

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

IN THE MATTER OF:

IRONTIGER LOGISTICS, INC.,

Respondent

and

Case 16-CA-27543

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,**

Charging Party

**REPLY BRIEF TO COUNSEL FOR
THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

Submitted this 8th day of July, 2011

Submitted by:

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SUMMARY OF ARGUMENT

This is Respondent's reply brief to General Counsel's answering brief to Respondent's Exceptions pursuant to Section 102.46 of the Rules and Regulations of the NLRB, Series 8, as amended. Neither General Counsel nor Charging Party filed any exceptions to Judge George Carson III's (hereinafter "ALJ" or "Judge") recommended Decision and Order, particularly the finding that the ALJ determined that the Union's request for information was irrelevant. Only the General Counsel filed an answering brief on June 24, 2011.¹ The General Counsel raises the following questions:

- I. Q: Were Respondent's 12 Exceptions and 48-page brief flawed for specificity? (page 4).
- A: No, the Exceptions were concise, not argumentative, and the brief includes considerable specificity to Respondent's objections.
- II. Q: Did the Respondent have a legal obligation to respond earlier to a request for irrelevant information by telling the Union its request was irrelevant and harassment, as Respondent did on September 27, and not that the Respondent had to give the Union anything, but merely telling the Union its request was irrelevant would have been sufficient if done earlier? (page 6).
- A: No, the ALJ found that the requested information was irrelevant and there is no legal obligation to respond to such a request.
- III. Q: Was the Union prejudiced as Respondent argues? (page 10).
- A. There is no evidence in the record supporting prejudice and, as a matter of fact, the record illustrates the opposite of General Counsel's mere argument.
- IV. Q: Was the Union's request for information on May 11 made in bad faith and made to harass the Respondent? (page 11).
- A: The record evidence establishes the Union's bad faith and harassment and General Counsel merely ignores this evidence.

¹ All dates will refer to 2010 unless otherwise indicated.

V. Q: Did the ALJ make a “per se” finding of bad faith? (page 14).

A: Yes, he did because he plucked the mere date of September 27 out of the record and that date, in and of itself, was the basis for this explained decision.

Each argument will be responded to in the Order of the General Counsel’s response.

ARGUMENTS

I. THE GENERAL COUNSEL ALLEGES RESPONDENT’S EXCEPTIONS ARE INCOMPLETE.

The General Counsel alleges that Respondent’s exceptions are incomplete; however, the twelve (12) Exceptions explicitly state the page and line and precisely what the Respondent’s objection is and the errors made by the ALJ in his decision. The Respondent’s 48-page brief, in detail, outlines the issues, a statement of the case, the facts, the record and authority for its Exceptions. The Exceptions were drafted to be as concise as possible to frame the objections. The Exceptions speak for themselves. For example, the first Exception involved lines 8-9 of the Statement of Case and specifically states the issue: “The ALJ’s finding of a “per se” violation: I find that the Respondent was obligated to timely respond to the request made by the Union and that it failed to do so.” This Exception, as does the other 11 Exceptions, states the argument as concisely as possible regarding why Respondent is objecting to the ALJ’s decision. Anything more would have been added argument, which was left to the 48-pages of the supporting brief. The supporting brief efficiently outlines the record relied upon, the argument, and the facts and law supporting the Exception. General Counsel also objects to the sufficiency of the brief; however, the Statement of Case, while clearly set forth by the ALJ, is adequate, Respondent in detail outlined the additional Statement of the Case after the Statement of Issues on pages four through seven of Respondent’s brief.

The Board has long received and considered exceptions where the accompanying brief provides citations to the record and the grounds for the exceptions, such that no party is prejudiced by the alleged lack of specificity. *See, e.g., Cromwell Printery Inc.*, 172 NLRB 1817, footnote 1 (1968); and *Schneider Mills, Inc.*, 161 NLRB 1135, 1136, footnote 1 (1966).

General Counsel's interpretation of Board Rules regarding alleged technical deficiencies in the Respondent's Exceptions and supporting Brief are not supported by Board precedent. Generally, the Board has refused to consider an exception only where both the exception and the supporting brief, when read together, fail to explain the grounds for the exception and fail to cite to the portions of the record relied upon. *See, e.g., One Stop Kosher Supermarket, Inc.*, 355 NLRB No. 201, footnote 2 (2010); *Oak Tree Mazda*, 334 NLRB 110, footnote 1 (2001); and *Show Industries, Inc.*, 312 NLRB 447, footnote 2 (1993). In its totality, the exceptions and supporting brief outline everything in great specificity and comply with Section 102.46(b)(1) and Section 102.46(c) of the NLRB's Rules and Regulations.²

II. THE CASES GENERAL COUNSEL RELIES UPON TO CREATE A LEGAL DUTY TO RESPOND EARLIER TO AN ADMITTED IRRELEVANT REQUEST ARE DISTINGUISHABLE AS ARE THE CASES RELIED UPON BY THE ALJ TO MAKE HIS FINDING OF A "PER SE" VIOLATION OF BAD FAITH BARGAINING.

As the ALJ did in his decision, the General Counsel's argument and cases cited are all distinguishable as outlined in Respondent's Brief- in-Chief, set forth on pages 39 to 43. In each of the cases relied upon, the judge or the Board found that the union's request for information

² What more could be written to be complete? However, in the event that the documents are determined to be noncompliant under the Rules, the Board has stated that its general policy is to permit corrected versions of noncompliant documents to be submitted. *See Hotel del Coronado*, 344 NLRB 360 (2005). To the extent that the Board may determine that any Exception or Brief of the Respondent might need more details, the Respondent requests the opportunity to resubmit the documents consistent with the Board's instructions.

was relevant and the respondent in some, if not most, of the cases relied upon do not even challenge the relevancy or why there was a delay to a relevant request for information. Without filing Exceptions, the Union's request here is irrelevant and because it was irrelevant, there was no obligation to respond and, likewise, if there is no obligation to respond then there is no legal obligation to respond earlier to an irrelevant request telling a union the request was irrelevant.

III. THE UNION WAS NOT PREJUDICED BY THE RESPONDENT'S SEPTEMBER 27 ANSWER AS ARGUED BY THE GENERAL COUNSEL.

The Union was not prejudiced because of when the Respondent answered the Union's request for information. The Union's request for information is dated May 11 and on September 27 the Respondent answered this request by telling the Union its request was irrelevant and it was harassment. However, the General Counsel's reply, without any evidence, solely relies on the quote below to establish prejudice:

“. . . Respondent's conduct prejudiced the Union because the Union was not given the opportunity to bargain over the information request and/or explain the relevance of the requested information. Board law shows that Respondent's delay in responding did, in fact, prejudice the Union and the Judge's finding of a violation was well-founded.

(General Counsel's Brief, page 10)

This is a baseless argument, without any facts or law to support the General Counsel's mere conclusion. First, it must be restated that without any exception, from the General Counsel or Charging Party, it is final that the requested information as found by the ALJ was itself irrelevant. Additionally, there is no evidence in the record supporting the General Counsel's above argument; none! The record evidence actually refutes the General Counsel's argument with uncontradicted testimony that once the Union's request was answered on September 27, the

Union actually refused to meet with the Respondent after the Respondent made at least four written requests to do so. (*See* Respondent's earlier brief, pages 26-29). Likewise, when the Union was asked for information to shed any light on the Union's request it was the Union that refused not only to meet but also to tell the Company anything. As early as April 5, the Respondent asked for more information and to meet and that was approximately 35 days before the request of May 11. (*See* Respondent's Exhibit 17). The Union's response to a meeting was it would not meet and Union Representative Boysen Anderson said, "Don't question me on what I believe" and, in another response to the Company contending there was no violation of the CBA, Anderson said, "Bullshit, you WILL abide by the contract" (*See* Respondent's Exhibits 10-15). That's it! It was proven that the union intentionally refused to meet and the Union refused to give any information to the Company regarding its request before May 11, after May 11, and after September 27. The Union adamantly refused to meet or bargain over the requested information or want to explain anything. (*See* TR 78-80, 121, 181, 184; Respondent's Exhibits 4, 17, 18, 33, 34 and 36; and Judge Carson's Decision, page 6, lines 1-6, 9-18 and 28-30).

The General Counsel can not "boot strap" its mere argument by ignoring the record evidence and then creating some imaginary fantasy about what could have happened. The General Counsel's only argument to there being no prejudice is that Boysen Anderson was not given the opportunity to bargain. How could someone even consider making this argument if that person attended the trial on March 24, 2011? Why? General Counsel had to make up some argument to suggest prejudice where there is none!

To further illustrate that there was no prejudice, consider the following scenario: The Union, on May 11, makes the same request for information and one day later, on May 12, the Respondent gives the Union the same answer given to the Union on September 27. Would that

have changed anything? Answer: Nothing Was the Union prejudiced? Answer: No! The Union, at the trial and before the trial, admitted that without receiving one sheet of paper and without receiving any information of any kind to its May 11 request, the Union's request was satisfied. (See TR 8-9 and 142-145; Respondent's Exhibit 27; Judge Carson's Decision, page 6, lines 45-52; and Respondent's earlier brief, pages 34-37). Not because the Union needed information but because the Union's request was irrelevant and there was no basis for claiming a violation of the subcontracting provision. As the Respondent told the Union as early as April 5, there was no violation and again on September 27 Respondent told the Union the CBA provided, "The parties hereto agree that loads not appearing on the IronTiger Logistics drivers kiosk are not IronTiger Logistics loads and will be moved by carriers other than IronTiger Logistics and the movement of such loads does not constitute subcontracting and does not violate Article 19..." (See TR 91, 109-119 and 169-176; Respondent's Exhibit 40; and Judge Carson's Decision, page 2, lines 5-52 and page 3, lines 1-22).

Because that is the only argument General Counsel has to the prejudice, it should be conclusively determined that there was no evidence of prejudice and it was the Union that adamantly refused to bargain over any issue of relevancy or the specifics of the alleged contract violation or the information sought. Why did the Union adamantly refuse to meet? There was no CBA violation, the bogus grievance had already been forfeited, and Anderson's conduct was solely to harass the Respondent, all of which comes from an irrelevant request for information.

IV. THE GENERAL COUNSEL CONTENDS THAT RESPONDENT HAD A LEGAL OBLIGATION TO ANSWER THE UNION'S ADMITTED IRRELEVANT REQUEST EARLIER WITHOUT DISCUSSING ANY OF THE UNCONTRADICTED TESTIMONY OF BOYSEN ANDERSON'S CONDUCT AND BEHAVIOR SURROUNDING THE MAY 11 REQUEST AND EVENTS BEFORE AND THEREAFTER MAY 11.

Boysen Anderson's bad faith, retaliation and harassment trump any possible finding that Respondent acted in bad faith and Boysen Anderson's behavior and conduct blocks any obligation Respondent had to respond, let alone respond earlier which, according to the General Counsel, if Respondent had done as they did on September 27, there would not have been a claim of bad faith bargaining.

General Counsel does not disagree with the uncontradicted evidence of Boysen Anderson's behavior and conduct, she merely ignores it. She ignores it even though it is uncontradicted and illustrates Anderson's bad behavior. General Counsel or Charging Party did not file Exceptions to Judge Carson's findings, one of which should establish harassment. Judge Carson finds:

Anderson recalled meeting with attorney Jones regarding an unrelated matter on May 12, the day after the May 11 information request and the day before he asserted that there was no contract at Garland or Springfield. In casual conversation, Anderson recalled that Jones referred to the information request, stating that Anderson was "asking for a lot of bullshit." Anderson recalls answering, "Yes I am, but I need it." He claims that Jones stated that he would be responding, but no response was received until September 27. Anderson's agreement that the information sought was "bullshit," absent an explanation regarding why the information was needed, confirms my finding that the information requested was irrelevant.

(See Judge Carson's Decision, page 7, lines 45-52 and TR 219).

As stated in Respondent's earlier brief, "all of the facts and evidence," which here is ignored by the General Counsel, demonstrates bad faith and harassment. (See Respondent's

earlier brief pages 8-9 (and record evidence and exhibits cited there) and the 14 factors that establish harassment or bad faith that need not be repeated here.) “All of the facts and circumstances” involving IronTiger and Anderson’s conceded threat, his illegal attempt to rescind the CBA and strike IronTiger, his bogus and forfeited grievance, his request for irrelevant information, his refusal to provide one example of the bogus grievance alleging a contract violation, his refusal to meet and confer, plus the evidence in the prior brief outlining other evidence, establish Anderson’s bad faith and his motive to harass the Respondent, all make this more of a case of harassment than found in *NLRB v. Wachter Construction*, 23 F.3d 1378, 1380-1388 (8th Cir. 1994).

V. GENERAL COUNSEL SAYS THAT JUDGE CARSON’S DECISION DID NOT FIND A “PER SE” VIOLATION BECAUSE SHE SAYS SO.

In less than one page and without citing any meaningful facts or law the General Counsel merely concludes that Judge Carson did not improperly apply the concept of a “per se” violation because he didn’t. *Black’s Law Dictionary* (8th edition, 1999), defines “per se” as “(1;) of, in, or by itself, standing alone, without reference to additional facts. . .” Judge Carson, of, in, or by itself, stated that it was only the failure to timely respond until September 27 that was a violation of the law. He considered no other facts in making that particular decision! It is clear that Judge Carson plucked the September 27 date out of all the facts and circumstances and merely said that this was in and of itself bad faith bargaining. This is inconsistent with “all the facts and circumstances” test of the *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 150, 152-154 (1956) and other cases cited throughout our earlier Brief.

CONCLUSION

Based on the arguments set forth herein and our previous arguments outlined in our brief submitted on June 2, 2011, we respectfully request that you dismiss this case.

Dated at Milwaukee, Wisconsin, this 8th day of July, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 8, 2011, a copy of Respondent IronTiger Logistics, Inc.'s Reply Brief To Counsel For The Acting General Counsel's Answering Brief To Respondent's Exceptions was electronically filed using the E-Filing system of the National Labor Relations Board's website, and served in the same manner as that utilized in filing with the Board, on the following individuals listed below:

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