

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

MIDWEST TERMINALS OF	:	
TOLEDO INTERNATIONAL, INC.	:	
	:	Cases 8-CA-38092
Respondent,	:	8-CA-38581
	:	8-CA-38627
and	:	8-CA-63901
	:	8-CA-73735
MIGUEL RIZO, JR.,	:	8-CA-92746
OTIS BROWN	:	8-CA-97760
MARK ANTHONY LOCKETT, SR.	:	8-CA-98016
	:	
and	:	
	:	
LOCAL 1982, INTERNATIONAL	:	
LONGSHOREMEN'S ASSOCIATION, AFL-CIO	:	

**RESPONDENT MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.'S
REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF
IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE CARISSIMI'S DECISION**

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I. INTRODUCTION

Respondent Midwest Terminals of Toledo International, Inc (“Midwest” or “the Company”) incorporates herein the arguments set forth in its initial Brief, and otherwise replies herein below to the positions taken within Counsel for the General Counsel’s (“General Counsel”) Answering Brief. It files this Reply pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (§ 102.46 (h)).

II. RESPONDENT DID NOT REFUSE TO HIRE OTIS BROWN IN JUNE, JULY AND AUGUST 2008 AND, AS SUCH, DID NOT VIOLATE SECTIONS 8(a)(3) AND (1) OF THE ACT

Judge Carissimi concluded Midwest violated Sections 8(a)(1) and (3) of the Act by refusing to assign work to Otis Brown (“Brown”) during the months of June, July and August 2008 because of certain grievances and/or threatened grievances filed by Brown. (Decision p. 12.) Judge Carissimi reasoned that Midwest was aware of Brown’s purported intent to file a grievance on May 9 (even though he did not do so) and the grievances he actually filed on July 22, 2008, August 1, 2008 and August 7, 2008. (Id. p. 10 and G.C. Ex. 31(a) & (b), (c) and (e).)

Presumably, Judge Carissimi determined that Midwest refused to hire Brown in June and the majority of July based upon Brown’s May 9, threat to file a grievance. Notably, Midwest hired Brown nine (9) times in May subsequent to his May 9 threat to file a grievance. (G.C. Ex. 33(19-20), (23-26), (30), (33-34), (36) and (39).) Brown worked a total of 86.5 hours during this period. Accordingly, under General Counsel’s theory, which was supported by Judge Carissimi, Midwest disregarded Brown’s threatened grievance the remainder of May, but the May 9 threatened grievance caused Midwest to discriminate against Brown in June and July. Such reasoning is not plausible, nor is it supported by the record evidence. Additionally, Judge

Carissimi determined that Midwest, during this very same time period, did not cease applying seniority principles in applying work to employees. (Decision, pp. 12-14.)

Brown was on the regular list during this time period, meaning members from the skilled list have to be hired before Brown can even be considered for hire. (Tr. 344 & G.C. 27.) Thus, simply because Brown testified that he showed up regularly in 2008 for shape-up in order to maintain his health benefits does not mean the Company refused to assign him work, as is clearly illustrated below. Moreover, if the Company does have to hire from the regular list, Brown would have to be available for work and qualified to perform the work available. (Tr. 345.) Brown acknowledged if a particular employee is next in line to be hired on the regular list, they are not guaranteed employment as they must be qualified to perform the available work. (Id.)

Notably, Leach attempted to put Brown on the skilled list multiple times during this period, but Brown decided to stay on the regular list. Thus, Brown's testimony that he showed up regularly at shape-ups in 2008 in order to maintain health benefits is specious and not credible. If he were truly concerned about maintaining his health benefits, he would have and/or should have joined the skilled list. Moreover, Judge Carissimi acknowledged that Brown, due to "personal issues," did not want to go on the skilled list during this time period because then he would be obligated to make himself available for work every day. (Decision, p. 9, FN8.) Notwithstanding, Judge Carissimi improperly credited Brown's testimony that Brown regularly showed up for work but Midwest refused to hire him. The record evidence demonstrates that the vast majority of time in June, July and August when Brown did not work, Midwest only hired persons off the skilled list, hired only the top person on the regular list (Claude Tucker),¹ hired persons below Brown on the regular list because he was not qualified to perform the work and/or Brown did not attend the morning shape – up.

¹ See, G.C. 27.

General Counsel attempts to discredit the record evidence (Gate Log Records) because they establish that Brown's testimony that he regularly showed up to work is not credible.

Specifically, General Counsel stated:

Respondent primarily relies on the security gate log records to demonstrate that Otis Brown failed to appear for work on certain dates during the months of June, July, and August 2008. Yet, Respondent's witness, Superintendent Terry Leach, on direct examination explained that the security gate log records introduced into evidence cannot be solely relied upon to determine whether an employee appeared for hire. Leach testified that the records do not reflect all of the gates employees use to enter and exit the facility. Tr. 888. 889. Respondent's attempt to now argue otherwise thus contradicts its own witness.

Answering Brief, pp. 7-8. Leach's testimony said nothing of the sort. Leach noted that the gate log records do not reflect who showed up for a shape-up, i.e. if a person's name is on the gate log it does not necessarily mean they attended shape-up, and were subsequently offered a job. Leach testified as follows:

Q. What -- could you identify that document?

A. This is the front gate log.

Q. Okay. And is -- again, is there anything on that document which conclusively establishes whether or not certain individuals presented themselves available for work and at shape-up on that particular day?

A. No.

Q. Okay. Is there anything on that document which would establish whether or not a person was, in fact, offered a job, for reasons unknown declined the job and left?

A. No. There -- other than the time they left. I mean, they could have been offered a job. I'm looking -- I'm looking -- I'm trying to get an example here. It's only time-in/time-out on this sheet --

Q. Okay. So there's just no way --

A. -- just so --

Q. -- there's just no way to know.

A. They could have been offered a job and turned the job down. It just shows, the gate log shows that they came in, let's say, at 0700 and left at 0800.

Q. Okay. And if a person leaves the back gate, is that time recorded?

A. No.

Q. Okay. Joint Exhibit 17, Page 6. It is dated 21 July 2008. Joint Exhibit 18 is the gate log dated August 22 of '08. Joint Exhibit 19 is dated September of '08. And Joint Exhibit 20 is for November of 2008. Are those all security officer logs?

A. Yes, they are.

Q. And with respect to a question was asked on Joint Exhibit 16, do any of these documents establish whether or not a person showed up and was present at the shape-up that particular day?

A. No, it -- it doesn't indicate shape-up.

Q. And does anything on that document establish whether or not if an individual was offered a job, turned it down, and subsequently left?

A. No.

Q. And, again, if a person leaves the back gate, would it be recorded on that document?

A. No. This is the front gate log.

(Tr. pp. 888-889 & 890-891.) However, if a person's name is not on the gate log record it does not necessarily mean they were not on Company property and, hence, did not attend shape up. The record evidence does not support Brown's testimony that he regularly showed up for work.

Specifically, during June 2008 Brown performed work on June 4, 5, 6, 13 and 14. (G.C. 34.) On June 21, 22 and 29 Midwest only hired men from the skilled list. (G.C. 27 & 34(HH), (II) and (QQ).) On June 10, 11, 19, 20, 23, 24, 25 and 26 Midwest only hired the top person on the regular list. (G.C. 27 & 34(M), (N), (FF), (GG), (JJ), (KK), (LL) and (MM).) On June 2, 2009 Midwest hired the top person from the regular list and the eleventh person from the regular list, Lavern Jones (“Jones”). (G.C. 27 and 34(A).) Jones was hired to run an end loader (E/L on G.C. 34(A)), a piece of equipment Brown is not qualified to use. (G.C. 27.)² On June 3, 2008, Midwest hired the top person on the regular list and Jones was hired as the foreman (“FR”) for a Gang working a vessel on the night shift.³ More importantly, the Gate Log for June 3 illustrates that Brown did not return for the night shift. (Jt. 16(E).) On June 12, Midwest again hired the top person on the regular list and Jones was hired as the foreman for a Gang working a vessel. (G.C. 34(N) and (O).) On June 17 and 18, Midwest again hired the top person on the regular list and Jones was hired as the foreman for a Gang working a vessel on the night shift. The Gate Log for June 17 and 18 illustrate that Brown did not return for the night shift. (Jt. 16(YY) and (EEEE).) The Gate Logs for June 27 and 28 indicate that Brown did not report to. (Jt. 16(AAAAA) and (FFFFF).) On June 7, 8, 9, 15, 16 and 30 Midwest hired one person from the regular list with less seniority than Brown. However, there are no gate logs for June 7, 8, 9, 15 and 30 to verify whether Brown even showed up on Company property. Instead, Judge Carissimi erroneously credited Brown’s testimony that he regularly showed up for work during this time period even though he is a convicted felon. (Decision, p. 10.) Thus, of the 30 days in June 2008, Midwest, at most, potentially refused to hire Brown on only 6 days. Accordingly, Midwest has sufficiently rebutted General Counsel’s prima facie case for the month of June.

² “C” =’s Crane; “F” =’s fork lift; “E” =’s end loader and “FP” =’s fall protection.

³ The working union foreman assists and helps out with all of the activities taking place on a particular day. (Tr. 795.)

In July 2008 Brown performed work on July 5-6, 8, 12, 21 and 28-29. (G.C. 35.) The Gate Logs illustrate that Brown did not report to work on July 1, 3, 10, 22 and 30. (Jt. 17(B)-(E), (M), (NN), (GGGG) and (LLLLL).) On July 26 Midwest only hired persons from the skilled list. (G.C. 27 & 35(LL).) On July 1- 3, 7, 10-11, 14-18 and 23-25 Midwest only hired persons from the skilled list and the top person (Claude Tucker) from the regular list. (G.C. 27 & 35(A)-(C), (K), (P), (Q), (S)-(W) and (FF)-(JJ).) On July 31 Midwest hired the top person from the regular list and Ward was the Foreman.⁴ Ward operated an end loader; a piece of equipment brown is not qualified to operate. (G.C. 27 & 35RR.) Thus, there are only three days (July 9, 19 and 20)⁵ when persons lower in seniority than Brown were hired from the regular list. (G.C. 27 & 35(O) and (Y)-(AA).) There are no Gate Logs for July 19 and 20 to verify whether Brown showed up on Company property. Accordingly, Midwest has sufficiently rebutted General Counsel's prima facie case for the month of June.

In August 2008 Brown performed work on August 1, 4-5, 24, 28 and 30-31. (G.C. Ex. 36.) On August 2 Midwest only hired men from the skilled list. (G.C. 27 & 36(c).) The Gate Logs illustrate that Brown did not report to work. (Jt. 18, pp. 15, 17 and 20.) On August 16 Midwest hired Ward as the foreman and not everyone from the skilled list was hired. (G.C. Ex. 36(v).) On August 8, 12 and 14-15 Midwest hired the top person from the regular list and Ward was the foreman. (G.C. 27 & 36(j)-(k), (n)-(o) and (r)-(u).) On August 18-22, 26 and 29 Midwest hired the top person from the regular list, Ward was the foreman and Christopher Fussel was listed as a crane trainee. (G.C. 27 & 36(w)-(cc), (ll) and (pp).) As such, there are only five

⁴ Ward was working as a foreman during this time period in order to prepare him to join the skilled list which he did by late fall of 2008. (Tr. 796-797.) The Company was attempting to fill slots on the skilled list as Brown continued to turn down opportunities to do so.

⁵ There are no time records for July 4, 13 and 27.

days (August 9, 11, 13, 23 and 27)⁶ when persons lower in seniority than Brown were hired from the regular list (G.C. 27 & 36(l)-(m), (p)-(q), (dd)-(ee) and (mm)-(nn) and there are no Gate Log records for August 9, 13, 23 and 27 to verify whether Brown even showed up on Company property. Accordingly, Midwest has sufficiently rebutted General Counsel's prima facie case for the month of August.

III. RESPONDENT LAWFULLY DISCIPLINED MIGUEL RIZO, JR. AND, AS SUCH, DID NOT VIOLATE SECTIONS 8(a)(1) OF THE ACT

Judge Carissimi determined that MWTTI's August 19, 2011 discipline issued to Miguel Rizo, Jr. ("Rizo, Jr.") violated Section 8(a)(1) of the Act. (Decision, p. 23.) Midwest did not discipline Rizo, Jr. because he filed a grievance. Rather, Midwest disciplined Rizo, Jr. because he was seeking a monetary remedy for an 8 hour day on a day which he did not present himself for hire; a violation of established Company policy. To be sure, merely engaging in concerted protected activities does not confer immunity upon an employee from the consequences of violating established company policies, rules and practices. See, *Contort & Co., Inc.*, 275 NLRB 560, 583 (1985). See also, *Media General Operations, Inc., d/b/a The Tampa Tribune*, 246 NLRB 269, 370 (2006) (Employee's involvement in union activity does not grant immunity from discipline for unrelated misconduct.)

Midwest maintains that *United Parcel Service of Ohio*, 321 NLRB 300, 323-324 (1996) is inapposite to the facts herein and, as such, Judge Carissimi's reliance upon it is erroneous. Judge Carissimi determined that Rizo, Jr. filed the grievance in good faith and that Rizo, Jr. did not falsely claim he was present at shape-up on the day in question. Hence, there was no intent to deceive the Respondent. Judge Carissimi noted that "the lack of any intent to deceive was

⁶ There are no time records for August 3, 10 and 17.

given great weight by the Board in finding that the grievances that were filed in that case were protected.” (Decision, p. 23.) Likewise, General Counsel maintains that Rizo, Jr. did not intend to deceive Respondent because “[h]e never alleged that he appeared for shape up. Instead he asserted that he is entitled to be made whole because the Employer hired non-bargaining unit employees to perform unit work.” (Answering Brief, p. 13.) Notwithstanding, Rizo, Jr. did misrepresent facts in order to receive personal gain, i.e. receive 8 hours pay for a day in which he did not make himself available for work.

The grievance filed by Rizo, Jr. was not a class action grievance on behalf of the entire bargaining unit, but instead was an individual demand to be made whole. Put another way, Rizo, Jr. was seeking to get 8 hours pay for an alleged wrong against bargaining unit employees that transpired while he was home sitting on the couch. Therefore, his demand for pay was necessarily “baseless and fraudulent” as noted in his discipline. Rizo Jr.’s demand for 8 hours pay while he was home sitting on the couch is equivalent to an employee submitting timesheets and demanding pay for time that the employee did not work. It is for this reason, and not the filing of a grievance, that Rizo, Jr. was disciplined. See, e.g., *United States Postal Service*, 310 NLRB 530 (1993) (upholding former chief shop steward’s discharge for falsifying court leave documents for additional pay); *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672 (2004) (upholding discharge of employees who prepared and submitted fraudulent timesheets); *The Children's Mercy Hospital*, 311 NLRB 204 (1993) (finding discharge for falsification of record and misrepresentation of the facts was lawful); *Asarco, Inc. v. NLRB* 86 F.3d 1401 (5th Cir. 1996) (finding union membership does not insulate an employee from discipline for flagrant violations of employer policies). To be sure, during the course of his employments Rizo, Jr. has

filed numerous grievances and was not disciplined as a result of filing those grievances or any other grievances he has filed. (Tr. 687-688 & See, e.g. G.C. 16(1)-(16).)

IV. CONCLUSION

For the reasons outlined in this Reply Brief, its Exceptions and in accordance with the record evidence, the Respondent respectfully requests that the Board find contrary to Administrative Law Judge Carissimi's rulings, findings, conclusions and the recommended Order with respect to the issues raised in its Exceptions.

Dated at Dublin, Ohio on this 21st day of February, 2014.

Respectfully submitted,

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