

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington D.C.**

INTERMODAL BRIDGE TRANSPORT

and

Cases 21-CA-157647
21-CA-177303

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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

Submitted by:

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Counsels for the General Counsel submit the following Reply Brief to the Answering Brief filed by Respondent Intermodal Bridge Transport (“IBT”). For the reasons described below, the arguments asserted by IBT in its Answering Brief are without merit, and the Board should grant the General Counsel's Limited Exceptions to the decision issued by Administrative Law Judge Dickie Montemayor (“ALJ”) on November 28, 2017.

I. The ALJ Properly Found that the General Counsel Established a Prima Facie Case Under Section 8(a)(3) of the National Labor Relations Act (“Act”)

IBT erroneously avers in its Answering Brief that the ALJ erred in finding that the General Counsel established a causal connection between driver employee Eddie Osoy’s (“Osoy”) Union activities and his suspension and/or discharge because IBT did not discipline other driver employees who, like Osoy, actively engaged in Union activity.¹ In support of this contention, IBT misguidedly relies on the Board’s decision in *Gold Coast Restaurant Corporation*,² and misstates the holding in that case. *Gold Coast Restaurant Corporation* stands, not for the prima facie principle of establishing a causal connection between union activity and an adverse employment action, but rather for the proposition that knowledge can be inferred from union activity.

Here, inference was not necessary to establish IBT’s knowledge of Osoy’s Union activity because, as the ALJ properly found, it was undisputed that IBT was aware of Osoy openly engaging in Union activity. (ALJD 28:32-33).³ Indeed, IBT conveniently overlooks evidence of Osoy openly engaging in ongoing Union activity that further intensified just days before his suspension and/or discharge. Specifically, on May 23, 2016, just three days before Osoy’s suspension and/or discharge,

¹ IBT improperly advances arguments in support of its Exceptions in its Answering Brief in violation of Section 102.46 (b)(2) of the Board’s Rules and Regulations. As stated in the General Counsel’s Answering Brief, the Board should disregard IBT’s Exception No. 102 regarding the ALJ’s finding of a prima facie case under Section 8(a)(3), because IBT failed to address that exception in its Exceptions Brief. See, e.g., *Ozburn-Hessey Logistics*, 362 NLRB No. 180, slip op. at 1, n.4 (2015).

² 304 NLRB 750, 751 (1991).

³ ALJD__:_ refers to page followed by line or lines of the ALJ’s decision in JD(SF)-48-17 (November 28, 2017); Tr. __refers to pages of the Transcript of the hearing from August 22, 2016 to December 7, 2016; GC Exh.__ refers to GC exhibit followed by exhibit number; U. Exh. refers to Union exhibit followed by exhibit number, and R. Exh. __ refers to Respondent exhibit followed by exhibit number.

Osoy was prominently featured in an article in the Los Angeles Business Journal entitled “Trucker Classification Fight Proves Costly Battle” that highlighted the Union organizing campaign at IBT. (Tr. 219-220; GC Exh. 5). The picture of Osoy in the article showed him wearing a Teamsters t-shirt and standing in front of IBT’s Wilmington facility. The caption underneath the photo described him as “Driver Eddie Osoy who has filed suit against [IBT].” The article also quoted Osoy saying he had worked for IBT for nine years with no insurance, paid sick days, or vacation and that he “was tired of the abuse.” (GC Exh. 5).

Discussion in *Gold Coast Restaurant Corporation* that the suspicious timing of the discharges of three employees was tempered by the fact that only one of them had a leadership role in the union organizing campaign and other union supporters were not similarly discharged is non-binding dicta. Even if *Gold Coast Restaurant Corporation* expressly addressed a causal connection between union activity and an adverse employment action, the facts in the present case are distinguishable.

Here, although Osoy and other Union supporters participated in strikes, wore Union vests, and distributed flyers, IBT admitted in its Answering Brief that Osoy was a “lead Union activist” and the only IBT driver featured in the Los Angeles Business Journal article about the campaign. No other IBT drivers were either pictured or quoted in the article. IBT was aware of the article and Osoy’s involvement as the article stated that IBT did not respond to a request for comment. IBT saw this as a direct attack on its business and suspended and/or discharged Osoy in retaliation for his involvement with the article and commitment to the Union campaign. Indeed, Osoy’s Union activities were widespread and there is no doubt that Osoy’s feature in the article, just three days before being disciplined, intensified his organizational activities in comparison to other Union supporters and served as a loud pronouncement to IBT of Osoy’s unwavering support for the Union campaign.

While IBT argues that other drivers appeared on and were quoted on Union flyers without consequence, those flyers were less pronounced and only distributed by drivers in front of a local

Target on one occasion. By contrast, Osoy's article in the Los Angeles Business Journal was more pronounced and had a bigger impact on IBT, as the publication distributed over 22,000 weekly copies and had over 100,000 readership subscriptions.

Contrary to IBT's contention in its Answering Brief that Osoy was not engaged in protected activity during the May 25, 2016 incident that led to his removal, the record shows that Osoy and Jose Molina ("Molina") were talking about the Union campaign and safety vests distributed by the Teamsters. During the incident, Molina aggressively told Osoy that he was going to make sure that Osoy was taken out of the company – that the Union was no good and was not going to come into the company. (Tr. 223-224). Molina then brought up the fact that Osoy distributed the Teamsters vest to drivers. (Tr. 2814).

IBT also argues that timing alone cannot establish a prima facie case under Section 8(a)(3) of the Act and relies on the Board's decision in *Camaco Lorain Manufacturing Plant*⁴ in support of that contention. However, the Board has consistently held that suspicious timing of an adverse employment action in relation to protected activity can support an inference of unlawful motivation.⁵

IBT misinterprets the import of the Board's decision in *Camaco Lorain Manufacturing Plant*. In that case, the Board, in the absence of exceptions, affirmed the ALJ's finding that the employee had been unlawfully suspended for three days because of his union activity. In its Answering Brief, IBT misleadingly restricts the ALJ's analysis adopted by the Board in *Camaco Lorain Manufacturing Plant* by claiming that the Board held in that case that a suspension occurring a month after the employer initially learned of the employee's union activity did not permit an inference of causation. Yet IBT conveniently fails to state that the ALJ's assessment was based on whether causation could

⁴ 356 NLRB 1182 (2011).

⁵ See *Sawyer of Napa*, 300 NLRB 131 (1990); *Adco Electric*, 307 NLRB 1113, 1123 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993); *Olathe Health Care Center*, 314 NLRB 54 (1994), *Daniel Construction Co.*, 264 NLRB 569 (1982), *enfd.* 45 F.2d 191 (2d. Cir. 1984).

be inferred from statements made by a supervisor that the employee was “trying to create problems” and was “trying to be extremely difficult.”

IBT misconstrues the ALJ’s reasoning in *Camaco Lorain Manufacturing Plant* as the ALJ actually determined that those specific statements did not justify inferring unlawful motivation because the record did not provide other substantial evidence of animus.⁶ Nevertheless, the ALJ ultimately determined there was enough evidence of unlawful motivation based on subsequent events because the employer suspended the employee immediately after it learned the employee intended to solicit other employees to sign a petition about their working conditions.⁷ Notably, the ALJ in *Camaco Lorain Manufacturing Plant* found that even a one month delay will not negate an inference of causation, if there is evidence that the employer manifested anti-union animus in other ways.⁸

Here, even under the analysis adopted by the Board in *Camaco Lorain Manufacturing Plant*, the ALJ properly concluded that Osoy’s discipline took place within a time frame in which improper motives can be inferred. (ALJD 28:38-39). Osoy consistently engaged in protected Union activity, the most recent of which occurred through the article published three days before his suspension and/or discharge. The conversation at issue with Molina, which IBT was well aware of, also related to the Union campaign and safety vests distributed by the Teamsters. Thus, the ALJ properly concluded that unlawful motivation may be inferred from the timing of these events.

More importantly, there was more than just timing establishing a causal connection between Osoy’s open Union activity and suspension and/or discharge as there was ample evidence of IBT harboring animus towards the Union and the drivers’ organizing efforts. Evidence of IBT’s animus was displayed through coercive conduct found by the ALJ to be unlawful under Section 8(a)(1). This includes: IBT’s Vice President, Ozzie Zea, threatening driver employees with unspecified reprisals,

⁶ *Id.* at 1194.

⁷ *Id.* at 1194-1195.

⁸ *Id.*

interrogating driver employees by polling them to ascertain who supported the Union, and expressing the futility of the Union organizing campaign; and a dispatcher threatening unspecified reprisals and plant closure, promising better work to driver employees for abandoning their Union support, and interrogating driver employees.

In addition to these flagrant instruments of coercion, some of which were specifically directed at Osoy, the record overwhelmingly demonstrates that IBT officials also repeatedly disparaged Union supporters and the organizing campaign.⁹ The substantial evidence of animus towards the Union in addition to the timing of Osoy's suspension and/or discharge and IBT's admitted knowledge of Osoy's protected activities, overwhelmingly support the ALJ's finding that the General Counsel established a prima facie case under Section 8(a)(3) of the Act.

II. The ALJ Erred by Finding that IBT Satisfied Its Burden Under *Wright Line*¹⁰

While the ALJ correctly found that the General Counsel established a prima facie case under Section 8(a)(3) of the Act, the record evidence simply does not support the ALJ's conclusion that IBT satisfied its burden of proving that it would have taken the same action in the absence of Osoy's protected activities.

⁹ Emails exchanged between IBT management representatives regularly used expletives and derogatory terms towards Union supporters, particularly those who, like Osoy, demonstrated or went out on strike. (GC Exhs. 127, 137, 138; U. Exhs. 38, 39). These emails referred to Union supporters as "plants," "teamster goons," "scumbags," and "fucking picketers." (GC Exhs. 127, 137; U. Exhs. 38, 39). In one email, IBT's Sales, Pricing, and Administrative Manager Denise Ackerman ("Ackerman") talked about vomiting on a Union supporter's "pimped out Teamster-mobile." (U. Exh. 39). In April 2016, about one month before Osoy's suspension and/or discharge, in an exchange of emails after having received notification of another Union strike, Ackerman referred to Union supporters as "MOTHERFUCKERS." (Tr. 2591; 2558; 2562; GC Exh. 138).

IBT also distributed memos to its driver employees referencing the Union campaign and the strikes and warned the drivers that IBT would do "whatever was necessary" to maintain its independent contractor model, thereby suggesting to the drivers that their organizing activities were in vain. (Jt. Exhs. 1(c), 1(d); GC Exh. 90). During this time, Vice President Zea even questioned whether drivers who went on strike could still be forced to pay their weekly lease, and suggested that trucks be withheld from them when they returned to work. (Tr. 2409-2410; GC Exhs. 88, 126; U. Exh. 45). In May 2015, IBT management exchanged emails about rewarding IBT drivers who did not strike by paying them a bonus disguised as wait or standby time or allowing them to use a truck for free. (Tr. 2380-2384; 2540; GC Exhs. 132, 133; U. Exhs. 49, 57).

¹⁰ 251 NLRB 1030 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

a. IBT Treated Osoy Disparately

The ALJ ignored the fact that Osoy's suspension and/or discharge was both a departure from IBT's established disciplinary practice and disparate treatment. IBT argues in its Answering Brief that its treatment of Osoy was consistent with how it disciplined other drivers. Yet this argument is untenable as IBT's treatment of Osoy stands in stark contrast to its treatment of the driver IBT removed in June 2016, after suspending and/or discharging Osoy. The record evidence showed that Safety Director Brent Bradley ("Bradley") contacted that driver and took a written statement from him documenting his version of what transpired, wherein the driver admitted hitting the picketer. (Tr. 1931; GC Exh. 89). The evidence further established that unlike its treatment of Osoy, Bradley spoke with the driver on multiple occasions to get his version of events before terminating his contract with IBT. (Tr. 1930). Moreover, the evidence showed that after Bradley obtained the statement wherein the driver admitted to physically assaulting the picketer, IBT took over 20 days to investigate the allegations before ultimately deciding to terminate its working relationship with the driver.

Unlike how IBT treated Osoy, there was no evidence in the record to establish that IBT issued the driver an escrow check or requested that he sign a document stating that he was leaving the company prior to IBT investigating the incident and obtaining a written statement from him. And, unlike Osoy, this driver was not escorted off the premises by armed security guards or by any representative of IBT and humiliated in front of a number of other drivers during morning dispatch, despite his admitted act of physical violence. (Tr. 1931-1933; 4082-4083; GC Exh. 89). In fact, Bradley first contacted the driver at home and then met the driver at a McDonald's near IBT's facility instead of summoning him to IBT's yard and having armed guards escort him off IBT's property, like it did with Osoy. (Tr. 1932-1933). Although IBT speciously contends that it had Osoy escorted off its property because Osoy had accepted an early morning assignment, IBT decided to suspend and/or discharge Osoy by 2:00 p.m. the prior day. Bradley could have easily called Osoy over the phone that

afternoon and told him about IBT's decision and reassigned his run to another driver. (Tr. 1913-1915).

As noted in the General Counsel's Exceptions, the ALJ also ignored evidence in the record that other drivers who engaged in inappropriate conduct prior to Osoy's suspension and/or discharge were not terminated. IBT avers that the General Counsel misstated a reference in the record that "the driver attempted to reach through the dispatch window to get the dispatcher." After reviewing Union Exhibit Number 27, the General Counsel clarifies that the driver threatened to reach through the dispatch window to get the dispatcher.

However, contrary to the representations advanced in IBT's Answering Brief, this incident served as evidence of another driver acting aggressively and threatening to physically assault and attempting to pick a fight with one of IBT's dispatchers. It was not just about a problem with damage to company property as IBT misleadingly contends. In fact, despite this threatening behavior and destruction of company property, IBT alarmingly did not identify this driver as a safety threat. This driver was not taken out of service, no incident report or statement from the driver was taken, security was not called, and the driver was not escorted off the premises. (Tr. 3965-3966; 3993-3994; R. Exh. 88). Rather, he simply paid to have the door that he damaged repaired. (Tr. 3994). Therefore, such evidence of disparate treatment supports a finding that IBT would not have taken the same action against Osoy had he not been a lead Union supporter and consistently engaged in protected activities.

b. The ALJ Erred in Finding that IBT Took Actions to Temporarily Place Osoy Out of Service

IBT asserts in its Answering Brief that it properly put Osoy on "hold" to investigate the allegations against him. However, the record is devoid of evidence establishing that IBT's decision to discipline Osoy was temporary at the time it was made. IBT inaccurately avers in its Answering Brief that Safety Director Bradley informed Osoy via the May 26, 2016 letter that IBT was investigating

the matter. Yet neither the letter presented to Osoy nor the email Bradley sent to IBT's managers and dispatchers suggested that an investigation was ongoing or that the decision to place Osoy out of service was a temporary one. (Jt. Exh. 1(e); GC Exh. 102). Rather, the letter given to Osoy conclusively stated that Osoy threatened physical violence, not that it was alleged that he did so. Moreover, the letter accused Osoy of engaging in highly offensive and criminal conduct and made no mention that IBT was investigating the matter as IBT erroneously contends in its Answering Brief. (Jt. Exh. 1(e)). As further evidence of IBT's illusory investigation, on the same day of Osoy's suspension and/or discharge, IBT distributed a memo to all drivers stating that IBT would not tolerate any driver threatening another driver. The May 26, 2016 memo conclusively stated that drivers had been threatened and did not mention that IBT was investigating allegations of safety threats. (Jt. Exh. 1(f)).

Osoy was also never told that IBT was investigating the incident or that he was "on hold," making his removal temporary, given that IBT never solicited Osoy's version of events either before or after suspending and/or discharging him. Rather, IBT merely accepted Molina's version of events at face value without conferring with Osoy, or other drivers who witnessed the exchange between them. This was further confirmed when Osoy called the day after his removal to inquire about his paycheck and escrow account. Safety Assistant Vicky Rosas informed Osoy that his check and the balance of his escrow account were ready, and asked him to sign papers stating he would no longer work at IBT in exchange for his check, further confirming that IBT had no intention of conducting an investigation that might allow Osoy to return to work. (Tr. 270-271).

The record evidence amply demonstrates that at the time of Osoy's removal, IBT did not place Osoy "on hold" or on out of service status temporarily to conduct an investigation. Rather, IBT intended to discharge him and permanently sever its working relationship with him.

c. The ALJ Erred by Concluding that IBT Conducted a Meaningful Investigation of the Incident that Led to Osoy's Suspension and/or Discharge

The ALJ cited no evidence supporting his finding that IBT investigated the circumstances that led to Osoy's suspension and/or discharge and certainly the record evidence does not support this conclusion. While IBT claims in its Answering Brief that it conducted "a measured review" of the incident, this assertion is baseless and entirely unsupported by the record. Indeed, the full record in this case showed that IBT did not talk to any witnesses to the incident between Molina and Osoy either prior to or after suspending and/or discharging Osoy, notwithstanding clear evidence in the record that IBT was aware of other drivers who were present during the incident and who could attest to whether Osoy in fact threatened Molina with bodily harm. (Tr. 531; 732; 979; 1939; 2828). Even more problematic is Safety Director Bradley's failure to follow-up with Molina after he initially reported the incident to Customer Service Manager Christina Rivera. This failure is particularly telling because, even though Bradley asserted at one point that he spoke with Molina, Molina himself denied speaking with Bradley after initially reporting the incident to Rivera. (Tr. 2829).

Equally significant is IBT's failure to proffer any written record of its purported investigation, including asking Molina for a written statement of what happened despite averring in its Answering Brief that it allowed Osoy to return to work once "it obtained a more complete record of what occurred." According to the record evidence, Bradley decided to suspend and/or discharge Osoy before speaking with any witnesses himself and based on instructions from Vice President Zea, who at no time spoke with Osoy, Molina, or with any other driver, about the alleged incident before instructing that Osoy be disciplined and taken out of service. (Tr. 1912; 1915; 1918-1919; 1955; 2358; 2829). Instead, IBT accepted as fact, Molina's initial report of the incident. IBT failed to proffer any evidence to establish that Molina felt threatened by Osoy as a result of their exchange and reported the incident to the company because he feared for his safety. In fact, Molina conceded he did not take Osoy's words seriously, and that he didn't pay much attention to them. (Tr. 2820).

The inadequacy of IBT's investigation is further evident by the fact that IBT prevented Osoy from explaining what had happened before suspending and/or discharging him. (Tr. 231; 1916). Bradley confirmed that he would not let Osoy speak, and did not ask him for his version of the incident because he just "wanted him off the property." (Tr. 231; 1916). Even after Osoy's removal, IBT never sought out his version of events. In fact, the first time that IBT learned of Osoy's version of events is when Osoy submitted an unsolicited email and incident report that he prepared with the Union's assistance. (GC Exh. 6). It was only after IBT received Osoy's May 27, 2016 email and incident report, and after IBT had already suspended and/or discharged Osoy that he was invited to meet with Safety Director Bradley. (ALJD 27:27-28).

IBT argues in its Answering Brief that there was no need to interview Osoy because Osoy provided IBT with his own account of events through submitting the May 27, 2016 email and incident report. However, IBT conveniently fails to explain why it should not have interviewed Osoy before suspending and/or discharging him. Osoy's incident report, which further corroborates his testimony at the hearing, was submitted after he was already suspended and/or discharged. The Board has held that an adequate investigation does not rest on an after-the-fact finding that the incident occurred, but rather on what IBT knew at the time it first decided to discipline Osoy.¹¹

III. Conclusion

Based upon the foregoing and the reasons set forth in the General Counsel's Exceptions Brief, Counsels for the General Counsel respectfully request that the Board reverse the ALJ and find that IBT violated Section 8(a)(3) of the Act by suspending and/or discharging Osoy because he engaged in protected activities.

¹¹ *G4S Secure Solutions*, 364 NLRB No. 92 (2016) (finding employer's investigation inadequate when employer suspended employee without interviewing and giving him opportunity to give his version of events and accepted as fact reports that were solicited 5 days after employer ultimately terminated employee).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sanam Yasseri", written over a horizontal line.

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Dated at Los Angeles, California, this 11th day of May, 2018.

STATEMENT OF SERVICE

I hereby certify that a copy of **COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on May 11, 2018.

The following parties were served with a copy of said document by electronic mail on May 11, 2018:

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Respectfully submitted,

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