

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

IN THE MATTER OF)	
K-AIR CORPORATION, Respondent)	
)	CASE NO. 16-CA-091326
and)	
)	
SHEET METAL WORKERS LOCAL #67)	
A/W SHEET METAL WORKERS)	
INTERNATIONAL ASSOCIATION)	

**K-AIR CORPORATION’S ANSWERING BRIEF
TO CROSS-EXCEPTIONS**

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**RESPONDENT’S ANSWERING BRIEF TO COUNSEL FOR THE ACTING GENERAL
COUNSEL’S CROSS-EXCEPTIONS**

COMES NOW Respondent K-Air Corporation, (“Respondent”) pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and files this Answering Brief to Counsel for the Acting General Counsel’s Cross-Exceptions and Brief in Support of Cross-Exceptions to the Decision and Recommendation Order of Chief Administrative Law Judge Joel P. Biblowitz issued on May 30, 2013. In support, Respondent shows the Board as follows:

On May 30, 2013, Judge Biblowitz issued his recommend Decision and Order finding, *inter alia*, that Respondent did not coerce and threaten employees with unspecified reprisals because of their union activities. (ALJ Decision p. 8, LL 41-46). The Acting General Counsel took limited exception to this finding complaining only about statements made to Justin Reeder (“Reeder”). This Brief addresses the Acting General Counsel’s limited cross-exception. Respondent submits that Judge Biblowitz’ finding that Respondent did not coerce or threaten employees with unspecified reprisals is fully supported by the credible evidence and case law and urges the Board to adopt the Judge’s decision and deny the Cross-Exception filed by the Acting General Counsel.

I. PERTINENT FACTS

Before Kyle Villarreal (“Villarreal”), owner of Respondent, hired Reeder to work for Respondent, Reeder, on his own initiative, and without being asked by Villarreal, told Villarreal that he had filed NLRB charges against his prior employer, Swisher. (TR 113:24 through TR 114:19; and TR 128:3-19)¹. In fact, Reeder, on his own initiative, told Villarreal that he had gotten into a physical altercation with Gihardi, the foreman at Swisher. (TR 130:4-8). Reeder did this because he wanted to put Villarreal on notice that he had a NLRB charge pending against Swisher. In response to Reeder **volunteering** this information, Villarreal naturally had questions about what happened. (TR 132:3-15). In addition, before Villarreal hired Reeder, Reeder told Villarreal that he had an interest in joining a union. (TR 133:2-6). Notwithstanding, on or about September 15, 2012, Respondent hired Reeder as a lead man to work at a Yogurt Zone facility and the Subject LA Fitness Jobsite. (TR 110:12-22; TR 132:16-20; TR 133:2-8; and TR 214:5-14). In addition, Villarreal asked Reeder to help him find workers for the Subject LA Fitness Jobsite. (TR 213:15-25).

It is unclear when, but according to Reeder, Villarreal and Reeder had a brief discussion on a “Saturday” regarding his charges against Swisher. Reeder explained that the dispute was over back pay and an **assault** charge. Reeder testified that Villarreal asked him if he was union member and stated that he was not interested in having union members on the job site. Reeder believed that Villarreal was asking him these questions due to some of the issues that were going on between Reeder and Swisher (i.e., the NLRB charge and assault charge). (TR 114:22 through 115:24). Reeder testified that he told Villarreal he was not sure who was union-

¹ References to the hearing transcript appear as "TR page:lines" References to General Counsel's, Respondent Employer's and Joint Exhibits appear respectively as "GC Ex. __", "R. Ex.____" and "J. Ex."

affiliated. Importantly, Reeder could not recall how that discussion came up, but he testified, “I believe a few employees were wearing Brandt hardhat and Brandt gear” and that Villarreal asked “isn’t Brandt a union company.” (TR 116:11 through TR 117:2). This less than 5-minute conversation occurred in the parking lot of the Subject LA Fitness Jobsite. (TR 117:25 through TR 118:3).

Moreover, Reeder testified that the Monday after that he and Villarreal were sitting in a van waiting for Reeder’s girlfriend to get him from work. Reeder noticed that Gihardi, the foreman from Swisher with which Reeder got into an altercation, called Villarreal on his cellular phone. After Villarreal declined the call, Reeder asked Villarreal if Gihardi had been saying negative things about Reeder. Villarreal told Reeder that he had talked with Gihardi, but that Villarreal was his own person and could make up his own mind. Importantly, without any hesitation, Reeder stated that after that he was ready for a cigarette so he then exited the vehicle. (TR 118:4-25). However, after being prompted by General Counsel for more information about the conversation, Reeder testified that he told Villarreal that he did not know if Albert and George were union-affiliated and he told him that because he did not want Villarreal to think he had done anything intentionally. There is no evidence that Villarreal asked Reeder about said employees. Moreover, according to Reeder, Villarreal stated that the job was over budget and behind schedule and that he did not want union members on the jobsite. (TR 119:1-18). After giving this additional testimony, Reeder stated that it was then that he exited the vehicle. (TR 119:21-24). Reeder continued working at K-Air through approximately October 11, 2013. (TR 136:13-16).²

² Reeder’s testimony is not credible regarding this issue because Reeder was clear that he exited the vehicle after Villarreal stated he could make up his own mind regarding the Gihardi altercation issue. It was only after he was prompted for additional information that he added the alleged testimony regarding Villarreal’s comments about the union and what he told Villarreal.

II. LEGAL ANALYSIS

As the Administrative Law Judge found, the Section 8(a)(1) allegations are not supported by the record and must be dismissed. The test for interrogations or discussions of this nature is whether the supervisor's statements "... would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question was actually intimidated." *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1228 (2000). Furthermore, the Board's applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the "totality-of-the-circumstances" test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), *aff'd*. sub nom. *See Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). In analyzing the alleged interrogations under this test, it is appropriate to consider what have come be known as the "Bourne factors" outlined in *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). That is, in order to apply this analysis, there must be some information about the background of the comments, the nature of the information sought, the identity of the questioner, the place and method of the questioning, and the truthfulness of the employee's reply. *Id.*; *see NLRB v. Pneu Elec.*, 309 F.3d 843, 850-851 (5th Cir. 2002)("An unlawful threat is established if, under the totality of the circumstances, an employee could reasonably conclude that the employer is threatening economic reprisals if the employee supports the union."). Flip and intemperate remarks that are mere expressions of personal opinion are protected by the free speech provisions of Section 8(c) of the Act. *Sears, Roebuck & Co.*, 305 NLRB 193 (1991).

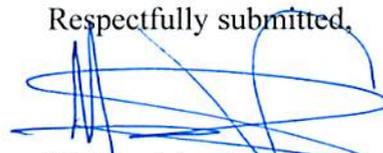
Prior to being hired, Reeder voluntarily told Villarreal that he had a physical altercation with a Swisher foreman and had filed NLRB charges against Swisher. He told Villarreal this because he wanted to put Villarreal on notice that he had a NLRB charge pending against Swisher. Naturally, Villarreal had questions regarding the altercation. (TR 113:24 through TR 114:19; TR 128:3-19; and TR 132:3-15). Also, all of the alleged discussions Reeder testified about that related to his union membership or others' affiliation with the union appear to arise from the discussion regarding Reeder's physical altercation and charge against Swisher, which again, he volunteered to Villarreal. In fact, Reeder testified that he believed that Villarreal was asking him these questions due to some of the issues that were going on between Reeder and Swisher (i.e., the NLRB charge and assault charge). (TR 114:22 through 115:24).

K-Air is an employer, with every right to be concerned about one of his workers having a physical altercation with a prior employer. In fact, Reeder testified that Villarreal told him that: (1) he did not want any kind of physical altercations at his job site; and (2) he did not want any kind of problems with the employees. (TR 145:5-10). Any questions Villarreal made to Vega or Reeder regarding the details of the altercation are not unlawful and are protected by the First Amendment provisions of Section 8(c). Moreover, there is nothing in those statements that would convey any explicit or implicit threat or attempt to harass or interfere with one's Section 7 rights. In fact, after learning of this altercation and charge, via Reeder himself, Villarreal hired Reeder. (TR 110:12-22; TR 132:16-20; TR 133:2-8; and TR 214:5-14). Further, after all of these alleged discussions with Reeder, Villarreal continued to employ Reeder. Thus, the Administrative Law Judge correctly found that Respondent did not unlawfully coerce or threaten employees with reprisals and that said charges should be dismissed.

III. CONCLUSION

For the foregoing reasons, Respondent requests that the Board: (1) deny Acting General Counsel's Cross-Exception; (2) affirm the Administrative Law Judge's finding that Respondent did not coerce or threaten employees with unspecified reprisals; (3) and grant any further relief the Board deems appropriate.

Respectfully submitted,



Melissa Morales Fletcher

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CERTIFICATE OF SERVICE

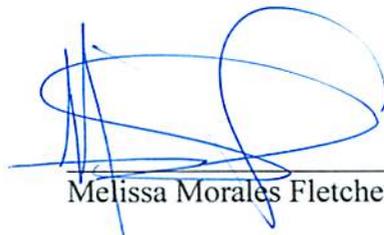
I hereby certify that in accordance with the NLRB's rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of the foregoing Respondent's Answering Brief to Cross-Exceptions was timely filed via the NLRB E-filing system and was served on the following on the date below by undersigned counsel for K-Air Corporation via electronic mail:

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DATED JULY 18, 2013



Melissa Morales Fletcher