

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

ORCHIDS PAPER PRODUCTS CO., And UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO,	Cases 14-CA-184805 14-CA-184807 14-CA-188413 14-CA-189031 14-CA-190022 14-CA-192908 14-CA-199035
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**RESPONDENT ORCHIDS PAPER PRODUCTS CO.'S REPLY BRIEF IN FURTHER
SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent Orchids Paper Products Company (“Orchids” or “Respondent”), hereby submits its Reply in Further Support of Its Exceptions to the Administrative Law Judge’s September 15, 2017 Decision (“ALJD”). For the reasons set forth in Orchids’ Exceptions, accompanying brief, and this reply, the National Labor Relations Board (the “Board”) should not adopt the Decision and recommendations of the ALJ, but rather dismiss the Amended Fifth Consolidated Complaint in its entirety.

I. People Source Employees (Exceptions 2-15, 20)

The General Counsel and the ALJD both rely almost exclusively upon *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015) (“*BFI*”), a case currently under appeal with the United States District Court for the District of Columbia, for its baseline presumption that Orchids and its temporary staffing agency People Source were joint employers of the People Source employees assigned to work at Orchids. The General Counsel’s arguments pertaining to the People Source employees are all premised upon this finding of joint employer status. Without a finding

of joint employer status, the ALJD's conclusions that Orchids (1) failed to adhere to the contract and (2) discriminatorily terminated the assignments of the five named People Source employees cannot stand. The burden of proving joint employer status rests with the General Counsel. *See BFI*, at 16.

This finding of joint employer status relies on *BFI* for the proposition that Orchids is a joint employer of the People Source temporary employees because Orchids "dictat[es] the number of workers to be supplied, control[s] scheduling, seniority, overtime, and assigning work and determin[es] the manner and method of how work is to be performed." ALJD at 21:5-10; General Counsel's Answering Brief, at p. 5. This interpretation of *BFI* is a massive stretch, as it would essentially render impossible the ability of any union employer to use temporary workers.¹ Of course Orchids is required to "initiate a request for labor by identifying the number of employees necessary, shifts to work start dates, type of assignment and how long the assignment is scheduled to last" and "when assignments end." *See* General Counsel's Answering Brief, at p. 6. This is necessary for the use of any temporary labor. What is the alternative? How else could any company ever use a temporary agency to provide temporary workers and manage a business with fluctuating needs?

In its Brief in Support of its Exceptions, Orchids submitted unrefuted testimony that People Source recruits, interviews, screens, hires, sets the wages and benefits for the employees it refers out, fire, suspends, and disciplines. *See* Orchids' Brief in Support, at pp. 3-4; ALJD at 5:27-29. The General Counsel contends that the People Source employees were performing similar work to the Orchids' employees. *See* General Counsel's Answering Brief, at pp. 7-8. However, they did not refute the fact that temporary workers did not have full access to the plant, but were restricted to the periphery (outside the doored enclosures where employees worked). *See* Orchids' Brief in

¹ As set forth in Orchids' Brief in Support, the facts of the current case are substantially different and easily distinguished from the facts of *BFI*. *See* Orchids' Brief in Support, at pp. 2-9.

Support, at p. 5. Even the ALJD states that “[t]he evidence is limited regarding who supervises the temporary employees and what that supervision involves.” ALJD at 6:8-9

The entirety of the ALJD’s determination and the General Counsel’s argument pertaining to the work performed by the People Source employees and any supervisory control is based *almost exclusively* upon the testimony of only two (2) of the People Source employees who were assigned to work at Orchids. *See* Orchids’ Brief in Support, at pp. 20-21. Initially, the General Counsel had five (5) named People Source employees. It then improperly expanded the claims at the hearing to include other People Source employees. However, despite these claims, the General Counsel only called two (2) individuals to testify about their assignments for People Source at Orchids.

The ALJD inexplicably expands the testimony of these two (2) individuals to apply to an unenumerated number of People Source employees – each of who has a separate, independent set of circumstances. The ALJD’s reliance upon the testimony of two (2) individuals for its blanket analysis allegedly pertaining to “all” People Source employees who had assignments of more than 60 days is an extreme stretch as it is the General Counsel’s burden to prove joint employer status. *See BFI*, at 18.

As an initial matter, Orchids contends that the General Counsel mischaracterizes some of the testimony of Jennifer Whisenhunt (“Whisenhunt”) and Carrie Bunnell (“Bunnell”), the two (2) individuals who testified. *See* Orchids’ Brief in Support, at pp. 5-6. Additionally, Orchids further contends that – even were the Board to determine that Orchids may somehow be a joint employer over Whisenhunt and Bunnell – there was never *any* evidence presented establishing that Orchids may somehow be a joint employer over any other People Source individuals. No one else testified about their assignment at Orchids. No one else testified about the work they performed at Orchids. No one else testified about the ending of their assignment at Orchids. No one else testified that they were

considered “permanent temps.” No one else testified that they were assigned to work a regular shift. No one else testified *at all* about their People Source assignment at Orchids.

The ALJD and the General Counsel rely exclusively upon People Source’s time records and billing records to Orchids to expand the General Counsel’s claims to include violations of the Act based on this joint employer status to any employees who were assigned to work at Orchids for more than sixty (60) days. However, these time records alone are not sufficient to establish that Orchids and People Source were joint employers of any of these individuals. The sixty (60) day timeframe is based upon the CBA (which covers only bargaining unit members) and was not a benchmark of any sort between Orchids and People Source. Trying to fit this sixty (60) day probationary period for “employees” under the CBA to the relationship between Orchids and its temporary staffing agency is not appropriate. For instance, does the 60 day period start the first day a temporary worker is first assigned to Orchids? Does the 60 day period start when a People Source employee is assigned to Orchids on a regular shift? Does the 60 day period start when a People Source employee starts performing different job duties at Orchids (if there is some evidence that they do so)? Not only does this improper analysis create these and other questions, but there is absolutely no testimony in the record about any of these possible time periods for any People Source employee other than Whisenhunt and Bunnell.

The ALJD’s determination that the General Counsel met its burden of establishing that the five (5) named individuals and “any other employees that may be identified after a review of Respondent’s records” were joint employees of Orchids and People Source should not stand. ALJD at 39:20-21, 42:41-42. As the ALJD finding that Orchids jointly employed any People Source employee who was assigned to Orchids for more than sixty (60) days is erroneous, the remainder of the ALJD determinations and the General Counsel’s arguments must also fail. Orchids did not fail to

adhere to the 60-day probationary period of the CBA, as the People Source employees were not employees of Orchids.² Further, Orchids' ending of the temporary assignments from People Source did not violate Section 8(a)(5) and (1) and Section 8(d) of the Act as Orchids did not have an obligation to bargain over a decision that had no impact on the bargaining unit.

In a recent similar case, the D.C. Circuit Court of Appeals found that CNN was not a joint employer of outside contractors who provided technicians. While the Board found multiple violations of the Act based on a finding of joint employment status, the Court of Appeals concluded that "the Board's determination that CNN and TVS [the contractor company] cannot stand." The Court of Appeals reached this conclusion because the Board applied the *BFI* standard and did not even mention any other precedents, similar to the ALJD in the present case.

Such "[s]ilence in the face of inconvenient precedent is not acceptable." *Jicarilla Apache Nation v. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010). "An agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'" *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting *Columbia Broad. Sys. V. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)). Indeed, it is "elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent." *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995). "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). Because the Board crossed that line here, we must set aside its finding that CNN was a joint employer. *See, e.g., E.I. Du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). And as a consequence, we must vacate the two unfair-labor-

² In its decision, the ALJD relied in large part upon Chad Vincent's August 12, 2016 e-mail to Court Dooley that addressed some "confusion as to the direction to go on probationary employees" and provided a "detailed explanation on how this issue should be resolved." While this e-mail sets forth the Union's position, it does not change the fact that Orchids consistently maintained that the People Source employees were not employees of Orchids and that there was never a joint employer relationship.

practice findings that rested on CNN's joint-employer status. *See Computer Assocs. Int'l*, 282 F.3d at 853.

NLRB v. CNN Am, Inc., 865 F.3d 740, 751 (D.C. Cir. 2017). In the present case, the ALJD and the General Counsel also predicate the joint employer determination on the incorrect standard set forth in *BFI* and fail to apply any other analysis. For the same reasons set forth by the D.C. Circuit Court of Appeals in the *CNN* case, Orchids requests that the Board refuse to adopt the ALJD and dismiss the General Counsel's claims relying on a joint employer relationship.

II. Conversion of Lines 6 and 7 to Op-Tech Lines (Exceptions 16-20)

As set forth in Orchids' Brief in Support of its Exceptions, the ALJ's analysis about the conversion of the Op-Tech lines erroneously concludes that Article 37 of the CBA was unambiguous, and, as such, excluded any parol evidence. *See* Orchids' Brief in Support, at p. 21. Orchids contends that the language in Article 37 of the CBA was ambiguous³ as it was unclear whether the conversion of Lines 6 and 7 to Op-Tech lines was already negotiated in the previous contract (as the first sentence of the last section would indicate) or required an additional agreement (as the second sentence of the last section may indicate). As it was ambiguous, Court Dooley reached out to others who were present (as Union officers) during the previous negotiation and confirmed these discussions in writing by e-mail to Chad Vincent. GC Ex. 16. Any parol evidence argument incorrectly presumes that the last section of Article 37 was unambiguous. As the language at the end of Article 37 of the CBA was ambiguous, the testimony offered by Court Dooley about his conversations with previous Union

³ This confusion is further evidenced by the fact that the General Counsel provides in its Answering Brief that "[d]uring the life of the 2012-2016 CBA, the parties agreed that Respondent's Line 9 would convert into an Op Tech line." *See* General Counsel's Answering Brief, at p. 14. However, the cited testimony does not support this proposition that Line 9 was a conversion or that the parties had any discussion about Line 9. Rather, Line 9 was a new line that was added (not a conversion) and clearly covered by the terms of Article 37 (Line 8 and Any New Line). The ambiguity and confusion over Lines 6 and 7 arose because of the language at the end of Article 37 specifically referencing Lines 6 and 7.

officers who were present during the last negotiation (along with his contemporaneous e-mail about such conversations) is proper. The General Counsel never provided any testimony to dispute the previous agreement during the last negotiations. As such, even were the ALJ to discredit Mr. Dooley's testimony about conversations he had that he immediately set forth in writing (GC Ex. 16), the General Counsel did not provide any evidence that an agreement was required for the conversion of Lines 6 and 7 (other than the language of Article 37 itself, which is ambiguous). As an agreement was not required for the conversion of Lines 6 and 7 under the CBA, the ALJ erroneously concluded that Orchids violated the Act by failing to obtain the Union's consent prior to the conversion.

III. Health Insurance (Exceptions 21-22)

Neither the ALJD nor the General's Counsel's Answering Brief address the arguments and case law set forth in Orchids' Brief in Support of its Exceptions requiring that a change must amount to "a material, substantial, and a significant one" in order to constitute a violation of Section 8(a)(1) and (5). *See* Orchids' Brief in Support, at p. 25. Moss testified that the direction to the new broker was to "mirror" the current plan. Tr. at 794. All copays remained the same as the previous plan. Tr. at 794. Orchids continued to pay 80% of the plan, and the employees paid 20%, deductibles and out of pocket maximums did not change, and Orchids continued its practice of reimbursing deductibles for employees. Tr. at 775, 780. As there was no any material, substantial, or significant impact of employees, the ALJD erroneously concluded that Orchids was obligated to bargain over the change in carriers.

IV. FRC Policy and Michael Besley (Exceptions 23-31)

Compliance with National Fire Protection Association 70E, or "NFPA 70E," was a priority of Graham Darby, Maintenance Engineering Manager for Orchids. Tr. 587-90, 602-03. Chad Vincent requested that Orchids address the Arc Flash at an August 2016 meeting when he requested that

Orchids “try to get compliant on that particular piece of the law.” Tr. at 141-44. Lack of compliance with NFPA 70E was raised by OSHA in its December 2016 visit to Orchids and subsequent discussions concerning abatement (where Darla Reed was present). Tr. at 141-44; Jt Ex. 1. In short, Orchids adopted the FRC policy to comply with NFPA 70E to abate OSHA safety violations, to comply with legal requirements, and to ensure a safe working environment for employees. A unilateral change is not unlawful when that change is mandated by Federal law. *Exxon Shipping Co.*, 312 NLRB 566, 567-68 (1993); *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964).

The General Counsel sets forth Michael Besley’s recitation of how he was confused about when he had to wear the FRC because he was allegedly receiving contradictory instructions. *See* General Counsel’s Answering Brief, at pp. 18-23. However, the testimony of everyone else who was involved with Maintenance and testified was that Darby had been clear throughout with all Maintenance employees that the FR clothing should be worn at all times and did not make any exceptions. Tr. at 420, 443, 616-21, 699, 705-06. Besley’s baseless assertions to Orchids’ employees not in the Maintenance Department, conflicting stories, and blatant refusal to comply with the NFPA 70E safety requirements led to his suspension on May 15, 2017.

Based upon these behaviors, as well as continued complaints and previous discipline for his work performance, Orchids pulled its CMMS records for Besley during his suspension confirming the feedback that it received from other maintenance employees. Based upon the complaints received by other employees as confirmed by a review of the CMMS records, Darby concluded that Besley was improperly utilizing the CMMS system and that his work falls well below company expectations. Tr. at 636-53; R Ex. 6; Jt Ex. 32. The ALJ agreed that there was no dispute that Besley was failing to

properly log his time and work orders. ALJD at 19:7-8. Thus, Besley returned from the suspension and received a written warning setting forth specific performance expectations.

In its Answering Brief, the General Counsel contends that “[t]he record is clear that Respondent targeted Besley in comparison to the rest of the maintenance employees.” *See* General Counsel’s Answering Brief, at p. 24. This could not be further from the truth. If anything, Orchids allowed Besley more latitude because he was the Union President. Orchids was ultimately forced to take some action against Besley based on his actions (or inactions) and his refusal to wear safe clothing as required by NFPA 70E. Besley was given multiple opportunities to do so, the employees in the Mill had been wearing FR clothing for about five (5) years, and Besley was the only Converting employee who refused to wear the FR clothing. This does not support the General Counsel’s argument that Orchids was “singling out” Besley.

Orchids contends that the General Counsel is unable to meet its *prima facie* burden as Besley’s failure to wear proper clothing that was required by law is not protected concerted activity. Besley was acting solely on his own behalf and without the authority of any other employees. Orchids’ suspension of Besley was not because of his protected concerted and union activities or motivated by union animus, but was because of his failure to comply with his supervisor’s directive to wear safe clothing and his poor performance. Besley’s refusal to follow safety rules and to follow the directions of his supervisors were not trivial offenses, and Orchids had no option but to take disciplinary action against Besley to ensure a safe working environment for himself and others.

V. “Policy” Regarding Union Activities During Working Time (Exceptions 32-33)

In its Answering Brief, the General Counsel details instances whereby Court Dooley (and, in one instances, Kelly Foss) made comments to employees about their need to perform work while they are at work. *See* General Counsel’s Answering Brief, at pp. 25-26. As set forth in detail throughout

Orchids' Brief in Support discussing each of these situations, these statements did not unilaterally modify or promulgate any new rule. Rather, Dooley never disciplined any employee for performing any authorized Union business and never prevented an employee from conducting Union business when they had the permission of a supervisor. Instead, Dooley attempted to manage a workforce whereby employees were not permitted to harass other employees and whereby employees were required to perform their job. *See* Orchids' Brief in Support, at pp. 36-37 (November 29, 2016 Conversation Between Dooley, Reed and Besley), 37 (December 2016 Conversation Between Blower, Foss and Reed), 38-39 (February 2017 Conversation Between Blower, Foss and Ree), 39 (Conversation Between Moss and Dooley and Reed and Montoya), 40 (Conversation Between Cochrell and Besley).

VI. Independent Section 8(a)(1) Violations (Exceptions 34-49)

Orchids reiterates the arguments set forth and the accompanying references to testimony and to the record in support of its exceptions to the independent Section 8(a)(1) violations.

VII. Management Rights Clause (Exception 1)

A union may waive bargaining with respect to a particular condition of employment so long as the waiver is clear and unmistakable. "A union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain." *NLRB v. Okla. Fixture Co.*, 79 F.3d 1030, 1036-37 (10th Cir. 1996); *Heartland Plymouth Court v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016). To the extent the General Counsel argues Orchids did not identify specific portions of the Amended Fifth Consolidated Complaint, Orchids contends that it retained rights under the Management Rights Clause with respect to the People Source employees, the conversion of Lines 6 and 7, its health insurance carrier, the FRC policy, and the "policy" regarding Union activities during working time.

WHEREFORE, for all the foregoing reasons and the reasons set forth in its Exceptions and Brief in Support of its Exceptions, Respondent Orchids Paper Products Co. respectfully requests that the Board refuse to adopt the Decision and recommendations of the ALJ, but rather dismiss the Amended Fifth Consolidated Complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

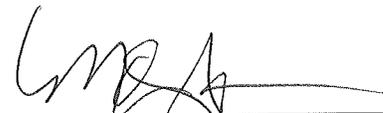
I, the undersigned, do hereby certify that on this 10th day of November, 2017, a true and correct copy of the above and foregoing document was filed electronically and sent by email to:

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