UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

VOITH INDUSTRIAL SERVICES, INC.,
Respondent,

and Case 09-CA-097589

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL UNION NO. 89, a/w,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Charging Party.

ANSWERING BRIEF OF CHARGING PARTY TEAMSTERS LOCAL 89

Charging Party Teamsters Local Union No. 89 presents this answering brief, pursuant to Section 102.46(d)(2) of the Board's Rules and Regulations, in support of the Decision and recommended findings of fact and conclusions of law of the Administrative Law Judge, the Honorable Paul Bogas, issued January 23, 2014 in the above-referenced case. Respondent Voith Industrial Services, Inc. ("Voith") has again engaged violations of Sections 8(a)(1), (3), (4) and (5) of the Act at the Employer's Louisville, Kentucky facilities, particularly in regards to the unjust employment terminations of employees Kelly Stein and Patti Murphy. Charging Party Teamsters Local Union No. 89 supports the arguments and analysis presented by Counsel for the General Counsel's March 26, 2014 Answering Brief in the present case. Charging Party Teamsters Local Union No. 89 opposes Respondent's March 12, 2014 Exceptions and Brief herein by answering the salient points of Respondent's latest battle array in the "War against the Teamsters"[1]. (ALJD, page 4, line 34).

[1] The sixty year history of the collective bargaining unit and wage, benefit and conditions standards established by skilled Louisville, Kentucky area employees, represented by the Teamsters and its Local 89, providing labor for finished vehicle loading and distribution for Ford Motor Company, is described in the record and referenced in the Decision of Administrative Law Judge Bruce D. Rosenstein in *Voith Industrial Services, Inc., et al.*, Case 09-CA-075496, etc., December 21, 2012, currently pending Respondent's Exceptions before the Board.

MERITLESS EXCEPTIONS TO ALJ'S CREDIBILITY DETERMINATIONS

One basis for the ALJ's credibility determination that credited all General Counsel's witnesses, including former Voith supervisor Jason Miller, discredited the testimony of Respondent's Facility Manager Jason Wilson and found additional evidence of an illegal motive attributed to Respondent, was that the during the pendency of the trial before Judge Bogas in this case Wilson sent a mobile text message to Voith manager Bret Griffin, and Voith supervisor Jeremy Spears that stated: "Fukin Miller is here to testify on behalf of the Teamsters." (Tr. 947 to 951; GC Exh. 49(a) and GC Exh. 49(b); Respondent Exceptions 1 and 2). When this text message was revealed, in Respondent's document response to a General Counsel subpoena, Wilson testified to Judge Bogas that "[i]t was sent the last time we all gathered together at the Federal Building Downtown." (Tr. 948, lines 11-12).

Respondent's Exceptions 1 and 2 seek a finding that former Voith supervisor Jason Miller had not testified before Judge Rosenstein at a Federal Building in downtown Louisville in an earlier proceeding. But such an exception is irrelevant to the issues litigated in this case. Respondent has **not** filed Exceptions to the finding of Judge Bogas that, during the time an NLRB Regional Director's Complaint was being litigated by the General Counsel before an ALJ in an open hearing, at a time when subpoenaed witnesses for the General Counsel were waiting to testify against Respondent Voith, Voith Facility Manager Wilson sent a mobile text message to Voith Regional Manager Bret Griffin, and Voith supervisor Jeremy Spears that "Fukin Miller is here to testify on behalf of the Teamsters." (ALJD page 2, lines 44 to 46).

Respondent's Exceptions 1 and 2, therefore, concern only a tangential point that does not affect the judge's findings on the essential factual issues in the present case. See *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 561-562 (1979), enfd. in relevant part, 751 F.2d

1571 (11th Cir. 1985)(ALJ's erroneous citation to a separate ALJ's credibility determination regarding a witness in another case did not merit reversal), cited in *Pratt (Corrugated Logistics), LLC*, 360 NLRB No. 48, slip op. page 1, fn. 1 (Feb. 21, 2014). Even Respondent's counsel has not made a reasoned argument, either in Respondent's Exceptions Brief or at trial (Tr. 951, lines 3 to 7), to challenge the Judge's ruling that the text message from Wilson is evidence of "animus towards people testifying at Board proceedings." (Tr. 951, lines 3 and 4).

Respondent Voith has failed to present a convincing argument that the clear preponderance of all the relevant evidence in this case requires this Board to depart from its established policy not to overrule an administrative law judge's credibility resolutions. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd., 188 F.2d 362 (3d Cir. 1951). Respondent's Exceptions 1 and 2 should be overruled.

SECTION 8(A)(1) AND WILSON'S DECEMBER 21 THREATENING STATEMENT

The ALJ correctly concluded that Respondent's Facility Manager Wilson's statements to employees Kelly Stein, Patti Murphy and Sandra Rhodes during a disciplinary meeting on December 21, 2012 violated Section 8(a)(1) of the Act. (ALJD, page 17, lines 29 to 32). Respondent has **not** filed exception to the ALJ finding that Wilson warned Ms. Murphy and Ms. Stein to "refrain from [making] threats of calling OSHA and the NLRB" and that Wilson told these employees not to make such statements to supervisors or others in the office building. (ALJD, page 16, lines 10 to 13; Respondent Exception 12). When Ms. Stein answered, in concert with Ms. Murphy and Ms. Rhodes, that she "wasn't going to stop calling OSHA or the Labor Board" if Voith managers "continued to do things that were against the law" (Tr. 77, lines

7-9), Wilson admitted that he said "I need for you all to stop doing that." (ALJD, page 16, line 14; Tr. 909, line 25 to Tr. 910, line 1).

Respondent's Exception 12 challenges the ALJ finding that, by this conduct of Respondent's supervisor, "the Respondent coercively threatened employees in violation of Section 8(a)(1)". (ALJD, page 17, lines 29-30). Respondent's challenge does not deny the statements of its supervisor Wilson, or the protected nature of employee filing of work place complaints with OSHA and the NLRB. (Resp. Brief page 9).

Respondent's Exception 12 turns solely on an affirmative defense, not plead in Respondent's Answer in this case, that the statements Ms. Murphy and Ms. Stein made to Wilson and other supervisors were of the same nature as the employee in *Atlantic Steel Company*, 245 NLRB 814 and 816 (1979), who lost protection of the Act by addressing supervisors during a workplace session while using the term "lying son of a bitch," or "m--f--lie" (or "liar"). (Resp. Brief page 11). Because the evidence in this record as to the actions and statements of Ms. Murphy and Ms. Stein shows the fully protected nature of their statements and conduct, and because the record shows that the only person using the "F" word is Voith supervisor and agent Jason Wilson, Respondent's Exception 12 should be overruled. See, *Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at page 2 (March 25, 2014).

SECTION 8(A)(1), (3) & (4): DISCIPLINE / DISCHARGE OF MURPHY AND STEIN

The decision of the Administrative Law Judge in this case makes appropriate findings and conclusions on this record that Respondent Voith Industrial Services, Inc. violated Sections 8(a)(1), (3) and (4) of the Act by:

- Issuing discipline to Ms. Stein and Ms. Murphy on December 21, 2013 for refusing to work. (ALJD, page 17, line 35 to page 21, line 18; Respondent Exception Nos. 13, 15, 17),

-Issuing Suspensions to Ms. Stein and Ms. Murphy on December 21, 2013 for claims of failure to comply with the UAW-negotiated attendance policy. (ALJD, page 17, line 35 to page 21, line 18; Respondent Exception Nos. 4, 5, 6, 7, 8, 13) and

-Terminating the employment of Ms. Stein and Ms. Murphy on January 4, 2013. (ALJD, page 21, line 20 to page 22, line 7; Respondent Exception Nos. 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16)

Counsel for the General Counsel analyzed the record in their October 25, 2013 post-hearing brief to the ALJ in this case, at pages 8 and 9, regarding the context of this discipline as follows:

> "On December 15, Respondent's Vice-President of Operations, Darrin McElroy, sent an e-mail to Regional Manager Bret Griffin and Jason Wilson congratulating them on their performance at the LAP 'especially considering the stress and distractions of the Teamster nonsense.' (Tr. 565-66; GC Exh. 33) On December 18, Stein, Murphy and the rest of their crew were assigned to load rail, however, there were no gloves. (Tr. 69, 209) Because gloves are needed to safely perform rail loading duties, Supervisor Elizabeth Dawson told the entire crew to stage units (i.e. park them for later loading) until the gloves arrived. (Tr. 70, 209-10) No supervisors did anything to indicate that they disapproved of this. (Tr. 212)
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> "Murphy and Stein were off work on December 19. (Tr. 280; GC Exhs. 38, 39) Murphy was also off work on December 20. (Tr. 212; GC Exh. 50) On December 21, 2012, Judge Rosenstein issued his decision in the first *Voith* trial. That same day, Supervisor Elizabeth Dawson called Stein, Murphy and Rhodes into her office and told them that they were being written up for refusing to load in the dark. (Tr. 72). Despite the fact that Stein, Murphy and Rhodes requested union representation at the meeting, no representative was offered. (Tr. 73-4, 146, 214) Stein tried to give a handout to Dawson explaining Weingarten rights, but Dawson refused to take it. (Tr. 74; GC Exh. 3) Dawson handed out written warnings to Stein, Murphy and Rhodes. Stein and Rhodes handed the warnings back to Dawson, but Murphy did not. (Tr. 72-3; GC Exh. 13) Murphy's warning is

> characterized as a 'disciplinary action' issued because the employees allegedly refused to load rail on December 19. (GC Exh. 13) The three employees told Dawson that they were not even at work on the day that they supposedly refused to work in the dark. (Tr. 73, 216) At the hearing of this matter, Stein and Murphy testified unequivocally that they never refused to work in the dark after August 1. (Tr. 68, 75, 206) After the encounter with Dawson, Stein and Murphy returned to work. The discipline issued to Stein and Murphy is, apparently, the only instance of anyone being disciplined by Respondent for refusing to perform work since July 1. (Tr. 538-39)"

Respondent Voith argues now that its supervisors absolved themselves of Dawson's obviously unlawful refusal-to-work discipline of Ms. Murphy and Ms. Stein on December 21, 2012 and placed themselves, within a matter of a few hours, on a course to terminate Ms. Murphy and Ms. Stein "for cause" under Section 10(c) of the Act by Wilson for violations of the UAW-negotiated absentee policy, **if** the Board would reverse the ALJ's refusal to apply the repudiation of unlawful conduct principles under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). (Resp. Brief at page 16). There are no grounds on this record for this Board to do so. (ALJD, page 21, lines 1 to 14 and footnote 16).

Wilson's claimed repudiation of Dawson's conduct did not admit wrongdoing, only that she got the date wrong because both Ms. Stein and Ms. Murphy were not scheduled to work on December 19th, and failed to give assurance to employees that the Respondent would not interfere with their Section 7 rights in the future. As noted by the ALJ, Wilson's withdrawal of the Dawson discipline was accompanied by additional unfair labor practice conduct. Respondent, therefore, clearly failed to satisfy the standards for repudiation set forth in *Passavant*. See, *Pride Care Ambulance,* 356 NLRB No. 128, slip op. at 6 (2011).

The ALJ was correct in finding that Respondent discriminated in violation of Section 8(a)(1), (3) and (4), when it issued disciplinary suspensions to Ms. Murphy and Ms. Stein on December 21, 2013, and terminated them on January 4, 2013. Under the Board's *Wright Line*

decision, in cases alleging discrimination in violation of Section 8(a)(3), the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

The General Counsel, as pointed out in the Answering Brief filed March 26, 2014 at pages 8 to 12, met this burden in this record by showing that: (1) Ms. Murphy and Ms. Stein engaged in union or other protected activity, (2) the Respondent Voith managers and supervisors knew of such activities, and (3) Respondent Voith harbored animosity towards Ms. Murphy's and Ms. Stein's support for Teamsters Local Union No. 89 because of its effective representation of LAP loading and yard employees for many years, and harbored particular animosity toward their the protected activity in making OSHA complaints and supporting Local 89's filing of NLRB charges against Voith by their testimony before Judge Rosenstein in Case 09-CA-075496, etc. (ALJD, page 18, line 12 to page 19, line 31). See, *Lucky Cab Co.*, 360 NLRB No. 43, slip op. pages 4 to 7 (Feb. 20, 2014). The evidence of *prima facie* unlawful animus by Voith was so extensive in this record that the ALJ did not need to rely on the unlawful animus in record before Judge Rosenstein. (ALJD, page 19, footnote 14). The *Wright Line* burden properly shifted to Respondent Voith.

This Board recently describes the Respondent's burden under *Wright Line* in the opinion in *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at page 6, as follows:

> "The burden shifted to the Respondent to prove, as an affirmative defense, that it would have discharged them even in the absence of their organizing activities. *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 2 (2010); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). This burden may not be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon for the discharge. Rather, as

> the Board has consistently held, a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. at 5 (2011). Further, an employer does not carry its *Wright Line* burden merely by asserting a legitimate reason for an adverse action, where the evidence shows it was not the real reason and that protected activity was the actual motivation. *T&J Trucking Co.*, 316 NLRB 771, 771–773 (1995), enfd. mem. sub nom. *NLRB v. T&J Container Systems*, 86 F.3d 1146 (1st Cir. 1996); *Stevens Creek*, supra, 357 NLRB No. 57, slip op. at 5; *Metropolitan Transportation Services*, 351 NLRB 657, 659–660 (2007)." (Full citations in slip opinion)

Respondent Voith belabors this Board with ingenious arguments, in the face of stark facts in this record showing that the discriminatory application of the absentee policy contained in the National Voith-UAW collective bargaining agreement, found to violate Section 8(a)(2) of the Act by Judge Rosenstein, was the pretext for the suspension and discharge of Ms. Stein and Ms. Murphy. (Tr. 623-624; Resp. Exh. 5, p. 38-40). Therefore, the attendance policy itself violated Section 8(a)(5) of the Act under the Order on the Motion for Limine (ALJD, page 3, lines 38 to 42) and Judge Rosenstein's decision. The discriminatory application of the terms of the Voith-UAW CBA policy, as to Ms. Murphy and Ms. Stein owing to the UAW representation and appeal procedures under the National Voith-UAW collective bargaining agreement that were not afforded to employees who showed support for Teamsters-representation, highlights the pretextual nature of Respondent Voith's claimed *Wright Line* defense. (ALJD, page 21, line 20 to page 22, line 4).

Counsel for the General Counsel clearly showed that Voith managers acted against Ms. Stein and Ms. Murphy in the December 2012 "heat" of the issuance of Judge Rosenstein's 12/21/2012 decision, the January 3, 2013 speech by Voith Regional Managers that it was futile for the employees to seek support of Teamsters Local 89 in this dispute, the renewed December 28, 2012 bargaining demands of Local 89 (GC Exh. 21) and Voith's internal discussions seeking

to find a more favorable forum to continue their unlawful interference and coercion of employees' Section 7 rights. Voith manager Erwin Gebhardt knew that the actions taken by Voith LAP supervisors to "get rid of the problems" at LAP (Tr. 517, lines 4 to 11) would lead to the current Complaint case, when he advised Wilson in an email dated December 29, 2012 that "We will receive a charge on this but cannot ignore the issue", while he exclaimed, "Of course they [Stein and Murphy] will not receive their holiday pay for Xmas Eve and Xmas!" (Resp. Ex. 29).

Counsel for the General Counsel has also shown that Voith's claims that Ms. Murphy and Ms. Stein may have been terminated under the terms of the Teamsters Agreement at LAP, in any event, are also unavailing based on the testimony of the Teamsters Business Agent Avral Thompson (Tr. 342, 345, 346, 367 and 378), particularly where Voith fails to acknowledge that, by its own records, Ms. Kelly and Ms. Murphy maintained 40 hours of earned and unused vacation accrual time on the date of their unjust termination. (Resp. Exhs. 13 and 15). The ALJ correctly rejected Voith's belated arguments on this point. (ALJD, page 22, footnote 17). Respondent is not entitled, on this record, to a Section 10(c) defense under *Anheuser-Busch*, 351 NLRB 644 (2007). Voith has no just cause in its termination of Ms. Stein and Ms. Murphy.

SECTION 8(A)(5) AND (1): UNILATERAL CHANGES REGARDING POLICIES ON ATTENDANCE AND LOADING RAIL CARS DURING NON-DAYLIGHT HOURS

Finally, Respondent's Exceptions Nos. 3, 21, 22 regarding the ALJ findings and conclusions of violations of Section 8(a)(5) of the Act should be overruled. (Resp. Brief, pages 36 to 40). Board has precluded a party from relitigating determinations of successorship and bargaining obligation reached in a prior proceeding where, as here, the parties in the two proceedings are the same and the factual findings are necessary to support the judgment in the

prior proceeding. See *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1024-1025 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992). Respondent Voith's unilateral changes to the policies on attendance and rail loading in non-daylight hours established under the Teamsters CBA at the Ford Louisville Assembly Plant were shown by the Counsel for the General Counsel to have violated Section 8(a)(5) of the Act.

After the issuance of the Regional Director's Complaint in Cases 09-CA-075496, etc., Respondent implemented and began enforcing a new attendance policy at the LAP which had been previously bargained with the UAW. (Tr. 694; Resp. Ex. 5). Respondent did not bargain with the Teamsters over the newly implemented attendance policy at the LAP. (Tr. 22). Under Jack Cooper Auto Handling's attendance policy, doctors' notes on behalf of the employee or family members were sufficient to excuse an unlimited number of absences. (Tr. 110, 171, 224; G.C. Ex. 20, p. 3). Sick days were also available, but were not used for absences that were excused by doctors' notes. (Tr. 350).

The discipline process was not implicated under Jack Cooper Auto Handling's attendance policy until an employee had three unexcused absences in a 30-day period. (Tr. 223-24, 269-70; G.C. Exs. 18(a), 19) The first instance of three unexcused absences would only result in a joint meeting with the employee, Teamsters 89 and the employer. (Tr. 342). The second offense would lead to a written reprimand. (Tr. 342). The third offense would result in a 1-week layoff and the fourth offense would be termination — but only after the case was sent to arbitration and the employee afforded union representation by Teamsters 89. (Tr. 346, 367). Disciplines stayed on an employee's record for six months. (Tr. 345).

Under the Voith-UAW attendance policy, a new point system with progressive discipline was implemented where Respondent vested its supervisors with nearly unlimited discretion in

excusing absences). (Resp. Ex. 5). Doctors' notes no longer, necessarily, excused absences unless granted at the discretion of the supervisors. Employees were limited to four "appeals" per rolling 12-month period under Respondent's attendance plan. (Resp. Ex. 5). There was no joint meeting with the Teamsters as a part of Respondent's policy. The ALJ findings on this point are supported by the record and Board law. *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 53 (2011); *Virginia Mason Hospital*, 357 NLRB No. 53, slip op. at 4 (2011). (ALJD, page 22, line 27 to page 23, line 4).

The Counsel for General Counsel also showed substantial evidence of the unilateral change in the non-daylight loading working conditions at the LAP. On August 1, 2012 Respondent's supervisors, Charlie Calhoun and Jason Miller, informed Stein, Murphy and the other members of their crew that they would be loading rail cars that day instead of performing the duties that they anticipated. (Tr. 61, 196-197). The crew performed shuttle work until about 1:00 a.m. when Calhoun told them that they would need to start loading rail. (Tr. 62). In her thirteen years of performing yard work at the LAP, including work for predecessor employer Jack Cooper Auto Handling, this is the first time that a supervisor ever ordered Ms. Stein and the other employees to load rail in the dark. (Tr. 62, 69). Likewise, Ms. Murphy had never experienced a request by management to load rail in the dark in her many years working in the yard at the LAP, including her time at Jack Cooper Auto Handling. (Tr. 199, 207-08, 259).

Teamsters 89 Vice-President Avral Thompson testified that since 1997, when he first acquired responsibility over the LAP as the union business agent, the policy was to load rail only in daylight because the facility was not equipped with proper lighting for night-time loading. (Tr. 306-07). Jason Miller also testified that when he worked for Jack Cooper Auto Handling, the policy was not to load rail in the dark. (Tr. 378). Respondent did not notify Teamsters 89 or

bargain with Teamsters 89 prior to implementing the new policy requiring employees at the LAP to load rail in the dark. (Tr. 22).

On this record, the ALJ properly found that the change to non-daylight loading working conditions at the LAP triggered the obligation to bargain because it was "material, substantial, and significant." *Crittenton Hospital*, 342 NLRB 686 (2004); *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991); *AK Steel Corp.*, 324 NLRB 173, 181 (1997) ("equipment and work rules related to job safety" are mandatory subjects of bargaining). (ALJD, page 23, lines 6 to 47). The ALJ also found that that work rules involving the imposition of discipline constitute a mandatory subject of bargaining. *California Offset Printers, Inc.*, 349 NLRB 732, 733 (2007); *General Die Casters*, 359 NLRB No. 7, slip op. at 1-2 (2012) (employer makes unlawful unilateral change by beginning to discipline employees for misconduct for which it did not previously impose discipline). (ALJD, page 23-24).

The Board should overrule Respondent's Exceptions to the findings and conclusions of the ALJ that Voith Industrial Services, Inc. violated Section 8(a)(5) of the Act through these unilateral changes of working conditions at the LAP.

CONCLUSION

Charging Party Local 89 respectfully submits that the Administrative Law Judge correctly found that the General Counsel has shown by a preponderance of the substantial evidence in this record that Voith has violated Sections 8(a)(1), (3), (4) and (5) of the Act in the matters described in this Complaint, as amended, and that all remedies under Section 10(c) of the Act, including the reinstatement and backpay awarded to Patti Murphy and Kelly Stein, are appropriate in this case. The Board, after considering the decision and the record in light of

exceptions and briefs, should issue a Decision and Order affirming the judge's rulings, findings, and conclusions.

Date: March 26, 2014

Respectfully submitted,

s/James F. Wallington

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2014, I electronically filed the foregoing Answering Brief of Charging Party Teamsters Local 89 in the above-referenced case with the Executive Secretary of the National Labor Relations Board using the Board's E-File system, and served copies by electronic mail addressed to the representatives of the parties in this matter as follows:

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