UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

INTERNATIONAL SHIPPING AGENCY, INC. d/b/a INTERSHIP, MARINE TERMINAL SERVICES, INC. and TRUCK TECH SERVICES, INC., single employer	Cases	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
and		
UNION DE EMPLEADOS DE MUELLES (UDEM), LOCAL 1901, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO		

GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO CGC'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. Statement of the Case

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel (CGC) files the following Reply Brief to Respondent's Answering Brief to CGC's Brief in Support of Exceptions to Administrative Law Judge Robert A. Ringler's Decision issued on March 30, 2016, in International Shipping Agency, Inc., Marine Terminal Services, Inc., and Truck Tech Services, Inc., Cases 24-CA-097123 et al., reported at JD-24-16.[1] On May 27, 2016, CGC and Respondent each filed exceptions and supporting briefs. On June 17, 2016, each party filed an Answering Brief to the other party's exceptions.

This reply brief addresses the Section 8(a)(3) and (5) violations the ALJ found regarding MTS and TTS' closings (Respondent Arguments A and B), the suspension of shop-steward Gonzalez (Respondent Argument C), the unilateral reduction of maintenance employees' work hours (Respondent Argument D), and the remedies sought by CGC (Respondent Argument F).

II. Respondent Argument A

Respondent argues that there is no evidence supporting the finding that the closing of MTS was motivated by a purpose of chilling "imminent unionization" in the remaining plants of the single employer or that the employer could have reasonably foreseen that said closing would likely have that effect, and that CGC's theory regarding the proximity of the MTS and TTS facilities and testimony that MTS employees went to TTS facilities "is a transparent attempt to argue that the Employer should have suspected something that motivated it to act with ill intent." (R. Ans. Brf. p. 7-8). Respondent basically argues that there was no union activity at TTS, and thus, there was no chilling effect on TTS employees when Respondent closed MTS and no chilling effect elsewhere when it closed TTS. These arguments should be rejected.

[1] As used herein "JD" refers to the ALJ's Decision, followed by the page and line numbers; "Tr" refers to the transcript followed by the page and line numbers; "GC" refers to General Counsel's exhibits; "J" refers to joint exhibits; and "R" refers to Respondent's exhibits; "R. Ans. Brf." refers to Respondent's Answering Brief.

As previously argued, Respondent closed MTS because it unionized, and used said unlawful action to coerce its TTS employees and prevent them from joining the Union. Later, when Respondent feared that TTS employees were discussing unionizing, it continued to threaten and coerce them, and finally closed TTS because they were considering organizing and to chill the union activities of its remaining Intership employees. The ALJ properly credited the corroborative testimony of former TTS supervisor Darren Ryan and TTS employees that TTS employees were told that MTS closed because it unionized, in violation of Section 8(a)(1) of the Act, and Respondent did not except to these findings. (Table at JD 14- 15). Furthermore, the ALJ properly credited the testimony of Ryan and TTS employees that Respondent knew that TTS employees discussed unionizing, and this evidence, together with Respondent's numerous unlawful statements, establishes Respondent's knowledge of and animus towards the TTS employees' union activities. (JD 24:6-8). Thus, it was more than "mere suspicion" that motivated Respondent to close TTS. Consistent with this argument is Union President Mercado's testimony to the effect that, after MTS closed, the Union decided not to attempt to organize any other Intership subsidiaries because it feared that Intership would respond as it did with MTS, by closing down. (Tr. 1033:20 to 1034:4, 1064:18 to 1065:5). Therefore, the closing of MTS also had the intended chilling effect on the Union's leaders, who were all employees of Intership and were seeking strength and support when reaching out to MTS employees to join the Union.

With respect to Respondent's assertion that there was no "imminent unionization" at TTS, this is not the standard required to find a violation under *Darlington*. *Darlington* merely makes reference to "contemporaneous union activity" as one of the factors considered to determine whether an employer's motivation was to chill unionism. *Chariot Marine Fabricators*, 335 NLRB 339, 352 (2001). Proof of motivation and chilling effect in these cases may be based on "fair inferences arising from the totality of the evidence considered in light of the then-

existing circumstances." *Darlington Mfg. Co.*, 165 NLRB 1074, 1983 (1967), on remand from *Textile Workers v. Darlington Mfg. Co.*, 380 NLRB 263 (1965).[2] As the GC has extensively argued, the proximity of MTS and TTS; the fact that Respondent knew TTS employees were discussing unionizing (JD:24:7); that TTS employees learned, from Respondent's supervisors, that MTS closed because it unionized; and the multiple threats and violations found by the ALJ with respect to TTS (JD 14 and 15, table), all support Respondent's chilling motivation.

With respect to TTS' closing, Respondent argues that Intership employees were not engaging in any organizing activity. It also questions how could stopping the transfer of Intership unit work to non-union subsidiary TTS, by closing TTS, would have a chilling effect on Intership unit employees. (R. Ans. Brf., p, 10) By this argument, Respondent infers it acceded to Intership unit employees' demands when it closed TTS. However, the evidence does not support this inference. Respondent did not simply return the maintenance work to Intership when it closed MTS and TTS. Rather, it subcontracted the work to outside entities, Frank's Chassis and Tribo Tech. Moreover, Respondent closed TTS and discharged all of its employees because TTS employees were discussing unionizing, as the ALJ found (JD 24:7), and shortly after Union President Mercado asked Respondent to include TTS employees in the bargaining unit. Mercado's testimony regarding his request to Respondent VP Garcia to include TTS employees in the existing bargaining unit is uncontested. [Tr.843-844; GC 38(b), 39]. Thus, the TTS closing had the same chilling effect on Intership employees that the closing of MTS two days after the MTS employees voted for the Union had. As the ALJ found, "Intership's unlawful handling of the MTS subcontract, in violation of Section 8(a)(3) and (5) demonstrates a common scheme to use

[2] When determining whether the proscribed chilling motivation and reasonable foreseeable effect can be inferred from the totality of then-existing circumstances, the Board has considered several factors including, among others: "**contemporaneous union activity at the employer's remaining facilities**, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer officials and supervisors to other employees." (Emphasis provided) *Chariot Marine Fabricators*, at 352.

unlawful subcontracts and work transfers to thwart unionization," and this was conduct Intership had been engaging in for years and was demonstrated by the Union's grievances and related arbitration award. (JD 24:21-23; J. 3).

Based on the above, Respondent's arguments should be rejected and the Board should find that the closure of MTS and TTS violated Section 8(a)(3) of the Act under *Darlington*.[3]

III. Respondent Argument B

Respondent argues that the CGC has failed to explain how Respondent's decision to close MTS was amenable to resolution through bargaining with the Union, incorrectly suggesting that this is the GC's burden. (R. Ans. Brf., p. 13-14, 16). Respondent's argument erroneously interprets well established Board law. Respondent did not assert that the decision was not amenable to resolution through bargaining before submitting its Answering Brief.

As restated by the ALJ, under the standard set forth in *Dubuque*, CGC has the initial burden of showing that the employer's decision was unaccompanied by a basic change in the nature of its operation. Then, the burden shifts to the employer to prove certain affirmative defenses and rebut the GC's *prima facie* case. (JD 18:22-25) *Dubuque*, at 391. The employer may avoid bargaining if it can show that labor costs were not a factor or that, even if they were, the union could not have offered sufficient concessions to alter the employer's decision. *Id.*

The ALJ found that the GC made a *prima facie* showing that the MTS subcontract did not significantly change the scope and direction of Intership's business, because Intership remained a stevedoring company and continued to market the same stevedoring services. (JD 19: 29-33). Thus, Respondent had the burden of rebutting the GC's showing and establishing its affirmative

[3]Respondent cited from GC's Brief in Support of Exceptions: "the ALJ further properly found that Respondents violated Section 8(a)(3) and (1) of the Act by closing MTS and TTS and discharging the MTS and TTS employees because they selected the Union as their bargaining agent." (R. Ans. Brf., p.7, fn. 3). (See JD 21:35-38; 23: 14-36). Regarding TTS, GC hereby clarifies that, as the ALJ properly found, Respondent violated Sec. 8(a)(3) and (1) of the Act by closing TTS and discharging TTS employees because they were discussing unionizing. (JD 23:40 to 24:24).

defenses. As correctly found by the ALJ, Respondent failed to establish any *Dubuque* defenses and "wholly failed to meet its evidentiary burden of showing that labor costs were not a factor in its decision or that, even if such costs were a factor, the Union could not have offered sufficient concessions to alter its decision." (JD 20:12-15). Therefore, a bargaining obligation existed. Moreover, Respondent did not file exceptions with regard to this ALJ finding and conclusion. Respondent's belated attempt to raise this defense should be rejected.

IV. Respondent Argument C

Respondent argues that the GC did not allege in the complaint or at the hearing that the rule[4] Respondent relied upon to suspend shop steward Efrain Gonzalez was illegal on its face or in its application. (R. Ans. Brf., p. 16). Respondent further argues that this rule does not prevent the presentation of grievances, but simply provides a meaningful process on how to do so. (R. Ans. Brf., p. 17). Both arguments should be rejected.

Although the Complaint does not allege that the rule is invalid, this does not prevent the CGC from arguing that Respondent's rule prohibits activity protected under Section 7 of the Act. CGC is not urging the Board to find a violation with respect to Respondent's rule, it is simply submitting that Respondent could not suspend Gonzalez based on a rule that prohibits him from carrying out his shop steward duty of administering the parties' contract. Although Respondent argues that the rule does not prevent the presentation of grievances, this is exactly what the rule attempts to do. The rule limits employees' Section 7 rights to Respondent's choice of forum, whereas the Act does not so limit employees' rights to grieve to third-parties, including employers' clients. *Handicabs, Inc.,* 318 NLRB 890 (1995*)*, enfd. 95 F.3d 681 (8th Cir. 1996),

[4] This rule established that Intership employees working at Intership clients' facilities cannot raise work-related grievances directly to Intership's clients and should instead bring them up to the attention of Intership's supervisors.

cert. denied 521 U.S. 1118 (1997). Even though shop steward González directed his complaint to his employer's client, he was engaged in protected activity.

Respondent denies that Gonzalez' suspension was because of protected conduct; however, it admits suspending Gonzalez for violating Respondent's aforementioned overly broad rule (R. Ans. Brf., p.18). The Board has long held that employees engaged in protected activity "generally do not lose the protective mantle of the Act simply because their activity contravenes an employer's rules or policies." *Louisiana Council No. 17*, 250 NLRB 880, 882 (1980).

V. Respondent Argument D

Respondent argues that the ALJ's finding regarding its reduction of maintenance employees' work hours is supported by the record, but misrepresents the evidence. Respondent states that "Intership calls employees to work through a seniority list when the company needs them.[5] (R. Ans.Brf., p. 19). Similarly, it states that the "supervisor call the employees directly." (R. Ans. Brf., p. 20). Respondent suggests that employees do not report to work regularly without the need to verify if there is any work for them, but admits that senior maintenance employees come to work unless they are told otherwise. (R. Ans. Brf., p. 20).

In addition to this admission, the record does not support the claim that Intership calls maintenance employees as needed. Respondent Manager Rosa confirmed that he does not have to notify these employees to report to work (Tr. 579: 24-25), and VP of Operations García admitted that they are not subject to a shape-up or daily call (Tr. 970-19-21). The ALJ found, and Rosa acknowledged, that Intership's most senior employees regularly worked forty hours per week.[6] (JD 10:21-22; Tr. 579:13-25; 599: 15-17; 606: 14-16).

[5] The ALJ found that "a standing seniority list governs who is scheduled to work" and that "it is plausible that maintenance employees were assigned 'as needed,' in accordance with seniority." (JD 10: 19-20, 32-33).

[6] This is consistent with employee testimony that, before the unilateral change, the supervisor only told them not to show up to work on holidays. (Tr. 597:3-5).

Respondent also asserted that the reduction of days and hours in the maintenance department "had happened before." (R. Ans. Brf., p. 20). Nonetheless, Rosa, who was credited by the ALJ, testified that, for at least two years prior to the summer of 2014, those workers worked forty hours per week. (Tr.579:13-25).[7]

In addition, Respondent misleadingly asserts that, in July 2014, Garcia met with Union Vice President Rodríguez and Secretary Treasurer Rivera to discuss the welder situation. To the contrary, García testified that, on July 24, 2014, the Union officers came to his office on their own initiative to discuss a supervisor performing unit work.[8] (Tr. 982:20 to 983:9). Consistently, Rivera and Rodríguez testified that they went to the mechanics' shop in response to a complaint they received from mechanic Figueroa about a supervisor performing unit work.[9] (Tr. 506, 532). Figueroa confirmed making this complaint. (Tr. 611:21 to 613:17). Respondent's admissions show that the Union did not meet with Garcia to discuss the reduction of hours. The record fails to show that there was meaningful bargaining about that issue on July 24, 2014.

VI. Respondent Argument F

1. The Board should order a restoration remedy.

Respondent argues against the GC's exception regarding the ALJ's failure to order a restoration remedy, claiming that Intership's financial distress and inability to continue providing financial aid to MTS and TTS was litigated before the ALJ. (R. Ans. Brf., p. 25). However, the financial situation at the time of the unfair labor practices is not relevant to the restoration issue. Rather it is Respondent's current financial situation that is relevant to the viability of a restoration remedy. The ALJ improperly found that Respondent's current financial situation had

[7] Rosa later testified that a previous reduction of maintenance employee hours occurred in 2008 or 2009, five or six years earlier. (Tr. 581:11-18). This one-time event does not establish that such reductions are the *status quo*.
[8] It was during the meeting, that the cut back of maintenance employees' hours was brought up.(Tr.982:20 to 983:9).
[9] Rodríguez testified that, before going to the shop, he called García to make him aware of the issue concerning the supervisor, and García told him to come over to his office to discuss that matter. (Tr. 507:14-18, 533: 14-25).

been fully litigated in denying a restoration remedy. In an attempt to refute one of the GC's arguments—the unknown nature of the relationship between Respondent and the lessee and the uncertainty of renewal or termination of said lease, Respondent alludes to the Lease Agreement. (R. Ans. Brf., p. 26). However, because there is no record evidence about this, Respondent inappropriately invites the Board to consider information on the lessee's website, which is not part of the record. (R. Ans. Brf., p. 26). The Board should decline that invitation.

At this point, facts important to the applicability of a restoration remedy remain unknown. For example, was the machinery and equipment used by MTS and TTS sold or discarded or is it still in Respondent's possession? Will the lease of the MTS building continue in effect? Respondent still owns the former MTS and TTS buildings and has full possession of the TTS facility. Thus, the Board should follow its usual practice and require restoration, while permitting Respondent to raise any issues concerning the appropriateness of a restoration remedy in a compliance proceeding. See *Lear Siegler, Inc.*, 295 NLRB 857, 861-862 (1989).

2. Respondent should be ordered to make offers of reinstatement to MTS employees

Respondent argues, without evidence, that an order requiring Intership to offer employment to the claimants in former MTS bargaining unit would affect the seniority rights of a substantial amount of workers who have an acquired right to be called to work when work is available at this work place. (R. Ans. Brf., p. 27). This argument should not prevent the Board form granting the standard remedy in Section 8(a)(3) cases to correct discriminatory discharges. See *Lear Siegler*, at 860; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 187, (1941).

3. The Board should require a notice reading

Respondent argues that a notice reading remedy should be denied because it was not included in the Complaint and the GC did not move to include this particular remedy prior to the

hearing. (R. Ans. Brf., p. 29). Respondent relies on completely irrelevant case law that attempts to protect a party against theories of great magnitude raised by the first time after a hearing.

The notice reading remedy was requested in CGC's post-hearing brief to the ALJ, and Respondent filed a reply brief to the ALJ, but did not address this proposed remedy. More importantly, Section 10(c) of the Act authorizes the Board to order "such affirmative action … as will effectuate the policies of [the] Act." In *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938), the Supreme Court stated that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." The Board has broad discretion for crafting appropriate remedies given the particular facts of each case. *Excel* Case *Ready*, 334 NLRB 4, 5 (2001). See *Schnadig Corporation*, 265 NLRB 147 (1982) ("[w]hether counsel for the General Counsel seeks a backpay remedy is immaterial since we have full authority over the remedial aspects of our decisions."). In view of the above, the Board should reject Respondent's argument and grant a notice reading remedy, which is appropriate for this case.[10]

VI. Conclusion

For the above reasons, and for the reasons set forth in the GC's Exceptions and supporting brief, CGC respectfully urges the Board to grant the GC's exceptions in their entirety.

Dated at San Juan, Puerto Rico, this 1st day of July 2016.

Respectfully submitted,

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[10] In cases where high ranking managers personally committed violations, having the manager read the notice to employees will "dispel the atmosphere of intimidation he created" and assure employees that their rights will be respected. *Three Sisters Sportswear Co.*, 312 NLRB 853, 853 (1993), enfd. mem. 55 F. 3d 684 (D.C. Cir. 1995)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, General Counsel's Reply Brief to Respondent's Answering Brief to CGC's Brief in Support of Exceptions to the Administrative Law Judge's Decision, in the matter of International Shipping Agency, Inc., Marine Terminal Services, Inc. (MTS), and Truck Tech Services, Inc. (TTS), a single employer, Cases 24-CA-091723 et al., was electronically filed with the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 1st day of July 2016.

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