UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

FLEX FRAC LOGISTICS LL.C AND
SILVER EAGLE LOGISTICS LLC,
JOINT EMPLOYERS
Respondents

and **CASE 16–CA–027978**

KATHY LOPEZ
an Individual

ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

On March 28, 2013, Flex Frac Logistics, LLC and Silver Eagle Logistics, LLC, Joint Employers (Respondent), filed its Answering Brief to Counsel for the Acting General Counsel's (AGC) Exceptions to Administrative Law Judge Margaret Brakebusch's (Judge) Supplemental Decision on Remand. Counsel for the Acting General Counsel now responds to the Answering Brief.

Respondent met each one of the AGC's 23 exceptions with some form of opposition. In many instances, the answering brief only provided a general response. The responses were not supported by citations to case law. Each exception and response is addressed below.

In Exception 1, Counsel for the Acting General Counsel excepted to the finding that Respondent learned the rates it charged customers were "out on the streets" *through an investigation.* (JD slip op. at 4, LL. 14-15). Similarly, in Exception 2, the AGC excepted to the characterization of the receipt of phone calls as an investigation.

As noted in the AGC's Brief in Support, no evidence in the record supports that Respondent took any action that led it to believe its rates were "on the streets." As noted in the

Brief in Support, the only evidence of Respondent learning about rates being "on the streets" came from President Funk, who claimed he received three unsolicited calls from unidentified persons who heard they were being paid a percentage of a lower-than-agreed sum and demanded to be paid a percentage of the actual rate Respondent was charging its customers. No other part of the sham "investigation" was shown to have cast any light on whether third parties had knowledge of Respondent's rates.

Without either arguing how some other investigatory action led to this supposed knowledge or an explanation as to how the passive receipt of the phone calls constituted an investigation, Respondent cites to numerous transcript references in response to both Exception 1 and Exception 2. None of the referenced testimony contradicts the AGC's contention.

In this regard, Respondent cites to President Funk's testimony that he "was told" that Lopez was telling employee Gay and "some of our contractors" about the rates. (Tr. 29, L. 25; 30, LL. 1-15). Here, Funk did not identify who the source of this information was or whether it was revealed through an investigation. Respondent also cites Funk's testimony about why the belief that Lopez had spoken to contractors would have upset him; he was not testifying about the source of this knowledge or any alleged investigation. (Tr. 33, LL. 4-25).

Respondent also relies on Funk's testimony from Tr. 34 about line-haul rates. The AGC is at a loss as to how this testimony impacts how Funk allegedly learned of the rates being "out on the streets" and whether it was through an investigation.

Respondent also cites to Tr. 37, LL. 19-25; 38 L., 20 in its Answering Brief. Although in this testimony Funk indeed references an "investigation" he only states that he asked his managers to "get involved" and "find out exactly what was going on" and that he talked to employee Gay who told him about conversations that Lopez had *with Gay* about profit margins but does not refer

to Lopez talking to contractors.

Respondent also cites Tr. 40, LL 14-25. Here, Funk testifies that he asked his managers to investigate. He provides no details of them reporting that the rates were "out on the streets."

Respondent cites Tr. 41, L. 14; 42, L. 13. Here, Funk provides the vague testimony that he received calls from unnamed and unrecalled persons where they stated "[Respondent was] charging this and they were only getting paid this, and that they wanted more money to run." Notably, as described by Funk, these were calls he received through no action of his own. Because the label "investigation" contemplates an active inquiry, Funk's passive receipt of phone calls by contractors demanding money cannot be described as an investigation. Indeed, having received these calls, Funk did not testify to even making any investigatory response in the conversation, such as asking the callers where they had heard the information or whether they had heard it from Lopez.

Respondent cites Tr. 43, LL. 7-3; 44, LL. 2-5. In these portions of the record, Funk testified concerning why he was upset about his belief that Lopez spoke to contractors; he did not testify about the source of this knowledge or any alleged investigation.

Respondent cites Tr. 48, L. 25; 50, L. 7 and Tr. 52, L. 13; 53, L. 17. Once more, Funk testified vaguely about receiving phone calls from persons upset with being paid a percentage of a less-than-agreed-upon sum. These conversations cannot be construed as part of an investigation.

In failing to provide a citation to a single investigatory action taken by Respondent that led to it learn that its rates were "on the streets" Respondent underscores the AGC's contention that Respondent did not learn its rates were "on the streets" through any investigation.

In Exception 3, the AGC excepts to the conclusion that the "record does not . . . reflect that Respondent has threatened or disciplined employees for discussing their wages and terms

and conditions of employment." (JD slip op. at 5, LL. 31-33). Respondent's response that the conclusion "is supported by a full review of the record" lacks in any citation to the record. Indeed, Respondent provided no argument against the AGC's support for this exception, which included the discharge notice given to Lopez, and the testimony of Lopez and Gay. Thus, the exception should be sustained.

In Exception 4, the AGC excepts to the finding that "Lopez is the only employee who testified that Respondent restricted employees in discussing wages." (JD slip op. at 5, LL. 31-34 and 36-37). Employee Gay testified that he knew he would be fired if he told the other dispatchers that he was on commission. (Tr. 174, LL. 14-15). Respondent ignores Gay's testimony and simply states that once again the "finding is supported by the complete record." In light of the judge's failure to consider Gay's testimony and Respondent's lack of citation or argument against it, the exception should be sustained.

In Exception 5, the AGC excepted to the finding that Respondent CEO Wilkinson did not tell Lopez "that she was terminated because she discussed wages and talked about drivers pay." (JD slip op. at 5, LL. 36-39). Respondent's entire response is:

> The ALJ states in her Decision thereafter the above quote that "I don't find Lopez's testimony to be credible in this regard. Aside from the Lopez alleged account of this conversation is self-serving, her account of this conversation conflicts with her other testimony. [sic]. (JD, slip op. at 5, 38-41)" This finding that Lopez's testimony was not credible was within the ALJ's purview, and supported by the record.

Respondent's repetition of the excepted portions of the judge's decision and its assertions that the judge was within her purview and "supported by the record" fail to address the AGC's identification of critical flaws in the judge's conclusion. Significantly, in the Brief in Support, the AGC noted that it was at a loss in identifying the "other [conflicting] testimony" to which the judge referred. Respondent's silence on this matter is evidence that it too is at a loss to explain

what the conflicting testimony is. Respondent provides neither any explanation nor argument as to why the lack of rebuttal by Wilkinson – who did testify – should not be afforded probative weight. Finally, Respondent did not discuss that Lopez's testimony should be credited because it is corroborated by the most compelling evidence in the record: the discharge notice. Thus, the exception should be sustained.

In Exception 6, the AGC excepted to the finding that had Villarreal actually warned Lopez she was prohibited from discussing wages under the confidentiality agreement, Lopez would not have freely engaged in such conversation with either Gay or Chambers. (JD slip op. at 6, LL. 3-6). Respondent vaguely argued that one should "see Lopez's entire testimony and the record in general, and the ALJ's determination that Lopez lacked credibility." Respondent did not address the judge's flawed reasoning and the exception should be sustained.

In Exception 7, the AGC excepted to the finding that Respondent's former supervisor Villarreal did not explain to Lopez that the confidentiality policy was promulgated in part to prohibit wage discussions. (JD slip op. at 6, LL. 16-18). Respondent argues only that "the ALJ found Lopez to not be credible." In so stating, Respondent fails to address the AGC's arguments and the exception should be sustained.

In Exception 8, the ACG excepted to the judge's failure to consider Respondent's position that Lopez's "disruptive conduct" factored into her discharge, its shifting positions and evidence of pretext, when she concluded that "the only other evidence that would otherwise support a finding that Lopez was terminated for discussing employee wages is the language that Office Manager Susie Kellum included in Lopez's termination notice." (JD slip op. at 6, LL. 29-31). Respondent's only response here is that "the entire record supports such finding, and the ALJ did not find Lopez to be credible." For the reasons set out in the Brief in Support, the

exception should be sustained.

In Exception 9, the AGC excepted to the conclusion that the "fact that [Lopez's] discussion included a reference to what Respondent paid its own employees does not establish that Lopez was disciplined for protected activity." (JD slip op. at 6 fn. 2). Respondent argues generally that "this was a proper conclusion based on the evidence and the entire record." Respondent failed to address the AGC's arguments in its Brief in Support, and the exception should be sustained.

In Exception 10, the AGC excepted to the failure to give proper weight to Respondent's termination notice that explicitly stated Lopez was terminated for discussing employee wages. (JD slip op. at 6, LL. 30-40; 7, LL. 5-26). Respondent argues, "[T]his was a proper conclusion based on the evidence and the entire record." Again, Respondent failed to identify relevant facts, cite relevant law or address the AGC's arguments in its Brief in Support, and the exception should therefore be sustained.

In Exception 11, the AGC excepted to the summary of Kellum's testimony that "Funk had spoken with [Kellum] only about terminating Lopez for her discussion concerning the difference in what the contractors were paid versus what Respondent's customers pay." (JD slip op. at 7, LL. 7-9). Respondent provided three transcript citations in support of this summary of Kellum's testimony, none of which contradicts the exception.

Initially, Respondent erroneously cites Tr. 47, L. 23 – 48, L. 10 for two reasons. The first is that, while the exception is to the judge's summary of *Kellum's* testimony, the citation purportedly in support is to *Funk's* testimony. The second reason is that it is a reference to a conversation where Lopez told employee Gay "confidential information" and there is no reference to contractor pay.

Respondent also cites Tr. 50, LL 8-19. Again, Respondent's reliance on this testimony fails primarily because it is Funk's testimony and cannot support a summary of Kellum's testimony. Second, the citation does not include a reference to what Funk actually told Kellum about firing Lopez.

Finally, Respondent relies on Kellum's testimony at Tr. 81, L. 23; 82, L. 4 and Tr. 83, LL. 20-25. Although unlike the previous citations, these are citations to Kellum's testimony, they nonetheless fail to support Respondent's argument. First, in the cited testimony, Kellum refers to what *she* told *Lopez* about her discharge and not what *Funk* told *Kellum*. Second, Kellum's testimony only vaguely refers to Lopez being discharged for "her comments" to drivers. Kellum does not testify about what "her comments" were and this vague reference to Lopez's comments can hardly support the judge's finding that Funk had spoken to Kellum about discharging Lopez *only* because of her comments regarding the difference between contractor rates and what customers pay.

The above citations do not support the judge's finding and for the reasons stated in the Brief in Support, the exception should be sustained.

In Exception 12, the AGC excepted to the finding that Kellum did not influence the decision to discharge Lopez. (JD slip op. at 7, LL. 19). Respondent merely cites the "overall record" in support of this finding. Respondent fails to address the testimony of Funk who testified that Lopez was discharged in part for disruptive behavior, the specifics of which he was not aware, and at the recommendation of his managers, including Kellum. Thus, this exception should be sustained.

In Exception 13, the AGC excepted to the finding that Kellum's "zeal" as a new manager made her prepare a termination notice that she thought would be a proper basis for termination

on her own initiative. (JD slip op. at 7, LL. 20-23). Again, Respondent vaguely cites to the "entire record" in support of the judge's finding. Respondent has offered no actual support for the judge's finding and the exceptions should be sustained for the reasons set forth in the Brief in Support.

In Exception 14, the AGC excepted to the finding that the wage discussions identified in Lopez's discharge did not factor into her discharge. (JD slip op. at 7, LL. 23-26). Respondent vaguely cites to the "entire record" in support of the judge's finding. Respondent has offered no specific record support or legal arguments and the exceptions should be sustained for the reasons set forth in the Brief in Support.

In Exception 15, the AGC excepted to the finding that Lopez was discharged because she had disclosed confidential customer information and not because she discussed employee wages. (JD slip op. at 7, LL. 43-45). Respondent vaguely cites to the "entire record" in support of the finding. Respondent offered no legal or factual support for the judge's finding and the exceptions should be supported for the reasons set forth in the Brief in Support.

In Exception 16, the AGC excepted to the conclusion that discussions about whether Respondent was paying its employee drivers in a manner consistent with their understanding of the payment structure or if it was cheating them by calculating their percentage-based wages off a lower-than-agreed figure were neither protected concerted activity under Section 7 nor activity that otherwise implicated the concerns under Section 7. (JD slip op. at 8, L. 19; 9, L. 15). Although this exception was to a legal conclusion rather than a finding of fact, Respondent argues it is supported by the "entire record." Respondent's assertion fails to rebut the AGC's arguments in the Brief in Support and this exception should be sustained.

In Exception 17, the AGC excepted to the conclusion that discussions about whether

Respondent was paying its drivers with whom it contracted in a manner consistent with their understanding of the payments structure or if it was cheating them by calculating their percentage-based wages off a lower-than- agreed figure were neither protected concerted activity under Section 7 nor activity that otherwise implicated the concerns under Section 7. (JD slip op. at 9, L. 16; JD slip op. at 10, L. 41). Although this exception was to a legal conclusion rather than a finding of fact, Respondent, as before states that the conclusion is supported by the "entire record." Respondent's assertion fails to rebut the AGC's arguments in the Brief in Support and this exception should be sustained.

In Exception 18, the AGC excepted to the judge's misapplication of burdens in determining that there was insufficient evidence to establish that third party drivers Lopez allegedly spoke to about Respondent's practices were statutory employees. (JD slip op. at 10, LL. 27-34). Here, Respondent provides the naked assertion that the "ALJ properly reviewed the evidence and properly [applied] the burdens." Respondent's assertion fails to rebut the AGC's arguments in the Brief in Support and this exception should be sustained.

In Exception 19, the AGC excepted to the finding that record evidence showed Lopez had interfered with Respondent's business operation. (JD slip op. at 11, LL. 1-5). Similarly, in Exception 20, the AGC excepted to the conclusion that Lopez's alleged interference with Respondent's business operations was the basis for her discharge. (JD slip op. at 11, LL. 1-5). In response to both, Respondent cited only the "entire record" in support of the judge's finding. Respondent's inability to point to any specific evidence showing that Lopez actually interfered with Respondent's business and that such alleged interference was the actual cause of her termination only underscores the lack of support for these conclusions which are critical to Respondent's defense. Thus, the exceptions should be sustained.

In Exception 21, the AGC excepted to the conclusion that Lopez's conduct did not implicate concerns underlying Section 7 rights. (JD slip op. at 11, LL. 17-18). In Exception 22, the AGC excepted to the judge's conclusion that Respondent did not violate Section 8(a)(1) by terminating Lopez, and her failure to provide an appropriate remedy. (JD slip op. at 11, LL. 18 and 26-27). In Exception 23, the AGC excepted to the judge's recommendation to dismiss the remainder of the complaint covered by the Order in 358 NLRB No. 127, slip op. (2012). (JD slip op. at 11, LL. 34-35). For these three exceptions, Respondent contends only that the judge's conclusions are supported by the "entire record." For the reasons set forth in the Brief in Support, the exception should be sustained.

For the reasons stated above, Respondent's Reply fails to rebut the AGC's exceptions and for the reasons stated in the Brief in Support, they should be sustained.

Dated at Fort Worth, Texas, this 10th day of April 2013.

Respectfully submitted,

David A. Foley
Counsel for the Acting General Counsel
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the Acting General Counsel's Reply Brief to Respondent's Answering Brief has been served this 10th day of April, 2013 upon each of the following:

Via E-Gov, E-Filing:

Scott Hayes, Esq.
Vincent Lopez Serafino Jenevein, P.C.
Thanksgiving Tower
1601 Elm Street, Suite 4100
Dallas, Texas 75201
VIA EMAIL TO: shayes@vilolaw.com
(attorney for Respondent Flex Frac)

Mark Williams, Attorney
The Law Office of Mark L. Williams
9115 McArthur Court
Tolar, Texas 76476-6603
VIA EMAIL TO: mlwlabor@aol.com
(attorney for Charging Party Lopez)

David A. Foley
Counsel for the Acting General Counsel
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102