

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22

<p>In the Matter of:</p> <p>MCCLAIN &amp; CO., INC.,</p> <p>Respondent,</p> <p>and</p> <p>CRAIG H. LIVINGSTON, An Individual,</p> <p>Charging Party</p>	<p>Case No. 22-CA-29792</p>
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RESPONDENT MCCLAIN & COMPANY, INC.'S BRIEF IN REPLY IN SUPPORT OF  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE ELEANOR MACDONALD'S  
DECISION

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## INTRODUCTION

On January 17, 2011, the General Counsel filed an Answering Brief to Respondent's Exceptions. This Brief is submitted in Reply to the General Counsel's Answering Brief ("Answering Brief") and in furtherance of the factual and legal analysis Respondent presented in its initial Brief in Support of Exceptions ("Moving Brief").

### POINT I

#### **THE RECORD AND BOARD LAW DO NOT SUPPORT THE FINDING THAT EMPLOYEES' INDIVIDUAL COMMENTS CONSTITUTED CONCERTED ACTIVITIES**

General Counsel continues to distort the facts and ignore the testimony that employees never complained as a group and that each of the employees complained on his own behalf about his specific concerns. For example, contrary to General Counsel's characterization of Brattoli's telephone call to Virginia, Brattoli specifically testified that he told Mr. McClain that he (Brattoli) was "speaking on his own behalf," and that, "I was calling for myself." (Tr. 127)<sup>1</sup> Further, contrary to the ALJ's statement that, "Bruno also left a message for Daniel McClain voicing similar concerns..." Bruno's actual testimony gave no detail about the message he allegedly left for Mr. McClain. (Compare ALJD 16:34 with Tr. 25)

Further, although all three (3) of the General Counsel's witnesses testified about a meeting in July 2010 that all employees and three (3) supervisors attended, no witness even suggested that anyone raised any question or concern about scheduling or distribution of work at that meeting. Thus, there is no evidence that any of Respondent's employees engaged in any conversation or activity "with the object of initiating or inducing or preparing for group action or [which] had some relation to group action in the interest of the employees." *Meyers Industries,*

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<sup>1</sup> Throughout this Reply, we abbreviate references to the hearing transcript as "Tr.," references to the Administrative Law Judge Decision as "ALJD," and references to the exhibits as "Ex. GC" or Ex. R." (for General Counsel exhibit or Respondent exhibit, respectively).

*Inc.*, 281 NLRB 882 (1986) (“*Meyers II*”). Even Casiano’s recitation of a conversation he allegedly overheard between DeCarlo and Ladd, was limited to, “*individual* employee concern, [which,] even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert action.” *Meyers Industries*, 268 NLRB 493, 497 (1984) (“*Meyers I*”) (emphasis in original) (“In general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”).

The cases General Counsel cites in the Answering Brief actually support Respondent’s position on the distinction between the individual griping evidenced in this case and the types of group action or intention which the Board requires to find concerted action. For example, in *In re Cibao Meat Products*, 338 NLRB 934 (2003), the Board reiterated:

It is well-settled Board law that the “activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity.” Such individual action is concerted as long as it is “engaged in with the object of initiating or inducing ... group action ....” “*Particularly in a group-meeting context, a concerted objective may be inferred from the circumstances.*”

(Footnotes omitted, emphasis in original). See *Whittaker Corp.*, 289 NLRB 933 (1988) (the “activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity.” (citing *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)). Such individual action is concerted as long as it is “engaged in with the object of initiating or inducing ... group action ....” *Id.* (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). Likewise, in *Rock Valley Trucking Co., Inc. and James W. Teed*, upon which General Counsel also relies, the Board found concerted action because the employee, “spoke to fellow drivers ... because he was generally concerned about all of the drivers getting their miles.” 350 NLRB 69,

73 (2007). There is no record evidence in this case to support a finding that any of the employees engaged in concerted action, as defined by the Board.

Thus, the record and Board law do not support the finding that employees' individual comments constituted concerted activities and, therefore, the Board should sustain Exception 1.

## POINT II

### **THE RECORD DOES NOT SUPPORT THE FINDINGS THAT FERRER'S JULY 21, 2010 AND AUGUST 30, 2010 EMAILS CONSTITUTE RETALIATION FOR PROTECTED CONDUCT**

The ALJD and General Counsel both interpret Ferrer's two (2) emails contrary to the interpretation that the testimony and plain language of the emails indicate. Neither of Ferrer's emails was directed at the content of the employees' complaints and neither "threatened employees with loss of work because of their concerted activities," as General Counsel misstates. (Answering Brief, p. 22) Rather, Ferrer stated in each email that he wanted employees to stop complaining *to Ladd about scheduling* and to direct their complaints to Ferrer or Pasquale; Ferrer did not prohibit employees from making *any* complaints as the ALJD found. (Tr. 291) Respondent's interpretation of these emails is consistent with Bruno's testimony that Ladd, "was always complaining -- that we were complaining to him. He says, I don't make the schedules. It's not coming from me, so there's nothing I can do for you. Speak to Joe." (Tr. 21) Respondent did not violate the rights of any employees by redirecting their complaints to the supervisors with authority to address scheduling issues or by warning employees against continuing to ignore proper procedures.

Ferrer reiterated in each of his emails a plea not to bother Ladd. Because some employees continued to voice their individual concerns to Ladd, on August 30, 2010, Ferrer took the additional step of telling employees that Ladd no longer would receive the schedule, thereby, leaving employees absolutely no reason to discuss scheduling with Ladd instead of Ferrer. (Ex.

GC-3) Further, this change did not limit employees' access to the schedule as General Counsel alleges because both prior to and after the August 30 email, employees did not receive copies of schedules - only team leaders got a copy of the schedule. (Tr. 272) Furthermore, Ferrer imposed the limitation on not coming to the office "unannounced" following Brattoli's unscheduled visit and "meltdown" about two (2) weeks earlier, and it had little impact on most employees. (See Point IV below and Respondent's Moving Brief, Point IV-C).

Thus, the record does not support that Ferrer's July 21 and August 30, 2010 emails were in retaliation for protected conduct and, therefore, the Board must sustain Exceptions 11 and 12.

### **POINT III**

#### **THE RECORD AND BOARD LAW DO NOT SUPPORT THE FINDING THAT LADD'S ONE-TIME CASUAL COMMENT IS EVIDENCE OF ANTI-UNION ANIMUS THAT CAN BE IMPUTED TO RESPONDENT AND ITS MANAGERS**

The ALJD erroneously found that Respondent had anti-union animus based solely on Ladd's alleged one-time casual comments to Dave DeCarlo that "unions really don't do anything for you. They don't really do anything for you other than take money for dues," and "in the event [the employees] were to unionize, Dan McClain would most likely pack up and run the operation out of our Connecticut location." (Tr. 71) First, the General Counsel did not present DeCarlo as a witness to testify about this conversation and, instead, is relying solely on Casiano's hearsay testimony about what he says he overheard.

Second, even if Casiano's hearsay account is accepted as true, the comments were not a "clear and unequivocal threat of plant closure," but merely a casual statement by a low level supervisor, said in a "somewhat comical" manner, in response to a hypothetical statement by an employee, and not in the context of any type of union organizing. (Tr. 93-94) See *Crown Bolt, Inc.*, 242 NLRB 776, 779 (2004) ("Words spoken by a plant owner or hospital chief executive

officer in a formal meeting have a different level of seriousness than different words used during casual conversation by a low-level plant supervisor.”) Notably, in the Answering Brief, General Counsel did not cite to any Board law to challenge the factual and legal arguments Respondent presented on this point. Accordingly, the record does not support that Ladd’s one-time casual comments are evidence of anti-union animus that can be imputed to Respondent and its supervisors and, therefore, the Board must sustain Exception 2.

#### **POINT IV**

#### **THE RECORD CONTAINS NO EVIDENCE THAT RESPONDENT KNEW WHETHER CASIANO AND BRATTOLI ATTENDED A MEETING WITH A UNION REPRESENTATIVE ON AUGUST 25, 2010**

The ALJD and General Counsel conclude that Respondent’s reasons for laying off Bruno, Casiano and Brattoli were a pretext to cover their motive of retaliating for concerted activity, even though there is not a scintilla of evidence in the record that any representative of Respondent knew at the time of the layoff that Casiano and Brattoli attended the August 25, 2010 meeting. In their September 7, 2010 conversation, Bruno and Ladd only discussed Bruno’s attendance at the meeting, but did not mention any other employee. The transcript gives no indication of when, what, or how Ladd learned about the meeting, other than Ladd’s statement that, “Well, then, people are lying...I don’t know. Whoever went to the union meeting.” (Ex. GC8a, p. 9), which indicates he obtained his information from someone who attended the meeting. Indeed, nowhere in any of the three (3) recorded conversations did Bruno or a supervisor mention Casiano or Brattoli or any other employee regarding the August 25<sup>th</sup> meeting.

Despite the absence of any supporting evidence, General Counsel concludes that Respondent knew about the meeting on the day it happened, and knew who attended and what occurred. General Counsel reaches this conclusion despite his acknowledgement that, “[t]he

record does not disclose the exact date that Respondent first learned of its employees' attendance at a union meeting." (Answering Brief, p. 24)

General Counsel merely repeats the ALJD's erroneous conclusion that "Ladd's remark[s] that 'you guys' attended a union meeting and that 'everything got back to Virginia,'" proves that Respondent knew the identities of the employees who attended the meeting. (*Id.*) General Counsel inexplicably offered no evidence about how or when Ladd obtained any information about the meeting or how much information he received.

The ALJD and General Counsel then jump to the additional conclusion that not only did Ladd have full knowledge of Casiano and Brattoli's attendance, but also, that Ladd instantly disseminated this information to Respondent's other managers. This record is devoid of any factual support for this double presumption, which is based on speculation and supposition without a shred of actual evidence, and also is contrary to Board law. In *In re Eagle-Picher Industries, Inc.*, 331 NLRB 169, 173 (2000) the Board relied on its decision in *Antioch Rocky & Ready Mix*, 327 NLRB 1091 (1999), and overruled objections because the Charging Party offered no evidence that a supervisor's unlawful conversation with an employee was disseminated in any way to other employees. The Board decreed that, "the objecting party must establish dissemination of statements allegedly interfering with preelection conditions; *dissemination will not be presumed.*" *Id.* (citing *Kokomo Tube Co.*, 280 NLRB 357, 358 including fn. 9 (1986)) (Emphasis added).

Thus, there is no legal or factual basis to conclude that Respondent had any knowledge of Casiano and Brattoli's attendance at a union meeting, and General Counsel has not met its burden of proving that Ladd knew about the meeting or what he knew prior to September 7, 2010. Therefore, the Board must sustain Exceptions 3 and 4.

**POINT V**

**THE RECORD DOES NOT SUPPORT A FINDING THAT THE STATED REASONS FOR BRUNO'S, CASIANO'S AND BRATTOLI'S LAYOFFS WERE A PRETEXT AND THAT THE TRUE MOTIVE WAS THEIR ATTENDANCE AT THE AUGUST 25, 2010 MEETING.**

In attacking Respondent's evidence in support of its layoff decisions, General Counsel compares the disciplinary records of the laid off employees with that of Michael SantaLucia, yet fails to inform the Board that Respondent fired SantaLucia in July 2010, more than a month before the layoff. (See Ex. GC-9) Likewise, General Counsel relies on the disciplinary record of Gabe Scianna, but fails to disclose that he possessed a unique qualification (TCS training), which none of the three (3) alleged disriminatees and only one other employee had at the time, and for which Respondent had an ongoing need. (Tr. 286; Ex. GC-10d).

The ALJD and General Counsel present the records of three (3) other employees, who had either two (2) or one warning each, but disregarded the unique circumstances applicable to Bruno, Casiano and Brattoli, which distinguish these three (3) from all other employees. For example, the ALJD disregarded the unique circumstance of Bruno causing extensive damage to an arrow board less than two (2) weeks before the layoff, even though the August 13, 2010 warning notice, written two (2) weeks prior to the layoff and the meeting, plainly states that Bruno caused "extensive monetary damage." (Ex. GC-6) The ALJD also disregards Pasquale's testimony based on his personal observation of the damage and other testimony, as supported by the recorded conversations, that Bruno's damage to the arrow board was the primary reason Respondent selected him for layoff.

The ALJD and General Counsel likewise disregard the unique circumstance of Casiano's arrangement with Ladd regarding the yard position, and the fact that Casiano's predecessor in that position also left the Company soon after leaving the yard. (See Ex. CG-9). The ALJD and

General Counsel also disregard the fact that Casiano received two (2) warning notices in a month's time after he temporarily transferred back to traffic, including August 17, 2010 warning because Ferrer wrote in the wrong year. The ALJD and General Counsel disregard the significance of the fact that the primary union organizer, Alex Martinez, signed the same warning as a witness, which gives credibility to its contents and its date. (See Ex. R-2, GC-9).

The ALJD additionally disregards the unique circumstances of Brattoli's "meltdown" in Ferrer's office just a week before the layoff, concluding that it actually happened on August 30, 2010, rather than August 17<sup>th</sup> despite the fact that Pasquale identified the specific date and the reason he knew the date. The ALJD discredits Ferrer, claiming he could not recall whether Brattoli's meltdown happened before or after the layoff, but the hearing transcript shows that when Respondent's counsel tried to ask a follow up question to help Ferrer clarify his recollection, the ALJ interrupted and cut counsel off, stating, "Yeah. Well, it's in the record already," thereby, indicating that the August 17<sup>th</sup> date already was in the record and that counsel should move on. (See Tr. 268-269) Most significant, the ALJD's conclusions about Brattoli are contrary to his own testimony that he spoke to Respondent's supervisors a week or two after August 26, not two (2) days later. (Tr. 117-118).

Finally, the ALJD and General Counsel assert that Respondent hired five (5) new employees after the layoff, without clarifying that these hires include security guards for the yard (who were not TCTs), Ferrer's brother, and at least one rehire. Accordingly, the record does not support a finding that the stated reasons for Bruno's, Casiano's and Brattoli's layoffs were a pretext for retaliation, and, therefore, the Board must sustain Exceptions 6, 7, 8 and 9.

## POINT VI

### **THE RECORD AND BOARD LAW DO NOT SUPPORT A FINDING THAT LADD OR PASQUALE COERCIVELY INTERVIEWED BRUNO OR THAT LADD GAVE BRUNO THE IMPRESSION OF UNLAWFUL SURVEILLANCE**

General Counsel uses a combination of factual distortion and legal misinterpretation when he asserts that Ladd “intentionally created the impression that employees’ union activities were under surveillance by letting Bruno know that he knew about the union meeting ... and what had happened at the meeting....” (Answering Brief, p. 31.) During the taped conversation, Ladd did not create the impression of surveillance. Rather, he clearly inferred that someone else at the meeting told him that Bruno attended and that a second meeting was scheduled. General Counsel previously argued that Ladd knew all about the meeting based on the same statements that he now is using to say Ladd interrogated Bruno about who attended the meeting and what transpired. Based on the objective facts, Ladd’s statements to Bruno do not constitute implied surveillance because “[a]n employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily provided.” *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

Moreover, Ladd’s conversation with Bruno also did not constitute an unlawful interrogation, based on the criteria as discussed in *Demco New York Corp.*, 337 NLRB 850, 851 (2002), where the Board “acknowledge[d] that several factors weigh against finding the interrogation coercive. The questioning took place in an informal setting ... the conversation began amicably, and [Ladd] was a relatively low-level supervisor.” Although the Board ultimately found the *Demco* supervisor conducted an unlawful interrogation, the criteria that lead to that conclusion did not exist in the Ladd-Bruno conversation. For example, Ladd did not ask Bruno any questions except an indirect question about a second meeting, Ladd remained calm

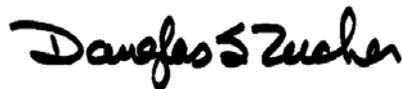
throughout the conversation, and the conversation occurred “in a context free of other coercive conduct.” Thus, the record and law do not support a finding that Ladd created an impression of surveillance or interrogated Bruno and, therefore, the Board must sustain Exceptions 10 and 13.

General Counsel also distorts the exchange between Pasquale and Bruno to claim it was a coercive interview and disregards how Bruno presented himself during his conversation with Pasquale. During the conversation, Bruno presented information indicating that he attended a union meeting and, therefore, was a union supporter. Pasquale asked follow-up questions to Bruno’s statements, but did not interrogate Bruno about his sentiments for or against the union, about any organizing efforts by the union, or who else attended the meeting with the union representative. Although Bruno denied active involvement, he, not Pasquale, asked for the meeting and introduced the subject of the union and Bruno’s attendance at the union meeting. Therefore, specifically as to Bruno’s status during his meeting with Pasquale, Bruno had self-identified as a union supporter, or at least an interested party.

In *Rossmore House*, 269 NLRB 1176 (1984), *aff’d. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985), the Board held that it would not find “an employer’s questioning open and active union supporters about their union sentiments, in the absence of threats or promises, necessarily interferes with, restrains, or coerces employees in violation of Section 8(a)(1) of the Act.” See *Union Nat. Bank*, 276 NLRB 84 (1985). Accordingly, Pasquale did not coercively interrogate Bruno and the Board must sustain Exceptions 14 and 15.

Respectfully submitted,

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