the General Counsel on the merits, since all prejudice and delay can only then enure to injure Respondent Pessoa.

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<sup>1</sup>The ALJ did find that: “The damage to the dump truck driven by Membrino on October 23, was repaired inhouse by Respondent’s mechanics. To repair the damage to the hood, Respondent bought materials for \$509. However, the resale value of the truck may have appreciably diminished by repairing the truck in this manner, rather than by doing more extensive repairs.” The ALJ did not deny and the General Counsel never rebutted that the value of the truck repairs was over \$8,000.00 or discuss the labor cost of repairs incurred by Pessoa.

**CONCLUSION**

For these reasons, Respondent Pessoa Construction Company respectfully requests that the Motion to Remand for limited Clarification be granted.

Respectfully submitted,

PESSOA CONSTRUCTION COMPANY

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Motion for Clarification was served by email on the following persons on this the 17<sup>th</sup> day of February 2010:

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