

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

In the Matter of

PRINT FULFILLMENT SERVICES LLC

and

GRAPHIC COMMUNICATIONS CONFERENCE OF  
THE INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS DISTRICT COUNCIL 3,  
LOUISVILLE, LOCAL 619-M

Cases 9-CA-068069  
9-CA-068849  
9-CA-069188  
9-CA-070706  
9-CA-072457

---

**PRINT FULFILLMENT SERVICES LLC'S  
ANSWERING BRIEF TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
LIMITED CROSS-EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

---

Submitted by:

FROST BROWN TODD LLC  
C. Laurence Woods III  
lwoods@fbtlaw.com  
400 West Market Street, 32nd Floor  
Louisville, Kentucky 40202  
(502) 589-5400  
(502) 581-1087 (facsimile)

Counsel for Print Fulfillment Services LLC

## I. STATEMENT OF THE CASE

Print Fulfillment Services LLC (“PFS” or “Company” or “Employer” or “Respondent”) submits this Answering Brief in response to the Counsel for the General Counsel’s (“GC”) Limited Cross-Exceptions (“the GC’s Cross-Exceptions”) to the June 27, 2012 decision of Administrative Law Judge Paul Buxbaum (the “ALJ”) issued in *Case Nos. 9-CA-068069, 9-CA-068849, 9-CA-069188, 9-CA-070706, 9-CA-072457* (the “Decision”).

A fundamental mischaracterization of the record in the Brief supporting the GC’s Cross-Exceptions must be corrected at the outset. PFS *retained* union supporters, and laid-off others, when it suffered a lay-off after the representation election. The GC’s Brief devotes much of its “Statement of the Facts” to comments attributed to PFS’s general manager, Brett Heap, that PFS would “get rid of” those who led the union organizing effort. The exact opposite is what happened.

PFS *retained* out-spoken union supporters: Bishop (a Steward), Murray, Gartland, Dykstra (another Steward), and Woosley. It laid-off others in their stead. The GC nowhere challenges the necessity of this lay-off. Retaining the strongest union supporters, when laying-off others doing the same job, is not the action of a company acting to “get rid of” its union supporters. For this and the other reasons stated below, the GC’s Cross-Exceptions should be denied; the Board should reject the GC’s challenge to the Decision issued on June 27, 2012.

A hearing upon the Complaint issued in this matter by the Regional Director of Region 9 of the National Labor Relations Board (“the Board”) was conducted on February 27, 28, 29; March 1, 2; and April 10, 11, 12, 2012.<sup>1</sup>

---

<sup>1</sup> A transcript of the Hearing was made. References to pages of the transcript will be designated “T. \_\_\_\_,” General Counsel Exhibits will be designated as “GC Ex. \_\_\_\_,” and PFS’s Exhibits will be designated as “R Ex. \_\_\_\_.”

In this case, the General Counsel alleged seventeen distinct unfair labor practices stemming from the circumstances surrounding the election of the Graphic Communications Conference of The International Brotherhood of Teamsters District Council 3, Louisville Local 619-M (“the Union”). The ALJ ruled in favor of PFS on four of the allegations in their entirety, and two additional allegations in part. PFS takes exception to the ALJ’s Decision to the extent the ALJ found that PFS violated the Act. Moreover, PFS takes exception to the remedy awarded by the ALJ for PFS’s alleged failure to bargain over the “effects” of a layoff. Although the Board has consistently stated that the financial remedy for the failure to bargain over the “effects” of a layoff is limited to the backpay described in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the ALJ nevertheless awarded a full backpay remedy.

This matter is before the Board pursuant to Section 10(c) of the Act and Sections 102.45 and 102.46 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended (the "Rules").

## **II. THE PARTIES**

PFS is a printing fulfillment company located in Louisville, Kentucky. (T. 1110, 1114). It is a wholly-owned subsidiary of a Nevada-based corporation. (T. 1108). Brett Heap is the general manager of the Company and also the managing member of the Nevada-based corporation. (T. 1107). At all relevant times, Paul Barnum was Mr. Heap’s Executive Assistant, William Morrison was the Production Manager, Scott Percy was the Quality Control and Press Room Manager, and Dale Miller was the Human Resources Director. (GC Ex. 1(ff) at ¶4).

The Graphic Communications Conference of The International Brotherhood of Teamsters District Council 3, Louisville Local 619-M (“the Union”) is the exclusive collective bargaining representative for all full-time and regular part-time press department employees, including offset press operators, digital press operators, plate makers, feeders, helpers, and team

leaders. (GC Ex. 1(ff) at ¶5(a)). The Union was voted in at Respondent's Louisville, Kentucky plant on October 28, 2011, and certified on November 7, 2011. (GC Ex. 1(ff) at ¶5(b)).

The size of the workforce changes from time to time during the year. (T. 1110). During the peak times of the year, the largest peak time being from October to the middle of December, the Company employs approximately 150 employees. (T. 1111-1112). At peak employment in December 2011, about 21 of the Company's pressroom employees were bargaining unit employees. (T. 1112). During work troughs, the Company employs approximately 90 to 105 workers, with 15 to 18 being bargaining unit employees. (T. 1114).

### **III. ARGUMENT AND ANSWERS TO SPECIFIC CROSS-EXCEPTIONS**

Pursuant to Section 102.46(f)(1) of the Rules, PFS specifically responds to the following Cross-Exceptions to the findings and/or conclusions of the ALJ:

1. Cross-Exception No. 1. The Administrative Law Judge's finding and conclusion that the Respondent's discipline policy did not violate Section 8(a)(1), (3) and (5) of the Act. (ALJD p. 42, lines 11-22; p. 57, lines 33-52; p. 58, lines 1-7).

**The ALJ correctly found that PFS's discipline policy did not violate Section 8(a)(1), (3) and (5) of the Act.**

Richard Woosley received a written warning on November 3, 2011 because his inattentiveness caused production errors that required two entire print jobs to have to be reprinted. (GC Ex. 9). The discipline that the Company issued to Woosley was not new or unusual. On the contrary, discipline for production errors is common, as evidenced by 35 documented examples of discipline for production errors that the Company produced. (R. Ex. 15-50) (T. 1201-03). These records evidence the indisputable fact that the Company had an established practice of issuing discipline for the types of production errors that Woosley caused

long before the Union arrived. Further, the Company's disciplinary policy concerning production errors applied to all departments, not just the press department. (*Id.*).

In all cases alleging a violation of Section 8(a)(3), the Board applies the causation test set out in its decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d. 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982). Initially, the General Counsel must make a *prima facie* showing sufficient to support the inference that the employees' protected activity was a "motivating factor" of the employer's action. *Id.* Once established, the burden shifts to the employer to demonstrate that its action would have taken place even in the absence of the employees' protected activity. *Id.*

"The Act is not a shield protecting employees from their own misconduct." *Neptco, Inc.*, 346 NLRB 18 (2005); see also, *Standard Products Co. v. NLRB*, 824 F.2d 291, 293 (4th Cir. 1987 ("the Act is not a shield for the incompetent even though the incompetent seeks immunity under the mantle of union membership or activity.") Absent a "showing of anti-union motivation, an employer may discharge [or discipline] an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws." *Id.*, quoting *Midwest Regional Joint Board v. NLRB*, 564 F.2d 424 (D.C. Cir. 1977).

The burden is on the General Counsel to show that Woosley's union activity was a motivating factor in his discipline. Only if this initial burden is met will the burden shift to the Company to demonstrate that Woosley would have been disciplined even if he had not been engaged in union activity.

Even assuming, arguendo, that the General Counsel has met his burden of demonstrating that Woosley's union activity may have been a motivating factor in his discipline, the Company has articulated a sufficient and legitimate reason for disciplining Woosley that was consistent

with its past practices and established policies. As evidenced by the disciplinary records issued for similar production errors, the Company routinely issues discipline for the types of production errors for which Woosley received a written warning. See, *Mid-Mountain Foods, Inc.*, 350 NLRB 742 (2007 (reversing a finding of a violation of Section 8(a)(3) because the “Respondent showed that it had issued numerous warnings to employees for infractions akin to [that of the union employee].”) The Company’s written warning to Woosley was consistent with its past disciplinary practices, and there is no evidence that Woosley would not have been disciplined absent the union election. Accordingly, there can be no violation of Section 8(a)(3) based upon the discipline that the Company issued to Woosley in November 2011.

Furthermore, the ALJ did not find that the Company had threatened to implement or later did implement new disciplinary practices and policies concerning production errors, absences, and tardiness, are belied by the record evidence. Specifically, Morrison testified that the Company routinely issued discipline for production errors and absenteeism well before any union activity. (T. 1006, 1012). The Company also presented multiple instances of written warnings for tardiness, and the numerous warnings for production errors referenced above clearly shows that the Company followed a practice of writing up employees for production errors before the union arrived. See, e.g., GC Ex. 17 attachments containing January 31, 2011 (production errors), and March 10, 2011 (production errors) Employee Warning Notices of James Swartz; March 10, 2011 (production errors) Employee Warning Notice of Tyson Hamilton; and June 22, 2011 (tardiness) and July 16, 2011 (tardiness) Employee Warning Notices of Kevin Tooley. This Cross-Exception is without merit and should be denied.

2. Cross-Exception No. 2. The Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(1) and (3) of the Act when it reprimanded Travis Dykstra on December 28, 2012 [sic]. (ALJD p. 51, lines 35-43).

**The ALJ correctly found that PFS did not violate Section 8(a)(1) and (3) of the Act when it reprimanded Travis Dykstra on December 28, 2011.**

On December 14, 2011, the Company issued Travis Dykstra a written warning because he sent a disrespectful text message to his co-worker, Paris Bradford, which contained inappropriate and offensive language. Dykstra's text to Bradford included the statement "What the fuck," abbreviated "WTF." Bradford was offended by the message and the statement, and he reported it to management. (GC Ex. 1(gg) at ¶9(a) and (b)). Management acted in response to this co-worker's complaint. The discipline issued to Dykstra is consistent with the Company's past practices and its policies prohibiting such language and conduct in the workplace, as evidenced by eleven examples of discipline that the Company introduced that it had issued for similar acts by others. (R. Ex. 51-61). Those disciplinary warnings were issued prior to any union activity and included other departments, and there was nothing new or unusual about the decision to discipline Dykstra for his conduct.

Furthermore, at the time of the discipline, Dykstra was assistant steward, and Bishop was steward. (T. 1748). While they walked together to meet with the Company about the message, Bishop told Dykstra "it was inappropriate for him to send that kind of message to a fellow operator." (T. 1486). Bishop felt Dykstra should not have written it. (T. 1486).

On December 28, 2011, the Company sent Dykstra a written warning for a production error. (R. Ex. 48). Dykstra had negligently allowed his press to run out of ink, causing a large amount of production to be lost. He admits the mistake. (T. 1746-1747).

As previously noted, the Company routinely disciplined employees in all departments for production errors like Dykstra's before any union activity. Dykstra is not exempt from discipline for production errors simply because he supported the Union in an election. As discussed above, union support does not immunize an employee from discipline for misconduct.

Even assuming that the General Counsel has met his burden of demonstrating that Dykstra's union activity may have been a factor in his discipline, the discipline did not violate the Act because the Company's actions toward Dykstra were consistent with its past practices and policies involving similar acts of misconduct and performance errors. There is no evidence that Dykstra would not have been disciplined absent the union election. Accordingly, this Cross-Exception should be denied because the Company has met its burden under *Wright Line* of demonstrating that prohibited motivations played no role in the discipline.

3. Cross-Exception No. 3. The Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(1) and (3) of the Act when it laid off Nicklaus Recktenwald. (ALJD p. 49, lines 1-9).

**The ALJ correctly found that PFS did not violate Section 8(a)(1) and (3) of the Act when it laid off Nicklaus Recktenwald.**

On December 16, 2011, the Company laid off Nicklaus Recktenwald and three other employees. (GC Ex. 1(gg) at ¶6(a) and (b)).

The General Counsel alleges that the Company selected employees for layoff based on the fact that they supported the Union. There was not a single fact adduced at the hearing which supports that allegation. Rather, every fact supports the Company's position that the decision was made based on demonstrated productivity and other legitimate factors.

The General Counsel does not contest the need for the December 2011 layoff. Although not seasonal, the Company's layoffs are fairly regular and predictable. Union witness Bishop admitted that he recalled at least two layoffs prior to December 2011; one in 2008 and one in 2010. (T. 1480). In both cases, the Company did not select employees based on seniority; it kept some of the junior employees and laid off some of the senior employees. (T. 1477). In 2008 and 2010, there was no union activity taking place. (T. 1479). In the absence of union activity, and the Company having previously not selected employees to be laid off based on seniority, only one other conclusion is reasonable. The Company has laid off employees in the past based on their relative ability to contribute. This is exactly what happened in December 2011.

By acting consistently with its past practices, and by showing that the layoffs of Rectenwald and others would have occurred for legitimate business reasons regardless of any union activity, the Company has met its burden to establish that the layoffs were permissible and did not run afoul of the Act. *Baptista's Bakery, Inc.*, 352 NLRB 547, 550-551 (2008) (reversing ALJ decision and dismissing alleged violations of the Act where company demonstrated that it would have laid off the employees for legitimate business reasons regardless of union activity); *Alberts, Inc.*, 213 NLRB 686, 695-696 (1974) (because the layoff of employee occurred as a result of a regular slowdown and was consistent with company's past practices at its other sites in response to such slowdowns, layoff decision did not violate the Act; the General Counsel's "mere suspicion" of antiunion motivation for the decision was "not enough"); see also, *A.J. Schmidt*, 269 NLRB 579, 588 (1984) (retention of strong union supporters during layoffs is evidence that layoff decision was not motivated by anti-union animus).

Paul Barnum testified that he selected employees based on their productivity, and other factors. Productivity was one element, and probably the most significant.<sup>2</sup> However, Barnum also testified that one of the least productive pressmen was retained in 2011 because he was able to run every press. (T. 1856). That was one of the “other factors” to which Barnum referred.

Barnum testified that he initially asked all department heads to identify the employees in their respective departments whom they would select for layoff. (T. 1209). Barnum then reviewed data on the Company’s “profit” system which shows the productivity of each employee. (T. 1847). It does this primarily by indicating their output of sheets per hour. (T. 1847). The data is a series of computer screens; it is not compiled in a single document and is not converted into written form. (T. 1847).

Barnum’s initial examination indicated the following pressroom personnel would be laid off: Jonathan Bishop, Dale Glover, Thomas Jones<sup>3</sup>, Nick Rectenwald, Robert Starks, Clifton Vaught and William Wellman. (G.C. Ex. 26).

On December 9, 2011, Barnum notified the Union. (G.C. 26).

Shortly after Barnum sent Castro that letter, Barnum double checked the productivity data upon which the December 9, 2011 letter was based. The computer personnel had changed the program to make sure the appropriate pressman was credited with the correct number of sides, and Barnum reviewed the information again. (T. 1852).

If the Company intended to lay off Union supporters to “send a message,” it makes sense that it would identify the most visible Union supporters, the “open and notorious” ones, and lay them off. GC Ex. 7, the talking heads piece, identifies the strongest Union supporters. In that

---

<sup>2</sup> As Bishop said, productivity is the “focus” of the Company. (T. 180).

<sup>3</sup> Not just regular employees were laid off. Jones was a temp. (GC Ex. 81).

document, Bishop (a Steward), Murray, Gartland, Dykstra (another Steward), Roederer and Woosley expressed their strong support for the Union. Only one of them, Roederer, was ultimately selected for layoff, and he retained his job by virtue of Bishop taking a voluntary layoff.

Retaining the strongest Union supporters is not the action of a Company trying to get rid of the Union supporters. *See, e.g., Operational Energy Corp.*, 1992 NLRB LEXIS 150, at \*52-53 (holding no violation of the Act where leader of union supporters was retained after a layoff, the layoff was economically justified, and the employer provided non-discriminatory reasons for laying off union supporters).

In a unit as small as the pressmen, removing good producers because they are Union supporters is a luxury the Company could not have afforded. In order to meet its unique delivery schedule<sup>4</sup>, it must retain the employees who best contribute to satisfying its obligations to customers. The Company did just that.

One other fact militates against the General Counsel's theory that the Company used the selection process to "send a message" that union supporters would be punished. If it intended to do that, the press department would likely be more affected by the layoffs than other departments. The opposite occurred. Castro testified that in the December 9 or 12 meeting, the Company and Union discussed the fact that other departments were affected more than the press department. (T. 1631).

The General Counsel has failed to meet even his initial burden under *Wright Line*. The facts clearly fail to warrant an inference that the layoffs were unlawfully motivated. Moreover,

---

<sup>4</sup> The Company commits to "buy it today – get it tomorrow." (T. 1123).

the evidence amply demonstrates that Barnum made the layoff decisions for only legitimate reasons.

The alleged remarks by Brett Heap are not consequential. Taking Percy's testimony as accurate, Heap may well have been upset by the election results and would have liked to remove certain individuals.

However, it didn't happen. Percy and Barnum understood, and said to each other, that Heap might not be happy about the people retained. Barnum said the Company would follow the law and do what was best for the Company. (T. 263). And the Company did follow the law. (T. 253). Barnum testified he showed the list of employees to be laid off to Heap and Heap accepted it. (T. 1209).

This was not the first time Barnum scrupulously followed what he believed the Act required. Previously, Barnum had told Roederer that the law prohibited increases without bargaining. Because his actions have been shown to be consistently in accordance with the Act, Barnum's entire testimony should be credited.

4. Cross-Exception No. 4. The Administrative Law Judge's refusal to issue an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump sum payment and taxes that would have been owed had there been no discrimination, and the submission of appropriate documentation to the Social Security Administration, so that when backpay is paid, it will be allocated to the appropriate periods. (ALJD p. 64, Lines 5-11).

**The ALJ correctly refused to issue the unprecedented order sought by the General Counsel.**

Such a remedy "would involve a change in Board law." *Bouille Clark Plumbing, Heating, and Electric*, 337 NLRB 743, *enf'd* 81 Fed. Appx. 377 (2<sup>nd</sup> Cir. 2003). As the ALJ held, "the Board has explained, 'it remains the judge's duty to apply established Board

precedent.... Only by such recognition of the legal authority of Board precedent will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.” *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004). The ALJ’s refusal to order the unusual tax remedy suggested by the General Counsel is correct and this Cross-Exception should be denied.

5. Cross-Exception No. 5. The Administrative Law Judge’s finding and conclusion that a notice reading is not appropriate under the circumstances of this case. (ALJD p. 65, Lines 20-27).

**The ALJ correctly found that a notice reading is not appropriate under the circumstances of this case.**

The determination of the remedy at this stage of the proceedings falls to the trial judge. *Williamette Industries*, 341 NLRB 560, 564 (2004). The ALJ’s conclusion that a notice reading provision is not necessary in this case is correct. As stated by the ALJ, “[t]he evidence shows, and my observation of the witnesses confirms that the members of this bargaining unit are highly skilled craftspeople. They were articulate, intelligent, and sophisticated witnesses who do not need the reassurance allegedly provided by a notice reading. They will have no difficulty understanding the meaning and content of the notice by reading it on their bulletin boards or computer screens.” (ALJD p. 66, Lines 2-5). This Cross-Exception should be denied.

#### **IV. CONCLUSION**

For the reasons stated above, PFS respectfully requests the Board to reject the Counsel for the Acting General Counsel’s Limited Cross-Exceptions to the Administrative Law Judge’s Decision in their entirety.

Respectfully submitted,

FROST BROWN TODD LLC

/s/ C. Laurence Woods III  
C. Laurence Woods III  
lwoods@fbtlaw.com  
400 West Market Street, 32<sup>nd</sup> Floor  
Louisville, Kentucky 40202  
(502) 589-5400  
(502) 581-1087 (facsimile)  
*Counsel for Print Fulfillment Services LLC*

**Certificate of Service**

This certifies that on this 22<sup>nd</sup> day of August, 2012, Print Fulfillment Services LLC's Answering Brief to Counsel for the Acting General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge, was filed electronically with the Office of the Executive Secretary, National Labor Relations Board, 1099 Fourteenth Street N.W., Washington, DC 20570 (<http://www.nlr.gov>), and one copy served by E-Mail on the following:

Eric A. Taylor  
National Labor Relations Board  
Region 9  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, OH 45202-3271  
eric.taylor@nlrb.gov

-and-

Israel Castro  
Graphic Communications Conference  
International Brotherhood of Teamsters  
District Council 3  
659 South 8<sup>th</sup> Street  
Louisville, KY 40203  
dc3icastro@insightbb.com

/s/ C. Laurence Woods III  
Counsel for Print Fulfillment Services LLC