UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTER CITY INTERNATIONAL TRUCKS, INC.	:	
Respondent	:	Cases Nos. 9-CA-45338
	:	9-CA-45402
And	:	9-CA-45437
	:	9-CA-45820
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS AFL-CIO DISTRICT LODGE 54, LOCAL LODGE 1471	:	9-CA-45975
	:	9-CA-46081
	:	9-CA-46136
	:	9-CA-46183
Charging Party	:	

CENTER CITY INTERNATIONAL TRUCKS, INC.'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE SANDRON'S DECISION AND BRIEF IN SUPPORT

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I. INTRODUCTION

Respondent Center City International Trucks, Inc ("Center City," "the Company" or "Respondent") files this Reply pursuant to § 102.46(h) of the Rules and Regulations of the National Labor Relations Board. The Company's Reply is limited to ten (10) pages and, as such, necessarily incorporates herein the arguments set forth in its initial Brief, and otherwise replies herein below to some, not all, of the positions taken within Counsel for the General Counsel's ("General Counsel") Answering Brief.

II. JUDGE SANDRON COMMITTED ERROR IN HIS CREDIBILITY FINDINGS

General Counsel alleges that Respondent's version of the facts are "distorted" and its ample references to the transcript serve no other purpose than to draw and repeat arguments that failed to convince Judge Sandron in the first instance. (G.C. Answering Brief p. 4.) Contrary to General Counsel's condescending arguments and Shakespeare quotations, the Company did not "cobble together excerpts" from the transcript so as to portray the record in a more favorable light. (Id. p. 6.) The Company cited to the transcript countless times, in an effort to make clear in simple terms, just how badly Judge Sandron misconstrued and mischaracterized the testimony and subsequently transformed it to fact. The clear preponderance of all the record evidence, including the plain meaning of witness testimony cited to in the Company's Exceptions and Brief in Support, clearly establishes that Judge Sandron's credibility decisions were incorrect. Simply put, Judge Sandron's credibility resolutions are not supported by the record evidence.

As example, Judge Sandron determined that the failure to call Reilly, Respondent's owner, left Ward's testimony unrebutted that Reilly had admitted to Ward that employees similarly situated to Russ Mason had been allowed to return to work, but that the same exception would not be made for Mason. (G.C. Brief pp. 3-6, citing Decision pp. 10-11.) There is not one

recorded fact in evidence of an employee who failed to timely renew their CDL being permitted to return to work. To the contrary, the record did contain testimony and tangible evidence that employees were permitted to return to work ***if, and only if*** they acquired their CDL ***within*** the 30 day time period prescribed by the Company. (G.C. 9, R. 249 & TR. 1430.) Faced with this quandary, Judge Sandron concluded that the Company did not offer evidence that it had ever discharged an employee who once had a CDL, but lost it during the course of their employment and, as such, Russ Mason treated disparately. (Decision p. 11). Frankly, the Company has never had an employee who had a CDL, lost it and then refused to reacquire it even though they had been given 145 days – nearly half a year to do so.

General Counsel notes that Judge Sandron found Mosholder's testimony unbelievable that "70 percent of Mason's job duties required him to have a CDL." (G.C. Brief p 7, citing Decision p. 7.) General Counsel then argues that the Company would have the "Board believe that it kept Mason employed from July 2, 2009 until his termination on November 30, 2010, in spite of its claim that he was unable to perform 70 percent of his job duties during that time period." (G.C. Brief p. 7.) As pointed out in the Company's Exceptions and Brief in Support Judge Sandron blatantly mischaracterized Mosholder's testimony.

Mosholder testified that, as of the time of trial, 80 percent of the work performed by Idealease techs (Mason's job) required travel to and from a customer's site and, of that 80 percent, 70 percent (of the 80%) required a CDL. Judge Sandron then asked if these figures were the same back in July 2010. He makes no mention of 2009. The transcript reads as follows:

> Q. Okay. Now, what percentage of work performed by Idealease techs requires travel to and from a customer's site?
>
> A. Right now, it's -- it -- it is at 80 percent.

> Q. Okay. And of that 80 percent, is there a percentage that would require -- does that -- does that 80 percent require a CDL, or is that a different percentage that requires a CDL?
>
> A. Different, it's 70 percent. We have some trucks that are non-CDL.
>
> Q. Okay.
>
> JUDGE SANDRON: And -- and was that the -- was that -- were those figures the same back in July of 2010 --
>
> THE WITNESS: Yes.

(Tr. 1377.)

Judge Sandron and General Counsel make much of the fact that the Company did not discharge Russ Mason much sooner, considering he lost his CDL in July 2009. However, Judge Sandron discounts evidence that Center City has had other mechanics lose their driving privileges due to DUI's and have allowed them to continue to work with the understanding that they were not to drive any vehicles during the time that their license was suspended. (Tr. 37, 843, 1364-1365, & G.C. 35, p. 3.) Had the Company fired Russ Mason in 2009, it would have been guilty of not affording Russ Mason the same exceptions/opportunities as other employees who had lost their driving privileges due to a DUI. (Tr. 37, 843, 1364-1366, & G.C. 35, p. 3.)

From the clear example above, the Company is not the party guilty of cobbling together excerpts of the hearing transcript or purposefully mischaracterizing testimony in an effort to portray the record in a more favorable light. The Company respectfully requests the Board to review the excerpts in their original form. The testimony cited by the Company in its Exceptions and Brief in Support demonstrates time and again that Judge Sandron mischaracterized the testimony in order to support his determinations.

III. JUDGE SANDRON ERRED IN FINDING RESPONDENT DID NOT ESTABLISH IT WOULD HAVE TERMINATED RUSS MASON IN THE ABSENCE OF HIS UNION ACTIVITIES AND, THEREFORE, VIOLATED SECTIONS 8(A)(3) AND (1) OF THE ACT

This specific aspect of the case is quite simple. Contrary to the findings and General Counsel's arguments, the dispositive issue is not that Russ Mason was a "long-term employee" as opposed to a "new employee." (G.C. Brief p. 16) Moreover, the critical factor is not that other employees were disciplined for failing to "acquire" a CDL whereas Mason was being "pressed to reacquire" his CDL. (Id.) Rather, the critical factor is that technicians are required to have a CDL in order to work for the Company.

General Counsel attempts rather unsuccessfully to distinguish Russ Mason's circumstances from employees Rose and Oman.[1] (G.C. Brief p. 17.) General Counsel stated as follows: "[a]t the time of the hearing Oman and Rose were employed by Respondent, having been allowed to return to work once they obtained there CDLs. Therefore, Oman and Rose are [ ] distinguishable." (Id. at fn 12.) However, General Counsel failed to note that the very reason the men were still employed was because, unlike Russ Mason, they complied with the Company's instruction to obtain a CDL within the 30 day time period listed in their reprimands. (G.C. 9 & R. 249.) Notwithstanding, Judge Sandron misinterpreted these factors to conclude that the Company did not offer evidence that it had ever discharged an employee who once had a CDL, but lost it during the course of their employment and, as such, Russ Mason treated disparately. (Decision p. 11).

The critical element is that technicians are ***required*** to have a CDL in order to work for the Company. Russ Mason admitted as such when he testified as follows:

[1] Rose and Oman received written reprimands instructing them they had 30 days to produce a CDL or face termination.

Q. What licenses or certificates did you have to have, if any, to work for Center City?

A. You have to have a Class B, commercial driver's license.

Q. Is this requirement in writing?

A. There is a CDL requirement in the expired contract, yes.

(Tr. p. 30.) Russ Mason further acknowledged that he needed a CDL in order to perform certain job duties. He testified as follows:

Q. What were your job duties as a mechanic at Center City?

A. My job duties were to perform preventative maintenance, which is oil changes, checking break [sic] linings, tire pressure. It was very basic repairs on that end of it.

We made engine repairs, transmission repair and replacement, differential, drive line, electrical. We did almost everything to the trucks, actually.

Q. Did you ever have to drive the tractors or trucks?

A. Oh, yeah. After you complete repairs, it's common practice to road test the truck to make sure the problem is corrected.

Q. Okay. Of all these that you just mentioned, which of these required you to have a commercial driver's license?

A. Driving tractors.

(Tr. 32-33.) By his own testimony, Russ Mason admits he could not adequately perform his job without a CDL as he stated that its "common practice" to road test vehicles after repairs. Without a CDL, Russ Mason could not road test the vehicle in order to determine whether his repair corrected the problem. Simply put, he was unable to perform one of his essential job duties which he acknowledged was "common practice." Furthermore, Russ Mason acknowledged that after the Company had acquired a new customer, Dayton Freight, work which required a CDL increased by as much as twenty (20) percent. (Decision p. 9 & Tr. 43-44.)

Judge Sandron attempted to downplay this significant increase by noting that Russ Mason simply serviced these trucks on the customer's lot. (Decision p. 9.) In doing so, Judge Sandron wholly disregards the testimony referenced above, i.e., performing a road test to ensure the problem had been corrected. Taken at face value, Russ Mason acknowledged that at least twenty (20) percent of the time while he did not have his CDL he was incapable performing a work duty which is "common practice."

The Company did not terminate Russ Mason because of his union activities. The Company terminated Russ Mason because he failed to obtain a CDL over a period of 145 days, the last thirty (30) of which he was on notice that failing to do so would result in further discipline up to and including termination. More importantly, Russ Mason acknowledged that you must have a CDL in order to work for the Company and it is a requirement expressly set forth in the contract. The Company did not abruptly pull the rug out from under Russ Mason. The Company gave him nearly one half year to comply a job requirement expressly set forth in the contract.

IV. JUDGE SANDRON ERRED IN FINDING RESPONDENT UNILATERALLY CHANGED ITS POLICY GOVERNING THE RE-EMPLOYMENT OF MECHANICS WHO RE-ACQUIRE THEIR CDL'S AND, THEREFORE, VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT

The record is completely absent tangible evidence that the Company's refusal to reemploy Russ Mason after he acquired his CDL after the 30 day time period had expired was a change to the Company's past practice. Notably, the record did contain tangible evidence that two employees were allowed to return to work because they acquired their CDL within the 30 day time period. (G.C. 9, R. 249 & TR. 1430.) Notwithstanding, Judge Sandron disregarded the plain meaning of written exhibits and instead credits the uncorroborated testimony of Ward with

respect to a conversation he allegedly had with Reilly, the Company's owner. (Decision p. 11 and 35.) Ward testified as follows:

> I asked him if he would hire Russ – Russ back into the west side shop, same position, if he acquired his CDL, as he has done in the past, as Riley [sic] has done in the past, or the Company has. He told me no, that he could not do it like he -- the Company in the past, he explained to me the Company in the past has to put a stop to rehiring those that did not get their CDL on time.

(Tr. 596). Judge Sandron claimed the Gerchy's testimony "confirmed Reilly's statement regarding the Company's past practice of reemploying mechanics suspended for not having a CDL once they obtained it." (Decision p. 11.) A review of Gerchy's testimony contains nothing which address or corroborates Reilly's alleged statement to Ward. (Tr. 238-239 & Respondent's Exceptions and Brief in Support p. 104).

V. JUDGE SANDRON ERRED IN FINDING RESPONDENT ENGAGED IN BAD FAITH OR SURFACE BARGAINING AND, THEREFORE, VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT

The right to good faith bargaining is a two way street. Even before the enactment of § 8(d) and 8(b)(3) of the Act, the Board recognized, that "**a union's refusal to bargain in good faith may remove the possibility of negotiation and be considered in deciding whether an employer acted in good faith**." See, *Alba-Waldensian, Inc*. 167 NLRB 695, 720 (1967), citing *Times Publishing Company*, 72 NLRB 676, 683 (1947) (Emphasis added). The Board reiterated the rule after § 8(d) and 8(b)(3) were added to the law. Id., citing *Phelps Dodger Copper Products Corp.*, 101 NLRB 360, 368 (1952). Each of these sections makes clear the **mutual obligation on both employer and union** to bargain in good faith. Id., citing *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 487-488 (1960) (emphasis added) and *Radiator Specialty Co*., 143 NLRB 350, 373-374 (1963).

The Company readily admits that it resubmitted its December 11, 2009 and March 10, 2010 proposals. It did so because the union was reneging T/A's and submitting regressive proposals and, as noted above, the union's bargaining tactics are indeed relevant in determining whether an Employer has bargained in bad faith. General Counsel argues that the Company disregarded the union's legal prerogative to retreat from tentative agreements upon a showing of good cause. (G.C. Brief p. 29). General Counsel further argues that the union's post 2010 proposals were supported by valid considerations and, as such, the union did not act unlawfully when it continuously reneged upon prior tentative agreements. (Id.) General Counsel uses these arguments to distinguish *Bob Showers Windows and Sunrooms, Inc.* 2005 NLRB LEXIS 589 (2005) and *Universal Fuel*, 2009 NLRB LEXIS 344 (2009). Nonetheless, the record evidence establishes by a preponderance of the evidence that the union's new proposals were *not* supported by valid considerations.

Gerchy's testified to the following with respect to why the union put various matters on the table after January 7, 2010:

> Q. Now, is that true, that those matters were addressed after January 7, 2010?
>
> A. Yes.
>
> Q. And why were those matters addressed after that date?
>
> A. We had meetings with our membership. We had become quite aware of what -- what a sham of a contract we'd been working under, and we got input from our membership to address some of these things, most of them.

(Tr. 261.) However, when viewing Gerchy's testimony as a whole, it is clear that the new proposals were not made because the membership had suddenly become aware that the contract they had been working under for years and years was a "sham." For instance, Gerchy testified that the union generally polls the membership in the beginning in order to ask questions about

issues, problems, or requested changes to the contract. (Tr. 283-284.) The union's first proposal submitted to the Company on September 9, 2009 contained only a single change to the expired contract. (Tr. 298 & J. 9.) When the union submitted this proposal to the Company, Gerchy indicated that the proposal was very simple and that the men were extremely happy with the current contract. As such, the only thing the union was proposing was a wage increase. (R. 1 at p. 2.)

The testimony elicited from Gerchy on cross examination establishes that "information" the Company provided was readily available to them well before they started reneging on T/A's and subsequently submitting regressive proposals. For instance, Gerchy testified that the union's Job Classification Proposal was in fact submitted to the Company after January 7, 2010. (Tr. 445-446.) Gerchy explained that the union withdrew the T/A and submitted this proposal because the employees were being disciplined for work outside their classification and it was the union's opinion that said employees were not being paid for this higher classification work. (Id.) Nevertheless, Gerchy admitted that the union was aware of these changes prior to October of 2009.[2] (Tr. 446.) The Company's bargaining notes confirm this. (R. 1 at pp. 161-162.) Chema indicated that June 4, 2010 proposal was because the old contract was ancient and needed to be brought up to date. (Tr. p. 1024, R. 1 p. 261 & R. 264 p. 71.) If that was an earnest statement the union would have made these proposals at the outset of bargaining, not six (6) months into bargaining.

Lastly, both General Counsel and Judge Sandron cite to the Company's rejection of the union's informal January 7, 2010 proposal and the elimination of union security and dues check off as evidence that the Company's intent was not to reach an agreement. First, the Company gave sufficient reasons for its decision to eliminate union security and dues check off. Whether

[2] For more examples, see pp. 110-112 of the Company's Exceptions and Brief in Support.

the Union, General Counsel, the ALJ or the Board finds the Company's reasoning for such a clause persuasive is immaterial. *See, APT Medical Transportation, Inc*., 333 NLRB 760, 770 (2001). The Employer need only show the reasons set forth for the elimination of the clause are not so illogical as to justify an inference that the Company has demonstrated an intent not to reach an agreement and to produce a "stalemate" so as to frustrate bargaining. Id. Secondly, these issues occurred beyond the scope of the 10(b) period as the Complaint states that the Company had engaged in bad faith bargaining since on or about January 20, 2010.

VI. CONCLUSION

For the reasons outlined above and in accordance with the evidence, Respondent Center City did not violate § 8(a)(1), (3) and (5) of the Act. Accordingly, the Respondent respectfully requests that the Board reverse Administrative Law Judge Sandron's rulings, findings, conclusions and recommended Order with respect to the issues raised on exception and dismiss the Complaint in its entirety.

Dated at Dublin, Ohio on this 1st day of February, 2012

Respectfully submitted,

/s/ Aaron Tulencik

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 1, 2012, an electronic original of Respondent Center City International Trucks, Inc.'s Reply Brief was transmitted the National Labor Relations Board, office of the Executive Secretary, via the Department Of Labor, 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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