

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 14

HOBSON BEARING INTERNATIONAL, INC.,	)	
	)	
	)	Respondent,
and	)	Case No. 14-CA-156114
	)	
TERA LOPEZ,	)	
	)	
	)	Charging Party.

**EMPLOYER’S SUPPORTING BRIEF TO EXCEPTIONS TO ALJ’S DECISION**

COMES NOW Respondent Hobson Bearing International, Inc., by and through its attorneys and for its Supporting Brief to its Exceptions to the Administrative Law Judge’s Decision dated August 24, 2016, states as follows:

**I. The ALJ erred in her determination that Respondent unlawfully interrogated Lopez on July 8, 2015.**

The ALJ’s determination that there was an unlawful interrogation of Lopez on July 8, 2015 is against the weight of the evidence and contrary to applicable law. Interrogation allegations are governed by *Rossmore House*, 269 NLRB 1176 (1984) and *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). The ALJ, while citing to the test set forth in *Bourne* , ignores the clear language and admonition of the 2<sup>nd</sup> Circuit when it held:

“Under our decisions interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards.”  
332 Fed 2d 47, 48 [1].

The standards outlined in the opinion are:

- “(1) The background, i.e. is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e. g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

- (3) The identity of the questioner, i. e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e. g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
- (5) Truthfulness of the reply."

332 Fed 2d 47, 48 [1]

The critical question that must be answered is whether the questioning at issue would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. GCX exhibits which purport to represent the entire conversation covers 53 pages and out of those 53 pages there are only nine separate places where contact with the NLRB is brought up. In almost all of those instances it is Lopez who raises the issue. Thus, applying the test referenced by the ALJ, the inescapable conclusion is as follows:

1. There is no prior history of any discrimination or hostility on behalf of Respondent.
2. There is no evidence from the transcript or listening to the actual recording that the questions or inquiries of Hobson amounted to an interrogation or that they were being sought for the purpose of retaliating in any way against Lopez.
3. There is no question that Hobson was the president of the company. He was as high in the company hierarchy as one can get.
4. The employee was not called away from work to the boss' office, there was no unnatural formality. In fact, it was a regular business meeting to discuss forecasting and it was Lopez who took the discussion into the area of the NLRB and EEOC contacts, allegedly, at least what she would have had Hobson believe, in order to protect the business and let him know that he had problems with his company policies and confidentiality agreement. Hobson, on behalf of

Respondent, repeatedly makes comments to the effect that she has every right to make the contact and/or a claim e.g. “well, it is your right to make the contact and if I violated the law, I will have my lawyer look at it and will make it right.” [See GCX-12 Part 1, Page 7, 8, 9, 14, 20 and Part 2, Page 5 and Part 3, Page 11]

Looking at the totality of the circumstances surrounding the July 8, 2015 meeting, there were no threats, veiled or unveiled, made against Lopez for her actions. Hobson clearly states that he will have his lawyer look at the documents and determine what needs to be done to make the company policies compliant with the law. The ALJ concedes and finds that there were no threats, direct or veiled, by Hobson/Respondent directed toward Lopez. [ALJ Decision Page 22]. In short, the record is devoid of any factual basis for a finding that there was an unlawful interrogation of Lopez by Respondent on July 8, 2015. There can be zero doubt that Lopez was not, in any manner, restrained or coerced by the conversation. Rather, Lopez sprung the subject on Hobson without warning and Hobson, at best, asked clarifying questions to ensure he understood exactly what it was Lopez was talking about and had been told by the agent of the NLRB so that he could then discuss it with his attorney and bring his policies into compliance if in fact there was an issue with them as Lopez claimed.

**II. The ALJ erred in finding that Lopez’s termination was motivated by her contacts with the NLRB.**

Absent the temporal relationship between Respondent via Hobson learning of Lopez’s contact with the NLRB on July 8 and her official termination on July 13, the record is devoid of any direct or circumstantial evidence of discriminatory animus on behalf of Respondent and a nexus connecting the termination with the protected activity. The burden was on General Counsel to prove by a preponderance of the evidence that the protected activity was a substantial or

motivating factor in the termination. *Concepts and Designs v. NLRB*, 101 Fed 3d 1243 (2) (8<sup>th</sup> Circuit 1996); *NLRB v. Transportation Management Corp.*, 462 U.S.C. 393, 401; 103 Supreme Court 2469, 2475; 76 Lawyers Ed 2d 667, 675 (1983). The burden may be satisfied by circumstantial evidence but not by reliance on suspicions, surmise, implication or plainly incredible evidence. *Concepts and Designs*, supra at 1244 [3]. Again, the ALJ is wrong in finding that there was an interrogation of Lopez regarding the protected activity. It is clear from the opinion and discussion of the animus found starting on Page 30, Line 35 through Page 31, Line 20 that the ALJ bases her opinion almost entirely on the content of the conversations between Hobson and Lopez on July 8 [GCX, 12 & 13]. The ALJ acknowledges that there was never any threat of any type of reprisal by Hobson to either Lopez or anyone else. [ALJ opinion Page 22, Page 30, footnote 24]

Again, in the 53 page transcript of the July 8 conversation there are nine times that contact with the NLRB or problems with the company policy and confidentiality agreement are mentioned. [See GCX-13: Part 1, Page 7, 8, 9, 14 and 20; Part 2, Page 5; Part 3, Page 1] It is crystal clear that Hobson's reaction, as president of Respondent, to the issue of the employee policies and confidentiality agreement being in violation of NLRB rules, regulations or law is that he will bring them into compliance and make them legal. [GCX-13: Part 1, Page 20, Lines 7 – 9; Part 2, Page 5, Lines 5 – 14; Part 3, Page 1, Lines 32 – 33] Further, what is inferable from the transcript, but is crystal clear when listening to the actual recording, is this entire meeting was contentious as between Hobson and Lopez. The only threat contained in the entire 53 page transcript comes not from Hobson but from Lopez when she tells him during the discussion of the "honesty issue":

Line 4 - TL: "I will tell you this. I have called the Labor Board and I have called the EEOC and I have great grounds". GH: "mmhmm." TL: "And I have plenty

of stuff.” TL: “Do I want to do that to you? No I have worked here for three years.”

[GCX-13: Part 1, Page 14, Lines 4 – 9]

Hobson’s response to this direct threat is “it is your right if that is what you want to do”. The ALJ is correct on one point when she finds in her opinion, Page 31, Line 39, that Lopez did everything she could to goad and incite Hobson. However, she is incorrect when she finds that Hobson took the bait because, in fact, he did not. What he says repeatedly in the sections quoted above is to the effect “if I am in violation of law, I will correct it. I don’t know that that is the law”. The fact Lopez recorded the conversation was further evidence of her intent to try and goad Hobson and entrap him into saying something incriminating. Lopez’s repeated questioning and repeated attempts to elicit something she felt she could use was clearly evidence that she was not coerced or intimidated and in fact was the main driving force behind the conversation. One cannot surprise their manager with information with the goal of convincing them they need to change their policy based on conversations with government agencies and then turn around and accuse the company official of unlawful interrogation when the official has follow-up questions on the very topic they brought up. Lopez did not merely state her opinion that she felt the policies were wrong. Rather, she specifically brought up her discussions with the government as proof that she was right. The balancing test of *Rossmore* is specifically designed to allow for real world considerations that an employee who introduces a topic on their own volition cannot then claim they were intimidated by follow up statements from the supervisor they brought it up to.

There was substantial and unrefuted evidence that Respondent had good reason and substantial grounds to be dissatisfied with Lopez as an employee as in detail in Respondent’s post-hearing brief . [No. II, subparagraphs D (2), (3) and (5), copies which are marked Exhibits

A, B and C and attached] Further, the evidence that Hobson intended on replacing Lopez was unrefuted and undeniable. Immediately following the MOS incident described in the evidence, Hobson contacted Mike Norman in an effort to get him to replace Lopez. [GCX-7, Transcript 76-77, 231-232] The unrefuted evidence from Hobson, Norman and Tanner was that Lopez was going to either be demoted or fired and would probably leave. The inescapable conclusion is that Lopez's tenure with Respondent was going to end. Did Lopez goad and attempt to "set up" Respondent and Hobson? The obvious answer is yes but she was not fired for the protected activity but because she was going to be fired anyway and she knew it.

**III. and IV. The ALJ erred in finding that Lopez was not a supervisor and therefore not entitled to the protection of 29 U.S.C.A.A. Section 1557 and 1558 and by not properly weighing the evidence of Greenwood and Halle who testified that Lopez exercised authority over their working hours and attendance when determining Lopez was not a supervisor under Section 2(11) and classifying this direct evidence as merely "inferences, suppositions or conclusionary statements."**

29 U.S.C.S. §152 (11) defines "supervisor" for purposes of the Act:

- (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As a general rule of law, supervisors are not "employees" as defined by the Act and therefore not afforded protection under its provisions. *NLRB v. Health Care and Ret. Corp of America*, 511 U.S. 571, 114 S. Ct. 1778, 128 L. Ed. 2 586 (1994).

An individual is a supervisor within the statutory definition if such individual has only one of the enumerated powers regardless of frequency. *NLRB v. Pilot Freight Carriers, Inc.*, 558 F2 205 (4<sup>th</sup> Cir. 1977) at 558 F2 206 (1).

The statute requires the resolution of three questions: (1) does the employee have authority to engage in one of the 12 listed activities; (2) does the exercise of such authority require the exercise of independent judgment; (3) does the employee hold the authority in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711, 121 S. Ct. 1861, 1866; 149 L. Ed. 2, 939, 946 [5] (2001).

Lopez's testimony elicited by the General Counsel confirms that she was a supervisor. She had full access to QuickBooks [TR307]; had the ability to hire, fire and do evaluations [TR308]. She claims that those duties were taken away in December 2014. She concedes that she was responsible for the forecasting [TR312] though subject to review by Hobson [TR313].

Hobson testified, and there was no contradictory evidence offered, that in his absence she was in charge. [TR267] She had authority to approve someone's leaving sick [TR268], clearly a decision requiring her to exercise independent judgment. She collaborated on hiring decisions of key persons. [TR268] Therefore, she had authority to effectively recommend action affecting the company's interests. Further, such input again required her to exercise independent judgment. Lopez had the task of organizing work parties which means she made independent decisions about to whom to assign task and work.

“If a person on the shop floor has “men under him,” and if that person decides “what job shall be undertaken next or who shall do it,” that person is a supervisor, provided that the direction is both “responsible” (as explained below) and carried out with independent judgment. See footnote 19, supra. In addition, as the statute provides and Senator Flanders himself recognized, the person who effectively recommends action is also a supervisor.” *Oakland Healthcare, Inc.* 348 NLRB 686, 691 (2006).

Monty Greenwood testified that Lopez was his immediate supervisor. [TR300] Per Greenwood, Lopez directed his work days and sick days. [TR300] Similarly, employee Halle testified that if and when she needed to leave work early she sought the permission of Lopez. Specifically Halle testified “if I needed to leave early, I would ask her.” (TR 297). What this evidence clearly established is that Lopez had the authority and exercised that authority to grant changes to employee hours. This is direct supervisory control and yet the ALJ erroneously discounted it as mere inference or supposition when it was, in fact, direct evidence by an employee of an example of how Lopez exercised authority over their terms and conditions of employment. The unrefuted testimony from Greenwood was that in Hobson’s absence, Lopez was in charge. [TR301]

There was no dispute that Hobson began reducing her duties but those reductions came about as a result of her actions: insubordination [TR242; GCX-13]; disclosing confidential information to a supplier, MOS [TR245]; and finally, not following Hobson’s instructions regarding communications with RBC [TR259, 260]. She was being held accountable for her actions. *Oakwood Healthcare, Inc.*, supra at 692.

Further, the following facts were unrefuted or rebutted by General Counsel’s evidence:

- a. He was only present at the business 10 to 20% of the time and in his absence Lopez was in charge. [TR267]
- b. Lopez organized and directed work parties. [TR267]
- c. Lopez oversaw quality control issues. [TR267]
- d. Lopez approved sick leave in Hobson’s absence. [TR268]
- e. Lopez would recruit and interview for vacant positions. [TR268]

- f. For key positions, the hiring process would have been a collaborative process with Hobson being the ultimate decision maker. [TR270-271]
- g. Lopez had employee training responsibilities. [TR272]
- h. In Hobson's absence, Lopez made day-to-day decisions on issues such as shipping inventory, invoicing, and customer relations. [TR274]
- i. Lopez's work with forecasting required her to have direct contact with both suppliers and customers. [TR275]
- j. Lopez was responsible for work scheduling. [TR275]
- k. Lopez's role in forecasting changed after the May incident involving HBI's supplier, MOS. TR276, 245-247, 249]

Even assuming that at the time of her termination Lopez did not have the ability to hire, fire, lay off, recall, promote or discharge any of the employees, that does not in and of itself preclude her from being a supervisor under the statute. *Keener Rubber, Inc. v. National Labor Relations Board*, 326 Fed 2d 968 (6<sup>th</sup> Circuit 1964). That Lopez was in charge of the plant when Hobson was not present was undisputed and unrefuted and supports a finding that she was a supervisor as defined by 29 U.S.C.S. Section 152 (11). See *Keener*, supra [970][4].

**V. The ALJ was in error and prejudiced Respondent by failing to order the cell phone which contained the recording of the July 8 conversation to be produced for forensic examination.**

At the time of the hearing Respondent asked that they be given access to the cell phone so that they could test the validity of the transcript GCX-13. [Transcript Page 185, Line 22]



**CERTIFICATE OF SERVICE**

I hereby certify that I have this 16<sup>th</sup> day of September, 2016, served a true and correct copy of the foregoing upon the following via E-filing:

William LeMaster, General Counsel  
National Labor Relations Board  
8600 Farley Street, Suite 100  
Overland Park, KS. 66212

Division of Judges  
1099 14<sup>th</sup> Street NW  
Room 5400 East  
Washington, D.C. 20570-0001

Additionally, I hereby certify that I have this 16<sup>th</sup> day of September, 2016, served a true and correct copy of the foregoing upon the following via e-mail:

Eric Crinnian, [eric@bculegal.com](mailto:eric@bculegal.com)

/s/Karl W. Blanchard, Jr.

- j. Lopez was responsible for work scheduling. [TR275]
- k. Lopez's role in forecasting changed after the May incident involving HBI's supplier, MOS. TR276, 245-247, 249]

General Counsel did not offer any testimony to refute any of the above listed facts.

2. **Insubordinate Behavior by Lopez towards Gene Hobson.**

Prior to early to mid-2014, Hobson viewed Lopez as a stellar employee. [TR70, 238] In early to mid-2014, Hobson began to notice a change in Lopez. [TR241-242] Hobson noticed that Lopez would roll her eyes, make gestures and turn her back on him while he was speaking to her. [TR242] This took place in front of other employees. [TR242] The insubordination was noticed by other employees. [Halle Hobson - TR298; Monty Greenwood – TR301, 302] The insubordination of Lopez is exhibited throughout the July 8, 2015 meeting of Lopez and Hobson by GCX-12, the surreptitious recording by Lopez of the July 8, 2015 meeting between Hobson and Lopez.

As a result of the insubordination, Hobson made the decision to find and hire a replacement which led him to contact Mike Norman. [TR77, 229, 231, 244] He also had a chance meeting with Evan Tanner at which time the issue of replacing Lopez was discussed. [TR244]

While Hobson had his doubts as to whether Lopez would stay after being demoted [TR81, 95], his initial plan of action was to demote Lopez but that changed after the MOS & RBC incidents discussed below. [TR81]

3. **Transmittal of Confidential Information to MOS.**

In May 2015, Lopez sent confidential and proprietary data to MOS, a supplier of HBI. [TR172] The publication of this information could have been harmful to HBI. [TR173, 245, 246, 247]

Ex A

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3. **Transmittal of Confidential Information to MOS.**

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Immediately after this incident, Hobson sent GCX-7 to Mike Norman in an effort to hire Norman to replace Lopez. [TR76-77, 231-232] Norman, for financial reasons, turned the job down. [TR232]

4. **Lopez's job is offered to Evan Tanner.**

Following Mike Norman's declining to accept a position assuming Lopez's supervisory duties at HBI, Hobson opened up discussions with Evan Tanner.

[TR99] In June 2015, Hobson met with Evan Tanner at HBI for the purpose of finalizing an agreement and getting Tanner on board as quickly as possible.

[TR260]

Tanner's duties were to include overseeing all operations at HBI including hiring, firing, logistics and inventory management, and day-to-day operations. [TR293]

Tanner understood in April 2015 that Hobson wanted to hire someone because he was having issues with an employee. [TR98] In May, Hobson identified the employee as Lopez. [TR99] Initially Tanner understood that he would be taking over some of Lopez's responsibilities and that she would be moved to a lessor position. [TR99] Hobson was indefinite as to his intentions regarding Lopez at this point. [TR100] Tanner met Hobson at HBI the first week of June 2015.

[TR100] At that meeting, Hobson offered Tanner the position. [TR102] Tanner decided to accept the position a week later. [TR102] At the time Tanner accepted the position, Hobson was still uncertain as to Lopez's future with HBI. [TR102-103] However, at the time of the June 30 meeting, Hobson told Tanner that he would be replacing Lopez and she would be terminated. [TR103, 261] Hobson wanted Tanner to start July 10, 2015, but Tanner's commitments were such that July 13, 2015 was the first day he could be at work. [TR106]

5. **The RBC Incident.**

Regal Beloit Corporation, referred to as “RBC” in the evidence, is and was the “bread and butter” customer of HBI. [TR256] In late spring/early summer 2015, HBI was having some issues supplying RBC’s bearing orders. [TR256] Lopez had been communicating with a Ms. Wanta at RBC, advising her of supply shortages. [TR257-258] Mr. John Guan of RBC, in a conversation with Hobson, requested that Lopez cease making the reports. [TR257-258] Guan’s concern was that the reports were causing issues with management at RBC. [TR258] Hobson instructed Lopez to cease making the reports. [TR259] Lopez, in a conversation with Wanta, reported that she had been instructed that she could not disclose the shortages to RBC which caused problems at RBC for HBI. [TR260]

6. **The July 6, 2015 employee meeting.**

There is no dispute that an HBI employee meeting was held on July 6, 2015, at which time revised company policies and guidelines were distributed and discussed. [TR26, 27; GCX-4] Mr. Hobson does not recall distributing the Confidentiality Agreement at GCX-5 at the July 6 meeting, it being his memory that it was distributed on May 28, 2015. It is undisputed that Hobson requested all employees to review and sign the documents GCX-4 and 5. [TR31]

There was conflicting testimony from witnesses Lopez, McBride and Wishon that after the employee meeting adjourned these three met in the warehouse, or the office, and either with or without Monte Greenwood, and either with or without Halle Hobson to discuss concerns they had regarding both GCX-4 and in regard to Ms. Lopez’ testimony, GCX-5. [TR205, 190-191, 123] Testimony also conflicted as to whether or not there was a plan of action decided upon at that meeting with Lopez stating that it was a general agreement that she would

Ex C