

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

BRUCE PACKING COMPANY, INC.,)	
)	
Respondent,)	Case Nos. 36-CA-10496 and 36-CA-10595
)	
and)	
)	
LABORERS' INTERNATIONAL)	RESPONDENT'S ANSWERING BRIEF
UNION OF NORTH AMERICA,)	IN OPPOSITION TO THE
LOCAL No. 296,)	EXCEPTIONS FILING BY THE
)	CHARGING PARTY
Charging Party.)	
_____)	

On May 20, 2010, Charging Party Laborers' International Union of North America, Local No. 296 ("Union") filed exceptions and a brief in support to the Administrative Law Judge's April 8, 2010 Decision and Order. On the General Counsel's motion, the deadline for filing answering briefs was extended to June 18, 2010. Bruce Packing Company, Inc. ("BrucePac" or "Employer") files this answering brief to the Union's limited exceptions.

ARGUMENT

Response to Union Exception No. 1: In Dismissing the Complaint Allegation, The ALJ Properly Concluded Federico Nieves Rojas Would Have Been Selected for Layoff Notwithstanding His Limited Union Activity

As the ALJ properly found, in mid 2009, BrucePac management determined that economic conditions required a general reduction in force across five departments, including sanitation. *Decision* at 5:18-20 and 48-50. In the final analysis, forty two (42) employees were selected for layoff in these five departments in the company's two facilities located in Silverton and Woodburn, Oregon. In this case, the General Counsel did not contend the general layoff decision or number of employees selected was unlawfully motivated. *Decision* at 45-47. Rather, the General Counsel's

Answering Brief to the Union's Exceptions - 1

narrow theory is BrucePac's selection of the four employees on the Silverton day shift sanitation crew was unlawfully tainted by union animus. *Decision* at 5:45-47. At the time of the June 2009 layoff, there were sixteen individuals, including Supervisor Abel Esparza and Foremen Jose Flores and Juan Briones, working the day shift sanitation crew at the Silverton facility. *Decision* at 6:1-2 and 6:10-14. Ultimately, Rojas was one of the four employees selected for layoff from the Silverton day shift sanitation crew.

Economically forced to work with smaller crews in the future, BrucePac sought to retain employees with desirable work traits such as good work performance. As the ALJ correctly recognized and credited, attendance is an integral component of good work performance. *Decision* at 14:38-39. Indeed, Mr. Rojas freely admitted that it was important at BrucePac to come to work on time and on scheduled days. Tr. at 197:19-23; *see* Tr. at 79:14-19.

As the ALJ correctly found, Mr. Rojas' attendance failed to meet the requisite standard for good work performance, which was part of BrucePac's paradigm for its layoff selections. *Decision* at 14:38-39. In 2008, Mr. Rojas was the *only* employee on BrucePac's Silverton day shift sanitation crew who received written discipline for attendance and tardiness problems. On November 19, 2008, he received an Official Verbal Warning for "being late to work too much" and "missing too much time from work." GC Exh. 6. Shortly thereafter, Mr. Rojas received a Written Warning for a no call / no show on November 28, 2008. GC Exh. 7. As the ALJ properly found, Mr. Rojas' attendance did not improve in 2009. Between January 26 and March 19, 2009, he was late seven times, including three days when he was more than two and a half hours late.¹ *Decision* at 14:33-35; R. Exh. 4 at 1.

¹ While approved, Mr. Rojas was absent from work between March 27 and April 13, 2009. *See* R. Exh. 4 at pg. 2 (top). Similarly, he was absent between May 19 and May 22, 2009. *Id.* While it appears he called in, Mr. Rojas also missed work on June 22, 2009. *Id.*

Mr. Rojas was well aware of his poor attendance and tardiness problems. As the ALJ properly credited, when informed of his selection for layoff, Mr. Rojas said he could “kind of” understand his selection because he knew he had occasionally been absent. *Decision* at 14:39-15:2; Tr. at 46:19-22.

After finding a prima facie case was established², the ALJ properly concluded that, as required by *Wright Line*, BrucePac demonstrated it would have selected Mr. Rojas for layoff notwithstanding his limited union activity. *Decision* at 15:2-4. As the ALJ properly credited, Mr. Rojas secretly discussed the Union with coworkers on Silverton’s day shift sanitation crew, including several employees who were not laid off. *Decision* at 14-15; Tr. at 184:5-185:3 and 195:23-196:10. He first learned of the Union in mid June 2009, but he never attended a Union meeting prior to this layoff. *Decision* at 4:13-17.

While the Union attempts to minimize Mr. Rojas’ poor attendance and tardiness problems, he was the only employee on the Silverton day shift sanitation crew who ever received written discipline in 2008 for such performance problems. GC Exhs. 6 and 7. Similarly, as the record reflects, he is the only employee on this crew with attendance and tardiness problems in 2009 prior to the layoff selections.

Moreover, the Union argues that BrucePac sought to “expand the reason for termination to rely upon a warning given to Mr. Rojas in February [2009] although management could not remember the specific incident.” *See* Union Exceptions at 1. In support of this allegation the Union cites to footnote 26 of the ALJ’s Decision:

Although Mr. Rojas also received a warning in February for not treating team members with respect, that was apparently not considered, as Mr. Martinez stated he did not recall any negative work performance reports about Mr. Rojas.

² BrucePac filed an exception to this finding.

Decision at 14:49-52 (footnote 26). The Union’s argument is misplaced for several reasons. There is no evidence in the record that Mr. Rojas received a warning in February for not treating team members with respect. As the record clearly reflects, two other employees – Nicanor Luna and Augustin Carmona – received warnings in February for not treating each other with respect due to a “heated” argument. *See* GC Exhs. 8 and 9(c); Tr. at 355:10-356:2, 357:6-15. More fundamentally, the General Counsel offered all of this evidence. BrucePac did not offer testimonial or documentary evidence in an effort to expand the reasons for Mr. Rojas’ layoff selection. As stated consistently and repeatedly, he was selected due to his poor attendance and tardiness problems.

As the foregoing reflects, the ALJ’s conclusion and dismissal of the Complaint allegations relating to the termination of Mr. Rojas are well supported legally and factually. Even assuming the General Counsel established a prima facie case, BrucePac established that it would have selected Mr. Rojas for layoff notwithstanding his limited union activity. In this respect, the ALJ’s decision should be affirmed.

Response to Union Exception No. 2: The Board Should Adhere to Its Well-Established Practice of Assessing Simple Interest

Assuming make whole relief for lost earnings is ordered, the Board should order simple interest. The Union’s assertion that simple interest awards BrucePac for violating the Act is absurd and baseless. While the Board has recently invited amicus briefs on this topic, BrucePac believes such a radical change in long-standing Board policy should be applied prospectively to new charges filed after any change in Board policy on this subject. Further, such change is more appropriately addressed by the Board through its rulemaking powers or when it is fully staffed with five members.

Response to Union Exception No. 3: Intranet or Internet Posting is Not Appropriate

This case is not appropriate for intranet or internet posting. Neither General Counsel nor the Union adduced any evidence at the unfair labor practice hearing demonstrating that BrucePac customarily communicates with its employees electronically. *Nordstrom, Inc.*, 347 NLRB 294, 294 ft. 5 (2006). The Union's exception should be rejected.

Response to Union Exception No. 4: As the ALJ Properly Proposes, the Notice Should Accurately Reflect All Employee Rights Under Section 7

In her proposed Notice, the ALJ included customary language describing employees' Section 7 rights, including the right to "choose not to engage in any of these protected activities." *Decision* at 16:26-27 and Appendix. In an apparent effort to mislead employees, the Union objects to the inclusion of this Section 7 language. If a Notice is posted, employees should receive an accurate and complete description of their rights under federal law.

Response to Union Exception No. 5: There is No Justification for Management to Read the Notice

The Union takes exception to the ALJ's failure to require management officials to read the Notice to employees. This case involves very limited actions by one low-level sanitation supervisor, Abel Esparza, over a two-week period in June 2009. The usual Board remedies are sufficient to undo the limited effects of any unlawful activities found by the Board.

Response to Union Exception No. 6: The Remedy Language is Appropriate

The Union takes exception to the ALJ's recommended order that BrucePac cease and desist from interfering with, restraining, or coercing employees "in any like or related manner." *Decision* at 16:4-5. Specifically, the Union argues the language should be changed to "in any manner." *See* Union Exceptions at 2:26-27. The ALJ's recommended order is appropriate under the circumstances and consistent with Board law. The Union's unsupported claim that the ALJ's recommended order gives BrucePac additional opportunity to violate the Act is baseless.

CONCLUSION

Based upon the foregoing, the Union's exceptions should be rejected.

DATED this 18th day of June, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2010, I electronically filed the Respondent's Answering Brief In Opposition to the Exceptions Filed by the Charging Party using the NLRB E-file System. I hereby certify that I have served the following recipients via e-mail using the e-mail addresses indicated below:

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Dated this 18th day of June, 2010.

/s/ Lori Keeran
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