

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERMODAL BRIDGE TRANSPORT

and

Case Nos. 21-CA-157647
21-CA-177303

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

RESPONDENT'S REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF

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INTRODUCTION¹

On March 2, 2018, Respondent, Intermodal Bridge Transport (“IBT”), filed its Exceptions to the Administrative Law Judge’s November 28, 2017 Decision (the “ALJ’s Decision”) in the referenced case. IBT established in its Exceptions that the Charging Party waited too long to file its misclassification-as-unfair labor practice claim, and IBT further established error by the ALJ in his misclassification decision as well as his finding that such a misclassification could, itself, be considered an unfair labor practice. Finally, IBT established error with respect to the ALJ’s findings that unfair labor practices were committed through the conduct of Oswaldo Zea and Marlo Quevedo.

The General Counsel responded to IBT’s Exceptions by abandoning its claim that misclassification, itself, is an unfair labor practice. With that provision of the Complaint abandoned, there is no need to evaluate whether drivers, as a whole, were misclassified. Rather, the only remaining unfair practice allegations relate to driver Eddie Osoy and Jose Portillo. Because both were independent contractors, the case must be dismissed. Even if they had been employees, however, IBT did not violate the Act. The Complaint, in its entirety, should therefore be dismissed.

¹ Given the reply brief limitations contained in Rule 102.46, IBT cannot address each point raised in the General Counsel’s 80-page Answering Brief. IBT in no way concedes any points made in the Answering Brief, and IBT continues to rely on the points made in its Exceptions Brief as warranting reversal of the ALJ’s Decision.

ARGUMENT

I. The General Counsel Has Confirmed Misclassification, Itself, Does Not Violate the Act

IBT has steadfastly argued that the General Counsel improperly urges an unprecedented cause of action – that misclassification, itself, is an unfair labor practice. Nevertheless, starting with the former General Counsel’s December 18, 2015 Advice Memorandum regarding *Pacific 9 Transportation, Inc.*, 21-CA-150875 (the “PAC 9 Memo”), the former General Counsel suggested misclassification may be an unfair labor practice. On September 24, 2015, the Charging Party in this case expressly alleged that IBT violated the Act discreetly by misclassifying drivers as independent contractors. GC1(f). The General Counsel, after investigating, issued a Complaint, alleging IBT misclassified its drivers as independent contractors and solely by virtue of misclassification, violated Section 8(a)(1) of the Act. GC1(v) ¶ 8; GC1(cc) ¶ 6.²

On December 1, 2017, the current General Counsel issued GC Memo 18-02, expressly rescinding the PAC 9 Memo. What is more, the current General Counsel, on April 25, 2018, submitted its Brief of the General Counsel in *Velox Express, Inc.*, 15-CA-184006, formally abandoning the position that misclassification of employees as independent contractors, standing alone, is a per se violation of Section 8(a)(1).

Finally, in its Answering Brief in this case, counsel for the General Counsel expressly rejects the ALJ’s “per se” legal theory on the first impression question that

² Counsel for the General Counsel made it crystal clear in her opening statement her position on the allegation: “the misclassification of employees is in and of itself a violation of Section 8(a)(1) of the Act.” Tr. 48.

misclassification, itself, is an unfair labor practice. *GC's Answering Brief* at 58-59. Rather, sensing a change in the direction of the Board, the General Counsel now takes the position for the first time in this case that misclassification must be accompanied by "some affirmative action by an employer to chill protected conduct" in order for a violation of the Act to have occurred. *Id.* at 59. In short, counsel for the General Counsel has effectively dropped the Complaint allegation relating to misclassification as a per se violation of the Act. The ALJ's finding in that regard should therefore be rejected as moot.

II. The General Counsel Cannot at This Late Stage Introduce a New Claim

In place of the now-abandoned "per se" violation allegation that has been heavily litigated throughout this case, counsel for the General Counsel seeks to install a new allegation – that IBT "actively used the misclassification of its employees to interfere with activity that is protected by the NLRA." *GC's Answering Brief* at 59. IBT, of course, had no way to prepare for such an allegation or enter evidence relating to such an allegation being that the hearing in this case occurred over a year and a half beforehand. The attempt to insert a new Complaint allegation should therefore be rejected.

Under the Administrative Procedures Act, "[p]ersons entitled to notice of an agency hearing shall be timely informed of ... the matters of fact and law asserted." 5 U.S.C. Section 554(b). "The Board has indicated that '[t]o satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change theories in midstream without giving respondents reasonable notice of the change.'" *Nyp Holdings, Inc., d/b/a the New York Post & Local 94-94a-94b, Int'l Union of*

Operating Engineers, 353 NLRB 343, 344 (2008) (citing *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004)).

In determining whether due process rights have been violated, the Board considers the scope of the complaint, any representations by the General Counsel concerning the theory of violation, and the differences between the theory litigated and the judge's theory. *Nyp Holdings*, 353 NLRB at 344 (citing *Sierra Bullets, LLC*, 340 NLRB 242, 242-243 (2003) (violation based on broader theory improper and violates due process when General Counsel expressly litigated case on narrow theory); see also *Champion International Corp.*, 339 NLRB 672, 673 (2003) ("It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is.")).

In *Lamar Cent. Outdoor d/b/a Lamar Advert. of Hartford & Gary Crump*, 343 NLRB 261, 263-64 (2004), the ALJ recommended dismissal of the complaint in its entirety, and in his exceptions, the General Counsel expanded the theory of the violation beyond what was alleged in the complaint and litigated at the hearing. *Id.* at 265. The General Counsel attempted to argue to the Board that the discharged employee's "protected activity consisted both in his cooperation with the General Counsel, albeit under subpoena, and his threat to retain counsel, which he alleges, was a threat to file an unfair labor practice charge." *Id.*

The Board found that it was "too late" for the General Counsel to argue his theory that the employee's threat to retain counsel was protected and a motivating factor in the discharge. The theory as stated in the complaint and argued to the ALJ was that the protected activity at issue was the employee's receipt of a subpoena and subsequent

cooperation in another Board case. “To find that the Respondent violated Section 8(a)(4) and (1) by discharging Crump on a theory that it was in retaliation for his threat to hire an attorney and presumably to file an unfair labor practice charge would violate fundamental principles of procedural due process, which require meaningful notice of a charge and a full and fair opportunity to litigate it.” *Id.* at 265.³

In *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 543 (7th Cir. 1987), the Acting Regional Director consolidated two employee charges and issued a complaint alleging that the employer (Quality) had violated section 8(a)(1) of the Act by discharging the employees because they had “ceased work concertedly and engaged in a strike by refusing to perform physically dangerous work.” After a hearing, the ALJ concluded that there had been no violation and dismissed the complaint. The ALJ further found that the only issue litigated under section 8(a)(1) was the claim that the employees had engaged in a concerted effort to protest unsafe conditions by work stoppage. *Id.* at 543-44.

The General Counsel filed exceptions to the ALJ’s decision with the Board and argued for the first time that the employees’ refusal to work was protected activity because it involved a protest over *uncomfortable* working conditions. *Id.* at 544 (emphasis in the original). Quality argued that this variance amounted to an amendment of the

³ The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, “an agency may not change theories in midstream without giving respondents reasonable notice of the change.” *Id.* (quoting *Rodale Press v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)).

Lamar Central Outdoor, 343 NLRB at 265-66 (citing *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992); see also *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1107 (6th Cir. 1994)).

complaint and “a change of strategy foreign to the issues heard at the hearing and argued in the briefs to the ALJ.” The 7th Circuit found that there was nothing in the complaint regarding any allegations of a section 8(a)(1) violation concerning discharges due to a concerted work stoppage to protest uncomfortable conditions of employment and the complaint was never amended. *Id.* Quality never received notice through the pleadings.

Furthermore, the 7th Circuit noted that “the simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be ‘fully and fairly litigated’ in order for the Board to decide the issue without transgressing Quality's due process rights.” *Id.* (citing *NLRB v. Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267, 274 (10th Cir. 1980)). Had Quality’s counsel known of the discomfort charge he would have been concerned with more factual and legal issues which require different research and arguments. *Id.* at 547-48. Reviewing courts should not speculate as to whether additional evidence might exist. “[T]he evil ... is not remedied by observing that the outcome would perhaps or even likely have been the same.” *Id.* at 548 (citing *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1257 (D.C. Cir. 1968)). Quality’s due process rights were violated, therefore, the case was vacated and remanded.⁴

⁴ See other cases holding the Board failed to provide meaningful opportunities to litigate issues where notice was provided shortly before or during an administrative hearing: “The Sixth Circuit in *NLRB v. Homemaker Shops*, 724 F.2d 535 (6th Cir. 1984), found a variance that violated due process where company counsel had received notice of the new claim only ‘some three to four days’ before the hearing. *Id.* at 548. . . . In *Stokely-Van Camp, Inc., v. NLRB*, 722 F.2d 1324 (7th Cir. 1983), the court held that a due process violation occurred when the respondent company was first informed of the differing charge in the General Counsel's posthearing brief filed with the ALJ prior to the ALJ's decision . . . We have also held that a complaint amended during the administrative hearing to present a new claim failed to afford the respondent company a meaningful opportunity to prepare

In the present case, IBT had no opportunity to provide evidence, refute evidence, examine witnesses, or cross-examine witnesses with respect to any purported affirmative use of its independent contractor misclassification to chill Section 7 activity. Specifically, aside from the misclassification as a per se violation, the totality of unfair labor practice allegations consisted of (1) interrogations, promises and threats by Quevedo, (2) threats by Zea, (3) surveillance and threats by Vicky Rosas, and (4) retaliatory suspension/termination of Osoy. GC1(cc) par. 7-11. The Complaint is utterly devoid of any allegation that any document whatsoever, alone or in sum, in any way violated the Act. As such, IBT's defense focused solely on the Complaint allegations that were present, and IBT had no way of knowing an additional claim would be made 18 months after the close of evidence.

Counsel for the General Counsel nevertheless cites documents it originally introduced to refute IBT's claim that drivers were properly characterized as independent contractors. Counsel cites a Driver Application Form and revised Lease and Transportation Agreement ("LTA"), both of which were modified outside the 10(b) period, as well as IBT ceasing a former practice of completing I-9 forms for drivers, revising the Truck Lease Agreement, entering "sham" negotiations over rates, requiring occupational accident insurance, instituting a "rejection log" to show that drivers have a choice of whether to accept or reject loads, changing dispatch procedures to provide more choice, and advising drivers they were independent contractors through memos. GC's

and present its case where the new claim was not a 'minor' variation from the claim in the original complaint. *Complas Industries*, 714 F.2d at 734."

Answering Brief at 63.

Counsel for the General Counsel has never alleged that any of these documents or activities chill Section 7 activity or otherwise violate the Act in any way. Rather, it appears counsel for the General Counsel, by citing these documents and activities, is merely arguing that the Board should be wary of IBT's ostensible steps to firm up the independent contractor nature of the relationship. But of course a sensible motor carrier would take such steps in a climate in which the independent contractor nature of relationships in the trucking industry is under attack. Furthermore, IBT unquestionably maintains the right to freely express its views and opinions, including legal opinions, as to independent contractor status, even if the legal opinions turn out to be incorrect. *Children's Ctr. for Behavioral Dev.*, 347 NLRB 35, 36 (2006).

The bottom line is that none of the documents or activities referenced by counsel for the General Counsel as supporting a new claim for actively chilling Section 7 activity were alleged to have violated the Act in the Complaint, and there is nothing IBT could have done in preparation for or during the hearing to know about such a claim let alone defend against a cause of action raised for the first time in General Counsel's Answering Brief. Rather, IBT could only have defended against the new allegation if it had notice of the allegation *before* the hearing in this case. The General Counsel's attempt to create this new cause of action should be rejected.

III. By Abandoning the Cause of Action, Misclassification Is Moot

By abandoning the per se violation allegation, it is no longer necessary to analyze whether *all* IBT drivers were correctly classified. Case law is clear in holding that the

Board will not decide an issue that would not affect the outcome of the present case.

In *Pub. Serv. Co. of N. Mexico*, the Board adopted the ALJ's finding that no violation of the Act occurred, and the Board therefore found it unnecessary to rule on whether the ALJ's additional finding of mootness was proper because it would not change the outcome. 364 NLRB No. 86 (2016). *See also Tres Estrellos De Oro*, 329 NLRB 50, 52 (1989), (the Board found it unnecessary to pass on one of the Judge's findings about an unlawful interrogation because the remedy for the alleged violation would be cumulative and would not affect the Order).

Here, the ALJ's finding that all drivers who leased a truck from IBT were employees is mooted by the General Counsel abandoning the claim that misclassification is a per se violation of the Act. Because the misclassification finding will not change the overall outcome, it is unnecessary to a final decision, and, just like in the above cases, the Board should forgo analyzing whether the ALJ erred in his calculation as to *all* drivers who leased a truck from IBT.⁵

IV. Misclassification Would Have Been Moot Anyway Because the Charging Party Did Not Make the Allegation Within the 10(b) Period

In its Exceptions Brief, as with its Post-Hearing Brief, IBT established that drivers were classified as independent contractors years before the Charge relating to misclassification was filed. The Charge is therefore untimely. *See IBT's Exceptions Brief* at 10-13.

⁵ The only relevant classification analysis left to be made involves the status of Osoy and Portillo, who were allegedly interrogated, threatened, and promised benefits. As shown in IBT's Exceptions Brief, Osoy and Portillo were properly classified as independent contractors.

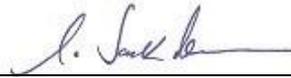
Counsel for the General Counsel's sole substantive response involves citation to case law that merely holds an unlawful work rule, such as an arbitration policy, constitutes a continuing violation as long as the unlawful rule is in effect. *See, e.g., Kmart Corp.*, 363 NLRB No. 66 (2015).⁶

Counsel for the General Counsel points to no case law involving a classification decision, leaving only the case law cited by IBT, which not only identifies how a classification decision should be evaluated, but also expressly rejects the continuing violation theory. Counsel for the General Counsel's position should be similarly rejected in this case.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in IBT's Exceptions Brief and its Answering Brief to the General Counsel's Exceptions and Charging Party's Cross Exceptions, IBT respectfully requests the Board to reject the ALJ's findings that violations of the Act occurred and to dismiss the Complaint in its entirety.

⁶ Counsel for the General Counsel elsewhere painstakingly details the fact that classification with respect to one statute does not necessarily require that same classification for other statutes. *GC's Answering Brief*, n. 95. General Counsel, however, argues that the mere mention of "independent contractor" in the LTA is evidence of a violation of the Act. *Id.* at 6. Thus, despite the General Counsel's contrary signal, his position, if successful, would effectively prevent IBT from identifying drivers as independent contractors for *any* purpose.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Reply in Support of Respondent's Exceptions was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on May 11, 2018. A copy of the Reply in Support of Respondent's Exceptions was also served upon the following by electronic mail on May 11, 2018:

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