

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

PRATT (CORRUGATED LOGISTICS), LLC)
)
 Respondent,)
)
and)
)
TEAMSTERS LOCAL 773)
)
 Charging Party.)

**CASE NOS. 04-CA-079603
04-CA-079858
04-CA-079975
04-RC-080108**

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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ARGUMENT

I. THE ALJ ERRONEOUSLY CONCLUDED THAT CORRUGATED LOGISTICS VIOLATED SECTION 8(a)(1) OF THE ACT

(A) The ALJ Failed to Analyze the Scope of Francisco Ortiz's Section 2(13) Agency Status

The ALJ wrongly concluded that Corrugated Logistics committed six separate violations of Section 8(a)(1) of the Act as alleged in paragraphs 5(a) and (b) of the Amended Complaint.¹ The actions and statements of an employer's agent are not automatically imputed upon the employer. The Board and courts have long held that where complaint allegations rely on an individual's status as an agent under Section 2(13) of the Act, the "fundamental rules of the law of agency apply. *International Longshoremen's and Warehousemen's Union, CIO (Sunset Line and Twine Company)*, 79 NLRB 1487, 1508 (1948).

The Restatement (Second) of Agency defines "agency" as the "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." In addition, the "agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." Even regarding alleged "apparent authority" the Restatement requires that it be "created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by any person purporting to act for him." RESTATEMENT (SECOND) OF AGENCY §§1, 14, 27 (1957). Here, the GC failed to satisfy its affirmative burden to show that Corrugated Logistics manifested an intent to bestow on Ortiz the authority to act on its behalf with regard to any matter.

¹ Citations to counsel for the General Counsel's answering brief appear as "(GC at ___)"; to Respondent's Brief in Support of Exceptions as "(Exceptions Brief at ___)"; to the ALJ Decision as "(ALJ: ___)"; and to the hearing transcript appear as "(Tr. ___)".

Equally, the charging party must prove the agent's alleged violation of the Act was a result of action taken within the scope of the agent's authority. *NLRB v. Schroeder*, 726 F. 2d 967 (3d Cir. 1984) *NLRB. v. General Industrial Electronics Co.*, 401 F.2d 297, 300 (8th Cir. 1968). (foreman's actions did not impute 8(a)(1) liability on the employer because the foreman had no responsibilities in the labor relations area, there was no showing the Company knew or should have known that he would foray into the election campaign, and there was no evidence that he was encouraged, tacitly or otherwise, to do so).

The ALJ incorrectly relied, without more, on the parties' general stipulation that Ortiz was a Section 2(13) agent. It is undisputed that no evidence whatsoever was presented to satisfy the required burden of proof regarding "the **nature** and **extent** of the [alleged] agent's authority". *NLRB v. Schroeder*, supra (statements by an agent of the employer are not "irrebuttably attributed to the employer.") *Id.* at 971 (3d Cir. 1984); RESTATEMENT (SECOND) OF AGENCY §§1, 14, 27 (1957)

The GC's answering brief misses the point completely by relying solely on the ALJ's legally irrelevant finding that: (1) Ortiz worked in "close proximity to Powell and Respondent's dispatcher and driver, and that he directed and assigned work to drivers and the yard jockey on a daily basis"; and (2) Ortiz told a driver that he [Ortiz][was not supposed to say anything about unions." (ALJ: 9)(GC Brief at 27-28).² This "evidence", as a matter of law, does not meet the GC's burden to prove that the scope of Ortiz's Section 2(13) authority included the authority to speak on behalf of the Company regarding labor relations matters.

Specifically, there is no record evidence that Corrugated Logistics conveyed any "responsibilities to Ortiz in the labor relations area." Likewise, there is nothing to suggest that

² Significantly, the GC did not allege that Ortiz is a Section 2(11) supervisor and presented no evidence to support a conclusion that 2(11) supervisory status exists. The ALJ's reference to Ortiz's authority to "direct and assign" the work is both legally irrelevant and unsupported by the record.

Corrugated Logistics, “its officers or those concerned with industrial relations, either knew or ought to have known, that [Ortiz] would make a foray into the election campaign.” Nor is there evidence indicating that Ortiz “was encouraged, tacitly or otherwise, to do so.” *NLRB. v. General Industrial Electronics Co.*, supra at 300.

The GC turns the required burden of proof on its head by suggesting that Corrugated Logistics was required to call Ortiz as a witness and that by failing to call him the ALJ “could have concluded that Ortiz would have admitted making the statements attributed to him.” (GC at 10). The GC should know better. Under Board law, it is the GC’s burden to establish the scope of Ortiz’s agency status. See, *International Longshoremen’s and Warehousemen’s Union, CIO (Sunset Line and Twine Company)*, supra at 1508.

In sum, the GC’s failure to present probative evidence establishing the scope of Ortiz’s Section 2(13) authority, and the ALJ’s failure to properly analyze the GC’s burden of proof is clearly erroneous and must be reversed.

(B) The ALJ’s Conclusion that Corrugated Logistics Violated Section 8(a)(1) of the Act by the Alleged Statements of Jason Greer is Erroneous

As demonstrated above in connection with Ortiz, the GC failed to present any evidence in support of a finding that Greer was a Section 2(11) supervisor and/or a Section 2(13) agent of Corrugated Logistics. In addition to an absence of any factual support for Greer’s alleged Section 2(13) status, the ALJ and GC both cite to cases that are wholly irrelevant to Greer’s alleged agency status. Regarding 2(11) status, that was not even asserted in the Complaint.

The GC specifically cites *Bally’s Atlantic City*, 355 NLRB 1319 (2010) “as support for [the ALJ’s] finding that Greer’s statements to employees make a very strong case for a violation.” (GC at 11) That case has no application, factually or legally, to the instant matter. In

Bally's, it was uncontested that “floor persons” are statutory supervisors. The Board concluded that the employer unlawfully solicited grievances with a promise to correct them when a supervisory floor person notified employees that she had been in a meeting with other management personnel discussing how they could satisfy the employees “so that they would not join the Union.” She further commented that she was “very happy” about the results of that meeting. *Id.* at 1326.

Unlike *Balley's*, the GC does not even allege that Greer is a statutory supervisor. Moreover, the GC presented no evidence of Greer’s alleged Section 2(13) agency status. Similarly, any reliance on *DHL Express, Inc.*, 355 NLRB No. 144 (2010) would be misplaced. In *DHL Express, Inc.*, the respondent admitted to the labor consultant’s agency status. The ALJ, therefore, did not have to make a factual findings to determine whether the consultant was a statutory agent. For all of the above reasons, Corrugated Logistics respectfully submits that the Board should reverse the ALJ’s findings of Section 8(a)(1) violations.

II. THE ALJ ERRONEOUSLY FOUND THAT CORRUGATED LOGISTICS VIOLATED SECTION 8(A)(3) OF THE ACT

(A) The ALJ erroneously found Corrugated Logistics had knowledge of union activity

(i) Christina Salazar

In a desperate attempt to establish the knowledge element of the required prima facie case under *Wright Line*,²⁵¹ NLRB 1083 (1980), the GC misrepresents facts in evidence regarding Salazar’s alleged union activity. For example, the GC asserts, and the ALJ erroneously found, that Union Business Darrin Fry “went to” the Macungie facility where he purportedly handed out union leaflets to drivers. Fry testified only that he stationed himself on two occasions at a cul-de-sac, not on Company property, where he handed out union fliers to a total of three Corrugated

Logistics drivers. Fry conceded that he did not have any contact with anyone in Corrugated Logistics management. (Tr. 49). The ALJ wrongly concluded that Fry “went to” the Company’s property to hand out fliers.

This extremely weak evidence formed the basis of the ALJ’s conclusion that Corrugated Logistics had knowledge of union activity. Simply put, there is no evidence anyone in management saw or heard about the alleged activity and consequently, no prima facie case under *Wright Line*.

In attempting to establish knowledge of Salazar’s purported union activity, the ALJ created out of whole cloth that Salazar had conversations with other drivers “mostly in person and in the yard at the facility.” (ALJ: 4). Contrary to the GC’s mischaracterization, consistent with the record evidence Corrugated Logistics position is that aside from purportedly calling other drivers while making deliveries, the only face-to-face conversation Salazar allegedly had at the Macungie facility regarding the Union was a single conversation with Michael Dolan. (Exceptions Brief at 36). The other alleged “face-to-face” conversation that the GC discusses in its answering brief (at page 4) occurred between Salazar and Brian Fritzingler at Penske. (Tr. 277). This conversation is of no relevance whatsoever because Penske is a different company at a different location unrelated to the allegations. Significantly, there is no evidence whatsoever the Company was aware of these conversations, much less the phone conversations Salazar allegedly had with fellow drivers. In sum, there is no proof Corrugated Logistics was aware of Salazar’s union activity. The ALJ’s contrary conclusion cannot stand.

(ii) Guillermo Mejia

It is undisputed that Mejia’s alleged union activity was virtually non-existent. Mejia’s purported union activity consisted of: (1) attending a union meeting in late April, and (2)

providing a blank union card to Michael Messina. (Tr. 101). **Mejia himself admitted no one from management was present at the Union meeting in April and no one saw him hand the card to Messina.** (Tr. 129).

The ALJ inferred Company knowledge of this minimal alleged activity based on the timing of Mejia's discharge, simply because it occurred during the week of April 23rd when other alleged union activity occurred. Mejia himself testified that no one from management was present at the Union meeting and no one saw him hand out the union authorization card. (Tr. 129). Based upon the undisputed record testimony the ALJ's conclusion must be reversed.

(iii) The Other Alleged Discriminatees

As trifling as the alleged Union activity was for Salazar and Mejia, the alleged union activity of the remaining discriminatees is even less compelling. The extent of their alleged activity consists (at most) of attendance at two clandestine union meetings at a diner in April. Moreover, all of the alleged discriminatees who testified about those two secret meetings admitted that no one from Corrugated Logistics management was present. (ALJ: 4; Tr. 40, 129).

The GC failed to present any probative evidence that the Company was aware of the specifics of the meetings or who was in attendance. Moreover, to the extent the ALJ relied on the alleged comments of Ortiz to establish knowledge of specific union activity, as established in Point I, the GC failed to prove the scope of his agency status or even assert 2(11) status in the Complaint. Accordingly, any comments attributed to Ortiz regarding the Union cannot establish Corrugated Logistics motivation as a matter of law.

(B) The ALJ erroneously found anti-union animus

Despite compelling, undisputed evidence establishing a lack of animus, the ALJ improperly relied on two alleged statements by Ortiz, and the fact that drivers attended group

meetings with Greer to establish anti-union animus. For the reasons discussed above and in the Company's prior brief, any attempt to establish animus by relying on the alleged statements of Ortiz and/or Greer fails. Namely, the General Counsel failed to establish that either one of those individuals had actual or apparent authority to speak on behalf of Corrugated Logistics with respect to the content of the alleged discriminatory statements.³

(C) The ALJ erred in failing to find that Corrugated Logistics presented a legitimate, non-discriminatory reason for the terminations

(i) Salazar

After Salazar's colossal accident on December 29, 2012 Olshefski determined after a lengthy investigation that Salazar was responsible. Salazar's negligence resulted in tens of thousands of dollars in repairs to the tractor and a "total loss" of the trailer. In addition, it is indisputable that Salazar's carelessness put the driving public at risk. This the GC does not deny. Nevertheless, in finding a violation of the Act the ALJ erroneously substituted his judgment for that of the Company.

There is no evidence Olshefski was aware of Salazar's alleged union activity. Similarly, there is no evidence that he took action against Salazar to thwart any such activity. The record demonstrates that Olshefski made a legitimate, non-discriminatory decision to discharge Salazar at the time he was implementing his decision to restructure the Macungie operations. The GC's assertion that Olshefski could not determine if damage to Company equipment was caused by Corrugated Logistics driver or outside carriers. The GC misses the point. Olshefski restructured the Macungie operations to shift liability, which constitutes a legitimate reason for discharge, for

³ It is undisputed that Corrugated Logistics hired Michael Messina despite the fact that he openly revealed on his application that he had been employed as a Teamsters Local 385 driver for 23 years. The ALJ failed to make any finding or to even acknowledge in his decision this highly relevant fact. The fact that the Company hired Messina despite his long-time union membership demonstrates that Corrugated Logistics was not averse to hiring union members or the obvious potential that they would attempt to organize the Macungie operation.

damages from Corrugated Logistics to third party carriers. Moreover, it is undisputed that Salazar alone was responsible for tens of thousands of dollars in damages for his one accident.

(ii) Mejia

The evidence supporting the Company's legitimate, non-discriminatory reason for discharging Mejia is equally compelling. In just the first few months of his employment Mejia accumulated multiple disciplines for carelessness with the trailers and equipment, and for failing to heed Powell's instructions. Well prior to any alleged union activity Mejia received a Disciplinary Notice after failing to raise the landing gear on a trailer before moving it in the yard. (Tr. 392). Mejia also failed to follow Powell's instructions to tag/lock down a trailer that was in no condition to be taken out on the road. General Counsel does not allege these prior disciplines were unlawful because they occurred well prior to any alleged union activity.

In light of these repeated, and in two instances, deadly serious infractions, Powell's decision to discharge Mejia on April 24, 2012 was clearly justified and the ALJ exceeded his authority in substituting his judgment for that of the Company in finding that discharge was unlawful.⁴ *Framan Mechanical, Inc.*, 343 NLRB 408 (2004) (the Board found that the employer lawfully discharged employees during an organizing campaign and stated that it is well-settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful...) *Id.* at 412.

(iii) The remaining alleged discriminatees

Aside from the General Counsel's failure to establish a prima facie case of a Section 8(a)(3) violation, the Respondent nonetheless presented testimony and evidence establishing that

⁴ The GC ignores the record and her own exhibits in asserting that Mejia was not told he was in danger of losing his job. (GC Exhibits 10 and 11). The ALJ's conclusion that there is a significant distinction between "telling" someone their job is in danger and notifying them of that fact in writing makes no sense. This "distinction" demonstrates just how far the ALJ went to "fit" the facts into the GC's theory of the case.

it had legitimate, non-discriminatory reasons for restructuring the Macungie operation. It is undisputed the Macungie operation commenced towards the end of 2011 with an uncertain book of business. Olshefski's un rebutted testimony establishes that because the Macungie operation was a "Greenfield" facility with no initial customer base he created a flexible business model allowing him to make quick adjustments as customer needs clarified over time. Olshefski: (1) initially relied predominantly on third party carriers, a fact Salazar admitted (TR 82, 83); and, (2) opted to rent, on a day-rate basis, the tractors and trailers utilized at the Macungie facility.

Moreover, commencing in November 2011 Olshefski engaged in discussions with Craig Anderson about the potential for U.S. Express to provide logistics services to Corrugated Logistics customers (TR 297; Resp. Exh. 4). The GC argues in its Answering Brief that the ALJ properly failed to consider Anderson's un rebutted testimony because "the evidence established that Respondent went on to hire its own fleet of drivers and did not even secure a bid from U.S. Express" until later in the year. The GC misses the point. The early undisputed contacts with Anderson, beginning in November 2011(several months prior to any alleged union activity) support Olshefski's testimony that he created a flexible business model allowing him to make quick adjustments as customer needs clarified over time.

After Corrugated Logistics incurred unsustainably high costs due to accidents and damage to equipment the discussions with Anderson continued. Anderson began providing quotes for U.S. Express to take over the majority of the logistics operations. Olshefski's un rebutted testimony is that he made the decision toward the end of March 2012, still well prior to any alleged union activity, to rebalance the ratio of direct hire and third-party drivers.

Olshefski employed even-handed, non-discriminatory criteria in selecting drivers for lay off, which included consideration of driver seniority, performance, and qualifications. Again,

the record is crystal clear that Olshefski made that decision well prior to any alleged union activity. The ALJ erroneously found that Olshefski's reasons for downsizing the fleet of tractors and direct hires was a pretext. The ALJ inappropriately and contrary to Board precedent substituted his business judgment for that of Corrugated Logistics regarding the timing of the announcement to employees.

The GC weakly asserts the ALJ properly failed to consider the Board decisions in *Framan Mechanical*, supra, *Gem Urethane*, 284 NLRB 1349 (1987) and *Baptista's Bakery*, 352 NLRB 547 (2008) because those cases "are not applicable or controlling." (GC at 27). The GC reads those cases as applying only to employer justifications for terminations that are based on economic hardship. To the contrary, *Framan Mechanical*, *Gem Urethane*, and *Baptista's Bakery* stand for the proposition that where an employer articulates a business reason for taking certain actions, "the crucial factor is not whether the business reason cited by [the employer was] good or bad, but whether it was honestly invoked and was, in fact the cause of the change." *Framan Mech., Inc.*, 343 NLRB 408, 411-412 (2004) (internal citations omitted). Here, the GC failed to prove pretext or even a prima facie case and, therefore, the 8(a)(3) allegations must be dismissed.

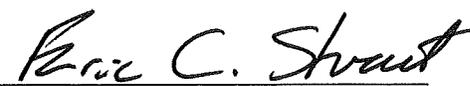
CONCLUSION

For all the foregoing reasons, the instant Complaint should be dismissed in its entirety.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By:


Eric C. Stuart

Dated: May 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that in accordance with the NLRB rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of Respondent's Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge was timely filed via the NLRB E-Filing System and was served on the following on the date below by the undersigned counsel for Pratt (Corrugated Logistics), LLC via electronic mail:

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Dated this 29th day of May 2013



Christopher R. Goe