

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

ALONSO & CARUS IRON WORKS, INC.

CASE NO. 24-CA-11558

and

**UNITED STEELWORKERS AFL-CIO
LOCAL 6873**

**RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE
DECISION AND BRIEF IN SUPPORT**

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Works, Inc.*

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TO THE HONORABLE BOARD:

COMES NOW, Respondent Alonso & Carus Iron Works, Inc., represented by its undersigned attorneys, and respectfully presents its exceptions to the Administrative Law Judge's *Decision*:

I. PROCEDURAL BACKGROUND

On September 30, 2010, a *Complaint* was issued in case 24-CA-11558 against Respondent, Alonso & Carus, alleging that it violated the Weingarten rights of two employees. On December 3, 2010, General Counsel moved to amend the *Complaint* to add as a new charge that the employer maintained an overly broad no solicitation rule.

The Hearing was conducted on December 14, 2010. Shortly thereafter, on January 18, 2011, counsel for the parties presented their respective post hearing briefs. On March 10, 2011, Administrative Law Judge, Michael A. Rosas, issued a *Decision* granting the Complaint in all counts.

Pursuant to Section 102.46 of the Board Rules and Regulations, Alonso & Carus files its exceptions to the ALJ's Decision and an accompanying brief containing the legal arguments and references to the record in support of its exceptions.

II. STATEMENT OF THE CASE

A. Mr. Carlos Camacho's Weingarten Violation Claim

On February 18, 2010, Mr. Camacho received working orders from Ms. Luisa Osorio. Mr. Camacho refused to follow the orders, threw the crane control of the crane he was operating to the platform, and started voicing derogatory comments. Ms. Osorio told Mr. Camacho that if he refused to follow the orders, he would have to go to Mr. José Hernández' office.

Mr. Camacho and Ms. Osorio met with Mr. Hernández at the shop's office. There, they discussed what happened, and Mr. Camacho admitted that he refused to follow the orders received. Mr. Camacho did not request the presence of another employee or Union delegate before, during or after the meeting. When the meeting was concluded, Mr. Camacho was instructed to go home for the rest of the day and report to work the next morning.

After the meeting, Mr. Hernández and Ms. Osorio contacted the Human Resources Director by phone. They explained to her what had happened, and the decision was made right then to terminate Mr. Camacho. Respondent's Exhibit 1.

On February 18, 2010, Mr. Camacho arrived at his work area but was instructed not to work. Later, Mr. Hernández summoned Mr. Camacho to meet with the Human Resources Director. At that time, Mr. Camacho made hand gestures signaling an employee. Mr. Hernández told him that he didn't need anyone else present since he was only going to be informed of the Company's decision. A brief meeting was then held, on February 19, 2010, to inform Mr. Camacho that he was discharged. A discharge memo or warning was drafted before the meeting. Joint Exhibit 2. The warning was given to Mr. Camacho later in the day. Ms. Lugo prepared minutes of the meeting. Joint Exhibit 3.

B. Mr. Héctor Rivera's Weingarten Violation Claim

Early on Friday, May 7, 2010, Messrs. José Hernández and José Soto, heard a verbal discussion between Mr. Rivera and Mr. Edgar Santiago, another Union employee. At around 1:30 p.m., the supervisors held a meeting with the two employees to investigate the events. During the meeting, Mr. Rivera repeatedly insulted Mr. Santiago. Mr. Rivera did not request before or during said meeting representation or the presence of a Union representative or another employee.

Around 3:00 p.m., Mr. Hernández informed Ms. Lugo of the situation by e-mail. Joint Exhibit 4. At around 3:30 p.m., the supervisors held a meeting with Ms. Lugo to discuss Mr. Rivera's behavior. During the meeting, it was agreed that Mr. Rivera would be terminated immediately. Mr. Rivera was asked to meet with Ms. Lugo at 3:30 but he alleged that he could not attend because of transportation problems. At 4:11 p.m., Ms. Lugo called Mr. Rubén Cosme, United Steelworkers Union Representative, and informed him of the events related to Mr. Rivera and of the decision to terminate him. Respondent's Exhibit 4.

On Monday, May 10, 2010, a meeting was held between Messrs. Hernández, Soto, Santiago, Rivera and Ms. Lugo to discuss the events that occurred the previous Friday. At the end of the meeting, Ms. Lugo informed Mr. Rivera that he was terminated. Joint Exhibit 5. Mr. Rivera did not request before or during said meeting representation or the presence of a Union representative. Ms. Lugo prepared minutes of the meeting. Joint Exhibit 6.

III. EXCEPTIONS & ARGUMENTS

Exception # 1 – Alonso & Carus takes exception of the ALJ's finding of fact that during the February 19, 2010 hearing Eileen Lugo investigated Carlos Camacho's misconduct by questioning supervisors Ana Osorio, José Hernández and Camacho himself. See, ALJ's Decision at p. 5 and 10.

Exception # 2 – Alonso & Carus takes exception of the ALJ's ruling sustaining an

objection that excluded relevant evidence regarding what she meant with the language used in the minutes of the February 19 meeting. See Tr. p. 138-139.

Exception # 3 – Alonso & Carus takes exception of the ALJ’s finding that Lugo’s summary of the February 19 meeting reflect that the incidents that occurred on February 18 were discussed with Mr. Camacho. See ALJD at p.6, fn. 15.

All three exceptions are closely related and are therefore jointly discussed.

The ALJ concluded as an undisputed fact that Ms. Osorio and Mr. Hernández called Ms. Lugo by phone on February 18 to discuss Mr. Camacho’s misconduct and decided that he was to be terminated. See ALJD at p.5, Fn. 12.

Ms. Lugo testified that in the February 19 meeting she read the last chance agreement, told him of the incident of the prior day, so he would know that she already knew what happened and proceeded to inform him that he was discharged. See Tr. p. 136, l. 8-12.

Ms. Lugo also testified that after she met with Mr. Camacho on February 19, she proceeded to write the minutes of the hearing. See Tr. p.138.

Mr. Hernández does not recall that Ms. Lugo asked him or Ms. Osorio any questions regarding the events that unfolded on February 18. See Tr. p. 96.

Ms. Osorio testified that Ms. Lugo did not ask any questions to Mr. Hernández, Mr. Camacho or herself. See Tr. p. 78.

During the direct examination of Ms. Lugo, Respondent asked Ms. Lugo what she meant or referred to when she wrote in the minutes that the events of February 18 were discussed with Mr. Camacho. However, General Counsel objected the question. Respondent explained that it sought to obtain what was Ms. Lugo’s point or what she mean with the cited phrase. The ALJ sustained the objection blocking clearly admissible evidence. Ms. Lugo’s testimony is not hearsay (FRE 801) nor it may be excluded from evidence under the best evidence rule (FRE 1002). As mentioned, the purpose of Ms. Lugo’s testimony was not to merely restate what is

contained in the minutes. On the contrary, the purpose was to explain what she meant and why she chose those words.

The ALJ read the phrase included in the minutes “the incidents which occurred on 2/18/10 were discussed with Mr. Camacho” and came up with his own inferences as to what Ms. Lugo meant. In the ALJD it was concluded that the minutes contradict Ms. Lugo’s testimony and that the February 19 meeting was much more than informative since she sought information from Mr. Camacho to bolster the termination decision. See ALJD p. 5-6, 10, fn. 15.

The ALJ ruling on the objection and his inference of the meaning of the phrase violates Respondent’s right to a due process. If the ALJ would have received Ms. Lugo’s testimony on the matter he would have learned that her phrase “were discussed” meant that she told Mr. Camacho of the February 18 incident so he would know that she was informed of the event. See Tr. p. 136. Additionally, General Counsel would have had a chance to cross-examine Ms. Lugo on that point. Due process would, at least, have required the ALJ to admit into evidence Ms. Lugo’s testimony and then weigh the evidence based on the facts and demeanor.

The evidence, taken as a whole, does not support a finding that Lugo sought to substantiate or bolster the termination decision by obtaining more information from Camacho. Any inquiries during the meeting were, at most, rhetorical in nature since Respondent had already decided to terminate Mr. Camacho and Ms. Lugo was keenly aware of the events that happened the previous day.

Employees have a right to union representation at an investigatory interview that the employee has a reasonable basis for believing may result in discipline. See NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). Union representation in such instances serves to guarantee the right of employees to act in concert for mutual aid and protection. See 29 U.S.C. §

157. The denial of that right is considered a violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1).

However, the right is limited in two respects. First, the employee needs to request the representation whereas his failure to do so is considered a waiver. See *J. Weingarten, Inc.*, 420 U.S. at 257. Second, the right does not arise in relation to interviews held to inform the employee of the disciplinary action that has already been decided upon. See *Wal-Mart Stores, Inc.*, 352 N.L.R.B. 815, 843-844 (2008).

Exception # 4 – Alonso & Carus takes exception of the ALJ’s finding that Mr. Rivera requested union representation. See ALJD at p. 11.

Mr. Rivera’s testimony is contradicted by Respondent’s witnesses. Both Messrs. Hernández and Soto, stated that Mr. Rivera never requested representation. See Tr. p. 98, 99, 104, 105, 121, 122, 129 and 130. It makes no sense, considering, Mr. Rivera’s experience, that he did not take steps, like calling a union representative, or debating the issue, when confronted with the alleged refusal to representation. Therefore, there is no credible evidence to support a Weingarten violation.

It is an irrefutable fact that Respondent notified Mr. Cosme, Union General Delegate, of their decision to discharge Mr. Rivera a couple of days before the meeting to inform the decision was held. See ALJD at p. 7. However, General Counsel decided not to present Mr. Cosme’s testimony during the hearing, despite the fact that he was present at all time. Why would Respondent go to the trouble of informing Mr. Cosme of its decision only to prohibit his presence at the meeting where the decision was announced? Respondent’s good faith in handling both Mr. Camacho and Mr. Rivera’s matters is evident from the un-contradicted testimony of its witnesses.

Exception # 5 – Alonso & Carus takes exception of the ALJ’s finding that Mr. Hernández

told Mr. Camacho that any employee that would attempt to represent him at the February 19 meeting would be discharged. See ALJD at p. 12.

Exception # 6 – Alonso & Carus takes exception of the ALJ's finding that Respondent violated Section 8(a)(1) when Mr. Hernández allegedly threatened to discharge any employee that would attempt to represent Mr. Camacho at the February 19 meeting. See ALJD at p. 12.

Both exceptions are closely related and are therefore jointly discussed.

There is no evidence in record that would suggest that Mr. Hernández told Mr. Camacho that any employee that would attempt to represent him would be terminated. Mr. Camacho's version of the events indicated that Mr. Hernández communicated the alleged threat to Mr. Rivera outside of his presence and that he gained knowledge of it because Mr. Rivera told him about it.¹ See Tr. p. 46-47. However, Mr. Rivera failed to testify at the hearing regarding that alleged threat. Mr. Rivera's failure to testify about the vents reveals a fundamental inconsistency or weakness in the facts.

On the other hand, General Counsel was not able to prove that the alleged threat resulted in a termination. In determining whether the unlawful conduct is *De Minimis*, the Board considers the number of incidents, their severity, the extent of dissemination, the size of the unit, and other relevant factors. See Lowndes County Health Service, Inc., 325 NLRB 250 (1997); Airsteam, Inc., 304 NLRB 151 (1991); Metz Metallurgical Corp., 270 NLRB 889 (1984); Caron International, 246 NLRB 1120 (1979).

There is no evidence on record indicating that Mr. Rivera or another union employee was actually discharged in accordance with Mr. Hernández' alleged threats. Since this is an isolated incident with is based on, at best, dubious evidence, and since the severity of the alleged

¹ Our objection that Mr. Camacho's testimony of the alleged threat was based on hearsay testimony (FRE 801) was overruled. General Counsel argued that Mr. Rivera was present at the hearing to testify about the events. However, General Counsel did not question Mr. Rivera about the alleged threat nor did the witness voluntarily testify about it.

violations is minimal, under these circumstances, it is alleged in the alternative that in any event the alleged unlawful conduct is *De Minimis* and clearly warrants the dismissal of the present Complaint.

Exception # 7 – **Alonso & Carus takes exception of the ALJ’s ruling sustaining an objection that excluded relevant evidence regarding how the term “horas laborables” or “working hour” is commonly used. See Tr. p. 149.**

Exception # 8 – **Alonso & Carus takes exception of the ALJ’s finding that that Respondent’s argument that “horas laborables” or “working hour” as used in Puerto Rico refers to hours spent by an employee working, bears no weight since it was not brought up at the hearing and subjected to cross examination.. See ALJD at p. 2, fn. 4.**

During the hearing respondent questioned Ms. Lugo about (i) how Alonso & Carus is able to corroborate that union activities are carried out as agreed in Article XIV of the Collective Bargaining Agreement (CBA); (ii) how Rule 46 is applied to employees; and (ii) what is the employers understanding of Rule 46. See Tr. at p. 146-149. All this questions were aimed to discuss how the language of the rules, including the term “horas laborables” or “working hour” in commonly used, understood and interpreted by Respondent and employees. However, General Counsel objected and the ALJ sustained the objection concluding that respondent sought legal conclusions from the witness. See Tr. at p. 149.

However, the ALJ ultimately concluded that Respondent’s argument that “horas laborables” or “working hour” as used in Puerto Rico, including in Respondent’s workshop², refers to hours spent by an employee working, bears no weight since it was not brought up at the hearing and subjected to cross examination. See ALJD at p. 2, fn. 4.

The ALJ contradictory ruling and conclusion violates Respondent’s right to a due

² Through Ms. Lugo’s testimony at the hearing, Respondent’s sought only to discuss the use, understanding and interpretation of the term “horas laborables” or “working hour” by the employer, the employees and Ms. Lugo. However, that testimony was not admitted into evidence. In Respondent’s post hearing brief we supplemented (without GC’s objection) our position with a certified court interpreters opinion of how the term “horas laborables” or “working hour” is normally used in this jurisdiction.

process. First, it excluded from evidence the facts that are not, in any way, legal conclusion. Second, he rejects Respondent's argument because the excluded facts never made it into evidence. Due process would at least have required the ALJ to admit into evidence Ms. Lugo's testimony and then draw its conclusions of fact based on the entire record.

Exception # 9 – Alonso & Carus takes exception of the ALJ's finding that Rule 46 is ambiguous and overly broad, and therefore unlawful because there is no evidence that the Company similarly prohibits other non work related matters. See ALJD at p. 12.

On January 18, 2011, Respondent filed its post hearing brief titled *Respondent's Brief to the Administrative Law Judge* including two attachments. The second attachment is a portion of Respondent's Rules of Prohibited Conduct including Rules 18 to 34. Rules 25 and 30 and no solicitation rules that apply to non-protected activities. The rule read as follows:

25. Selling or buying within the premises of the company tickets for lotteries, raffle, products, accessories, jewelry, clothing, collections, money lending activities and/or any activity that involves money, without the authorization of upper management.

...

30. Making and/or receiving personal telephone calls Turing working hours; Receiving visits from relatives, friends, buyers, sellers or collectors. Use of cell phones during working hours to attend personal calls. (Unless it is an emergency and with the authorization of the supervisor.)

Rules 25 and 30 are written in general terms without referring to a specific period of time or places where solicitation is prohibited. Its intention is to prohibit more broadly the solicitation related to non-protected activities. However, Rule 46 no-solicitation prohibition is written more narrowly because of its interplay with Article XIV and to comply with National Labor Relations Act requirements. See GC's Exhibit 2.

Article XIV of the CBA allows union activities in company premises and during hours where employees are working. Moreover, according to said portion of the CBA the hour used for union meetings or activities will be compensated as worked. See GC's Exhibit 2.

If Rule 46 is read in conjunction with Article XIV of the CBA and Rules 25 and 30, should be construed to comply with NLRA requirements. General Counsel has not pointed to any legal authority that prohibits the separation, division or splitting up of no-solicitation rules in protected and non-protected activities. Reading both rules in conjunction it is evident that Respondent does not single out protected activity. Therefore, the General Counsel has not presented enough evidence to prove the alleged violation.

Exception # 10 – **Alonso & Carus takes exception of the ALJ’s finding that Rule 46 is ambiguous and overly broad, and therefore unlawful because the employees might reasonable construed the prohibition to include non-working areas. See ALJD at p. 13.**

General Counsel did not offer any evidence that union members read Rule 46 to cover both working and non-working areas. Rule 46 does not state that union activities cannot be carried out in company property. On the contrary, Rule 46 is absent of any limitation regarding places where union activities may be carried out. The omission of a space limitation reasonably suggests that protected activity may be carried out anywhere inside Respondent’s premises, including working areas, as well outside of Respondent’s premises. See GC’s Ex. 2. **Rule 46 does not regulate the place where union activity is to be carried out.** Therefore, it should not be reasonably construed to be ambiguous or overly broad in that sense.

On the contrary, the parties negotiated an agreed in the CBA on a place where union activities would be carried out. Article XIV of the CBA states that Union meetings will be carried out in Company premises in a convenient room provided by Respondent for that purpose. See GC’s Exhibit 2. Rule 46, read along side the CBA may not be reasonable construed to ambiguously or broadly prohibit carrying out protected activity outside of Respondent’s working areas.

FOR THE ABOVE STATED REASONS, it is respectfully requested that the

Honorable Board admit the stated exceptions, reject the ALJ Decision in its entirety and conclude that Respondent did not violate the NLRA.

CERTIFICATE OF SERVICE: I hereby certify that on this same date a true and exact copy of this document was sent to **United Steelworkers**, PO Box 6828, Santa Rosa Unit, Bayamón, PR 00957; **Richard J. Brean**, General Counsel, United Steelworkers of America, Five Gateway Center, Room 807, Pittsburgh, PA 15222; **José L. Ortiz**, Counsel for Acting General Counsel, at jose.ortiz@nlrb.gov.

Dated at San Juan, Puerto Rico, this 7th day of April, 2011.

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