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VIA E-MAIL AND E-FILE

Gary Shinnars, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Brooks Brothers, A Division of Retail Brand Alliance, Inc.
And Local 340 and Local 25, New York New Jersey Regional
Joint Board
Case No. 02-UC-062745

Dear Mr. Shinnars:

I am writing to bring to the Board's attention a case issued by the DC Circuit Court of Appeals that is relevant to the Union's Request for Review in this matter issued after the Union filed its Request for Review. In Ozark Auto. Distribs. v. NLRB, 779 F.3d 576, 585 (D.C. Cir. 2015), the court vacated a Board order in a representation case because the Board's quashing of an employer's subpoena's was prejudicial error. This case further supports the Union's arguments in its Request for Review that the Regional Director committed prejudicial error by failing to either seek subpoena enforcement or apply spoliation sanctions.

In the instant case, the Regional Director denied the Employer's petition to revoke the Union's subpoenas of emails, finding that the emails were relevant. The Employer thereafter advised the hearing officer that all or nearly all emails from the relevant period were deleted. It produced one email from a witness, David Warren, whose emails the Union subpoenaed, in which Warren advised another employee that he deleted his emails. Warren wrote this email one month after the Union subpoenaed the emails. The Hearing Officer ruled that, despite the evidence that the Warren destroyed evidence after it was subpoenaed, the Employer made a good faith effort to comply and that it was his "judgment that it is improbable that any deleted emails would yield probative evidence and therefore that any expense incurred by the Employer to hire a contractor to attempt restoration of such emails would not be justified." (RD Ruling 7-23-14, p. 6.)¹

¹ This citation refers to the hearing officers 7-23-14 ruling concerning the Union's Request for Subpoena Enforcement.

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The court in Ozark Auto forcefully rejected a similar argument by the Board in that case. It found that the failure to produce relevant documents is prejudicial because there could be no certainty “what the [subpoenaed] documents would have revealed if” they had been produced. 779 F.3d at 585. One of the ways the court identified that the employer in Ozark Auto was prejudiced was that it was deprived of the incentive of a hostile witness to testify truthfully. It said:

As experienced trial attorneys know, when a hostile witness realizes that examining counsel has information bearing on the answers to counsel's questions, the witness tends to be more candid. Here, the company was deprived of this incentive for truthful and complete testimony.

Id. Here, nearly all the witnesses the Union called were hostile witnesses as it was an accretion case and the evidence was almost entirely in the control and possession of Employer agents. Thus, the Union was prejudiced in that it was deprived of the incentive that the Employer’s agents would testify truthfully and completely.

Because the Union was severely prejudiced by the Regional Director’s rulings, and the DC Circuit forcefully rejected the Board’s rulings denying a party’s right to subpoenaed information, the Board here should grant the Request for Review and overrule the Order in the Unit Clarification.

Thank you for your attention to this matter.

Very truly yours,



Thomas M. Murray

Cc: Karen Fernbach, Regional Director (via email)
Theo Gould, Esq. (via email)
Fred Kaplan (via email)