

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

GENERAL DIE CASTERS, INC.	:		
	:	Case Nos.	8-CA-37932
and	:		8-CA-38277
	:		8-CA-38278
TEAMSTERS LOCAL 24 a/w	:		8-CA-38306
INTERNATIONAL BROTHERHOOD	:		8-CA-38358
OF TEAMSTERS	:		8-CA-38390
	:		8-CA-38464
	:		8-CA-38523
	:		8-CA-38546
	:		8-CA-38549
	:		8-CA-38568
	:		8-CA-38600
	:		8-CA-38623
	:		8-CA-38707
	:		8-CA-38916
	:		8-CA-39165

**RESPONDENT GENERAL DIE CASTERS, INC.'S REPLY BRIEF
TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE CARISSIMI'S DECISION
AND BRIEF IN SUPPORT**

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I. INTRODUCTION

Respondent General Die Casters, Inc (“General Die” or “the Company”) incorporates herein the arguments set forth in its initial Brief, and otherwise replies herein below to the arguments, misrepresentations, and misstatements within Counsel for the General Counsel’s (“General Counsel”) Answering Brief.

II. ARGUMENT

Contrary to the assertion of the General Counsel, General Die’s Exceptions unquestionably meet the standards set forth in the National Labor Board’s Rules and Regulations and Statements of Procedure (“Rules”). General Die cited particular testimony in the hearing transcript, exhibits admitted into evidence, and specific pages of the Decision throughout its Exceptions to the Administrative Law Judge Carissimi’s Decision and Brief in Support. The National Labor Relations Board routinely denies motions to strike and/or disregard exceptions when a brief in support of exceptions contains citations to transcript testimony, exhibits, and pages of the judge’s decision. See, *Loudon Steel, Inc.*, 340 NLRB 307 (2003). Moreover, the Board regularly accepts exceptions that fall well below what General Die filed in this case.¹ Accordingly, General Counsel’s argument that General Die’s Exceptions do not comport the Section 102.46 of the National Labor Relations Board’s Rules is wholly erroneous and therefore should be disregarded.

¹ See, *Brown & Root USA, Inc.*, 319 NLRB 1009 (1995)(Respondent’s brief in support of its exceptions contains pertinent transcript citations and therefore the exceptions and brief, taken together, substantially, if not literally comply with the requirements of Sec. 102.46); *Williams Services, Inc.*, 301 NLRB 492 (1991) (Respondent’s exception and brief together sufficiently designate Respondent’s points of disagreement with judge’s decision even though not fully in compliance with the literal requirements of Sec. 102.46); *Days Hotel of Southfield*, 311 NLRB 856 (1993) (Board rejected General Counsel’s argument to disregard Respondent’s exceptions where exceptions did not precisely reference the portions of the judge’s decision but did cite transcript testimony to which the Respondent took issue, thereby appraising the other parties of the substance of the exceptions); and *Conway Mill*, 284 NLRB 135 (1987) (Board accepted the Respondent’s exceptions notwithstanding the fact that they did not fully comply with Sec. 102.46(b) and (c) because Respondent’s brief sufficiently designated portions of the record relied on and the grounds for the exceptions).

A. The Board Should Not Disregard the Finding's of the Regional Director With Respect to the Unfair Labor Practices Committed by the union

General Counsel urges the Board to disregard General Die's characterization of certain findings of the Regional Director. (G.C. Brief p. 29). Nevertheless, the Regional Director undeniably concluded that "[a]bsent settlement [he] will issue Complaint alleging that the Union violated Section 8(b)(3) of the Act by failing to meet at reasonable times and places and by conditioning bargaining on the presence of the federal mediator as set forth in the following numbered paragraphs of your charge: 2, 12, 15, 20, 24 25, 26, and 28." (Jt. Ex. 6 & 9.) In so doing, the Regional Director concluded that the union engaged in the following behavior in violation of the Act:

- On October 13, 2008, the Union would only agree to meet for one hour and since that date the Union has generally only agreed to meet for one and one-half hours per bargaining date.
- On August 18, 2009, the Union unilaterally canceled negotiations with only 30 minutes notice knowing that the Company's lead counsel was traveling to negotiations and his arrival would be just about the time the Union canceled the meeting.
- On August 21, 2009, the Union canceled previously scheduled negotiations set for August 25 and 27, 2009, over the objection of the Company.
- On August 21, 2009, the Union unlawfully threatened to attend no future negotiations unless a Federal Mediator was present.
- On August 23, 2009, the Union carried out its threat of August 21, 2009, by officially canceling negotiations scheduled without a Federal Mediator on August 25 and 27, 2009, and offering only two dates on September 2 and 8, 2009, when Federal Mediators will be present.

(Jt. Ex. 5-6 & 8-9.) ALJ Carissimi, acknowledged that the "union's conduct in refusing to meet during the remainder of August, obviously made reaching an agreement somewhat more difficult." (Decision p. 40.) Notwithstanding, ALJ Carissimi wholly ignored the Regional Director's findings and, instead, excused away the union's unlawful behavior. Now, General

Counsel is requesting the Board to do the same. Apparently, a Regional Director's formal decision to issue Complaint and any Settlement Agreement that arises there from is out of the bounds of consideration and need not be regarded.

B. Owens is Not a Section 2(11) Supervisor

The alleged verbal reprimands administered by Owens are not "disciplinary" and alone are not enough to impute Section 2(11) supervisory status upon an employee. *See, Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (LPN charge nurses were not Section 2(11) supervisors where their disciplinary authority consisted solely of the power to verbally reprimand); *see also, Crittenden Hosp.*, 328 NLRB 879 (1999) (RN's did not have Section 2(11) disciplinary authority even though they were required to point out and correct deficiencies of the nurse's aides). Both ALJ Carissimi and General Counsel conveniently ignore these cases.

Moreover, Owens does not decide whether the employee shall be issued a verbal warning, as opposed to a written warning or a suspension. In other words, Owens' Safety Notices are merely reportorial. General Counsel presented no evidence that Owens has the discretion to issue written warnings and/or suspension. More importantly, the fact that General Counsel provided no evidence indicating the appropriate level of discipline for any previously recorded discipline, establishes the fact that the Safety Notices are not a basis for future disciplinary action. *Ken-Crest Services*, 335 NLRB 777, 778 (2001) (no supervisory status where employee only issued verbal warnings and no written warnings were placed in evidence that even referred back to the previous verbal's issued by employee in question.) It is well established that the issuance of oral or written warnings that do not affect job status or tenure is insufficient to confer supervisory authority. *Lakeview Health Center*, 308 NLRB 75 (1992).

Only three (3) Safety Notices are in the record none of which are referenced in later disciplinary actions, and a single accident report that was precipitated by an employee's carelessness, rather than Owens's using independent discretion to initiate the disciplinary process. Accordingly, General Counsel failed in meeting its burden to establish that Owens is a Section 2(11) supervisor.

In an attempt to bolster General Counsel's case ALJ Carissimi relies on verbal testimony from Jerome Ivery and Chuck Smith that Owens disciplined Jim Pruney and issued a written warning to Chuck Smith. ALJ Carissimi credited this testimony without any evidence in the record to support these accusations. General Counsel makes light of the fact that Owens simply offered cursory denials when questioned about these incidents. (G.C. Brief pp. 44 and 45 & Decision pp. 64-65.) If he did not do it what else is he supposed to say other than "No"? Ruling a witness is not credible based upon a cursory denial is erroneous. ALJ Carissimi's decision on this point is results driven.

C. Willie Smith's Termination Was Not Unlawful

General Counsel asserts that the undisputed testimony offered by General Die that another employee (Karl Wolf) was terminated for threatening another employee is of no consequence. Contrary to General Counsel's assertions, that General Die terminated another employee is indeed in the record and it is undisputed. (Tr. pp. 77-79). Yet, General Counsel argues that there was "nothing of any substance for the ALJ to consider on this point." (G.C. Brief p. 33). Perhaps the ALJ should have considered Lennon's undisputed testimony. The ALJ certainly had no qualms crediting Chuck Smith and Jerome Ivery's testimony that they received discipline from Owens notwithstanding the fact that there was zero documentary evidence to support their testimony. (Decision pp. 64-65.) The evidence ALJ Carissimi conveniently

discounts establishes General Die did not treat Smith disparately with respect to its disciplinary rules.

D. General Die Did Produce The Names Of The Non-Unit Employees Laid Off During The April And May 2009 Layoffs

General Counsel acknowledges that General Die did indeed produce the requested information. (G.C. Brief p. 38.) However, just as they argued in their Post Hearing Brief, General Counsel alleges that General Die unlawfully delayed in providing the requested information. (Id at pp. 38-39.) ALJ Carissimi concluded that the time period it took General Die to comply with the requests for production at issue in the Complaint was reasonable. (Decision pp. 55-56.) There is no reason why this request for information should be treated differently.

E. General Die's Claim Of Economic Exigency With Respect To The Layoff Is Meritorious

As noted in General Die's Exceptions and Brief in Support the union's own President acknowledged that the economy was in serious trouble immediately prior to the layoff. (General Die Exceptions and Brief in Support ["Exceptions"] p. 10.) Subsequently, during the April 21 and May 21, 2009 bargaining sessions General Die submitted documents to the union establishing that its orders had dropped significantly. (R. Ex. 179 & 180.) These documents were also addressed during testimony of General Die's attorney, Ron Mason. He testified as follows:

Q. Do you recall attending a bargaining session in which the company gave the union a voluminous amount of documents with respect to orders from customers?

A. Yes. On April the Twenty –

MS. FERNANDEZ: I would object, only because of the length of the record we already have in front of us, and that is to say that the -- the customers' orders, any customers orders is not a part of the complaint. I think they're referring to an April/May time period when that might –

JUDGE CARISSIMI: All right. But you're asking about an information request that is not in the complaint?

MR. TULENCIK: Well this information is in the complaint, Your Honor.

MS. FERNANDEZ: Customers orders?

MR. TULENCIK: You know, there's been various issues as far as we didn't provide information to prove that orders were down.

JUDGE CARISSIMI: Okay. I see. All right. So this goes to the question of orders being down.

Q. Did there come a time in negotiations when the company provided with the -- the company provided to the union information with respect to customer orders?

A. Yes. We had actually provided the union with information on customer orders, I think about a thousand pages of documents, on April 21st.

(Tr. pp. 1993-1998.) Again, the union's own President acknowledged that the economy was in shambles and documentation establishing a drop in orders was submitted to the union during bargaining as evidenced by the bargaining notes. Moreover, the testimony presented by Jim Mathias, owner of General Die and Ron Mason is undisputed and there was no reason not to credit this testimony. ALJ Carissimi regularly credited union witnesses without supporting documentation. Here, the union was provided with such information and said information was discussed during bargaining. (R. Ex. 179 & 180).

F. Neither the Company or Its Attorney Violated Ivery's Johnnie's Poultry Rights

ALJ Carissimi found that the Respondent violated Ivery's *Johnnie's Poultry* safeguards and Section 8(a)(1) of the Act both when he was asked by management whether he would meet with the Respondent's attorney and, in fact, when meeting with the Respondent's attorney. This

finding was clear error. On Friday, September 17, 2010, Ivery was asked by HR director Doug Hicks, and supervisors Chuck Long and Brian Lennon if he would meet with the Employer's attorney Ron Mason. It is conclusive that Ivery was given an entire weekend to consider whether he wanted to meet with Mason. (Decision p. 72.) ALJ Carissimi has found that the Friday, September 17th meeting – which was to only ask whether Ivery would meet with the Employer's attorney, also required *Johnnie's Poultry* admonishments as well. The transcript expressly shows it was Ivery's choice to meet with Mason. By this logic, the ALJ is improperly requiring admonishments prior to the proper time for use of the safeguards – at the time Mason met with Ivery. Ivery had the entire weekend to consider whether he wanted to meet with Mason – part of which was to tell Mason that he lied giving his affidavit to General Counsel.

Even though through two administrative trials, Ivery has been found to have lied on several key issues which were the basis of General Counsel's allegations. After the weekend, Ivery asked Chuck Long whether it would be held against him if he did not meet with Mason. The testimony differs as between Ivery and Long. Long testified he told Ivery that meeting with Mason would not be held against him. Ivery testified that in addition, Long stated: "Don't know what other people would do, you know." (Tr. p. 152 and Decision p. 72.) Somehow, from this addition, trusting Ivery's testimony, the ALJ found that Ivery was threatened with repercussions even though he had not met with anyone. Again, chronologically, there has been no meeting. Ivery has not been asked any questions. It is clear error to find, even assuming *arguendo*, Long made the statement, there was an underlying threat made to Ivery – there has been no meeting.

On September, 20, 2010, Ivery met with Mason away from the plant. Ivery was given *Johnnie's Poultry* admonishments before being interviewed by Mason. Decision at p. 73. ALJ Carissimi's decision simply finds that Respondent had committed a number of violations of

Section 8(a)(5), (3) and (1) such that no admonishments could ever be given that would have allowed Mason to meet with Ivery. This position is completely against Board law. ALJ Carissimi's decision would deny any meeting between an employee and an employer in advance of a Section 8(a) trial to interview an employee preceding such hearing because the atmosphere would never be free of employer hostility. This is an impermissible result.

G. Credibility/Motion to Consolidate

ALJ Carissimi referenced that a "substantial majority" of General Counsel's witnesses were current employees of the Company at the time of their testimony. (Decision p. 5 at fn. 5.) In an attempt to boost their credibility and his credibility findings ALJ Carissimi cited *Bloomington-Normal Seating Co.*, 339 NLRB 191 (2003), *Flexisteel Industries*, 316 NLRB 745 (1995) and *Federal Stainless Sink Division*, 197 NLRB 489 (1972) for the proposition that "[t]he Board has long held the testimony of current employees which is adverse to the interest of their employer is not likely to be false. The Board has noted that when employees testify against the interest of their employer, they subject themselves to the possibilities of recrimination and the perils would be even greater if such testimony were false." (Decision p. 5 at fn. 5.) However, in *The Jewish Home for the Elderly*, 343 NLRB 1069, 1069 (2004) Chairman Battista and Member Schaumber stated that this formulation is "overstated."

Additionally, ALJ Carissimi cites *Jerry Ryce Builders*, 352 NLRB 1262, fn. 2 (2008) for the proposition that "nothing is more common in all kinds of judicial decisions than to believe some and not all' of the witnesses' testimony." (Decision p. 5 at fn.5.) General Counsel also relies on this proposition to support Ivery's credibility. (G.C. Brief p. 57.) However, the clear preponderance of the evidence has established that Ivery cannot be credited even part of the time. He admitted to lying on his affidavits and stated he was concerned about perjury. Yet, at trial, he

lied and said he did not make those statements. Simply put, Ivery is not a trustworthy witness. As noted in the Company's Exceptions and Brief in Support, Ivery's testimony was based upon the very affidavits he admitted to having lied on. Yet, somewhat incredibly, his testimony was credited time and again to the detriment of the Company. Ivery continued lying approximately three months later during another Hearing before ALJ Carissimi in Case No. 39211 et al. (Exceptions p. 95-96). His credibility cannot and should not be saved by the formulation set forth in *Jerry Ryce Builder's, supra*.

General Counsel originally requested that the record in this matter be reopened to consolidate the cases that were ultimately litigated in the second Hearing. Now, General Counsel is against consolidating the record knowing full well that the clear preponderance of the evidence establishes that its witnesses, including its premier witness Ivery, is anything but credible. No harm occurs in consolidating the record.

H. General Die Was Not Obligated To Bargain With The Union Over The Insurance For Recalled Employees.

General Die readily admits that insurance is a mandatory subject of bargaining. The insurance coverage was in effect pursuant to the terms of the agreement with the insurer. General Die was under no obligation to bargain over new insurance coverage for the three recalled employees – which would have been impossible pursuant to the agreement with the insurer. General Die merely acted as the agent for the insurer collecting the premium for those who did not want their insurance to lapse. There was no monthly proration of premium. Coverage continued for those who paid the premium. Coverage lapsed for those who did not. (Exception pp. 55-56.)

III. CONCLUSION

For the reasons outlined above and in its Exceptions and Brief in Support as well as in accordance with the evidence, General Die did violate Section 8(a)(1), (3) and 5 of the Act. Accordingly, General Die respectfully requests that the Board find contrary to Administrative Law Judge Carissimi's rulings, finding, conclusions and the recommended Order with respect to the issues raised on exception. Additionally, the Respondent requests the Board to order the custodian of the case record of *General Die Casters, Inc.*, Cases 8-CA-39211 *et al.*, JD-39-11 (July 11, 2011) cause the Record to be transmitted to the Board and for such Record to be included and considered in the Board's review of the credibility issues of Jerome Ivery and Leonard Redd.

Dated at Dublin, Ohio on this 8th day of September, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 8, 2011, an electronic original of Respondent General Die Casters, Inc.'s Reply Brief was transmitted to the Board, via the National Labor Relations Board electronic filing system, and further, that copies of the foregoing Reply Brief were transmitted to the following individuals by electronic mail.

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