

Decision at 2:1. “Given the lateness of the proposed amendment and since any remedy for existing 8(a)(1) allegations would substantially rectify any violation stemming from the proposed amendment,” the ALJ denied Counsel for the General Counsel’s motion. *Decision* at 2:6-8. On cross exception, Counsel for the General Counsel argues the ALJ erred in denying the motion to amend.

Under the circumstances, the ALJ’s decision is proper, consistent with Board law and consistent with proper notions of due process. Counsel for the General Counsel offers no explanation why the proposed amendment was offered at the close of the hearing. See *New York Post Corporation*, 283 NLRB 430, 431 (1987). Counsel for the General Counsel saved the testimonial evidence supporting this proposed amendment until its fifth and final witness (Maria Cortez) at the end of the second hearing day, but the amendment was not offered until the end of the third and final day after BrucePac rested its case. Ms. Cortez’s investigatory affidavits also contain this promise-of-benefit evidence, which again raises serious due process concerns why Counsel for the General Counsel chose to wait months and months before raising this new complaint allegation at the end of the hearing.

While BrucePac did solicit a general denial from Abel Esparza (“Esparza”), this new allegation was not fully litigated. BrucePac would have solicited more substantive testimony from Mr. Esparza on this particular allegation if it had been aware of the General Counsel’s intention to amend the complaint at the end of the hearing. Similarly, BrucePac would have explored this topic with other witnesses for possible impeachment of Ms. Cortez’s testimony. For example, it appears Ms. Cortez discussed this telephone conversation with her husband, Jose del Carmen Maciel (“Maciel”). On direct examination, Mr. Maciel stated he remembered a particular June 2009 date because Abel Esparza allegedly “threatened” his wife on the same date. Tr. at 128:10-13. If it had

been aware of this new allegation, BrucePac would have explored this issue further with Mr. Maciel.

Given the inexplicable lateness of the amendment and other Section 8(a)(1) findings substantially rectifying this alleged violation, the ALJ properly denied the amendment. Consistent with notions of basic due process, BrucePac should not have been forced to speculate about the General Counsel's complaint theories when there was ample opportunity to amend the complaint prior to the hearing's commencement and conclusion. Counsel for the General Counsel's cross exception should be denied.

Response to Cross Exception No. 2: 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, Counsel for the General Counsel did not contend the general layoff decision or number of employees selected was unlawfully motivated. *Decision* at 45-47. Rather, the 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 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, Federico Nieves Rojas ("Rojas") was one of the four employees selected for layoff from the Silverton day shift sanitation crew.

After finding a prima facie case was established¹, 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 Laborers Local 296 (“Union”) with his 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.

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 found, Mr. Rojas’ attendance did not improve in 2009. Between January 26 and March 19, 2009, Mr. Rojas was late seven times, including three days when he was more than two

¹ BrucePac filed an exception to this finding.

and a half hours late.² *Decision* at 14:33-35; R. Exh. 4 at 1.³ BrucePac offered a computer printout called a “Time Card Report” showing Mr. Rojas’ attendance and timecard punches in 2009.⁴ R. Exh. 4. Contrary to Counsel for the General Counsel’s argument, this computer report is the best evidence of Mr. Rojas’ actual attendance and tardiness problems, which also supported testimonial evidence that he had continuing attendance and tardiness problems. Recognizing the obvious relevancy of this evidence, the ALJ properly credited and relied upon it.

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. Inexplicably, Counsel for the General Counsel argues this statement cannot be used in support of BrucePac’s *Wright Line* defense. *See* Cross Exceptions at 19-20. Contrary to this argument, Mr. Rojas’ contemporaneous statement was properly considered and consistent with all other evidence related to his poor attendance and tardiness. While Counsel for the General Counsel tries to argue his attendance was not really poor, Mr. Rojas was keenly aware of his poor attendance and why he was an obvious choice for layoff. At a minimum, this evidence solidly bolsters BrucePac’s decision and rationale for selecting Mr. Rojas for layoff.

While Counsel for the General Counsel 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 late 2008 for such performance problems. GC Exhs. 6 and 7.

² Counsel for the General Counsel states the ALJ made no finding that these instances of lateness were unexcused. *See* Cross Exceptions at 18 nt. 84. Of course, this does not mean the implied converse is true, i.e., they were excused. In fact, the ALJ did not determine whether they were excused or unexcused.

³ 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.*

⁴ This document was generated in response to Counsel for the General Counsel’s subpoena duces tecum.

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.

Counsel for the General Counsel argues that Mr. Rojas should have been retained due to his seniority. *See* Cross Exceptions at 16. While no specific cross exception is taken, the ALJ found there is no evidence BrucePac ever based any employment decision on seniority. *Decision* at 12:41-44. Indeed, as Maria Cortez admitted on cross examination, BrucePac does not recognize or utilize seniority for any reason. *See* Tr. at 246:10-12.

Counsel for the General Counsel also argues that Mr. Rojas should have been retained due to his “high skill set.” *See* Cross Exceptions at 18. Again, while no specific cross exception is taken, the ALJ found there is no evidence “that the terminated employees were so skilled that disregarding their experience could reasonably suggest a discriminatory motive.” *Decision* at 12:41-47. Further, the ALJ did not find that Mr. Rojas was authorized to operate a forklift or pallet jack, though several other retained employees had passed the requisite qualifying tests to operate these pieces of equipment.⁵ *Decision* at 4:32-35. Contrary to the General Counsel’s inflation of sanitation employees’ skill sets, these positions primarily involve cleaning, scrubbing and garbage removal. *Decision* at 3:41-43-4:2.

Finally, Counsel for the General Counsel argues Gregorio Esparza Velasco was a “better candidate for layoff.” *See* Cross Exceptions at 18. Specifically, Counsel for the General Counsel argues Mr. Velasco “survived the layoff because his brother [Abel Esparza] was involved in the selection process, not because he was a better employee than Rojas.” *See* Cross Exceptions at 19. There is no evidence in the record or finding that Mr. Velasco survived the June 2009 layoffs

⁵ As HR Manager Jake de Soto testified without contradiction, BrucePac’s internal training program takes between 25 minutes to just over an hour depending on the piece of equipment. Tr. at 287:9-19; 288:25-290:22. This training normally involves a short video, a short written quiz and a possible “hands-on” component.

because he was related to Abel Esparza. Unlike Mr. Rojas, there is also no evidence that Mr. Velasco had attendance or tardiness problems.⁶

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 Counsel for the General Counsel established a prima facie case, BrucePac established that it would have selected Mr. Rojas for layoff notwithstanding his extremely limited union activity. In this respect, the ALJ's decision should be affirmed.

Response to Cross Exception No. 4: 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. While the Board has recently invited substantive amicus briefs on this topic in several other cases, BrucePac believes generally such a radical change in long-standing Board policy should be applied prospectively to new charges filed after any change in Board rules or policy on this subject. Further, such change is more appropriately addressed by the Board through its rulemaking powers.

While generally discussing both sides of the debate currently before the Board, Counsel for the General Counsel has seriously understated several arguments opposing compounding interest. For example, Counsel for the General Counsel argues delay is simply inherent in any administrative process so compounding interest is appropriate when the Board's own processes cause the delay. This argument misses the mark. Unfortunately, administrative delay at the Board is long running

⁶ Counsel for the General Counsel subpoenaed all time records and personnel files for all employees, including Mr. Velasco. Counsel for the General Counsel offered no evidence showing attendance, tardiness or other work-related problems by Mr. Velasco. This is consistent with Osmin Martinez's testimony that he considered Mr. Velasco to be a "good" employee.

and well known.⁷ As one federal court has described it, “[O]nce a case is presented to the board, ‘it appears to enter a new dimension – one where time has little meaning.’” Emhart Industries v. NLRB, 907 F.2d 372, 378 (2nd 1990), *citing*, H.R. Rep. No. 1141, 98th Congress, 2d Sess. 16 (1984); *see, e.g.*, TNS, Inc. v. NLRB, 296 F.3d 384 (6th Cir. 2002) (vacating decision after years of delay). Unless and until the Board can consistently resolve all cases in a timely manner, it should not punish employers with *both* lengthy back-pay obligations and interest compounding for years due to its own delay.

CONCLUSION

Based upon the foregoing, Counsel for the General Counsel’s cross exceptions should be rejected.

DATED this 12th day of July, 2010.

Respectfully submitted,

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⁷ With the U.S. Supreme Court’s recent decision in *New Process Steel LP v. NLRB*, there is little reason to believe this administrative delay will improve any time soon.

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, I electronically filed the Respondent's Answering Brief In Opposition to the Cross Exceptions Filed by the General Counsel 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 12th day of July, 2010.

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