

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

BOZZUTO’S, INC.

**Respondent
and**

**UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 919**

Charging Party

**Case Nos. 01-CA-115298
01-CA-120801**

August 18, 2015

**RESPONDENT’S ANSWERING BRIEF TO THE GENERAL COUNSEL’S CROSS-
EXCEPTION TO THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE**

The Respondent, Bozzuto’s, Inc., (“Bozzuto’s”) hereby files the following answering brief to the General Counsel’s cross-exception to the decision of the Administrative Law Judge (“ALJ”) in accordance with the rules and regulations of the National Labor Relations Board (“Board”).

**I. ARGUMENT: The ALJ Correctly Articulated and Applied the
Relevant Standard for the Notice Reading Remedy**

The Board may order the extraordinary remedy of reading of a notice by a Company representative when the unfair labor practices are “so numerous, pervasive and outrageous” that extraordinary remedies are necessary “to dissipate fully the coercive effects of the unfair labor practices found.” Fieldcrest Cannin, Inc., 318 NLRB 470, 473 (1995)(unfair labor practices found to be “egregious and notorious”).

Correctly applying this standard, the ALJ found that:

[a]lthough the violations found in the present case are certainly not trivial, they are not, in my opinion, numerous, pervasive or outrageous. Nor has it been shown that the Respondent has violated the Act in the past or that it likely will violate the Act in the future. In these circumstances, it is my opinion that the Board should not require the owner of the Company to stand in front of his employees and read the notice to the assembled group.

(ALJ 10: 40-44)

The ALJ's determination is supported by the record and the law.

A. The Termination of Greichen's Employment Was Not Outrageous

Insofar as Mr. Greichen's interactions with management on October 8, 2013, the record is abundantly clear that Bozzuto's tried to persuade Greichen to attend the required meeting on work standards and keep his job. (See R-12, p. 21-25) Indeed, Bozzuto's gave assurances to Greichen that he would suffer no adverse consequence whatsoever if he attended the meeting. Greichen made the ultimate decision not to attend the meeting with full knowledge that his employment would continue if he attended the meeting and that he would be found insubordinate if he refused to attend. Id. Bozzuto's made every effort to avoid terminating Greichen's employment and only did so when Greichen left Bozzuto's no alternative. Id.

Greichen had had many prior similar meetings with management with no adverse consequences and testified that he had no hesitation about meeting with Clark. (R-43; Vaughan Testimony, Tr. 435-439; Greichen Testimony, Tr. 857) Further, the record shows that Bozzuto's and its industrial engineers had met with other employees regarding work standards, both before and after union organizing. Those employees remain employed at Bozzuto's. (Wright Testimony, Tr. 548-550)

Greichen testified under oath that his reasons for refusing to attend the meeting on work standards were that he did not want to hear what management had to say and that he did not want to jeopardize an individual wage complaint he had filed with the Department of Labor. (Greichen Testimony, Tr. 848, 885) Thus Greichen refused to attend the meeting on work standards for personal reasons despite Bozzuto's repeated efforts to convince him to attend the meeting and keep his job and with full knowledge of the consequences of refusal to comply with Bozzuto's instructions.

Further, the record is clear that Bozzuto's has terminated other employees for insubordination including before the onset of union activities. The following chart depicts the disciplines at Bozzuto's for insubordination:

<u>EMPLOYEE</u>	<u>DATE OF VIOLATION</u>	<u>DISCIPLINE</u>
Isidore Germain	12/26/2007	3-Day Suspension
Salomon Drakeford	06/18/2012	Termination
Charles Harrington	09/09/2013	Termination
Patrick Greichen	10/08/2013	Termination
Frank Leon	12/06/2013	2-Day Suspension
Jourdin Senior	12/20/2013	Termination
Joshua Christian	03/10/2014	Termination

(R-44). As seen above, insubordination typically results in termination at Bozzuto's.

Two employees appropriately received suspensions for insubordination. Frank Leon, a driver, initially refused but ultimately performed the runs he was assigned. (R-44, Tab 5) His situation is easily distinguished from Greichen who, despite numerous opportunities, never agreed to do as instructed. Isidore Germain was a selector who

was denied permission he requested to unload a truck (“lumping”) but proceeded nonetheless to unload the truck. He received a three-day suspension. (Koch Testimony, Tr. 929-930; R-44, Tab 1). Again, that situation is easily distinguished from Greichen’s. Isidore Germain worked his entire shift unloading a truck. He had been directed to perform a different task, but it is not as if he simply refused to work. Both suspensions were appropriate under the circumstances of those infractions.

The record demonstrates that Greichen’s discipline was consistent with the discipline imposed on other employees. Salomon Drakeford was terminated in 2012 for refusing the instructions of his supervisor to get his ID and punch in before he performed work. (R-44, Tab 2). Jourdin Senior was terminated in 2013 for twice refusing the instructions of his supervisor to clean the freezer. (R-44, Tab 6) Joshua Christian was terminated in 2014 for continuing to chew tobacco after being told not to do so and refusing his supervisor’s instructions to clean a mess he made by spilling his tobacco cup in a truck. (R-44, Tab 7).

Bozzuto’s did not remotely behave in an outrageous manner towards Greichen. Thus, the ALJ appropriately concluded that Bozzuto’s should not be subjected to the extraordinary remedy of a public reading of the notice.

B. The Verbal Warning to Greichen Was Not Outrageous Conduct

Greichen received a verbal warning on October 1, 2013 for his repeated negative behavior and conduct which had become disruptive to the work force. (R-43, Tab 29). A verbal warning is the lowest form of discipline that exists at Bozzuto’s. As such, a verbal warning cannot serve as the basis to find the outrageous conduct needed to impose extraordinary remedies.

Since his date of hire in 2010, Greichen incurred at least seventeen corrective actions for work rule violations. (R-43) He also made false statements and an unfounded claim of harassment against a co-worker (R-43, Tabs 11, 12, 13). In August 2013, Greichen had telephoned Winans, Manager of Grocery Operations, to tell him that he did not like him. (R-13; R-43; Vaughan Testimony, Tr. 435-439) Clark, who did not know that Greichen was involved in union activity, which had just commenced, had also received complaints from his assistant that Greichen's behavior was scary. (Clark Testimony, Tr. 160, 163-164) Vaughan described Greichen's conduct as sometimes unusual, that he could get agitated, and that he would "rock back and forth." (Vaughan Testimony, Tr. 435, 438, 460) Greichen himself stated that he would "rant" about things. (Greichen Testimony, Tr. 877-878) His colleague McCarty described him as a "hot head," and even the union rep stated that he would have a hard time "controlling" Greichen at a meeting. (R-21)

At the October 1, 2013 meeting, Clark stated that Bozzuto's needed to address Greichen's behavior to assure a safe and comfortable work environment for employees. Greichen's comment about his own conduct was notable: he did not like being told he was doing something wrong and reacts "by wanting to get up and do the same things back to the person doing it to him." (GC-18)

Bozzuto's was justified in alerting Greichen that his way of communicating was unacceptable and disrespectful. Clark told Greichen that Bozzuto's wanted him to succeed as an employee. According to Greichen, there was no mention of unions then or at any time during 2013. (Greichen Testimony, Tr. 858)

Bozzuto's issued a form of corrective review with boilerplate language that had existed prior to any union activity. Bozzuto's has not contested the ALJ's finding that the provision stating that employees should not be involved in conversations that are "hearsay, rumors or nonfactual comments that cause disruption in the business environment" was improper and should be removed and no longer used. The inclusion of that language in the verbal warning form while incorrect is not outrageous conduct necessitating extraordinary remedies.

C. The Alleged Interrogation Does Not Reflect Outrageous Conduct

The ALJ's finding of unlawful interrogation was based on a solitary question which the ALJ characterized as an "offhand and somewhat innocuous comment" (ALJ 8:21-22). Certainly one "offhand and somewhat innocuous comment" does not rise to the level of outrageous behavior.

Further, applying the applicable law, it does not appear that any unlawful interrogation occurred. McCarty reported one verbal exchange mentioning a union with Senior Vice President Rick Clark ("Clark") after September 22, 2013 as follows: when he was coming out of a restroom in the warehouse on either September 27 or October 4, 2013, Clark said to him; "Hey Todd, what's going on with this union stuff?" McCarty's reply was "I'm not going to talk about it with you Mr. Clark." Clark put up his hands and said "ok." Nothing else was said in this conversation. (McCarty Testimony, Tr. 485) McCarty had no further conversations with Clark about union activity. (McCarty Testimony, Tr. 486)

This single "offhand and somewhat innocuous comment" (ALJ 8:21-22) does not amount to an unlawful interrogation under the Bourne analysis. See Bourne v. NLRB,

332 F.2d 47, 48 (2d Cir. 1964). First, there is no history of discrimination at Bozzuto's. To the contrary, the ALJ found that it had not been shown that the Respondent had violated the Act in the past or that it will likely violate the Act in the future. (ALJ 10: 41-42) Further, the ALJ found that the violations found were not "numerous, pervasive or outrageous". (ALJ 10: 40-41) Thus, the first Bourne factor weighs in favor of Bozzuto's. Second, Clark's single, brief question was not directed at discovering information about any particular individual. Thus, the second, and arguably most important, Bourne factor weighs in favor of Bozzuto's. Clark is a Senior Vice President at Bozzuto's so the third Bourne factor weighs in favor of the Complainant. Fourth, the exchange occurred at a chance meeting on the warehouse floor, not in Clark's office. Thus, the fourth Bourne factor weighs in favor of Bozzuto's. Finally, McCarty's response was direct ("I'm not going to talk about it with you"), and its tone certainly suggests no intimidation. There were no follow up questions after McCarty dismissed Clark's remarks. Thus, the fifth Bourne factor weighs in favor of Bozzuto's.

Four of the five applicable factors that must be applied to determine if unlawful interrogation occurred weigh in favor of Bozzuto's. These facts do not demonstrate outrageous conduct by Bozzuto's and in fact do not support a finding of any unlawful interrogation.

D. Bozzuto's Actions Toward McCarty Were Not Outrageous

As to McCarty, the record shows that McCarty withheld information from Bozzuto's that would have avoided any discipline. It is undisputed that McCarty had within his possession photographic evidence demonstrating that he met the production requirements (McCarty Testimony, Tr. 499-500; GC-45; GC-46a), and yet he elected to

withhold this evidence from Bozzuto's so that he was terminated in accordance with Bozzuto's policy on production deficiency discipline. (McCarty Testimony, Tr. 649; Koch Testimony, Tr. 939)

Bozzuto's was unable to conclusively establish who made the changes to McCarty's records because security at that time was lax - the supervisor codes were short and never expired, and once a log in occurred, the system would remain open and active indefinitely. The investigation also revealed that some supervisors shared their codes with employees. (Wright Testimony, Tr. 569; Winans Testimony, Tr. 368) Once a screen had been altered, only the altered screen remained viewable on the system. Thus, if someone looked up prior production data, he would only find the altered screen. Only the review of hundreds of pages of detailed individual transaction logs revealed the changes. (Wright Testimony, Tr. 571-573) Jason Winans did not have access to other supervisors' passwords when the changes to McCarty's records were made. (Wright Testimony, Tr. 600, 623-624; Winans Testimony, Tr. 355, 370-371)

McCarty testified that prior to 2014, if he brought compensation discrepancies to Bozzuto's attention with his evidence, Bozzuto's would correct the discrepancy (McCarty Testimony, Tr. 645). The evidence suggests that in 2014, McCarty purposely withheld the conclusive evidence he possessed that he met the production standards and allowed himself to be terminated, perhaps in order to invigorate the failing union campaign.

McCarty did consult with union representative Dokla about the issue of when to disclose his photographic evidence that he met production standards. (Dokla Testimony, Tr. 799; R-22) At that point in time, January 2014, the union organizing

drive had “gone cold,” with only six (6) cards signed in December and three (3) cards signed in January.¹ McCarty recognized that the organizing campaign needed to be invigorated (McCarty Testimony, Tr. 662, 678) and elected not to disclose the evidence that he was meeting production standards to Bozzuto’s.

McCarty testified that he furnished the screen photographs to the NLRB attorney in mid-late January, 2014. (McCarty Testimony, Tr. 656) However the first Board affidavit he signed showed a date of February 12, 2014. (McCarty Testimony, Tr. 1127) The NLRB did not advise Bozzuto’s of the allegation that McCarty production data had been tampered with and the “before and after” photographs until April 9, 2014. (R-19) This was the first time that Bozzuto’s had been notified of the tampering allegation and presented with this evidence, notice that was too late to review security cameras to determine who made the modifications. (Clark Testimony, Tr. 200; Koch Testimony, Tr. 896, 939)

Once Bozzuto’s was given the evidence by the Board agent in April 2014 (R-19), two months after McCarty’s discharge, Bozzuto’s promptly reviewed hundreds of individual transactions to conclude that McCarty’s production records had been tampered with and offered McCarty unconditional reinstatement. (R-24)

Bozzuto’s unconditional offer of reinstatement to McCarty offered:

¹ The Union received signed cards as follows:

September 2013:	84
October 2013:	54
November 2013:	21
December 2013:	6
January, 2014:	3
February 2014:	2
June 2014:	1

(Dokla Testimony, Tr. 794, 804) The Union never filed a petition for an election.

1. Unconditional reinstatement effective immediately to the same job category, with the same seniority, same benefits, and the same pay rate that McCarty would have held had there been no interruption in his employment.

2. Make whole relief for any losses, earnings and other benefits incurred as a result of the discharge.

The offer of unconditional reinstatement further stated that McCarty was not required to sign any settlement agreement or release any claims or withdraw any pending complaints. (R-24) Further, McCarty was advised that he could accept the unconditional offer of reinstatement and continue to pursue any legal claim or complaints against Bozzuto's, including but not limited to, his claim with the National Labor Relations Board and the civil action in the Hartford Superior Court. (Id.) If McCarty accepted the offer, Bozzuto's would contact him to arrange his return to work. Id. McCarty's attorney was copied on the letter offering reinstatement. Id.

Given Bozzuto's prompt investigation and reinstatement offer to McCarty once the relevant evidence had been supplied, the only reasonable conclusion is that McCarty would not have been disciplined or discharged if Bozzuto's had been given McCarty's photographic evidence in a timely fashion and that his union activity made no difference.

The record also shows that in the year prior to McCarty's termination twelve (12) other employees were terminated for low productivity, including eleven (11) terminations prior to the onset of union organizing. (See R-45). Bozzuto's applied its customary work rules in terminating McCarty for low productivity.

There was nothing outrageous in terminating McCarty in accordance with Bozzuto's normal work rules. Further, Bozzuto's prompt investigation and offer of unconditional reinstatement after receiving McCarty's evidence demonstrates Bozzuto's adherence and fair application of its discipline rules and eliminates any notion of outrageous conduct.

E. The Premium Increases Were Not Outrageous Conduct

Bozzuto's warehouse production employees, also called "direct labor," occupied several distinct positions: order selectors, forklift drivers, and loaders. Selectors and forklift drivers could also be assigned to do their tasks in the freezer, where they wore special clothing because of the extremely cold temperatures. Bozzuto's ran three shifts in the warehouse, the first being the most desirable to employees. (Clark Testimony, Tr. 231)

Bozzuto's had difficulty recruiting and keeping employees in certain positions, namely assignment to the freezer, and "skilled labor" (forklift and loaders) and shifts beginning after 1 p.m. (Clark Testimony, Tr. 149, 228) The freezer required working in unpleasant conditions and the forklift operator needed special certification. Loaders required special expertise to be able to configure the loads for a delivery route. (Clark Testimony, Tr. 230) The retention and recruitment issues were made more difficult by the fact that a good selector could augment his earnings by substantial amounts because of incentive compensation.

In the late summer - early fall 2013, prior to union organizing, Bozzuto's was preparing its budget for its fiscal year, which began on October 1st. This budget included funds for direct labor. (Clark Testimony, Tr., 149) Employee focus and

supervisor focus groups were proposing an increase to the premiums for work in the freezer, forklift operators, loaders and a shift differential for the later shifts.² (R-1, R-2, Clark Testimony, Tr. 231)

The increases were not for pay rates, as in 2010 and 2012, but applied to more limited groups and were a premium. (Compare, GC-17, Bates 319) The wage history data shows no pattern. Prior increases in 2010 and 2012 were announced at meetings in November and May and applied to different categories of recipients. (GC-17)

The premium increases commenced in the new fiscal year, i.e., on October 1, 2013. Legitimate business decisions cannot be precluded because of a subsequent union organizing campaign. Here, Bozzuto's had a valid need for its actions which were articulated several weeks prior to the appearance of union cards in late September.

The ALJ found that the premium increases constituted a violation of the Act because Bozzuto's meeting minutes did not reflect a final decision on the premium increases prior to the onset of union activities. While Bozzuto's did not challenge the ALJ's determination, Bozzuto's action in implementing premium increases that were clearly contemplated prior to any union activities is not outrageous conduct.

CERTIFICATE OF SERVICE

This is to certify that on August 18, 2015 the undersigned emailed a copy of the foregoing Respondent's Answering Brief to the General Counsel's Cross-Exception to the Decision and Recommended Order of the Administrative Law Judge as follows:

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