UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

A.S.V., INC., d/b/a TEREX Respondent, And INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS AFL-CIO, Charging Party	))))))))))	Case Nos. 18-CA-131987 18-CA-140338 18-RC-128308

RESPONDENT'S REPLY BRIEF TO CHARGING PARTY'S ANSWERING BRIEF

Charles P. Roberts III
Constangy, Brooks,Smith & Prophete, LLP
100 N. Cherry Street
Suite 300
Winston-Salem, NC 27101-4016
(336) 721-6852
(336) 748-9112 (F)
croberts@constangy.com

NOW COMES A.S.V., Inc., Respondent herein, and files its Reply Brief to Charging Party's Answering Brief as follows:

ARGUMENT

A. Respondent's Exceptions Substantially Comply With the Board's Rules.

The Charging Party's contention that Respondent's exceptions fail to comply with the Board's rules should be rejected is spurious. Respondent filed 77 specific exceptions to the ALJ's decision along with a 75-page supporting brief. This brief sets forth a detailed statement of facts with specific citations to the record. It includes a statement of the issues and identifies the exceptions that relate to each issue. It contains extensive legal and factual argument in support of its exceptions. The Board is not being asked "to embark on spurious or frivolous endeavors" or "engage in a fishing expedition to determine what, if any, problems, irregularities, or manifest error ensued." *Aitoo Painting Corp.,* 238 NLRB 366 (1978). [CP Brief at 16.] In *Aitoo,* the respondent filed exceptions without a supporting brief, and its exceptions were "so ambiguous as to be totally ineffective to adequately apprise the Board" of the issues and allegations. *Id.* at n. 4. The Board's decision in *James Troutman & Associates,* 299 NLRB 120 (1990) is to the same effect. The exceptions (without any brief) were devoid of argument and citation to the record. Respondent's exceptions and brief are not ambiguous at all.

In *BCE Construction, Inc.,* 350 NLRB 1047, 1047-48 (2007), relied upon by the Union, the respondent filed exceptions and a supporting brief. Although it set forth "specific arguments on the merits for all other points in its exceptions, it did not do so for" one exception to a § 8(a)(1) finding. Thus, the Board rejected this single exception. In Respondent's case, it has presented specific argument in its brief regarding all of its exceptions.

The Board has long held that there is "substantial compliance" with the Board's rules when the supporting brief provides the argument and record citations relied upon, even if these are not set forth in the actual exceptions document.[1] *Niblock Excavating, Inc.,* 337 NLRB 53, n. 1 (2001); *Waukegan North Chicago Transit,* 182 NLRB 708, n. 1 (1970). Respondent's exceptions and brief substantially comply with the Board's rules. *See, e.g., Carey Salt Co.,* 360 NLRB No. 38, n. 2 (2014); *FJC Security Services, Inc.,* 360 NLRB No. 6, n. 1 (2013).

B. DiBiagio's June 10 Meeting With Employees.

The Union erroneously argues that DiBiagio's June 10 meeting with employees refutes Respondent's contention that the layoff decision was "made gradually over a few weeks" and supports the ALJ's finding that Respondent made the layoff decision hastily shortly after this meeting. (CP Br. at 20-21). First, the record establishes that a meeting was held as early as June 2 to discuss staffing and possible reductions in force and that Joan Hoeschen began working on skills matrices in the event layoffs were necessary. (R. Exh. 69, Tr. 342-343, 1823-24). Thus, it is incorrect to say that there was no consideration of headcount reductions until mid-June. It is correct to say that the final decision was not made until mid-June, but this supports, rather than detracts from, Respondent's contention that the layoffs were economically motivated. In fact, there was a key event that occurred on June 11, one day after DiBiagio's meeting with employees that both the ALJ and the Union wholly ignore. On June 11, following the step 3 call,

[1] Respondent's counsel has practiced before the Board for 36 years, and has always understood the Board's rules to permit record citations to be included in the supporting brief. Indeed, it is much more efficient and comprehensible for these citations to be set forth in the brief where more detailed substantive discussion can be provided, than to provide a naked list of countless pages of record at the end of each exception. Despite having filed, and responded to, exceptions in countless cases over 36 years in the same manner as in this case, this is the first time Respondent's counsel has experienced a party moving the Board to reject such exceptions for noncompliance with the Board's rules.

Respondent severely reduced its forecast for the third quarter by 145 machines, thereby reducing the level load build plan for the third quarter from roughly 10 units per day to less than 8 units per day. (R. Exh. 36, p. 4; R. Exh. 39(c)). DiBiagio had been holding off making a decision in hopes that positive news would be received. Unfortunately, the large Blue Line order was lost on June 5 or 6 and with the third quarter reduction in forecast and plan, the die was cast. Overtime had already been reduced and there were no alternatives left but to reduce the headcount to come into line with the planned build rate. However, DiBiagio did mitigate the scope of the layoffs by extending the July 4 shutdown. (Tr. 1621-24). The timing of the final decision is fully explained by the course of events.

As for DiBiagio's June 10 meeting, it is a gross overstatement to say that he "specifically lead employees to believe there would be no layoffs." (CP Brief at 20-21). While DiBiagio stated that Respondent would try to "ride the storm" like in January, his remarks were clearly littered with references to hard times: (1) "we're facing real issues here;" (2) "We're looking at seeing what we can bring in between now and the next couple of weeks," but orders sometimes "pop and sometimes they don't;" (3) Nine machines is "all we got," which is "like four days' worth of work" and "[i]t's kind of tough;" (4) "we have to make some adjustments," which "is agonizing," and (5) "we haven't had layoffs since I've been here," which "I've been trying to avoid them at all costs," but "we'll see." (GC Exh. 53(b), pp. 1-7, 24-29). In fact, his final comments that agonizing adjustments would have to be made and that he had been trying to avoid layoff, but "we'll see" certainly hinted at the possibility that some type of action would have to be taken. One cannot possibly read his remarks and come away with a warm and fuzzy feeling.

However, even if DiBiagio did mislead employees to believe there would be no layoffs, it is entirely understandable that he would not affirmatively state that layoffs were on the horizon. Not only had the decision not been made on June 10, but to suggest that layoffs were coming could have interfered with the upcoming elections. It is difficult to see how DiBiagio's June 10 statements support the ALJ's findings. DiBiagio clearly did not tell the employees that all was good. He was quite candid regarding the downturn in business and the bleak outlook. Further, there is a giant hole in the ALJ's analysis. If we accept that DiBiagio had no intent on June 10 to lay off employees and that the decision was made on June 16 and June 17, what is it that occurred between June 10 and June 16 regarding the union situation that would cause Respondent to suddenly decide to lay off employees because of the union? The answer is "nothing." There is nothing in the record showing any event pertaining to the Union that would suggest a link between the decision and union activity. There is, however, a significant intervening economic event, i.e., the June 11 reduction in third quarter forecast.

C. Hearsay Testimony Of Adam Hughes

The Union argues that an adverse inference should be drawn because Respondent "did not call individuals that could potentially have refuted [the testimony of Adam Hughes], making an adverse inference appropriate." (CP Brief at 22). The Union cites *National Football League,* 309 NLRB 78, 97-98 (1992) in support of this argument. In that case, however, the issue involved a party's refusal to produce relevant documents that had been subpoenaed and were in its exclusive control. Here, Respondent did not refuse to produce subpoenaed documents. Rather, the General Counsel attempted to rely on an internal memo by Hughes to his employer concerning purported reasons for Respondent's decision to outsource the painting of large parts. The General Counsel called Hughes as a witness and he identified a number of employees with

whom he spoke during his visit to Respondent, only one of whom was a supervisor of Respondent. Despite intense questioning by Respondent to state who provided the information upon which Hughes relied to draw his conclusions, Hughes was unable to do so. Hughes also could not say what was actually said to him to cause him to conclude that the Union was one of the reasons for the outsourcing decision. (Tr. 146-177; GC Exh. 17). This vague and non-specific testimony was wholly non-probative, and Respondent had no obligation to go out and call every person with whom Hughes spoke to refute this rank hearsay, particularly since all but one were not agents of Respondent. It was the General Counsel's burden to produce probative evidence, and all of these persons were equally available to the General Counsel. Hughes' testimony should be disregarded in its entirety.

D. Profits And Losses Versus Orders And Backlog

The Union contends that Respondent took contradictory positions in its exceptions brief, first asserting that profits and losses were irrelevant and then arguing that profits and losses supported its position. (CP Brief at 26-27). This contention blatantly distorts Respondent's argument as set forth in its exceptions brief. Respondent never asserted that profits and losses were wholly irrelevant. What it asserted was:

> But the fact remains that Respondent's operations are labor intensive and when volume goes up or down, labor costs must be adjusted up or down. Reduced profits and increased losses are a symptom of excessive headcount, but there is no evidence that Respondent has ever made layoff decisions based on the level of profits or losses. Of course, the expectation is that reducing headcount to meet demand (right-sizing the business) will reduce losses or increase profits, but that is a result, not a cause, of layoffs.

(Exceptions Brief at 35).

Later in its brief, Respondent argued:

> As noted, reduced profits and increased losses are often a symptom of declining volume and excess headcount. The financial metrics for 2014 (R. Exh. 50) demonstrate this correlation. The following chart reflects the 2014 monthly figures for income from operations and manufacturing wages ($000): [chart omitted]
>
> Thus, Respondent made a profit of $1.329 million in the first five months of 2014, but lost ($424,000) in the following six months. But for the reduced labor costs, Respondent's losses would have been even greater. Indeed, had Respondent maintained its manufacturing wages at the already-reduced June levels during the ensuing five months (July – November), which is effectively what the ALJ's decision mandates, its losses would have ballooned from ($428,000) to ($788,000). There is nothing in the record that would support the conclusion that, but for the ongoing union activity, Respondent would have willingly tolerated an additional loss of ($360,000) in these five months. And of course, the Judge's decision requires that these additional losses be extrapolated beyond November and indefinitely into the future.

(Exceptions Brief at 26-27).

There is no contradiction whatsoever in Respondent's argument. Indeed, it is a very simply paradigm. Volume determines headcount. If the headcount is excessive for the orders being received, profits will decline and/or turn into losses because labor costs will be excessive for the units being produced. If operations are then right-sized, profits will increase and/or losses will decline because labor costs will match production. If operations are not right-sized, profits will continue to decline and/or losses will continue to increase.

The Union's contentions, which echo the ALJ, that because Respondent lost more money in the summer of 2013 than it lost in the summer of 2014, but did not lay off employees in 2013, the 2014 layoff must have been related to the Union is the kind of sophomoric business analysis that is easily rejected. (CP Brief at 24). Respondent discusses the differences between 2013 and 2014 at length in its exceptions brief. (Exceptions Brief at 41-49). The Union's reliance on *Chariot Marine Fabricators & Indus. Corp.,* 335 NLRB 339, 354 (2001) is misplaced. In that case, the employer's new controller "testified after he familiarized himself with Chariot's

financial statements, he realized that Chariot had been losing money for years and that it would continue losing money for the foreseeable future," and that the employer closed its facility for that reason. But, the financial records established that "the overall operation [was] actually producing ordinary income of approximately $90,000, rather than a net loss." In these circumstances, the Board found that the employer failed to establish its affirmative defense. Here, Respondent never asserted that it laid off employees because it was losing money. Thus, *Chariot* is inapposite.

Insofar as the Union is contending that because Respondent had suffered years of losses and had finally turned profitable, it was required to tolerate equal losses in 2014, that contention is preposterous. (CP Brief at 30). Initially, it is incorrect to say that "Respondent experienced years of unsustained profitability where it took no action to lay-off employees. (ALJ 62-63.)" (CP Brief at 30). The record reflects numerous layoffs between 2009 and 2012. (R. Exhs. 71, 72, 73, 74). Further, DiBiagio was hired with the mission to turn the Grand Rapids facility profitable, and he did so, with 2013 showing a tiny profit for the first time since its acquisition by Terex in 2008. The plant continued to be profitable during the first five months of 2014. But when it became clear that the tide was turning and that volume was shrinking, it would have been irresponsible, indeed foolhardy, for DiBiagio to say, "no big deal, we've always lost money in the past, so I'm not going to take any action."

The Union (and the ALJ) harp on the favorable actual performance of the plant in comparison to the pre-2014 plan and forecast as it relates to the first five months of 2014, but wholly ignore the downward spiral that began in June 2014. Thus, in June the facility began a sustained downturn in performance, which dwarfed the favorable performance for the first five months. This is true both in terms of shipments and profits:

Shipments	June	July	Aug.	Sept.	Oct.	Nov.	(Jun-Nov)	(Jan-May)	Net
Plan	165	170	135	151	179	165	965	729	1,694
Actual	131	122	128	138	126	115	760	796	1,556
Deficit	(34)	(48)	(7)	(13)	(53)	(50)	(205)	67	(138)

	June	July	Aug.	Sept.	Oct.	Nov.	(Jun-Nov)	(Jan – May)	Net
Profits ($000)									
Plan	$547	$219	($71)	$48	$579	$180	$1,502	$550	$2,052
Actual	($347)	$38	$180	($384)	$239	($150)	($424)	$1,329	$905
Deficit	($894)	($181)	$251	($432)	($340)	($330)	($1,926)	$779	($1,147)

(R. Exh. 50).

As Respondent argued in its exceptions brief, the original plan is of limited significance to the layoff decisions in issue. Businesses must adapt as conditions change. But since the ALJ, General Counsel, and Union place so much emphasis on the plan, it is helpful to look at the big picture. For the entire year, the plant performed poorly to plan, and its performance between June and November was dreadful in comparison to plan. Needless to say, it would have been even worse had DiBiagio not made the difficult layoff decisions he made. Businesses cannot wait indefinitely to make necessary adjustments. As backlog dwindled, thereby indicating that shipments were outpacing incoming orders, Respondent began losing faith in the TCA forecast in May and early June, and on June 11, it downgraded the forecast and adjusted its level load build plan to meet the conditions that were actually occurring. The third quarter was fast approaching, and Respondent could not wait any longer to take action simply because union elections were pending.

CONCLUSION

Respondent respectfully requests that the complaint be dismissed in its entirety.

Respectfully submitted this 15th day of September 2015.

/s/ Charles P. Roberts III

Constangy, Brooks,Smith & Prophete, LLP
100 N. Cherry Street
Suite 300
Winston-Salem, NC 27101-4016
(336) 721-6852
(336) 748-9112 (F)
croberts@constangy.com

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing BRIEF by electronic mail on the following parties:

Tyler Wiese
Counsel for General Counsel
NLRB – Region 18
Minneapolis, MN
Florence.brammer@nlrb.gov
Tyler.wiese@nlrb.gov

Jason R. McClitis
Blake & Uhlig
753 State Avenue, Suite 475
Kansas City, KS 66101-2510
jrm@blake-uhlig.com

This the 15th day of September 2015.

s/ Charles P. Roberts III