

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 positions taken within Counsel for the General Counsel’s (“General Counsel”) Answering Brief. It files this Reply pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (§ 102.46 (h)).

II. THE ALJ COULD NOT HAVE FOUND A WEINGARTEN VIOLATION

There was no probative evidence introduced by General Counsel upon which ALJ Carissimi could have found that General Die Managers should have given Jerome Ivery any *Weingarten* admonitions. General Counsel offered no testimony to establish whether Ivery believed the second part of the meeting was an investigatory interview. During the cross examination of Jerome Ivery, General Counsel’s only witness on this issue, ALJ Carissimi denied, out of hand, Respondent’s counsel’s attempt to cross examine Ivery on the nature of the meeting. The examination is as follows:

CROSS-EXAMINATION

BY MR. MASON:

Q. Referring you back to the testimony regarding the time when you hit your head, do you recall that?

A. Yes.

Q. When did that accident occur?

A. It was like February 18th, or something like that.

Q. Of 2011?

A. Yeah. Yes, sir.

Q. Did you report that?

A. Yeah. I filled out an accident report, yeah.

Q. Okay. Now, you were told by Brian that on the date that you turned in the six hours, that you actually worked three hours and twenty -- 3.25 hours; right?

A. What day was it?

Q. Remember the training issue with the timecard? I'm referring you to that testimony, okay?

A. Okay.

Q. Do you recall that?

A. Yeah.

Q. Okay. Now, do you recall talking to Brian about the fact that Brian told you that you only actually worked three hours and twenty -- three hours and fifteen minutes?

A. Are you talking about in that meeting --

Q. Yes, sir.

A. -- when they were -- the day they disciplined me?

MS. FRATERNALI: Objection, Your Honor. That's going to go to the audiotape already introduced.

JUDGE CARISSIMI: Why have questions about an audiotape, something that occurred? Now, isn't the tape going to tell me what happened? Aren't we going to prolong the hearing if we ask a bunch of questions about something that's on an audiotape or the transcript?

Tr. pp. 208-210. As the transcript clearly bears out, the Respondent's Counsel did indeed attempt to elicit testimony from Mr. Ivery with respect to the November 1, 2010 meeting. General Counsel's arguments to the contrary are simply untrue. (G.C. Answering Brief p. 4). More importantly, the Respondent is not placing blame upon ALJ Carissimi. Respondent is simply pointing out that it attempted to ask questions of Mr. Ivery with respect to the November 1, 2010 meeting and ALJ Carissimi advised Respondent's Counsel not to do so.

Moreover, General Counsel asserts that it had no duty to elicit testimony from witnesses regarding the meeting in question as it had already introduced the audio recording. (G.C. Answering Brief p. 4). The testimony set forth below expressly states that General Counsel was relying exclusively on the tape recording to prove a *Weingarten* violation.

Q. Did you ask for a union representative before the meeting?

A. Yes.

Q. Who did you ask it of?

MR. MASON: Objection, Your Honor. This is not part of -- you know, the General Counsel already acknowledged this isn't a part of their Complaint.

JUDGE CARISSIMI: What's the relevance of that, Ms. Fraternali?

MS. FRATERNALI: It was just to give context to the tape.

MR. MASON: Well, the tape speaks for itself, Judge. We don't need conversations before the tape.

JUDGE CARISSIMI: Yes. I'm going to sustain the objection. There's nothing in the Complaint about a *Weingarten* violation occurring until sometime during the meeting, as I understand it. Is that correct?

MS. FRATERNALI: That is correct.

JUDGE CARISSIMI: And there's a tape of the meeting. And --

MS. FRATERNALI: Correct.

JUDGE CARISSIMI: -- is the General Counsel relying on the substance of the tape and the transcript to prove that violation?

MS. FRATERNALI: Yes, we are, Your Honor.

JUDGE CARISSIMI: Okay. All right. So, I sustain the objection to something that's not in the Complaint, and you can ask your next question.

(Tr. pp. 176-177). Respondent certainly agrees that General Counsel does not have a “duty” to introduce additional evidence on this matter. Notwithstanding, General Counsel does indeed

have the burden to prove by the preponderance of the evidence that Ivery's *Weingarten* rights were violated. However, viewing the audio recording/transcript as a *whole*, General Counsel has failed to prove by the preponderance of the evidence that Ivery's *Weingarten* rights were violated. Moreover, Respondent contends that the audio recording/transcript in and of itself is not enough evidence to support ALJ Carissimi's "inference" that Lennon was aware that Ivery was requesting union representation. (Decision p. 13). Likewise, the audio recording/transcript in and of itself is not enough evidence to support ALJ Carissimi's finding that "Ivery reasonably believed that Lennon's desire to discuss issues that had arisen between himself and Jordan could potentially lead to discipline especially considering Lennon never indicated to Ivery that no discipline was being considered." (Id.) The transcript expressly indicates otherwise. An objective viewing of the *entire* transcript of the November 1, 2010 meeting establishes that Ivery's *Weingarten* Rights were not violated.

III. THE BOARD SHOULD CONSOLIDATE THE RECORD OF THIS CASE WITH THE PREVIOUS CASE 8-CA-37932 *et al* AND ISSUE A CONSOLIDATED OPINION

Respondent is not seeking an extraordinary remedy. The Board is able to consolidate the record of this with the record in case with Case 8-CA-37932 *et al.* stand. Oddly, General Counsel seems to now be juxtaposed to its previous position when it filed the Motion To Consolidate. This change of heart by General Counsel is easily explained. By the second trial, the General Counsel's premier witness to most of the facts contained in the consolidated charges, Ivery, was shown to be wholly non-credible to a degree far exceeding the standard as identified by *Jerry Ryce Builders* at p. 1262. *See also, J. Shaw Associates, LLC*, 349 NLRB 939 (2007) at p. 940. Any presumption of initial credibility given by ALJ Carissimi during the first trial in 8-CA-37932 *et al.* had, justifiably, by this trial completely dissolved.

In its Answering Brief, Counsel correctly points out that the ALJ set forth how he would determine credibility when he stated:

. . . and 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. p. 257).

Indeed, ALJ Carissimi determined Ivery's credibility after having heard his testimony in the two cases. He found that Ivery was completely uncredible and lying regarding the facts outlined in General Counsel's allegations and dismissed them accordingly. It is clear that the hours of Ivery testimony convinced the ALJ that Ivery was completely untruthful. The decision does not appear to have been reached like some new found epiphany as General Counsel seems to suggest, but rather, after hours of Ivery being confronted on the stand with documentary, audio and visual evidence that completely refuted his testimony. Unfortunately, ALJ Carissimi cannot now go back and revisit his decision in Case 8-CA-37932 *et al.* to correct the decision in keeping with all of the observations of Ivery's credibility he reached in the second case – it was a process to decide credibility, one that the ALJ made clear in his second decision.

Because the decision has been issued in Case 8-CA-37932 *et al.*, it now falls within the responsibility of the Board to consider the records of the cases, as a whole, to determine the overall credibility of Ivery. The Board has the authority to consolidate the cases for purposes of decision. Case 8-CA-37932 *et al.* has only been recently submitted upon its final briefing schedule. Both cases contain nearly identical witnesses. The second case is a chronological

succession of the same basic facts, witnesses, issues, and importantly, General Counsel's use of Jerome Ivery as its premier witness for both.

In this instance, there will be no prejudice to either party. All appealable issues are now before the Board.

IV. CONCLUSION

All appealable errors raised by General Die in this second case relate directly to the employer's interactions with Jerome Ivery. In this instance, General Counsel has alleged that the mere presentation of the audio tape from the November 1, 2010 meeting where Ivery received discipline and there was further conversation is sufficient proof of a *Weingarten* violation. There is no evidence credible or otherwise from any of the participants to the meeting to infer that the meeting had changed to an investigatory meeting of any kind. Simply put, the burden of proving the parties' intent was upon General Counsel and the burden was not met. The ALJ erred in finding Ivery's *Weingarten* rights had been violated.

Regarding the continued testimony of Jerome Ivery, it is clear from the case record and decision in this case that any evidentiary benefits of doubt Judge Carissimi extended to Ivery in Case 8-CA-37932 *et al.* had vanished in light of Ivery's continued untruthfulness. The Board must consolidate the case record, together with Case 8-CA-37932 *et al.* in order to fully and fairly evaluate the chronology of these cases. Neither party will be prejudice by such a consolidation. Furthermore, consolidation by the Board may even bring these related cases to a speedier conclusion. For all of these reasons, the Respondent petitions the Board to overrule Judge Carissimi regarding the employer's alleged violation of Jerome Ivery's *Weingarten* rights and consolidate this case together with Case 8-CA-37932 *et al.* for the full and fair adjudication of the matter as a whole.

Dated at Dublin, Ohio on this 20th day of September, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20, 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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