

**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,	)	
	)	ALJ Arthur J. Amchan
Charging Party.	)	

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**RESPONDENT'S REPLY BRIEF TO THE BOARD  
IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ALJ**

Respondent Pessoa Construction Company ("Pessoa" or "Company"), files this brief in support of its Exceptions pursuant to Rule 102.46(h) of the Board's Rules and Regulations.

**COUNTER-STATEMENT AND ARGUMENT**

Counsel for the General Counsel response cobbles together certain evidence from the record and fits them into a framework that *could* explain the ALJ's Decision when the ALJ had not done so. The vitriolic allegation of hallmark violations of the Act are not supportable.

1. Factual Allegations.

The General Counsel's allegation concerning Mr. Membrino's discharge desperately tries to establish union animus where there is none. Despite the Union's election as the exclusive bargaining representative of Pessoa's employees, Mr. Membrino repeatedly walked into Julio Pessoa's office and demanded special treatment, a pay raise. ALJD 3. The Company correctly and legally told Mr. Membrino that no changes could be made for him because the Union had become the employees' certified representative. ALJD at 4 n.4.

Undeterred by this explanation from Mr. Pessoa, Mr. Membrino raised the question of getting a raise and adjusting travel pay with the Union at a meeting on September 30, 2008. The Union's Business Manager then promptly *notified Pessoa's attorney* on October 2, 2008, that the

Union had in fact held a meeting with employees and that an issue concerning travel pay had been raised at its meeting and shared with him the internal communication from the Union's Organizing Director concerning it, to wit GC Ex. 12:

One of the drivers at Tuesday's meeting stated that the drivers do not get paid until they get to the jobsite. This is not legal. Will you ask Brian to have Pessoa give an explanation as to its side of this before legal action is taken. Even a pro-company worker confirmed this. Apparently the trucks have GPS systems on them which tracks the time as well. The workers also keep a log.

Some workers have been told that they cannot receive raises because of the union. Please let Brian know that he [sic] will not consider this to be a ULP if the raises wer [sic] regularly scheduled, etc.

2. There is No Sufficient Basis to Find the Company Engaged in Surveillance.

As counsel for the General Counsel admits, Ans. Br. at 11, keeping with Mr. Membrino's monthly tradition, Membrino walked into Mr. Pessoa's office unannounced on October 13, 2008, and asked Mr. Pessoa to give himself and only himself a raise for a higher take home pay apart from other unit employees. Membrino 329-30, 360. With the subject of compensation having been raised, Mr. Pessoa repeats what the Union had deliberately advised the Company days before about the union meeting concerning travel pay. The General Counsel so argues at 11.

Yet, there was nothing coercive about this communication from Mr. Pessoa. Membrino asked for more money, an unprotected act. In fact, Membrino was told exactly what the Union had told the Company, thus making Pessoa's statement protected under Section 8(c) of the Act.

The ALJ's finding of unlawful surveillance solely by the simple recitation to Mr. Membrino of what the Company was in fact told to it by the Union about what had been raised at the union meeting cannot stand in these circumstances.

3. The Location of Company Vehicles.

Missing from the Answering Brief is the undisputed testimony that Pessoa has a regular

practice of leaving equipment *dedicated* to jobsites on those jobsites overnight because it is inefficient to return them to the yard. Machado 1532; Pessoa 116; Reeder 1326. Also in error was the ALJ's finding that Pessoa's policy regarding *dump truck drivers* (who he identified as Membrino and Capetta), ALJD 5 ll.29-31, should have been applied to all "other truck drivers" he identified as Ramirez, Loving, and Smith, ALJD 5 ll.33-34, when there was no evidence the "other trucks" were dedicated to working at Route 231. These "other trucks" were also *not dump trucks*, contrary to the General Counsel's assertion at 30, which is also contrary to the ALJD.

Membrino admitted that at the time of the directive (October 17) *he was assigned to work* regularly at the Route 231 site, "lately I was working there regularly, yes. Membrino 363 ll.15-16. "We were starting to get a little slow right now." Route 231 was one of the few jobs Pessoa had left and Membrino admits it was the only "real work" the company had. Membrino 530.<sup>1</sup>

Contrary to the ALJ, the institution of the practice for Membrino and Capetta was not a unilateral change in working conditions. No person testified that the practice did not exist or that it would also apply to all other "drivers" or other equipment dedicated to Route 231. Contrary to the ALJ, the "temporal relationship" between the cost of fuel, Pessoa's determination to dedicate dump trucks to Route 231, and the lack of new projects, as the testimony showed, occurred in October 2008. The cost of fuel "peaked" in the Fall of 2008. Infante 417 ll.2-6. The evidence was in the record, but overlooked. Pessoa met its burden of proof. The made-up demand by the ALJ for the Company to show when the economic pain reached critical level to be "wasteful" for Membrino to drive from the yard every day, is irrelevant. ALJD at 6 ll.8-11.

Moreover, the General Counsel does not deny that Pessoa's dedication policy towards

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<sup>1</sup>The ALJ's finding of no "temporal relationship" between the directive and "when Membrino's truck became exclusively dedicated to the 231 site, ALJD 6 ll.8-9, is therefore incorrect.

dump trucks *did not* apply to other drivers such as fuel truck driver Ramirez, low boy driver Smith. Nor does the ALJ's speculation that the logic of the October 17 directive would have "made economic sense" to also apply to Bonnie and Laura when they had not even been hired at the time the directive issued. ALJD 5 n.7; GC Ex. 15 (employee list Nov. 5, 2008).

4. The Discharge of William Membrino.

Membrino was discharged for reckless conduct in parking his dump truck. The ALJ stated "I make no finding as to who was at fault in the accident or whether either Membrino's conduct or McCane's conduct at the time of the accident was proper or safe." ALJD at 10-11. The Company's finding that Membrino was at fault for the incident and that "the record indicates it is unsafe for anyone to work around the Gradall when the operator is in the cab," ALJD 8 ll.26-27, are established in the record.<sup>2</sup>

No one single person corroborated any element of Membrino's story that dump truck drivers ever help Gradall operators change a bucket or had ever seen Membrino do so. Counsel for the General Counsel called Gradall Operator Juan Carlos Martinez to the stand who Membrino testified he had worked alongside with, but Mr. Martinez *did not* confirm Membrino's account of ever helping Gradall operators change buckets. The Answering Brief is silent on this.

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<sup>2</sup>The assertion that Membrino's explanation for what he was doing in the bucket area is to be credited over the unanimous testimony of McCane, Reeder, Machado, and Pessoa because they provided only "general denials" for what Membrino said, is insupportable. See Ans. Br. at 14 n.26; ALJD 8 l.8. McCane *expressly denied* he needed Membrino's help to change the Gradall bucket, tr. at 1363 ll.12-16:

Q. Do you recall ever asking him to help you change your bucket?

A. No, I don't. I never need no help to change the bucket.

Q. Why not?

A. It's only two bolts. It's an operator job.

Tr.1380 ll.1-5:

Q. With respect to Mr. Membrino that day, did he help you change any bolts on the bucket?

A. No, no.

Q. Has he ever helped you change bolts on a bucket?

A. No.

Also Tr.at 1366 ll.1-4 ("Q...did you ask Mr. Membrino to go help you change the bucket...A. No.").

Membrino in fact was the cause of “significant damage” to the Company’s newest dump truck with a repair estimate of over \$8,000.00. Reeder 1296 ll.11-20, GC 103. The General Counsel’s claim that the damage could be considered diminimus because the Company did not undertake a complete and immediate repair when the repair cost exceeded the Company’s \$5,000 insurance deductible, the damage diminished “the resale value of the truck,” ALJD 12 1.22, the Company was not able to spend money at the time due to the fallen national economy, and because the Company had in house mechanics that could make interim repairs, does not excuse Membrino for his acts. Rather, it amounts to “discharge for cause” under Section 10(c).<sup>3</sup>

As a result of the incident, both McCane and Membrino submitted statements according to Company policy. Neither man apparently told foreman Reeder or general superintendent Machado how the incident occurred. Membrino states he was there to help McCane change a bucket and McCane states Membrino was parked in a blind spot. GC Exs. 86 & 87.

Mr. Pessoa was the decisionmaker. He possesses knowledge of the Gradall Manual, safe operation of the Gradall, and as a Gradall operator himself, knows in fact that changing a bucket is a one-person job for the operator. This professional knowledge led him to understand that Membrino’s placement of the truck behind the Gradall (which Membrino *admits was moving* at the time he parked the dump truck) was reckless, without justification, and would get someone killed. Pessoa 110. He had seen the pictures of the damaged equipment, reviewed the site plans, talked to Machado and McCane, reviewed Membrino’s statement, and even telephoned Membrino for an explanation before he acted. Pessoa 109 ll.10-19.

When an employee is involved in significant damage to equipment (over \$5,000), it is

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<sup>3</sup>Even Membrino admitted that this was “a major accident.” Membrino 491 1.25. McCane’s hearsay statement to Membrino that the truck damage was not “major,” is irrelevant.

normal to discuss it; an inquiry is expected. Pessoa 107.<sup>4</sup> There is no testimony to the contrary. Membrino was terminated; not, but for the fact he did not talk to Mr. Pessoa after the accident, as alleged. Ans. Br. At 20. Of course, the ALJ refused to find that Membrino was not at fault.<sup>5</sup>

5. The ALJ's Credibility Determinations.

The General Counsel asserts that Membrino's account of the accident was credited over the Company's witnesses and therefore this affirms all the ALJ's conclusions. Yet, the ALJ made no attempt to show that Membrino's credibility could sustain the burden of proof that he was not discharged for cause. As argued, the ALJ findings are insupportable.

First, the ALJ supplies no basis why he would discredit every direct witness but Membrino on safety, company policy, and work rules. Asserting "general denials" by some witnesses does not suffice for reasoned decisionmaking. For example, McCane's denials were clearly specific, not "general." See note 2, supra. That Membrino's explanation for being at the bucket site was "plausible," did not make it true or diminish the key fact that Membrino parked his dump truck recklessly—a fact determination made by the Company. The ALJ's criticism of McCane "generally" to discredit him for not being more literate in his company statement does not equally show how Membrino's decision to park his dump truck where it could be hit, should have been further explained in his statement, as well, and should have similarly been discredited

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<sup>4</sup>The ALJ credits Mr. Pessoa's testimony at 9 ll.1-2, that Mr. Membrino denied being directed by Juan Infante to report. Mr. Pessoa took Membrino's denial to be insubordinate, he could "care less." Pessoa 108 l.1; 117 l.4. These facts undermine the ALJ's finding at 11 n.12, that the directive to Infante occurred after the phone call. Infante only saw Membrino head in the direction of Pessoa's office—but he never made it. Mr. Membrino was not recalled to resolve his admissions. Membrino 559 ll.8-9.

<sup>5</sup>Another example of a finding not entitled to deference is where the ALJ states that Purcell Smith "was clearly at fault" for cutting GPS wires. ALJD 13 ll.30. No witness testified to the truth of that statement, only that "somebody cut them." Pessoa 1176 l.2. The GC repeats the claim. Br. 32. But, the invalid point reiterated here is comparing apples (dump truck drivers) to oranges (operators & other drivers) rather than apples to apples to show disparate treatment upon employee caused damages to the Company resulting in the multiple of thousands of dollars, not every application of discipline.

since Membrino told *no one else* that story. ALJD 8 1.49.

The ALJ discredits “any of Abilio Machado’s testimony,” ALJD 10 n.11, without any explanation of why when Machado clearly took and brought the pictures of the truck damage to the office at the end of the day to show to Mr. Pessoa as Pessoa directed him to do. Pessoa 1823. See ALJD 11 n.13. . It is not reasonable when the uncontroverted evidence is Machado made termination recommendations on other workers and Mr. Pessoa indisputably met with Machado.

Second, an ALJ must make some effort to explain why witnesses are discredited, such as Abilio Machado, e.g. ALJD 10 11,34, 48. Camelot Terrace, Inc., 353 N.L.R.B. No. 20 at 1 (2008). The boilerplate opening statement of ALJ’s making findings, as here, “including my observation of the demeanor of the witnesses,” ALJD 1¶3, has been criticized by the Board because they do not provide for any meaningful review. Atlantic Veal & Lampi, Inc., 342 N.L.R.B. No. 37 at 3, 5 (2004). When a ruling is not demeanor based, “the Board itself may proceed with an independent evaluation.” Starcraft Aerospace, Inc., 346 N.L.R.B. 1228, 1231 (2006). When “the judge’s decision makes no reference to this critical testimony, his credibility resolutions do not reach this specific testimony,” either. Id. Even if a ruling is demeanor based, a demeanor ruling is not dispositive it is contrary to established facts and reasonable inference from the whole record. E.S. Sutton Realty Co., 336 N.L.R.B. 405, 407 n.9 (2001).

Third, an ALJ is not empowered to make random findings unless it is demeanor based. If not, then he must draw all inferences from the record—in favor and against the Complaint. The Board “is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.” Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 378 (1998). If it was reasonable to fire dump truck drivers Capetta and Branham for causing many thousands of dollars in damages as the General Counsel admits, Br. 33, the inference is that Membrino was treated equally. That comparison was never undertaken.

The ALJ cannot be selective. NLRB v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952).

6. The General Counsel Failed to Carry the Burden of Proof

Mr. Pessoa did not discuss Membrino's attendance at the meeting, Mr. Pessoa only repeated what the Union had told him. Then, Membrino told Pessoa it was he who raised the question. The ALJ's ruling is therefore not factually correct at 4 ll.26-28, and the ALJ does not account for the employer's Section 8(c) rights in stating objective information to Membrino. Neither does the General Counsel discuss Section 8(c) rights at all in the Answering Brief.

7. The Discriminatory Motive for Showing Animus is Insufficient

The General Counsel's argument in this case is entirely based on *inference*. "I infer animus and discriminatory motive from the timing of the change, Pessoa's comments to Membrino on October 13, and the unexplained failure to make the same change in the working conditions of other drivers." ALJD 6 ll.31-34. Ans. at 28.

Although impressed by the ALJ's finding, the General Counsel fails to account for the fact that an ALJ may not select inferences he makes in a case. Once traveling down that road, he must make all other reasonable inferences from the evidence. Allentown Mack Sales, *supra*.

Moreover, under Wright Line, there must be a linkage between the protected activity and the adverse action. Wal-Mart Stores, Inc., 352 N.L.R.B. 815, 815 n.5 (2008). The entire caselaw presentation made by Pessoa is not rebutted in the Answering Brief. The prima facie case is suspect here, because no contemporaneous protected act of Membrino led to any contemporaneous act by Pessoa. NLRB v. CWI of Maryland, 127 F.3d 319, 331 (4th Cir. 1997).

The General Counsel does not disagree that Pessoa met its burden to establish that Membrino's reckless act to park his dump truck behind a moving Gradall that resulted in substantial damages to company property was a legitimate business reason for terminating Membrino. But, the General Counsel argues the ALJ found the "defenses to pretextual," Br. 34,

but the ALJ absolutely did not. Perhaps pretext may be inferred, but even if the employer's reason is found to be pretextual, "largely because of perceived inconsistencies in the Respondent's disciplinary practices...the judge erred with respect to the standard of proof necessary to meet the rebuttal burden under Wright Line....Wright Line simply requires a respondent to establish by a preponderance of the evidence that it would have discharged the employee even absent the employee's union or other protected activity." Mid-Mountain Foods, Inc., 350 N.L.R.B. No. 67 at 2 (2007).

First of all, the General Counsel is absolutely wrong concerning whether Membrino recklessly was the cause of damage to Pessoa's truck. Br. 35. The judge refused to make the finding of fault. ALJD 10-11. He also *did not* find this reason was "false." Rather, he felt Membrino's reckless act was "totally irrelevant" to his discharge. ALJD 11 l.2.

Because the General Counsel must *prove* by a preponderance of the evidence that anti-union animus was a substantial or motivating factor in the discharge, TNT Logistics of North America Inc. v. NLRB, 413 F.3d 402, 406 (4th Cir. 2005); Wright Line, 251 NLRB at 1088 n.11, the ALJ must find what that substantial evidence is, not just that there might be. And, it cannot be the iteration to Membrino of the contents of the Union's email to Company. That statement is protected by Section 8(c) of the Act. The General Counsel repeats the Judge's error by arguing at page 35, that Pessoa's statement "created an impression of surveillance and served as evidence of knowledge and animus." See U-Haul Co. Of CA, 347 N.L.R.B. 375, 376 (2006).

8. The Termination was caused by Membrino's Reckless Acts Not Union Activities

The ALJ relies on the "temporal relationship" between the Membrino's sole union act of attending a union meeting and his discharge. The General Counsel asserts a statement that Membrino's head is not with the company is evidence of animus. Br. 29. The ALJ made no such finding. The argument is waived because General Counsel filed no such Exception.

9. The Placement of Dump Trucks at Route 231 Did Not Violate Section 8(a)(5).

It is indisputable that dump trucks have poor fuel economy, 2008 saw the construction collapsed, and the Route 231/ Lusby sites were the only sites Pessoa's dump trucks worked on.

Pessoa informed Membrino and Capetta they would be transported to the jobsite at no cost. E.g., GC Ex. 84. The ALJ made no finding what travel time pay might be for dump truck drivers. On the record, the General Counsel stated "I'm not here to litigate whether or not he was, in fact, paid for travel time." Tr. 113 ll.20-22. It is incredulous for the General Counsel to now claim that there was a "commute time" cost. The argument is waived.

The ALJ states the cost of fuel was shifted to the dump truck drivers. This is illogical. When they drove a truck, Pessoa paid for their fuel. When they were thereafter driven to Route 231, Pessoa paid for the fuel to get them there. There was no change. Membrino was driven to Route 231 by McCane. Membrino 429.

Also, contrary to the record is the General Counsel's argument that there was no past practice for dedicating equipment to jobsites. Br. 37. The ALJ missed the evidence and relied on what happened in the future, that the trucks were on site for another six weeks and then pulled off during the winter for snow removal. ALJD 7 l.7. That does not disestablish a *past practice*.

10. No Timely Served Unfair Labor Practice Charge

The Board's Rules and the Statute require personal service. The Complaint and Notice of Hearing in Case Nos. 5-CA-34547 & 34761 issued on May 29, 2009; GC Ex. 1G. Membrino was discharged on October 23, 2008, more than six months before the Complaint was filed and later served. The instant Consolidated Complaint on September 11, 2009, is not a substitute. Under Buckeye Mold & Die Corp., 299 N.L.R.B. 1053 (1990), the Board held that failure to timely serve a charge is made up by filing a complaint within the 10(b) period. That did not occur here.

The argument about service on counsel is therefore irrelevant in these circumstances.

**CONCLUSION**

For the foregoing reasons, Respondent Pessoa respectfully requests that the recommended violations of the Act be reversed and the Complaint be dismissed.

Respectfully submitted,

PESSOA CONSTRUCTION COMPANY

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Dated: April 6, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Pessoa's Reply Brief in Support of Exceptions to the Board was served by email on the following persons on this the 6<sup>th</sup> day of April 2010:

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April 6, 2010