

**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

**REPLY BRIEF IN SUPPORT OF EXCEPTIONS ON BEHALF
OF PRINT FULFILLMENT SERVICES LLC
TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Submitted by:

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Print Fulfillment Services LLC ("PFS"), hereby replies to Counsel for the Acting General Counsel's Answering Brief in Support of the Administrative Law Judge's Decision dated June 27, 2012 issued in Case Nos. 9-CA-068069, 9-CA-068849, 9-CA-069188, 9-CA-070706, 9-CA-072457 (the "Decision"). 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, 2012.¹

PFS's Exceptions filed with the Board on July 25, 2012, took exception with the Decision to the extent the Administrative Law Judge ("ALJ") (1) awarded a full backpay remedy for PFS's alleged failure to bargain over the "effects" of a layoff; and (2) found that PFS repeatedly violated the Act. The Regulations' ten page limit for a Reply Brief render a thorough response to the General Counsel's Answering Brief impossible. PFS's Reply must focus on select errors in the Answering Brief.

I. MAKE WHOLE REMEDY (EXCEPTION NO. 1)

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 (Decision at 63).

It is respectfully submitted that a make whole remedy is not warranted. In his Answering Brief, Counsel for Acting General argues that even if PFS's "decision to conduct a layoff is not at issue, the decision to lay off these *particular* employees *is*." (G.C. Answering Br. at 39, emphasis supplied).

¹ 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. ____."

The ALJ held the alleged layoff-based violations were “strictly related to an asserted failure to bargain over the methodology of the selection process and *other effects* of the ensuing layoff.” (Decision at 19 (emphasis added)). Each of the decisions relied upon by the ALJ or cited by the General Counsel involved a violation of the Act as a result of the employer’s refusal to bargain over the layoff decision. Here, however, there has been no such allegation by the General Counsel or finding by the ALJ. Instead, the only allegation has been that PFS failed to bargain over the effects of the layoff decision. Under such circumstances, *Transmarine* provides the appropriate remedy.

In *Louisiana Dock Co.*, 293 NLRB 233 (1989), the Board explained the circumstances under which the limited *Transmarine* remedy, rather than a full backpay remedy, is awarded:

In cases in which an employer has failed to provide its employees’ bargaining representative with an opportunity to engage in effects bargaining, including bargaining over the effects of the layoff of employees, the Board traditionally has imposed a limited backpay requirement and an affirmative order that the parties bargain over these effects. In fashioning this remedy, the Board has specifically found that in order to assure meaningful bargaining a limited backpay requirement is needed.

Louisiana Dock Co., 293 NLRB at 237 (citing *Litton Bus. Sys.*, 286 NLRB 817 (1987); *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)).

The portion of the ALJ’s award that provides for a full backpay remedy should be vacated.

II. VIOLATION OF SECTIONS 8(A)(1), (3), (5) OF THE ACT

A. WILLIAM MORRISON’S STATEMENT DID NOT RISE TO THE LEVEL OF A VIOLATION OF THE ACT. (SECTION 8(A)(1)) (EXCEPTIONS 2, 3, 4)

The ALJ erroneously found that PFS violated the Act when William Morrison made what the ALJ characterized as a statement of futility to PFS employees, a threat to Nick Recktenwald, and a coercive statement to Richard Woosley. (Decision at 28-30). None of Morrison’s statements rose to the level of a violation of the Act, because in his testimony Morrison either denied making the alleged statements or explained the context in which they were made (T. 995-999). Morrison’s non-threatening expression of disappointment at an employee’s support for a union is not a

violation of the Act. The Board has held that the expression of disappointment in an employee's support for a union, unaccompanied by threats, is protected employer free speech under Section 8(c). *Collavino Bros. Construction Co., Inc.*, 222 NLRB 889, 891 (1976); *Aztec Chemicals*, 218 NLRB 116, 117 (1975). In *Aztec Chemicals*, the Board reversed an ALJ finding of a violation where a manager told an employee that he was "very disappointed" that the employee was involved in the union.

B. THE ALLEGATIONS REGARDING TIMBERLAKE AND LINCOLN ARE TIME BARRED UNDER SECTION 10(B) OF THE ACT. (EXCEPTIONS 5 AND 6)

The ALJ erroneously determined the General Counsel's allegations related to Benjamin Timberlake and William Lincoln were timely. (Decision at 32-28.)

Even if timely, the General Counsel failed to prove "a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity." *Carney Hosp.*, 350 NLRB 627 (2007) at *19; *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). Each worker had unique circumstances to those making other allegations. Each situation was handled as a one-off decision, without thought to potential union ramifications.

The allegations in the Brief supporting the GC's Cross-Exceptions that both the timely filed allegations and the untimely allegations are part of an "overall scheme to undermine union activity" are unsupported by any evidence in the record. (G.C.'s Answering Br. at 26). The record contains no evidence of a "plan" or "overall scheme." The GC's evidence presented merely a collection of alleged unfair labor practices. Ignoring the Act's statute of limitations under such circumstances simply writes the requirement of timely filing out of the Act. These allegations clearly must be dismissed as time barred under Section 10(b). Finally, notwithstanding the 10(b) argument, the Company did not violate the Act in the way it treated Timberlake or Lincoln.

C ISSUING A WRITTEN WARNING TO RICHARD WOOSLEY FOR PRODUCTION ERRORS. (EXCEPTION NO. 9)

Richard Woosley's written warning issued by PFS for production errors was not new or unusual, nor was it discriminatory as found by the ALJ. (Decision at 31-32, 41). Discipline for production errors was common as evidenced by 35 documented examples that the Company produced. (R. Ex. 15-50) (T. 1201-03). These records evidence the indisputable fact that PFS had an established practice of issuing discipline for the types of production errors that Woosley caused long before the Union arrived. Under *Wright Line*, 251 NLRB 1083, 1089 (1980), the General Counsel had the burden to show that Woosley's union activity was a motivating factor in his discipline. Assuming, *arguendo*, that the General Counsel met his burden, PFS articulated a sufficient and legitimate reason for disciplining Woosley consistent with its past practices and established policies. *Mid-Mountain Foods, Inc.*, 350 NLRB 742 (2007). The ALJ erred in finding the PFS violated Section 8(a)(3) of the Act based upon the discipline issued to Woosley in November 2011.

III. SECTION 8(A)(1), (3) AND (5) VIOLATIONS (EXCEPTION NOS. 7, 8 AND 11)

Union witnesses confirm that the "new rules" found by the ALJ were not new at all, but only a list of pre-existing rules. Union supporter and witness for the GC, Jonathan Bishop, confirmed at the hearing that every one of the duties of press operators listed on GC Exhibit 2, either were already in place before union organizing began, or are inconsequential. Citations to the Record for Mr. Bishop's testimony about these rules are set out in full at page 19 of PFS's Exceptions and Brief. Accordingly, they need not be repeated here. A restatement of existing and insignificant rule changes cannot support a Section 8(a)(5) violation. *See e.g., Toledo Blade Co.*, 342 NLRB 385 (2004) (change must be material, substantial, and significant to require bargaining).

Similarly, sending employees home when PFS had no work for them to do was hardly a new "policy." Accordingly, the ALJ also erred when he concluded that PFS violated the Act when it sent Nicholas Recktenwald home when it had no work for him since his press was down. (Decision at

40-41,). Neither did PFS institute a “new” policy of sending employees home when presses are down, (Decision at 54.)

Toward the end of October, several presses were down. Recktenwald had been allowed to work the previous two shifts performing various types of work because there was work available for him to do. But, there was no additional maintenance work to be done at the time PFS sent Recktenwald home (T. 996). As Morrison said, Recktenwald was “maintenanced out.” (T. 996). Recktenwald was no greater or lesser a union supporter when PFS had enough work to keep him busy, versus when PFS had to send him home in fairness to others.

With limited tasks available for press operators with presses not operating, the only fair thing to do was rotate the available work among all the affected employees. (T. 997). That decision was not in retaliation for Recktenwald’s union activity, and the General Counsel has provided no evidence that the decision was in retaliation for his union activity.

Recktenwald is not entitled to a preference over all other employees because he is a union supporter.² The Act is not a shield that prevents the Company from making fair and/or necessary decisions as to its union supporters. *See Standard Products Co. v. NLRB*, 824 F.2d 291, 293 (4th Cir. 1987) (“The Act is not a shield...” that allows union supporters to seek “immunity under the mantle of union membership or activity”), *See also, Sam's Club*, 349 NLRB 1007, 1025 (2007) *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1221 (2004).

IV. SECTION 8(A)(5) VIOLATIONS

A. THE COMPANY MADE A GOOD FAITH EFFORT TO COMPLY WITH THE UNION’S REQUEST FOR INFORMATION IN NOVEMBER 2011. (EXCEPTION NO. 12) AND REGARDING THE DECEMBER 2011 LAYOFFS (EXCEPTION NO. 14)

(i) The ALJ erroneously found that PFS violated the Act when it failed to timely respond to the Union’s request for information in Novemer 2011. (Decision at 54-57). General

² Interestingly, although General Counsel claims Recktenwald was one of the strongest union supporters, his picture does not appear in the talking heads piece. (GC Ex. 7).

Counsel failed to establish the Company's actions were unreasonable or unlawful in the circumstances of this case.

The request was for a significant amount of information, and the Company was only given 10 days to respond.³ (GC. Ex. 12, T. 556). The 10-day response time was not objectively reasonable. Barnum sent his responses to the Company attorney, who forwarded it to the Union (T. 1192). As of early February, 2012, the Union had received everything requested. (T. 508).

The Company provided the sought information in a reasonable time under all the circumstances and General Counsel failed to demonstrate any prejudice to the Union. Under the totality of the circumstances here, the provision of the requested information within three months was more than reasonable, and there is no basis or support for the General Counsel's allegation that the response was unlawfully delayed. *See, e.g., Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn.9 (1993) (5-1/2 month delay in providing information not unlawful); *Union Carbide Corp.*, 275 NLRB 197 (1985) (delay of over 10 months found to be reasonable for request for voluminous amount of information).

(ii) The ALJ erred when it determined that PFS violated the Act by failing to provide requested information related to the December 16, 2011 layoffs. (Decision at 58-62.)

The Company never refused the Union's request for information. The Company had no obligation to respond to an information request that it never knew was made. *See Kieft Bros. Inc.*, 355 NLRB 116 at *47-48 (2010). Even when the Company was casually asked for the information it made a reasonable good faith effort to respond to the request as promptly as the circumstances allowed considering the information to be provided. Under the circumstances, the Company met its duty under the Act.

³ The requests were drafted from a "standard" request for a contract "reopener" (T. 548). In the case of a reopener, there is already a collective bargaining agreement. In this case, there was none. The negotiations were for an initial contract. Because the requests were not particularized for this Company, (T. 540), they were more extensive than necessary.

B. THE COMPANY FOLLOWED ITS PRIOR LAYOFF PRACTICES IN DECEMBER 2011 AND BARGAINED WITH THE UNION ABOUT THE SELECTION OF EMPLOYEES FOR LAYOFF. (EXCEPTIONS 10 AND 13)

The ALJ erred when he determined that the decision to layoff Jonathan Bishop was discriminatory, (Decision at 45-49,) and that PFS violated the Act by laying off Jonathan Bishop, Nicklaus Recktenwald, William Wellman, and Robert Starks when it failed to bargain over the effects of the layoff decision. (Decision at 58-60.)

The ALJ's finding that the PFS's "decision" to layoff Bishop was discriminatory is beyond belief. Although considered for layoff, Bishop was not laid off. He took a voluntary layoff, allowing a fellow production employee, Robert Roederer, to stay. (T. 135).

As to Wellman, when the Union met with the Company to discuss which employees the Company had initially identified for layoff, the Union had its own suggested list, based on seniority. The Union's list included Wellman or Teague because they were least senior. (T. 1749). Although the Union would have included Wellman in a layoff, the ALJ provided him a full back pay remedy.

The General Counsel alleged that the Company selected employees for layoff based on the fact that they supported the Union. 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. Bishop testified 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; union witness Jonathan Bishop testified that the Company kept some of the junior employees and laid off some of the senior employees.⁴ (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 not selected employees to be laid off based strictly on seniority, only one other conclusion is reasonable. The Company has

⁴ This testimony is contrary to the ALJ finding that "there was a complete failure of . . . proof" that PFS "employed the same selection criteria for layoff that it had used in past instances." (Decision at 64 n.86.)

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 Recktenwald, Wellman, and Starks would have occurred for legitimate business reasons regardless of any union activity, the Company 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). Paul Barnum testified that he selected employees based on their productivity, and other factors. Productivity was one element, and probably the most significant.⁵ However, Barnum also testified that Teague, who was not one of the most 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.

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 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.*, No. 20-CA-22788, 1992 NLRB LEXIS 150, at *52-53 (Feb. 5, 1992) (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).

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

⁵ As Bishop said, productivity is the “focus” of the Company. (T. 180).

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 alleged remarks by Brett Heap, although vivid, did not result in a violation of the Act. 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 pay increases without bargaining. Because his actions have been shown to be consistently in accordance with the Act, the ALJ should have credited Barnum's entire testimony. He did not do so, and the Company believes he was so taken with the alleged remarks attributed to Heap that his entire decision-making process was adversely affected.

V. CONCLUSION

For the reasons set forth above, the ALJ erred to the extent it determined that PFS violated the Act. To that extent, the Board should reject the ALJ's Decision and dismiss the Complaint in its entirety. At the very least, the Board should vacate the ALJ's Decision to the extent it ordered a full backpay award for the failure to bargain over the effects of PFS's layoff decision and institute a limited backpay remedy in accordance with *Transmarine*.

Respectfully submitted,

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Certificate of Service

This certifies that on this 22nd day of August, 2012, the foregoing Exceptions and Brief on Behalf of Print Fulfillment Services LLC to the Decision of Hon. Paul Buxbaum, 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:

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