UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRINK'S, INC. and FEDERATION OF ARMORED CAR WORKERS	Case 29-CA-097556

GENERAL COUNSEL'S REPLY BRIEF IN OPPOSITION TO RESPONDENT'S ANSWERING BRIEF AND IN FURTHER SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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The General Counsel ("GC") hereby files this Reply Brief in opposition to Respondent's Answering Brief and in further support of the GC's exceptions to the Decision and Recommended Order (the "Decision") of Administrative Law Judge Margaret G. Brakebusch (the "ALJ").

FACTS

The facts have been set forth in the GC's Brief in Support of Exceptions to the Administrative Law Judge's ("Exceptions Brief") and other briefs and will not be repeated herein. The purpose of this Reply Brief is to respond to several misleading and incorrect arguments and contentions set forth in Respondent's Answering Brief to the General Counsel's Exceptions ("Answering Brief").

ARGUMENT

A. The Record Evidence Firmly Establishes that Francis Engaged in Protected Union Activity Prior to January 3, 2013

Respondent's Answering Brief erroneously states that "GC contends that the ALJ should have. . . found that Francis was distributing union cards in October or early November 2012. . . ." (Answering Brief, p. 8.) However, this is simply not the GC's contention. Instead, the GC contends that the ALJ erred in finding no evidence that Marvin Francis solicited authorization cards on behalf of Federation of Armored Car Workers ("Union") prior to January 3, 2013. To that end, the record establishes that, despite the inability of Francis and employee witness Franklin Esammason to recall the exact dates on which they engaged in Union organizing activity, the mutually-corroborating testimony of these witnesses confirms that Francis distributed authorization cards to co-workers long before Union attorney David Cann faxed a letter to Respondent on January 3rd explicitly notifying Respondent's Strategic Market Director Michael Foreman of Francis' participation in the Union organizing committee. Thus, the critical factor for the Board to consider in relation to the timing of Francis' union activity is whether he engaged in

such activity prior to January 3, not the precise dates prior to January 3rd on which Francis's Union activity occurred.

Respondent's suggestion in the Answering Brief that an adverse inference should be drawn against the General Counsel for its failure to call an employee to testify that Francis gave him/her an authorization card is plainly wrong. First, Esammason, a non-supervisory employee of Respondent provided ample, corroborative testimony regarding Francis' Union activity and that Francis distributed Union authorization cards to co-workers at Respondent's facility in Brooklyn, New York (the "Brooklyn Branch"). Thus, the evidence establishing Francis's activities in assisting in the Union organizing drive is, in fact, corroborated. Respondent's suggestion that the GC should have called additional employee witnesses to testify on behalf of Francis ignores the reality of the difficulty in persuading current employees to testify adversely to their employer's interests. The GC was not required to call additional employee witnesses to further substantiate Francis' testimony, which was already corroborated by Esammason, and the Board should draw no adverse inference against the GC for its failure to call additional non-supervisory employees.

B. Respondent's Contention that Evidence Establishing Its Knowledge of Francis' Union Activity on December 15, 2012 Was Not Undisputed Should Be Disregarded

The record establishes that on December 15, 2012, employee Tameka Grant, who had a close personal and working relationship with Senior Route Logistics Manager Garth Young, observed Francis distributing Union authorization cards inside the Brooklyn Branch and told Francis, "Ooh, I'm telling. You're going to get in trouble," before proceeding directly into Young's office. (Tr. 141-44, 301.) No testimony was offered to contradict these facts.

Respondent's Answering Brief, however, avers that this evidence establishing Respondent's knowledge of Francis' union activity at least as of December 15 was refuted by other record evidence. (Answering Brief, p. 17-18.) Yet the only evidence Respondent points to in support of this contention is Young's self-serving testimony that he was unaware of any union

activity in December 2012 and Respondent's false characterization of the testimony of Tracy Williams regarding when Francis' name was first raised by Respondent's managers in connection with the Union organizing campaign.[1] None of the evidence cited in Respondent's Answering Brief directly relates to what occurred on December 15 between Francis, Grant and Young, and significantly, Respondent did not rebut Francis' testimony concerning those events.

Respondent suggests that the Board should draw an adverse inference against the General Counsel for failing to ask Young, on cross-examination, questions about Young's knowledge of Francis' union activity. This contention is absurd. The General Counsel cannot be expected to elicit further self-serving denials from a supervisor and agent of Respondent such as Young. Rather, the appropriate adverse inference for the Board to draw is against Respondent for its failure to elicit any testimony from Young whatsoever concerning his discussions with Grant about Francis' Union activity. See e.g., *Bay Metal Cabinets*, 302 NLRB 152, 173 (1991), enf'd 940 F.2d 661 (6th Cir. 1991) (adverse inference drawn based on failure of witness to testify as to certain material matters). Respondent had ample opportunity to counter the evidence presented by Francis on this issue, and its decision not to offer *any* evidence refuting Francis' testimony regarding what occurred on December 15 compels the conclusion that Young would not have been able to credibly contradict that Grant told him about Francis distributing Union cards on December 15.

C. Board Law Does Not Support the ALJ's Analysis of the Evidence Establishing Animus

In her Decision, the ALJ found that because there was no evidence establishing any independent violations of Section 8(a)(1) of the Act, the record did not contain any evidence of Respondent's animus against Francis' union activity. Respondent argues in its Answering Brief

[1] As explained more fully in GC's Exceptions Brief, and contrary to Respondent's contention, Williams testified that in December 2012, Respondent's managers began discussing Francis as possibly being one of the employees involved in Union organizing during their daily managers' meetings. (Tr. 320-21.)

that "substantial authority" supports the ALJ's interpretation of the law, yet it cites not a single Board decision upholding the ALJ's finding. (Answering Brief, p. 21.) That is because, as Respondent seemingly acknowledges, Board law holds that an employer's lawful anti-union statements or comments may nevertheless be considered as evidence of the employer's animus toward its employees' union activities. See e.g., *Tim Foley Plumbing Serv., Inc.*, 337 NLRB 328, 329 (2001).

Having misinterpreted the applicable legal standard, the ALJ could not have, as Respondent contends, conducted a full and fair evaluation of the evidence establishing Respondent's animus. Rather, the ALJ's misinterpretation and incorrect application of Board law was a material error and caused her to disregard crucial evidence of animus, as set forth fully in the GC's Exceptions Brief.

D. Evidence Establishing Young's Animus against Francis May Be Imputed to Respondent, Even Though He was Not the One Who Ultimately Decided to Terminate Francis

The record evidence establishes that, after observing Francis advocating to employees on behalf of the Union outside the Brooklyn Branch on January 17, 2013, Senior Route Logistics Manager Garth Young remarked to Route Logistics Supervisor Tracy Williams that "Francis has a lot of nerve doing something like that after everything I've done for him." Respondent contends in its Answering Brief that this evidence cannot be used to support a finding that the anti-union animus clearly reflected in Young's statement motivated Respondent's decision to discharge Francis because it was Strategic Market Director Michael Foreman, not Young, who made final decision to terminate Francis. (Answering Brief. p. 23-24.) Respondent's contention, however, does not comport with applicable Board law and precedent.

The Board has repeatedly held that statements demonstrating animus made by a supervisor or agent of an employer provide evidence of animus, even though the supervisor or agent who made such statements \was not the one who made the ultimate decision to take the adverse

employment actions in question. See e.g., *GM Electrics*, 323 NLRB 125 (1997); *Diehl Equip. Co.*, 297 NLRB 504 (1989); *Willamette Industries, Inc.*, 341 NLRB 560, 562 (2004). For example, in *GM Electrics*, the Board overturned the administrative law judge's finding that statements of animus made by the employer's secretary could not be attributed to the employer. 323 NLRB at 125-26. The Board in that case found that the secretary was acting as an agent of the employer under Section 2(13) of the Act, and her statements could thus be imputed to the employer to establish the employer's animus, despite the fact that the employer's owner was the one who ultimately made the decision not to hire the employees in question. *Id.* Similarly, in *Diehl Equipment Co.*, statements of animus made by the employer's receptionist were imputed to the employer and formed the basis of the Board finding animus sufficient to establish a Section 8(a)(3) violation. 297 NLRB 504 at fn. 2; see also *Willamette Industries, supra*, 341 NLRB at 562 (finding statement of animus by a supervisor other than the one who decided to take the adverse employment action in question established animus).

In the current case, Respondent admits that Young is a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. (Joint Exh. 1.) Thus, Young's statements reflecting animus against Francis' union activity are properly imputed to Respondent. Moreover, Respondent's suggestion that Young played no role in the decision to terminate Francis is belied by the evidence demonstrating that Young held significant influence over Foreman's personnel decisions. In particular, the evidence indicates that in 2011, Foreman was prepared to discharge Francis for his involvement with a missing CompuSafe, but Young persuaded Foreman not to discharge Francis at that time. (Tr. 577-78.) In explaining the matter to Francis, Young testified that he told Francis "the decision was made to kind of like terminate your employment. **And ultimately it's my decision and I'm not going to do it.**" (Tr. 578) Additionally, Young testified that his "duty is to oversee the entire operation of the branch," with particular focus on the

Route Logistics or Cash-In-Transit department where Francis worked. (Tr. 570.) Thus, the evidence strongly suggests that Young had at least some role in Respondent's ultimate decision to discharge Francis – evidence that the ALJ ignored – and Young's statements demonstrating animus against Francis for engaging in union activity furthers the GC's showing that Respondent's animus motivated the discharge.

Respondent's Answering Brief cites several cases in an effort to temper the significance of Young's statements. These cases are easily distinguishable. In *Vae Nortrak North America, Inc.*, 344 NLRB 249 (2005), the Board affirmed the administrative law judge's finding that a statement made by the employer's plant manager at the time could not establish that anti-union animus factored into the adverse employment decision in question because the record was clear that the plant manager took no part in the decision. *Id*. at fn. 3. There, in sharp contrast to the present situation, the Board noted that the plant manager was not even employed by the respondent at the time the decision was made. Unlike the plant manager in *Vae Nortrak*, Young in this case remained in a critical supervisory position of authority at all relevant times, including the period when the decision to terminate Francis was made.

Likewise, in *JS Mechanical, Inc.*, 341 NLRB 353 (2004), the Board affirmed a ruling that a supervisor's statements could not have motivated the employer's decision not to hire a union adherent because the supervisor had no part in the decision. *Id*. at fn. 7. In that case, however, the judge explicitly found that the supervisor's statement did not reflect anti-union animus, and further, the supervisor neither interviewed the applicant nor gave any advice or information to the ultimate decision-maker regarding the applicant. To the contrary here, Young's statement reflects unmistakable animus, and the evidence establishes that Foreman relied on Young to give input concerning personnel actions, as explained above.

Finally, in *Brown & Root Industrial Servs.*, 337 NLRB 619 (2002), also cited by Respondent, the Board declined to infer that the employer's hiring decisions were motivated by union animus based on statements from a supervisory foreman. *Id*. However, again unlike the present case, the record was clear that the foreman who made the statement reflecting animus played no part in the decision not to hire the alleged discriminatees because the foreman worked only in the employer's instrument department overseeing instrument fitters, and he had no role in overseeing the electrician position for which the alleged discriminatees had applied. *Id*. Clearly in the present case, Young had an active and ongoing role in overseeing Francis' position as a Messenger in the Route Logistics or Cash-In-Transit department.

Thus, the foregoing illustrates that Young's statement must be imputed to Respondent, and it provides strong evidence of the animus that motivated Respondent's decision to discharge Francis. The ALJ plainly erred in disregarding this evidence.

E. Francis' Involvement with the Missing CompuSafe in 2011 Did Not Form the Basis of Its Decision to Terminate Francis

In its Answering Brief, Respondent falsely contends that the evidence establishes that Francis' involvement with a missing CompuSafe in July 2011, which resulted in an approximately $31,000 loss to Respondent, was a motivating factor behind Respondent's decision to terminate Francis. However, Foreman – the ultimate decision-maker behind Francis' termination – testified that Francis was discharged for his involvement in four losses sustained by Respondent in 2012 from automated teller machines (ATMs) operated by Respondent's customer Global Cash Access at the Resorts World Casino (the "Casino losses"). (Tr. 561-63; GC Exh. 19(b).) Foreman further acknowledged that, in stating the reasons for Francis' termination in Francis' termination letter, Foreman declined to include any reference to the 2011 CompuSafe incident, or any other alleged misconduct on the part of Francis, aside from the Casino losses. The evidence thus establishes

that, at the time it discharged Francis, Respondent's stated bases for the termination were the Casino losses, and not any other incident.

In its Answering Brief, however, Respondent claims that Foreman's December 26, 2012 e-mail to Senior Human Resources Director Bryan Rosenthal and Vice President of Operations Bill Vechiarella requesting a termination letter be prepared for Francis shows that the 2011 CompuSafe incident was considered by Respondent in the decision to terminate Francis. (Answering Brief, p. 35-36.) Yet, in addition to Francis' "past losses," Foreman's e-mail also makes reference to Francis "being late several days with an attitude of 'I don't care if I'm late'" as grounds for his termination. (Resp. Exh. 8(c).) Respondent offered no evidence to support Foreman's contention in this email regarding Francis' tardiness, and read as a whole, Foreman's December 26 email smacks of the type of "piling on" in order to justify an unlawful disciplinary action, which the Board has recognized as telltale evidence of animus and pretext. See *Enjo Contracting Co., Inc.*, 340 NLRB 1340, 1351 (2003) (affirming finding that the respondent's "shifting and piled on defenses" warranted an inference of animus and pretext). Like the tardiness defense stated in Foreman's December 26 e-mail, and all other lawful reasons proffered by Respondent to explain Francis' termination, the notion that the 2011 CompuSafe incident caused Respondent to terminate Francis after learning of his involvement in the Casio losses is illusory.

F. Respondent's Emphasis on Francis Being "A Common Denominator" in the Casino Losses Ignores the Undisputed Evidence that Other Employees Were Involved in Those Losses But Were Not Disciplined

Respondent argues that Francis was "a common denominator" in the Casino losses, and therefore would have been terminated despite any protected activity, while entirely ignoring evidence that there were other employees involved in these losses that were not disciplined or even interviewed by Respondent in connection with its investigation of the losses. (Answering Brief, p. 37, 42.) The record establishes that, for the Casino Route, each of the employees on the

route crew, including the Lead Messenger, the Assistant Messenger and the Driver, helped service the ATMs at the Casino. (Tr. 584-87.) The evidence further establishes that Respondent considered an employee as being potentially associated with a loss if he/she was on the route crew either the date the loss was discovered or the service date prior to the loss. (Tr. 387, 645, 704) The record is thus clear that several employees other than Francis were involved in multiple Casino losses, including Messengers Antonio Maysonet and Ruben Corchado, and Driver Crispolo Olivera. (GC Ex. 9-17, 32.)

Respondent, however, without any explanation whatsoever, ignored the other employees and their involvement in the Casino losses when determining that Francis was solely responsible and should therefore be terminated. Respondent did not discipline any of the other employees connected with the Casino losses, nor did it even have its Regional Security Manager Michael Buckley interview these employees as part of his investigation into the losses. (Tr. 825-27; GC Ex. 29.) Buckley's conduct during the Casino losses investigation differed markedly from his usual investigatory practices (Tr. 823-25.), and Respondent offered no evidence to evidence to explain the discrepancy. Respondent's apparent attempt to explain its disparate treatment and specific targeting of Francis to the exclusion of others cannot now be explained away by the simple assertion that he was "a common denominator" in these losses.

G. Respondent's Exception to the ALJ's Rejection of "After-Acquired Evidence" Is Procedurally Improper and Should be Disregarded

In its Answering Brief, Respondent seemingly excepts to the ALJ's rejection of "after-acquired evidence" concerning a loss sustained by Respondent from the servicing of a Bank of America ATM by one of Respondent's route crews (Answering Brief, p. 37). Section 102.46 (d)(2) of the Board's Rules and Regulations, however, clearly states that an answering brief "shall be limited to the questions raised in the exceptions and in the brief in support thereof." The Rules and Regulations therefore prohibit Respondent from raising in its Answering Brief any subject that

was not addressed in the GC's original Exceptions and Exceptions Brief. If a party filing an answering brief intends to respond to the ALJ's Decision regarding subjects not encompassed by the exceptions, party raising such issues must file cross-exceptions. See NLRB Rules and Regulations, Section 102.46 (e).

Respondent filed only an Answering Brief and did not file cross-exceptions. The GC did not include any discussion of the ALJ's ruling concerning the inadmissibility of "after-acquired evidence" from the Bank of America ATM loss in its Exceptions or the accompanying Exceptions Brief. Thus, Respondent's attempt to use its Answering Brief as vehicle to file cross-exceptions to the ALJ's Decision is procedurally improper, and this portion of the Answering Brief should be disregarded entirely.

CONCLUSION

The GC respectfully submits that, for the reasons set forth herein and in its Exceptions Brief, the record establishes that Respondent's suspension and termination of Marvin Francis violated Sections 8(a)(1) and (3) of the Act. The Board should sustain the GC's Exceptions in their entirety, reverse the ALJ's findings of fact and conclusions of law and modify the ALJ's Order with an appropriate Order adequately remedying these unfair labor practices.

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