

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

In the matter of:

**UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION**

Charging Party,

v.

BOAR'S HEAD PROVISIONS CO., INC.,

Respondent.

Consolidated Case Numbers:
07-CA-209874; 07-CA-212031

Before NLRB ALJ Randazzo

**RESPONDENT BOAR'S HEAD PROVISIONS CO. INC.'S POST-HEARING MOTION
FOR LEAVE TO SUBMIT REPLY BRIEFS and REPLY BRIEF**

Respectfully Submitted by:

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I. Legal Standard for Requesting Reply Briefs

Respondent respectfully moves here for leave to file this Reply Brief, pursuant to § 102.24 and 102.45 of the Board's Rules and Regulations. A trial judge has the discretion to request reply briefs or may grant a motion for leave to file them in an appropriate case. Judge Jeffrey D. Wedekind, NLRB Division of Judges Bench Book, 155 (2019) (citing *Gallup, Inc.*, 349 NLRB 1213, 1217 (2007)).

II. The General Counsel's Flawed Brief

The General Counsel failed to consider or mischaracterized evidence regarding several critical matters in their brief. The Brief also confirmed that evidence to support many of the General Counsel's allegations was lacking. Numerous allegations were withdrawn at the end of trial as well as after briefing. The withdrawal of the allegations resulted in Boar's Head devoting valuable time and effort defending, and the Court considering allegations that the General Counsel only decided not to pursue at the briefing stage. The allegations could have been withdrawn at the end of the trial or at any time prior to the submission of briefs. Failure to do so was a disservice to all but the General Counsel.

III. Boar's Head's Rule Prohibiting Pins and Other Items on Exterior Garments is Necessary for Food Safety and Required by the USDA

As noted in the briefs, the General Counsel and the Respondent have a fundamental disagreement about the scope of Boar's Head workplace rule regarding the wearing of objects on garments in food processing areas. The General Counsel mischaracterized the rule regarding this issue by citing only half of the workplace rule. They completely disregarded the other half of the rule that is needed to fully comprehend the food safety and USDA basis for the rule. The rule against pins on outer garments only applies to areas where exterior garments (specified

gowns) are worn: food production areas and areas where product is handled. (*See* Res. Ex. 7, 8a, and 8b). “Exterior garments” are not worn in other areas, which is why employees are given time to don and doff these exterior garments when entering or leaving production areas.

The General Counsel seemed to recognize that exterior garments were only worn in production areas when it questioned witnesses about donning and doffing, which refers to the putting on or taking off of the very exterior garments that are referenced within the workplace rule. They chose to ignore this testimony.

Moreover, the rule prohibiting pins and other items on exterior garments is based in part on the regulations that the facility must follow from the United States Department of Agriculture (USDA). Specifically, 9 CFR Section 416.5 defines the very exterior garments that are referenced in Boar’s Head rule:

(b)*Clothing*. Aprons, frocks, and other outer clothing worn by persons who handle product must be of material that is disposable or readily cleaned. Clean garments must be worn at the start of each working day and garments must be changed during the day as often as necessary to prevent adulteration of product and the creation of insanitary conditions.

The USDA regulations, as does Boar’s Head rule, reference “outer clothing” worn by the employees. As shown in Res. Exs. 8a and 8b, Boar’s Head employees wear different types of outer clothing or exterior garments depending upon their work area. The workplace rule is further clarified by Res. Ex. 7, the “Good Manufacturing Practices” (GMP) document. The GMP specifically discusses the clothing and exterior garments that individuals must wear while in Boar’s Head production areas and product storage areas. It again prohibits employees from wearing pins and other items on their exterior garments in food production areas.

Boar’s Head rule is also based in part on 9 CFR § 416.4 and 9 CFR § 416.14 which concern protecting product from adulteration and contamination of food products as well as the

standards that facilities must follow to prevent such contamination. USDA has stringent standards on preventing metal, plastic, and other items from ending up in food intended for human consumption. Thus, Boar's Head's rule is one where any potential impact on employee rights is outweighed by the food safety needs for the rule, and as such is lawful.

IV. The General Counsel Ignored Record Documentary Evidence that Boar's Head Initiated the Proposed Changes to the Vacation Policy Prior to the Start of the 2017 Union Campaign

The General Counsel omitted and totally ignored as if non-existent evidence that by its own standard would have resulted in it also moving to withdraw the allegation regarding the attendance and vacation policy. The General Counsel's brief erroneously claimed that Boar's Head did not put forth a proposal or make changes to the vacation policy until the union campaign had begun in August 2017. (*See* General Counsel's Brief at 17). The substantial documentary and testimonial evidence submitted at trial demonstrates that a proposal, submitted in July 2017, was under active consideration. A very significant follow-up email concerning consideration of the proposal was sent a day before the GC alleges that union activity began in 2017. (*See* Res. Exs. 12(o); 12(q)(1-4); and GC 4). By its own standard, this confirms that Boar's Head changes to the vacation policy were lawful as they were initiated prior to the inception of the union campaign. Had the General Counsel acknowledged the record evidence, it could have moved to also withdraw this allegation from briefing as it did for seven others for which there was no evidentiary support.

V. The General Counsel Failed to Produce Material Witnesses

The General Counsel cited the "missing witness rule" stating that the party that fails to submit a material witnesses with facts that would benefit them should have an adverse inference drawn against them. (*See* General Counsel's Exhibit 5). In this case, the only material witnesses

missing were those of the General Counsel. The GC failed to produce Nelson Langarita to testify on the allegation that Boar's Head granted him a wage increase to convince him to refrain from supporting the union. No General Counsel witnesses testified in support of this allegation.

Of equal relevance is the fact that the General Counsel also failed to produce any of the 15 to 18 other witnesses that were alleged to have heard Ms. Mendoza make unlawful comments on the line concerning the union while production was running, and employees were wearing earplugs. (Elba Rivas Tr. 88:2-22). These witnesses would have presumably been able to provide evidence in support of the General Counsel's allegations. Moreover, Elba Rivas only named two witnesses that allegedly heard the statements of Maria Mendoza: Jose Villabos and Martina Ramirez. (Elba Rivas Tr. 88:19-22). Only Jose Villabos testified, and he totally contradicted the testimony of Ms. Rivas.

Therefore, an adverse inference should be drawn against the General Counsel in both of these instances as they relate to the allegations.

VI. The General Counsel's Request to Withdraw Additional Allegations Raises Credibility Issues for Many of Its Witnesses

The General Counsel's curious request to withdraw additional charges with the filing of briefs also calls into question not only the other allegations, but also the credibility of the General Counsel's own witnesses. As noted by the Board,

When the Government's lawyer, after studying the record, finds no record support for a complaint allegation, the proper course of action is to move to withdraw the allegation based on lack of evidence. The better and more courteous practice is not even to wait until the brief to do this, but to do so by a separate document in advance of the brief so that opposing counsel does not waste time briefing the matter.

Gallup, Inc., 349 NLRB 1213, 1217 (2007)).

a. The General Counsel's Withdrawal of Allegations Against Maria

Mendoza Undermines the Credibility of Ascension Rios

Specifically, the General Counsel withdrew several allegations related to Maria Mendoza that were testified to by Ascension Rios. The General Counsel withdrew the allegation that Maria Mendoza threatened employees that workplace rules would be enforced more strictly and that she solicited complaints and grievances on or about December 24. Both of these allegations involve the direct testimony of Mr. Rios. The withdrawal of these allegations raises serious questions regarding the reliability of Mr. Rios's testimony since he was the sole witness involved in the allegations at paragraphs 18 and 19 of the Consolidated Complaint. Since his testimony clearly did not support these allegations against the company, it calls into question the credibility of the remaining allegations concerning him. At the very least, the belated withdrawal again demonstrates that the General Counsel failed to withdraw numerous allegations that could have been withdrawn at the conclusion of trial or prior to the submission of briefs. Nearly one and one half years (from November 9, 2017 when the original charges were filed to May 3, 2019 when the trial concluded) is more than adequate time for the General Counsel to conclude whether sufficient evidence supporting the allegations exists.

b. The Withdrawal of the Allegations Involving the Solicitation of Grievances by Maria Mendoza and Vicente Nunez Raises Questions About the Other Allegations Involving the Solicitation of Grievances

The withdrawal of the allegations regarding the solicitation of grievances involving Vicente Nunez and Maria Mendoza is especially curious since several other allegations involve Boar's Head established practice of soliciting employee complaints and grievances. Allegations 7a (Brad Rurka soliciting complaints and grievances), 8b (Larry Helfant solicited complaints and grievances), and 9 (regarding the use of the suggestion box) were not withdrawn although

they also involved Boar's Head long-standing practice of soliciting grievances that unquestionably predated the union campaign. The General Counsel's withdrawal of the allegation regarding the solicitation of grievances by Vicente Nunez in speaking with Norma Chacon, and Maria Mendoza conducting an annual employee interview appears to be an acknowledgement of Boar's Head's lawful practice of soliciting employee grievances. This begs the question of why the remaining allegations that involve Boar's Head other methods of soliciting employee concerns were similarly not withdrawn by the General Counsel.

VII. Conclusion

Therefore, we respectfully request that these allegations be dismissed as the evidence that was presented is insufficient to establish that Boar's Head committed any unfair labor practices.

Date: September 18, 2019

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CERTIFICATE OF SERVICE

The undersigned, on behalf of Respondent, Boar's Head Provisions Co., Inc. (Boar's Head), sent a true and correct copy, via email, of Boar's Head's Motion to File a Reply Brief and Reply Brief to the Administrative Law Judge filed this day in the NLRB Division of Judges with Administrative Law Judge Randazzo, to the parties at the addresses set forth below:

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