

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**GENERAL DIE CASTERS, INC.**

**and**

**TEAMSTERS LOCAL 24 a/w  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS**

**CASES 8-CA-39211  
8-CA-39228  
8-CA-39252  
8-CA-39256  
8-CA-39272**

**ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL  
TO THE BOARD IN RESPONSE TO RESPONDENT'S EXCEPTIONS**

This matter is before the Board based upon a decision issued by Administrative Law Judge Mark Carissimi on July 11, 2011 (JD-39-11). Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the Acting General Counsel submits this Answering Brief in response to Respondent's exceptions and argues that the record evidence and cited case law fully support Judge Carissimi's analysis and conclusions with respect to those exceptions.

**I. The ALJ Correctly Found a *Weingarten* Violation**

The record evidence supports the ALJ's finding that Respondent violated employee Jerome Ivery's *Weingarten* rights. (JD, at pp. 12-14) Employee Jerome Ivery was called into a meeting on November 1, 2010 regarding General Die Casters' (GDC) training pay policy. The ensuing conversation was recorded. The meeting began with Ivery receiving discipline for allegedly violating the policy. (GC Ex. 27) However, the meeting did not end after discipline was issued.

After issuing the discipline, Lennon told Ivery that he wanted to talk about “one other thing.” (GC Ex. 27, at 8) Ivery immediately asked “Do I need to get somebody else in here?” Lennon said “no.” Ivery again immediately asked “Should...Do I need to get somebody else in here?” Lennon’s response was a stutter of “eh.” (GC Ex. 27, at 9). Only Lennon, Hicks, and Ivery were present for the remainder of the meeting. (GC Ex. 27)

Lennon transitioned the meeting to a conversation he had with Mike Jordan, Ivery’s first shift supervisor. (GC Ex. 27, at 9) Lennon then conducted an investigatory meeting, questioning Ivery about his work performance, job duties, and interactions with Jordan. He asked why Ivery had been questioning Jordan about his job duties and responsibilities. (GC Ex. 27, at 9-10) When Ivery tried to explain that he was only questioning Jordan and not arguing with him, Lennon disputed Ivery’s assertion and said that Ivery was wrong and should read his job description better. Ivery questioned some of his duties, and Lennon responded that those duties are part of his job description. (GC Ex. 27, at 10)

Ivery asked if he had been brought into the office because he asked his supervisor a question. Human Resource Manager Doug Hicks responded that while they had called Ivery in about his time card discipline, they were now questioning him about his interactions with Jordan. (GC Ex. 27, at 12)

Lennon told Ivery that questioning his job duties and Jordan “are the kinds of traits that have gotten you in trouble in the past.” (GC Ex. 27, at 12) Lennon repeated that “[a]lot of these traits that have got you in trouble in the past are creeping up again, alright?” *Id.*

Ivery questioned if he was getting in trouble for asking Jordan about job assignments. (GC Ex. 27, at 13) Lennon responded, after some discussion, by telling Ivery that “You going, you’re basically going to your supervisor and saying you got me doing a job that I shouldn’t be doing” and asking “why does it matter, I mean what, why-why you always questioning what you’re doing at that given time as if we are doing it to single you out.” (GC Ex. 27, at 14)

After that was said, Ivery asked again if he was in trouble. *Id.* Lennon once again told Ivery that he “see[s] some things that you haven’t done in a while that are starting to creep up again that have got you in trouble in the past alright...”

Respondent boldly asserts that the ALJ should not have relied exclusively on the audio recording of the meeting between Lennon and Ivery to determine if Respondent violated Ivery’s Weingarten rights. Remarkably, it was Respondent’s counsel who stated **“Well, the tape speaks for itself, Judge”**. (Tr. 177)

Respondent argues that more evidence was needed for the ALJ to find that Lennon was aware that Ivery was requesting union representation, despite Ivery requesting a representative **twice** during the meeting. The ALJ correctly found that “Ivery’s question to Lennon regarding whether he ‘needed to get somebody else in here’ was enough to be construed as a request for union representation” and was objectively sufficient to invoke his *Weingarten* rights. See JD-39-11, at 13, *citing Circuit-Wise, Inc.*, 308 NLRB 1091, 1108-1109 (1977) (employee’s request for “someone” invoked his Weingarten rights) and *Southwestern Bell Telephone Co.*, 277 NLRB 1223 (1977) (employee asking for “someone” to be present to explain what was happening was sufficient to invoke Weingarten rights).

In making its argument that the record lacks evidence to support its assertions, Respondent blames Counsel for the Acting General Counsel and the ALJ. Respondent argues that Counsel for the Acting General Counsel failed to question witnesses about the meeting, as if somehow counsel had the duty to introduce evidence in addition to the audio recording.

Remarkably, Respondent disingenuously claims that the ALJ “prohibited questions any [sic] questions with respect to the November 1, 2010 meeting.”

(Respondent’s Exceptions Brief, hereinafter “Resp. Br.”, at 13) Indeed, the ALJ expressly **permitted** counsel to ask questions regarding the meeting:

**Now, once the tape is admitted and once the transcript typed is admitted, and it’s up to you, you can do anything you want to....** And, as I say, you can do anything you want to, but I just point this out. Once there’s a tape of a meeting, it’s like, well, isn’t that literally the best evidence of what happened, all right?

(Tr. 51-52)(emphasis added)

Despite the ALJ’s assurance that counsel could ask questions, Respondent chose not to. Respondent did not ask a single question of Jerome Ivery or Brian Lennon regarding the November 1, 2010 meeting. (See Tr. 208-240, 285-343) Respondent cannot, in hindsight, argue that there is not enough evidence in the record to support that Lennon was not aware Ivery was invoking his rights and instead thought the two were having a “friendly talk”. (Resp. Br., at 13-14)

Moreover, Lennon saying it was “meant to be a friendly talk” does not overcome the overall nature of the meeting. If an Employer is allowed to circumscribe *Weingarten* rights by making a friendly gesture at the end of an interrogation, *Weingarten* rights would be all but an empty principle.

Ivery's credibility is not an issue when it comes to Respondent's violation of his *Weingarten* rights. There was an audio recording of the conversation and the evidence of what was said cannot be disputed. In the instant case, the ALJ was correct in finding that, viewed objectively, Ivery had a reasonable belief that Lennon's questioning could lead to discipline. (JD, at 13)

## **II. The ALJ's Ruling on Consolidation Should Stand**

The ALJ denied Acting General Counsel's pre-hearing motion to re-open the record and consolidate the hearing in the present cases with prior Case Nos. 8-CA-37932 *et al.* (JD-26-11 (May 2, 2011), at ftn.4) The ALJ relied on the Board Rules and Regulations as one of the reasons for the denial of the Acting General Counsel's motion. The ALJ noted that a 10(j) petition for an injunction had been granted for certain allegations in Case Nos. 8-CA-37932 *et al* and explained:

I have been guided by the provisions of Section 102.94(a) of the Board's Rules and Regulations which mandate that I give priority to deciding the instant case over all other cases, since a 10(j) injunction has been issued. In my view, to consolidate the instant case with the later issued complaint would inevitably delay the issuance of the instant case...

(JD-26-11, at ftn. 4)

During this trial, on March 16, 2011, Respondent made a motion to consolidate the two proceedings which was also denied. (Tr. pp. 254-259) Respondent now again requests, post hearing, that the matters be consolidated and considered together by the Board for the purpose of the reviewing the credibility of General Counsel's witness Jerome Ivery. (Resp. Br., at 5) Respondent argues that if this is done, surely credibility

resolutions made in favor of Ivery in the first hearing could now be decided against him. General Counsel urges the Board to reject this argument.<sup>1</sup>

The ALJ explained during the hearing how he would determine credibility of witnesses from case 8-CA-37932 et al and the instant case:

[A]nd anything with regard to Mr. Ivery or any other witness, that's just the nature of what a judge has to do when you decide credibility.

But I don't see any problem with me being able to sort through the credibility of witnesses. To some degree, there's some overlap with respect to Mr. Ivery here.

But I don't see a problem with me being able to determine—

(Tr. 257)

Moreover, it is not uncommon for an administrative law judge to accept some portion of a witnesses' testimony while rejecting other aspects of that witnesses' testimony. *Jerry RyceBuilders*, 352 NLRB 1262, fn.2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F. 2d. 749, 754 (2dCir. 1950), rev'd on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007) The ALJ explained in his decision, that he credited some but not all of what witnesses said. (JD, at fn.4)

Respondent cites *ALC Corporation*, 273 NLRB 87 (1984) and *White Castle Systems, Inc.*, 264 NLRB 267 (1982) in support of its argument. These cases, however, are inapposite to Judge Carissimi's denial of the consolidation of Case Nos. 8-CA-37932 et al and 8-CA-39211 et al. In those cases, the Board *sue sponte* consolidated R cases with related C cases. Indeed, it is common for R and C cases to be consolidated.

Respondent is trying to compare apples to oranges.

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<sup>1</sup> Respondent chose not to take an interim appeal to the ALJ's denial of Respondent's motion made at the trial.

### **III. Conclusion**

Accordingly, Counsel for the Acting General Counsel submits that Respondent's exceptions are without merit, and that with respect to the issues discussed above, the ALJ's findings should be affirmed.

Dated at Cleveland, Ohio, this 7<sup>th</sup> day of September 2011.

/s/ Gina Fraternali

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**PROOF OF SERVICE**

Copies of the foregoing Answering Brief of Counsel for the General Counsel were sent to the following individuals by electronic mail and regular mail on September 7, 2011:

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