UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL SHIPPING AGENCY, INC. AND MARINE TERMINAL SERVICES, INC., AND TRUCK TECH SERVICES, INC. SINGLE EMPLOYER and INTERNATIONAL SHIPPING AGENCY, INC. AND TRUCK TECH SERVICES, INC. SINGLE EMPLOYER and UNION DE EMPLEADOS DE MUELLES (UDEM), ILA 1901, AFL-CIO	Case : 24-CA-091723 24-CA-104185 12-CA-129846 12-CA-133042 12-CA-135453 12-CA-135704 12-CA-136480 12-CA-142493 12-CA-143597 12-CA-144073

RESPONDENTS' REPLY BRIEF TO GC'S ANSWERING BRIEF TO RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

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INTRODUCTION

Pursuant to §102.46(h) of the Rules and Regulations of the Board, the following is Respondents' Reply Brief to the Counsel for the General Counsel's (GC) Answering Brief to Respondent's Exception to the Administrative Law Judge's Decision (GC's Answering Brief).

ARGUMENT

A. REPLY TO SECTION II OF THE GC'S ANSWERING BRIEF, P. 3-9.

In addressing Respondents' exception to the ALJ's finding that the MTS' work was subcontracted to Frank's Chassis, the GC asserts[1] that "Respondent itself failed to cite any significant evidence that contradicts the ALJ's finding." *GC's Answering Brief, p. 3*. The GC further contends that "[a]lthough Respondent argue that MTS' refurbishing of chassis for Intership was not an essential part of Intership's business, it failed to provide any evidence to support the contention and refute the ALJ's finding." *GC's Answering Brief, p. 4.*

The GC ignores Respondents' arguments in their Brief in Support of Exceptions. At page 17 of their Brief, Respondents explained ***with specific citations*** to Mr. Jose Garcia's testimony – a witness the ALJ found credible – what maintenance work Intership does as part of its stevedoring business. Respondents pointed to the uncontested evidence that shows that what Intership has historically done at its facilities and with its own employees as part of its stevedoring services is to provide "rodability" repairs for its chassis; not refurbishing work. *Id.* The GC's arguments fail to address this evidence in the record.[2]

1 On this subject, the GC also states that Respondents are excepting from these findings "***because*** the ALJ did not make any reference to the transcript or other evidence in the record when making this finding." GC's Answering Brief, p. 3. This is a typical example of the GC mischaracterizing Respondents' arguments. Respondents do not except from these finding ***because*** the ALJ did not make reference to the transcript or other evidence. That the ALJ failed to make reference to any part of the record that purportedly supports his findings is a fact. Respondents except from those findings because "there is no evidence in the record of this case, substantial or otherwise, to support" them. Respondents' Brief in Support of Exceptions, p. 12.

2 The same holds true with the GC's assertion that "Respondent also failed to cite any evidence in the record that contradicts the ALJ's finding that Respondent redistributed the work of repairing and maintaining chassis from MTS to Frank's Chassis its subcontractor after it closed MTS." *GC's Answering Brief, p. 4*. Pages 12-16 of Respondents'

Referring to the refurbishing work of chassis that MTS used to perform, the GC asserts in its Answering Brief that "[h]owever, the record shows that Intership maintenance employees performed these repairs before Respondents created MTS and shifted that bargaining unit work to MTS, in violation of the collective-bargaining agreement between Intership and the Union." *GC's Answering Brief, p. 5*. The GC cites J.Ex.3b in support of said contention. Nowhere in J.Ex.3b the Arbitrator determined that Intership's employees ever performed refurbishing work on chassis or that that work belong to the bargaining unit. In fact, not only did the ALJ correctly determined that Intership could not do this work because of E.P.A. regulations, but also the Charging Party recognized by its actions that refurbishing work of chassis is not part of Intership's bargaining unit. That is so because the Charging Party sought an election and to be certified as the representative of the MTS' employees as a distinct and separate bargaining unit. That would have been, of course, legally unnecessary if in fact refurbishing work was part of the Intership's bargaining unit.

Next, the GC argues that "Respondents incredulously asserts that, after its precipitous decision to close MTS two days after the MTS employees voted in favor of union representation, it suddenly had little or no need to perform the chassis repair work that MTS had performed for it." *GC's Answering Brief, p. 5*. Respondents have never argued that it closed MTS because "it suddenly had little or no need to perform the chassis repair work that MTS had performed." Respondents have always argued that MTS was closed because it needed Intership's financial aid to operate and given its own significant financial distress Intership could not provide that financial aid anymore.

Brief in Support of Exceptions are devoted to this subject with pointed reference to the evidence in record.

If the above cited GC's statement is addressed to the minimum amount of its own "mission essential" bump carts that Intership is now refurbishing, then the GC simply ignores the uncontested record for the evidence regarding the impact on operations of Intership's loss of work abounds. The record is full of uncontested evidence that the slowdown of work in 2012 resulted in a substantial reduction of worked hours and cargo moves. R.Ex. 47. Then came the departure in ***October 2012*** of Mediterranean Shipping Company (MSC) a client that represented approximately twenty percent (20%) of Intership's business. *T.1327:1-18*; R.Ex. 44 and 45. Then came the departure in April 2013 of yet another client, Tropical Shipping. R.Ex. 62. Mr. Garcia testified that precisely because Intership's decreasing volume of business, he was stacking chassis[3] to use or repair them "as need be fit". *T.893:6-21*. Accordingly, the record is sufficiently supported by the credible evidence – which neither the GC nor the Charging Party[4] even attempted to challenge – that clearly explains that beginning in 2012 Intership had substantially less need to refurbish chassis.

Next, the GC makes the argument that Respondents allegedly failed to answer properly an administrative subpoena and a trial subpoena regarding subcontracting information, and that accordingly it should not benefit from the alleged "concealment." *GC's Answering Brief, p. 6-7*. This was an issue that the GC brought up with the ALJ at the end of the hearing and in its Post Hearing Memorandum, and asked for the adverse inference. Respondents replied that those

3 In fact, during the administrative investigation of these charges, the Board Agent in charge of the investigation visited Intership's facilities and personally saw the stockpiles of chassis. In addition, photographs were provided showing the same. There is, therefore, no doubt about the fact that Intership was stockpiling chassis.

4 It is axiomatic to mention that the Charging Party – as the representative of Intership's bargaining unit and as the entity that receives reports of worked hours for purposes of Union dues and Welfare contributions – was in clear position to challenge this evidence if it was not true. Its failure to even attempt to do so is the best confirmation of its undeniable truth.

subpoenas were time-sensitive and were responded in that matter[5], that there was absolutely nothing in Mr. Garcia's testimony that would establish that the answer provided to the subpoena was wrong or incomplete at the time it was given, and that if the GC wanted Respondents to supplement any of their previous answers it should had so requested at the beginning of the hearing. *Respondents' Reply to GC's Post Hearing Brief, p. 7.* The ALJ did not make the requested adverse finding in his Decision. The GC, however, failed to except from the ALJ's refusal to do so. ***The GC is, thus, clearly impeded to urge this issue now at the Answering Brief stage***. See §102.46(b)(2) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged [in the exceptions] shall be deemed to have been waived.")[6]

Significantly, in its Answering Brief the GC does not try to challenge any of the seventeen (17) facts listed in Respondents' Brief in Support of Exceptions that clearly establish that MTS was a distinct and separate identifiable operation. *Respondents' Brief in Support of Exceptions, p. 14-17.* These facts, now unquestionably unchallenged, underscore the fact that after the closing of MTS, there is one less provider of refurbishing services for chassis and containers in Puerto Rico.[7] This, together with the fact that there is absolutely no evidence that Intership is involved in

5 In fact, as noted in the Record, the GC asked for and Respondents produced approximately 30 Banker's Boxers of Documents. *T.186:13-187:10.*

6 In any case, there was absolutely no concealment of any evidence or fact, and therefore no reason to make an adverse inference. Not only there is nothing in Mr. Garcia's testimony to establish that the answer to the subpoena was untrue at the time it was given, but also the GC has Mr. Garcia's Board Statement that confirms the answer, and in any case when asked the question about the current situation during the hearing he gave a straight-forward honest answer.

7 The GC again argues that TTS performed similar services than MTS. This theory was completely discredited during the hearing. *T.1452:6-1454:5; 1526:4-1528:24*. Also, the GC in trying to explain why the Complaint does not allege a transfer of work violation, seems to be implying that was so because it did not know until the hearing of such alleged transfer. The GC's excuse is unavailing as clearly established by the fact that it tried to present direct evidence of such contention and in response to Respondents' several objections never claimed that it just learned of it. *T. 1066:8-1069:10.*

any way in the business of refurbishing chassis for third parties, are clear impairments to finding a violation of the Act.

B. REPLY TO SECTION III OF THE GC'S ANSWERING BRIEF, P. 9-11.

In this section, and in response to Respondents' corresponding exception, the GC basically argues that "Respondent erroneously focuses its analysis on the closure of MTS' small business venture of repairing chassis for third parties. . .". *GC's Answering Brief, p. 9.* The GC cites no cases, and Respondents are aware of none, that somehow limit a Company's right to stepped out of a business only to situations involving "big" or "large" business ventures. Respondents are also unaware of any guidance from the Board as to what constitute a "small business venture" or a "big business venture." The unchallenged evidence in this case clearly establishes that MTS was a distinct and separate identifiable operation that cost more than one million dollars ($1,000,000.00) a year to operate and employed over sixteen employees, including a salesperson whose only and full-time duty was to obtain third party business. ***That is not a "small business venture" by any standard applicable to the Puerto Rico's economy***. The GC's argument, therefore, does not refute and or contest Respondents' exception on this issue.

C. REPLY TO SECTION IV OF THE GC'S ANSWERING BRIEF, P. 11-13.

In this section, the GC basically argues that Respondents were under an obligation to notify the Union of the MTS closing. That is not the essence of the waiver argument. The waiver argument addresses the unquestionable fact that the Union waited eleven (11) days after it unquestionably learned of the closing of MTS to request bargaining. There is no explanation by the GC as to why waiting this amount of time was reasonable under these circumstances.

In any case and most significant, even when it restates its argument that the Employer should have bargained the decision to close, in neither this nor in the previous section of its Answering

Brief does the GC present any type of theory as to how the particular situation faced by MTS was amenable to resolution through bargaining with the Union. As shown by the evidence, MTS was not generating enough income to cover its then ***current*** expenses. MTS was at the time operating at very low non-union cost. The argument that this situation was not amenable to resolution through bargaining, therefore, goes beyond the bare assertion that the Employer's thought that the Union would not give it needed concessions. In this case, there was no concession to give or to ask for: there was nothing the Union could have rolled back or adjust down to address the problem since even leaving everything as it was would not have been enough. As more fully explained in Respondents' Brief in Support of Exceptions, there is decisional bargaining obligation in this case.

D. REPLY TO SECTION V OF THE GC'S ANSWERING BRIEF, P. 13-24.

In this section, the GC basically restates the arguments that Respondents accepted the losses of these subsidiaries for years without closing them, and that there were other subsidiaries that were also losing money that were not closed. The GC ***again*** both mischaracterizes Respondents' defense ***and*** ignores the record.

Respondents' defense has never been that MTS was closed simply because it was an unprofitable operation. Respondents have always argued that MTS was closed because it needed Intership's financial aid to operate and Intership – faced with its own significant financial duress – could not provide that financial assistance anymore. That the "Intership Bank" ran out of money – had not happened before. The triggering events for Intership's financial duress, the causes and the effects are unchallenged by the GC. Accordingly, what happened during the previous eleven or twenty years – at the time the "Intership Bank" had money to continue financing those operations – does nothing to discredit Respondents' arguments in this case.

The GC also ignores the record because of the differences between MTS and the other subsidiaries abound. The record shows: **1:** that MTS was the subsidiary that owed the most money in total to Intership[8]: *T. 1460:18-1461:20* and cf. *T.1457:22-25*; ***2:*** that at the time the decision to close was taken, MTS had a "complete file" (three appraisals, one opinion from a CPA regarding tax consequence, no expectation of new business): *T.1374:10-19*; ***3:*** that Oceanic is a maritime agency and, as testified, the shipping lines ask their agencies what stevedoring company they prefer so that "if we have control of the agency, we also assure their stevedoring business": *T.1467:14-18*; ***4:*** Oceanic did not have a bleak business future as proven by the fact that is now "making money and has totally paid its debt": *T.1467:19-20*; and that ***5:*** Sea Air provided warehousing of cargo and special tax treatment to Intership's existing stevedoring clients so that Intership believed that it could lose even more business if they closed that operation: *T.1467:8-11*.

Intership bought all the assets of TTS' predecessor in 2009, and appointed a General manager in 2011 with the assignment of trying to get the Company to at least a breakeven point. *T.1172:24-1173:23*. There is absolutely no evidence in the record to show that TTS by October 2012 had gone through the whole review process MTS went through, since "you normally give five years to a business for that business to move on and progress." *T.1467:25-1468:2*. However, confronted with Intership's loss of business in 2012, TTS' own loss of clients, and the departure of yet another Intership's client – Tropical Lines – in ***April 2013***, R.Ex. 62, Respondents could not wait anymore and closed TTS in ***April 2013***: six months after MTS. Obviously, there were stark differences between MTS and the other subsidiaries.

8 By simply focusing in the increase from one year to another of the account payable to Intership of MTS and TTS- GC's Answering Brief, p. 17- the GC pretends to ignore this fact.

Remarkably, the GC asserts in its Answering Brief that "it is also significant that Respondent provided no explanation as to why it waited more than a year after receiving that [CPA's] report (but just two days after the NTS voted for the Union) to take any action in regard to MTS." *GC's Answering Brief, p. 18.* ***But the record shows that Respondents did take action***. Mrs. Caraballo explained that she took all the information she had in 2011 – including the CPA's report - to the President to urge him to close MTS, but he asked for an opportunity to see how some conversations he was having regarding a business opportunity for MTS went. *T.1365:25-1366:6*. The President, Mr. Segarra, confirmed this in his testimony. *T.1538:3-1539:8*. Moreover, R.Ex. 53 not only documents the fact that there had been several meetings regarding the future of MTS – as the GC suggests – but in Paragraph 5(b) (p.2) also establishes the fact that Segarra informed the Board in November 2011 of this business opportunity regarding MTS. The pursuit of this business opportunity lasted until 2012. *T.1546:4-15*. There is, therefore, nothing in Respondents' case that remains unexplained.[9]

The GC mentions several times in its Answering Brief that MTS closed two days after the election. In this case, however, neither the events that caused Intership's financial distress, nor the ***timing*** of the most significant one that forced Intership into taking action – MSC's last vessel coming to Intership on ***October 10, 2012*** (just seven days before the elections) – are challenged. ***These are undisputed facts at this stage***. In this context, the timing of the closing two days after the election does nothing to discredit or detract from Respondents' defense. As testified by Mrs. Caraballo, when MSC's vessel made its last port call on October 10, 2012, it became a matter of

9 The GC also asserts at page 17, footnote 13 that after closing, MTS had higher losses than when it was operating and that Respondents provided no explanation for this. The GC ***again*** ignores the record. This aspect of the financial statements was fully explained by Ms. Caraballo. *T.1474:1-12*. Moreover, Ms. Caraballo also fully explained the financial benefit for Intership to close MTS, which the ALJ found intuitive. *T.1524:15-1526:2*.

protecting Intership's approximately 500 jobs.[10] Preparing the documentation required to close the Company together with the required employee-payment liquidation of benefits takes time. Moreover, in terms of avoiding a potential challenge to the closing, it would have made no difference if MTS closed days before or after the election.

In the remaining part of this section, the GC does not address any of the specific arguments raised by the Respondents in their brief in support of exceptions but simply rehash the previous arguments from its own Brief in Support of Exceptions. Respondents have fully addressed those contentions in their Answering Brief, Arguments A and B, p. 6-16. There is no need to repeat them here. Suffice is to say, that the GC's attempts to present TTS as simply engaged in the repairs of Kalmars are unavailing. As fully explained in Respondents' Brief in Support of Exceptions, p. 45-46, with pointed reference to thirteen (13) facts in the record that the GC does not even attempt to challenge in its Answering Brief, TTS was much more than made out by the GC. Similarly, the GC's assertion that "the loss of this client [referring to the USPS] is not sufficient to justify the closing of the TTS operation, since it is reasonable to expect a business to gain and lose client" is disingenuous at best. ***Again***, Respondents do not contend that they closed TTS because it lost a client. TTS was closed because it needed Intership's financial aid to operate and Intership – faced with its own significant dire financial circumstances – could not provide that financial assistance anymore.

Even at this stage, after its Answering Brief, the GC still has not answered the most relevant and basic question: how Intership could have continued to provide financial aid to these

10 *T.1380:20-1381:3*. It was clear from Mrs. Caraballo's testimony that when she referred to 500 employees she was referring to the jobs at Intership. *T.1472:2-4*.

subsidiaries while sustaining the losses it was facing during the relevant times if "it wouldn't have had money, not even to cover its own expenses." *T.1386:13-18*.

E. REPLY TO SECTION VI OF THE GC'S ANSWERING BRIEF, P. 24-26.

In this section, the GC simply relies in a generalized description of the alleged acts of physical violence. These events were aptly described in the record, and the reasons why they do not amount to an unfair labor practices fully explained in Respondents' Brief in Support of Exceptions, p. 48-49.

CONCLUSION

FOR THE FOREGOING REASONS, the ALJ's findings excepted to should be reversed and the Board should issue an order finding no violation on the corresponding allegations.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Respondents' Reply Brief to GC's Answering Brief to Respondents' Brief in Support of Exceptions to the Administrative Law Judge Decision was served on this 1st day of July 2016 upon the following persons through email:

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