

**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 REPLY BRIEF IN
UNION OF NORTH AMERICA,)	SUPPORT OF EXCEPTIONS TO THE
LOCAL No. 296,)	DECISION AND ORDER OF THE
)	ADMINISTRATIVE LAW JUDGE
Charging Party.)	
_____)	

On May 27, 2010, Respondent Bruce Packing Company, Inc. ("BrucePac") filed exceptions to the Administrative Law Judge's Decision and Order dated April 8, 2010. Counsel for the General Counsel filed an Answering Brief on June 18, 2010. BrucePac files this limited reply brief responsive to select portions of the General Counsel's Answering Brief.

As detailed in its Exceptions, BrucePac implemented a ten percent (10%) reduction in force in June 2009 across multiple shifts in its two facilities located in Silverton and Woodburn, Oregon. On June 29, 2009, BrucePac laid off forty-two (42) employees. Concerning the Section 8(a)(3) allegations, this matter pertains exclusively to the four (4) reduction in force selections made on one shift at one facility, i.e., the dayshift sanitation crew at the Silverton facility. The General Counsel has never alleged the company's decisions to reduce its work force or to reduce its Silverton day shift sanitation crew by four positions were unlawfully motivated. Rather, the General Counsel's theory pertains exclusively to the individuals actually selected to fill these four slots reduced on the Silverton day shift sanitation crew.

BrucePac has filed an exception to the ALJ's conclusion that it failed to rebut the *prima facie* case concerning Jose del Carmen Maciel's ("Maciel") selection for layoff in June 2009. In particular, BrucePac has challenged the ALJ's conclusion that an incident and resulting February 2009 discipline involving Maciel are "reasonably comparable" to another incident and discipline involving two other employees, Augustin Carmona ("Carmona") and Nicanor Luna ("Luna"). In response, Counsel for the General Counsel argues the ALJ did not error in reaching this conclusion. *See* GC Answering Brief at 25-27. As set forth below, Counsel for the General Counsel's supporting arguments are factually baseless or misleading.

First, Counsel for the General Counsel argues that BrucePac concedes there is no evidence Maciel intended to specifically harm a female coworker (Marcelina Vargas), which somehow inexplicably equates to the ALJ permitting it to present evidence concerning Maciel's past performance. The lack of evidence in the record concerning Maciel's actual intentions during his violent outburst is due to the fact that the ALJ barred all such testimony. As argued in BrucePac's exceptions, even lacking evidence in the record that he specifically intended to harm Vargas or any other employee, Maciel's violent shoving of a table made personal injury foreseeable and, consequently, more serious than a "heated" conversation between Carmona and Luna.

In reaching her conclusion, the ALJ deemed the incidents to be "reasonably comparable" because "[t]here is no evidence the Respondent deemed Mr. Maciel's conduct to have been more volatile and potentially dangerous than that of the heated arguers: all three received the same discipline, i.e., written warning. . . ." *See* Decision at 13:26-28. As Counsel for the General Counsel concedes, the ALJ's conclusion is based upon an incorrect factual finding that all three individuals received the same amount of discipline. While Carmona and Luna received *one* form

of discipline, Maciel received *two* forms of discipline – a written safety warning *and* a disciplinary written warning. While they appear on a single sheet of paper, it is undisputed that Maciel received two separate forms of discipline. Recognizing these facts directly undercut the support for the ALJ’s conclusion, Counsel for the General Counsel shifts the argument and simply claims it is somehow “inconsequential” because Osmin Martinez never saw the documentation. *See* Answering Brief at 26.

Contrary to the ALJ’s conclusion, BrucePac did deem Maciel’s conduct to be more volatile and potentially dangerous as evidenced by the fact that he received *two* forms of discipline for one occurrence. More fundamentally, common sense dictates Maciel’s conduct was more volatile and potentially dangerous. While Carmona and Luna had a “heated” conversation, BrucePac concluded that Maciel “violently” shoved back on a rolling table at the same time Vargas was pushing it into the cleaning room. R. Exh. 3. Such violent physical action is clearly more volatile and potentially dangerous. In actual fact, Vargas was injured severely enough to require medical attention.

Because Martinez did not review personnel files containing written discipline prior to making his layoff selections, Counsel for the General Counsel argues he was “essentially ignorant” at the time he selected Maciel for layoff because “what [he] recalled about these disciplinary events in the few minutes he took to decide who would be laid off is, in fact, the company’s position concerning the relative weight to be given those events.” *See* Answering Brief at 27. While not presented with the disciplinary paperwork issued to Maciel by Human Resources and placed in Maciel’s personnel file, Maciel was *not* “ignorant” about the underlying incident leading to the multiple forms of discipline or the resulting injury to a female coworker who required medical attention. Indeed, as the ALJ noted, Martinez specifically mentioned this

incident when explaining why he selected Maciel for layoff: “And a few months before . . . he [Maciel] pushed this one table really hard, and it hit a lady, and she ended up hospitalized.” *See* Decision at 7:2-3. He was verbally informed of this incident by Abel Esparza. *See* Decision at 13:29-30.

By comparison and equating to its less serious nature, Martinez testified on cross examination that Abel Esparza told him something about the heated conversation between Carmona and Luna, but he did not really remember the details about the incident. Tr. at 409:8-15. In fact, he generally recalled the incident only after being shown one of the disciplinary write ups while he was testifying on cross examination. Tr. at 409:2-15; *see* GC Exh. 9(c). Applying Counsel for the General Counsel’s reasoning, Martinez’s testimony and clearer recollection of the Maciel incident demonstrates that he gave greater relative weight to the seriousness of Maciel’s actions in selecting him for layoff.

Stated simply, Maciel’s violent physical outburst was not “reasonably comparable” to a heated conversation between Carmona and Luna. Having to select four individuals from the day shift sanitation crew for layoff, Maciel’s outburst and resulting injury of a coworker made him a clear and obvious choice for one of the four slots to be reduced. As such, BrucePac rebutted the *prima facie* case under *Wright Line* and the ALJ’s conclusion to the contrary should be reversed.

Dated this 2nd day of July, 2010.

Respectfully submitted,

JACKSON LEWIS LLP

/s/ Bryan P. O’Connor
Bryan P. O’Connor, Esq. (WSBA 23867)

Counsel for Bruce Packing Company, Inc.

CERTIFICATE OF SERVICE

I hereby certified that on July 2, 2010, I electronically filed the Respondent's Reply Brief in Support of Exceptions to the Decision and Order of the Administrative Law Judge 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 2nd day of July, 2010.

/s/ Lori Keenan
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