UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302	)	
and	)	Case 19-CA-32298
	)	19-CA-32319
REBEKAH SILVA	)	19-CA-32435
and	)	
TIFFANY KELLY	)	

RESPONDENT'S REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF

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INTRODUCTION TO REPLY

Administrative Law Judge George Carson II issued a Decision on this matter January 24, 2011 ("Decision"). Respondent International Union of Operating Engineers, Local 302 ("IUOE Local 302" or "Respondent") filed and served Exceptions and a Brief in support of those Exceptions on February 19, 2011. The Acting General Counsel filed and served an "Answering Brief to Respondent's Exceptions and Brief in Support Thereof" on March 7, 2011. The Acting General Counsel did not file Cross Exceptions. Charging Party Rebekah Silva, who was represented by private counsel, did not file Cross Exceptions or an Answering Brief. No other pleadings were filed by any party.

Respondent stands by its opening brief. In this Reply, Respondent supplements its earlier submission on the core issues before you: (1) Judge Carson's refusal—both during and after the taking of testimony—to admit documentary and testimonial evidence reflecting Respondent's business justification for the termination of Charging Party Silva; and (2) Judge Carson's failure to apply a "causal nexus" analysis under *Wright Line*.

ARGUMENT

I. RESPONDENT WAS IMPROPERLY DISALLOWED FROM PRESENTING DOCUMENTARY AND TESTIMONIAL EVIDENCE OF ITS BUSINESS JUSTIFICATION FOR TERMINATING CHARGING PARTY SILVA.

The Acting General Counsel represents on brief that "at no time during the trial did Respondent attempt to introduce any 'source documents' related to the 'errors'

Respondent would attribute to Silva" and "deliberately avoided reliance on such 'source documents'." (AB. at 4) [1] The Acting General Counsel knows this is not true.

The record demonstrates this: During the testimony of Local 302 Executive Secretary Sandy Early, a document titled "Summary of Errors made by Rebekah Silva since her return from LOA on 12/7/09" was introduced by Respondent. (R. 17) It was preceded by the introduction and admission of "Summary of Errors" documents *with attached source materials* regarding errors made by Local 8 bargaining unit members Monique Paullus and Sabrina Kihne. (R. 14, 15; Tr. at 373-376). On *voir dire,* Ms. Early testified that the source data came from Ms. Paullus because "she would have to print out the raw data sheets. I don't have access to them." (Tr. at 373) [2] Ms. Early so testified with respect to the source documents for the Kihne error summary as well. (Tr. at 376)[3]

The "Summary of Errors" document pertaining to Ms. Silva was then introduced and received without objection. (Tr. at 383) Upon receipt, Judge Carson commented (Tr. at 383):

Judge Carson: Okay. And this is the document that you folks are gonna get access to the underlying data after we close? (Emphasis added)

The record then misidentifies who spoke next as "the Witness." (Tr. at 383) In fact, as demonstrated by the exchanged that followed, it was Counsel and the response was "Yes. Your Honor." (*Id.*) Judge Carson replied "Okay, that will be good." (*Id.*)

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[1]. Transcript citations appear as "Tr.". The citation of exhibits introduced by the General Counsel and Respondent are "GC." and "R." respectively. Citations to the Acting General Counsel's Answering Brief appear as "AB."

[2]. The "source data" is in the form of computer screen prints and/or emails reflecting the nature of the error committed (e.g., date member dues were paid current "never updated.") (R. 14, 15)

[3]. The Acting General Counsel characterizes the compilation of Ms. Silva's errors by Local 302 management to be "unprecedented." (AB. at 7). To the contrary, Ms. Paullus testified without contradiction that the auditing of errors by all clerical staff for accuracy was routine. (Tr. at 456-457)

Judge Carson's question supposes an earlier conversation about the Silva source data. The recorded portion of that conversation begins with this exchange between Ms. Silva's private counsel and the ALJ (Tr. at 273):

Ms. Irons: Your Honor, do you want to put on the record the portion about the two week opportunity to review—

Judge Carson: I said I would do that at the close of the hearing.

Ms. Irons: Oh. I'm sorry Your Honor. Thank you.

Judge Carson: I can note that we also came to agreement with regard to producing originals which are going to be referred to in a summary within two weeks after the close of the hearing, but I'll issue my order in that regard when I close the hearing.

(Emphasis added)

The exchanges quoted above were not the last on the topic of the Silva source data. During cross examination, the Acting General Counsel quizzed Ms. Early about whether she could tell how many errors attributed to Ms. Silva were discovered by Ms. Silva herself. (Tr. at 415) Ms. Early responded "not without looking through the stack." (Tr. at 415) Ms. Early then testified she had "looked through the stack" when preparing the Summary of Errors. (Tr. at 416)[4] Despite having posed the question, the Acting General Counsel did not ask the witness to "look through the stack." (Tr. at 416 – 435)

The effort to introduce the Silva source data was next made during the testimony of Ms. Paullus. She testified to having compiled the Silva source data in raw form and providing it to Ms. Early. (Tr. at 457-458) Ms. Paullus then attempted to testify

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[4]. The Acting General Counsel's represents that Ms. Early had not "reviewed the purported 'source documents'" (AB. at 5) This representation is patently false, as demonstrated by Ms. Early's testimony. The ALJ's decision makes the same mistake. (Dec. at p. 9, l. 52 – p. 10, l. 2)

about how the errors were determined, how they were discovered, the import of the erors, and how she could identify who committed the error. (Tr. at 458-461). The following exchange occurred regarding her discussion with Ms. Early (Tr. at 461):

Q: Did she ask you questions about what the import of the errors were in terms of what bad thing could happen because the error was made?

A: I don't know if she asked, but I expressed what the—

Q: Please tell me what you shared in that regard.

A: I'd have to look at one of the errors, I mean looking at an error I could say, okay, well this is what I would have explained to her.

Q: Okay. So without going through all of them, you have Respondent's 17 in front of you—

A: Okay.

Q: Just looking at the first page, I'm not asking you to—

Ms. Irons: Your Honor, if she's going to be allowed to testify concerning, I'm going to go into the same area.

Judge Carson: Oh no, this isn't going to do me any good. I promise.

(Emphasis added)

The ALJ tersely referred to the effort to introduce the Silva source documents saying: "But we don't have to do it pebble by pebble." (Tr. at 463) Respondent then asked for permission to present at least a single example of an error from the source documents on the record. (Tr. at 463) Judge Carson responded "One." (Tr. at 463)

The Silva source documents were discussed again at the conclusion of the testimony. By then, the discussion moved away from presenting hundreds of pages of screen prints and emails in raw form to, instead, presenting a refined summary of that data. (Tr. at 621) Having heard the evidence, Judge Carson did not repeat his

comment that the evidence would "do him no good." Instead, he gave this directive (Tr. at 621):[5]

> Okay. Counsel are hereby given until November the 12th, relative to their review of those documents to determine how, if at all, they want to handle it...Once you actually start looking at the raw data and determine what you think is the most suitable method for making whatever arguments you ultimately want to make relative to that, I am asking you to confer and possibly stipulate, and if you are still at sea and we need to have a conference call, get in touch with my clerk... (Emphasis added)

When no stipulation on a refined summary was reached, Respondent attempted to introduce the source data to the record again, in the form Judge Carson directed.[6] To that end, Respondent offered a refined summary of the Silva source data under cover of a Declaration from Local 8 bargaining unit member Paullus as an appendix to its post-hearing brief. The Acting General Counsel then played the "gotcha" card, moving to strike the evidence, and Ms. Silva's counsel did nothing. The Acting General Counsel's motion erroneously cited Section 102.48(d)(1) of the Rules and Regulations. Compounding the error, Judge Carson granted that motion saying the evidence was presented "following the hearing." (Dec. at 9)

Section 102.48(d) is not applicable as the case has not been transferred to the Board much less decided by the Board. The evidence was submitted following the conclusion of testimony but, as detailed above, the hearing had not been closed within

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[5]. The Acting General Counsel's argument that Respondent was "unwilling and unprepared" to introduce the source documents based on the number of copies brought to the hearing is childish. (AB. at 4) While much of the discussion of copying logistics was off the record, the fact the Acting General Counsel was provided a set of the Silva source documents and that Ms. Silva's private counsel had access was discussed on the record. (Tr. at 620-621)

[6]. The details of Respondent's effort to forge the stipulation Judge Carson requested are contained in Respondent's Brief in Response to Motion to Strike Portions of Respondent's Post-Hearing Brief and Related Attachments filed January 5, 2011.

the meaning of Section 102.43 of the Rules and Regulations. The closure of the hearing was conditioned on the result of the effort Judge Carson directed.

The General Counsel's present reliance on Ron's Trucking Service, 236 NLRB 1065, 1070 (1978), *enf'd* 628 F.2d 966 (6th Cir. 1980) is entirely misguided.[7] At issue there was the effect of the denial of a FOIA request on the presentation of evidence. 236 NLRB at 1065. Specifically, the Respondent claimed prejudice by failure to obtain by a FOIA request a set of documents it received at the start of the hearing anyway. *Id.*

That decision has nothing whatsoever to do with the present issue. Instead, the closest parallel to the issue before you is found in the Board's line of "adverse inference" cases. The Board has found adverse inference impermissible where the evidence is either unavailable or no longer exists. *See: e.g.,* North Hills Office Services, 344 NLRB 1083, 1084 (2005), *citing,* Champ Corp., 291 NLRB 803 (1988), *enf'd.* 933 F.2d 688 (9th Cir. 1990). There appears to be no authority for our fact pattern, namely, where documentary evidence is solicited, offered, and then barred.

This error is appropriately remedied per Section 102.48(b) of the Rules and Regulations. The Board may "reopen the record to receive further evidence before a member of the Board or another Board agent or agency" or "make other disposition of the case." As detailed in Respondent's opening brief, Judge Carson's decision should not be adopted with regard to the Silva discharge in any event. Short of that, the Board should direct the record to be reopened before a qualifying person other than Judge Carson to receive the Silva source data, or a new trial directed with the proper time afforded for the presentation of all of the evidence.

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[7]. The Acting General Counsel erroneously cites the subsequent history of the *Ron's Trucking* decision relied upon. (AB. at 5) The "enforcement" and "*cert denied*" citations offered by the Acting General Counsel pre-date the underlying decision.

II. THE ACTING GENERAL COUNSEL EMBRACES JUDGE CARSON'S MISAPPLICATION OF *WRIGHT LINE* BY ARGUING "INFERENCE" REPLACES "NEXUS" IN DETERMINING WHETHER SECTION 8(a)(3) HAS BEEN VIOLATED.

In its opening brief, Respondent argued that Judge Carson misapplied *Wright Line* by excusing the General Counsel from establishing a causal nexus tying protected union conduct to adverse employment action. The Acting General Counsel's Answering Brief attempts to draw attention away from this analysis. On brief, the nexus analysis is substituted with use of the terms "inference," "suggests" and "supports" as the quantum of the evidence against Respondent. (Ans. Brf. at 9, 10, 11). While useful for purposes of the first three prongs of the *Wright Line* analysis, such evidence is not sufficient to satisfy the fourth prong; causal nexus.[8]

To find a violation of Section 8(a)(3), the General Counsel must provide **proof** of a **causal nexus**, not inference, and not insinuation. *See: e.g.,* Naptco, Inc., 346 NLRB 18, 19 (2005). The requirement of proof of nexus has been adopted by the Board after nearly thirty (30) years of analysis of *Wright Line* by the Board and the Federal Appellate courts. Frye Electric, Inc., 352 NLRB 345 at 345, n. 2 (2008); *citing,* American Gardens Management Co., 338 NLRB 644, 645 (2002)("the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action.")

The Acting General Counsel is not afforded the luxury of avoiding the appropriate *Wright Line* analysis for the myopic purpose of prevailing in this case. For his part,

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[8]. Wright Line, 251 NLRB 1083 (1980), *enfd.,* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

Judge Carson's analysis falls into the trap and, like Judge Green's decision in *American Gardens Management Co.*, is flawed by failure to conduct the correct analysis. Accordingly, even if the Board does not direct a new trial based on the evidentiary error brief above, Judge Carson's decision should, at a minimum, be remanded with directive to apply the correct *Wright Line* analysis.

CONCLUSION

For the foregoing reasons, and those set forth in Respondent's opening brief: (1) the recommendation offered by Judge Carson should not be adopted in the particulars to which Respondent has made Exception; or (2) a new trial should be directed; or (3) the matter should be remanded to Judge Carson for the correct application of the *Wright Line* analysis.

DATED this 15th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2011, I caused eight copies of the foregoing Respondent's Reply to the Acting General Counsel's Answering Brief to be served, via FedEx Second Day service to:

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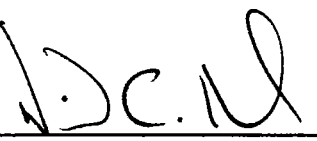

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