

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

ABF FREIGHT SYSTEM, INC.

and

**GENERAL TRUCK DRIVERS, WARE-
HOUSEMEN, HELPERS, SALES AND
SERVICE, AND CASINO EMPLOYEES
AND INTERNATIONAL
BROTHERHOOD
OF TEAMSTERS (IBT), LOCAL 957**

**Cases 09-CA-208379
09-CA-201267**

SUPPLEMENTAL BRIEF OF RESPONDENT ABF FREIGHT SYSTEM, INC.

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Respondent ABF Freight System, Inc. (“Respondent,” “ABF,” or the “Company”) submits this Supplemental Brief in response to the National Labor Relations Board’s (the “Board”) October 31, 2019 Notice and Invitation to File Briefs, inviting the parties to submit briefs regarding applicability of *MV Transportation, Inc.*, 368 NLRB No. 66 (September 19, 2019) (“*MV Transportation*”) to these cases. ABF asserts the contract coverage standard announced in *MV Transportation* should be applied to these cases, and that such application should result in an affirmance of the dismissal of the unilateral change allegation against the Company.

PRELIMINARY STATEMENT

The charge in Case No. 09-CA-208379 alleges “unilateral changes in terms in conditions of employment” by ABF’s “installing cameras in the breakroom/locker room.” (GC Exh. 1(a)). The complaint in this case asserts a violation of Section 8(a)(5) based on a unilateral change. *See* GC Exh. 1(e), Paragraph 7. The charge and complaint do not reference the parties’ collective bargaining agreement. The charge and complaint do not reference the parties’ collective bargaining agreement. This allegation was dismissed by the Administrative Law Judge Keltner W. Locke (“ALJ”), who found that the parties had a past practice concerning cameras in the workplace that allowed the Company to install “video cameras on its property in any places, except in bathrooms, or where employees change clothes [or] give specimens for drug testing.” The ALJ referred to these exceptions to the general rule as applying to “personal privacy spaces.” Administrative Law Judge Decision (“ALJD”), pp. 7-8.¹ Counsel for the General Counsel (“General Counsel”) appealed the ALJ’s “failure to find Respondent...unlawfully made a unilateral change by installing cameras in the break room/locker areas of its facility. This

¹ The General Counsel did not except to this conclusion.

conclusion is contrary to record evidence and controlling law.” GC Exceptions, p. 1(Exception 1). In its Argument in Support of Exceptions, the General Counsel explained that “the correct standard for establishing a violation in this case is the clear and unmistakable waiver standard. . .” *Id.*, p. 7.

In *MV Transportation*, the Board abandoned the clear and unmistakable waiver standard asserted by the General Counsel in this case and replaced it with the contract coverage standard.

The General Counsel pled this case as a simple unilateral change in violation of Section 8(a)(5). This was a deliberate strategic choice by the General Counsel designed to avoid any defense based on a discussion or interpretation of the parties’ collective bargaining agreement. Ironically, the General Counsel’s assertion that ABF was not entitled to unilaterally install cameras in break rooms rests on an interpretation of the contractual phrase “changing clothes.”

No matter how this case is framed by the General Counsel, however, the unilateral change allegation is and always has been dependent on an interpretation of the parties’ collective bargaining agreement. All parties have been singularly focused on the phrasing and interpretation of the contractual language as it pertains to areas where employees have an expectation of privacy. Throughout these proceedings, the Company invoked the contractual language as a defense to its actions. Therefore, under the Board’s ruling in *MV Transportation*, the standard for review is whether, giving effect to the contractual provisions in existence, applying ordinary principles of contract interpretation, the challenged act comes within the compass or scope of the contract. If the challenged act falls within the scope of the contract then no Section 8(a)(5) violation will be found. 368 NLRB No. 66, Slip op. 11. The installation of cameras clearly falls within the compass and scope of the contract. Application of the new standard here renders the unilateral change allegation meritless.

The application of the collective bargaining agreement permeates the entire record. The language was raised immediately at trial by the Company during an on the record discussion of the scope of the General Counsel's document subpoena served on ABF, with the Company noting that this case is "going to turn heavily on an interpretation of the collective bargaining agreement." (Tr. 7). The General Counsel and Charging Party did not dispute this assertion.

The General Counsel's opening statement referenced the collective bargaining agreement: "The evidence will show that the collective bargaining agreement between the parties specifically state (sic) that the cameras will not be installed in areas where employees change clothing." (Tr. 14). ABF's opening statement retorted that the evidence would show that the break rooms in question were not areas of privacy as defined in the parties' agreement and that Company "has used Article 26, Section 2, to place cameras in the break rooms all over the country..." (Tr. 17-19).

The principal witnesses for Charging Party and ABF, both of whom have contract administration responsibilities, agreed that the Company can unilaterally install cameras pursuant to the language of the collective bargaining agreement. All witness testimony and documents focused on whether the break rooms at issue were areas of privacy; the evidence clearly shows that no person would seriously consider the locker area in an open break room at the facility as a private area.

The ALJ directed oral argument in lieu of briefs. The General Counsel tried to pre-empt any discussion of the contract's coverage by arguing that the General Counsel is the "master of the complaint" and the decision to not plead this case as involving a Section 8(d) violation was well within prosecutorial discretion. (Tr. 332). ABF countered this argument by pointing out that the case centered on the terms of the collective bargaining agreement, which brought it

closer to *Bath Iron Works, Inc.*, 345 NLRB 499 (2005), a decision which foreshadowed *MV Transportation*: “Contrary to the General Counsel’s position, this is really not a unilateral change case. The entirety of the evidence has to do with interpretation of Article 26” and that it was anticipated that the General Counsel would argue that it was the “quote unquote the master of the complaint” but this assertion could not overcome the fact the evidence is “inextricably intertwined with the” contract. (Tr. 353).

The Board’s framework set forth in *MV Transportation* applies to this case. The General Counsel asserted a violation of the Act based on a lack of clear and unmistakable waiver, a standard which has been discarded. ABF asserted the contract as a defense. The parties agree that the installation of cameras falls within the compass or scope of the agreement: the contract authorizes unilateral installation of cameras by the Company with no discussion with the Charging Party. The Board’s application of the contract coverage standard should result in an affirmance of the dismissal of the unilateral change allegation because the clear language and meaning of the contract covers ABF’s unilateral placement of the cameras in the two break rooms at issue.²

The evidence also shows that Charging Party’s grievance over installation of the cameras has proceeded on a parallel track unhindered by this case. Disposition of the legal issue concerning the unilateral change will not have an impact on the grievance.

² The Complaint in this case alleges a violation of Section 8(a)(5) due to the Company’s installation of cameras in Shacks (which are employee break rooms) A, B, and C due to the presence of lockers. The evidence showed that there are no lockers in Shack C and the Union is not alleging a problem with respect to Shack C. GC Exh. 1(g); Tr. 84 (Union Representative Webb testifies the Union is not objecting to the placement of cameras in Shack C). *See also*, ALJD, p. 7.

STATEMENT OF FACTS³

A. ABF Installs Cameras in Shacks A and B and the Union Objects.

ABF installed cameras in Shacks A, B, and C in September 2017. Shacks A and B are traditional break rooms with tables, microwaves, sinks, and refrigerators. (See GC Exh. 5; R. Exh. 2). The Shack doors do not lock. These Shacks also contain lockers for employees to store personal items. There are no benches or other places for employees to sit in the locker area. Employees who work for ABF on the dock do not wear uniforms and there is no reason for anyone to fully undress at work, let alone in the Shack. A supervisor's window looks into Shacks A and B, the doors to the break room do not lock, and the tables where employees eat are positioned only a few feet from the lockers.⁴ There is no privacy curtain or other partition between the lockers and the tables. Anyone can enter the Shack at any time. Men, women, customers and employees use Shacks A and B and access is not in any way restricted. ALJD, pp. 8-9 (wherein ALJ adopts all of these facts).

The Union objected to the installation of these cameras and filed a grievance alleging a breach of Article 26, Section 2. (Tr. 52, GC Exh. 7). The charges in this case were filed approximately one month later. Both cases have continued along a parallel track.

B. The Parties' Agreement Codifies a Past Practice of Allowing ABF to Unilaterally Install Cameras Anywhere Except Areas of "Privacy"

The core terms and conditions of employment of the bargaining unit employees are contained in the ABF-Teamsters National Master Freight Agreement ("ABF NMFA" or "Agreement"). (GC. Exh. 2). The ABF NMFA in place during the events of this case had

³ The record evidence, and Respondent's Answering Brief, contain a full set of facts related to the issues herein. The public nature of the break rooms in this case is well established. This brief focuses on the facts related to application of *MV Transportation*.

⁴ Brittany Glover is a female statutory supervisor who sits in the office and can look into the break room at any time through an internal window. (Tr. 91-92, 242-243; GC. Exh. 5; R. Exh. 2).

effective dates of April 1, 2013 through March 31, 2018. (Tr. 147, GC. Exh. 2). Article 26 of the ABF NMFA, Section 2 states:

The Employer shall not install or use video cameras in areas of the Employer's premises that violate the employee's right to privacy such as in bathrooms or places where employees change clothing or provide drug or alcohol testing specimens.

The ABF NMFA applies to 8600 bargaining unit members nationwide and is the controlling document for labor relations. (Tr. 148). As with any mature labor relations situation, the contract language is the result of interaction, and compromise, between the parties. ABF Vice President of Employee Relations David Evans was the chief negotiator of the Agreement and directly negotiated changes to the language in Article 26. (Tr. 150, 152). Mr. Evans testified Article 26 was intended to reflect the parties' past understanding that ABF could unilaterally install cameras at its service centers for security purposes except for areas of privacy, such as areas where employees may fully undress to provide a urine specimen for a DOT test or areas where mechanics undress to take a shower. (Tr. 152, 154-56). The parties did not intend to prohibit the use of cameras in areas where employees removed weather-related outerwear such as coats, hats, gloves and boots. (Tr. 157). Therefore, the installation of cameras in areas where dock employees (who are not required to wear uniforms) might add or remove cold weather gear like jackets, gloves, or boots would not violate Article 26. (Tr. 157, 296-97).

The ALJ concluded Article 26 is evidence of the past practice that represents the *status quo*. (ALJD, pp. 7-8).⁵ Prior to September 2017, ABF had installed cameras throughout the facility at the Dayton Service Center, including the dock areas, in the warehouse, and the exterior areas of the service center prior to this case with no objection from the Charging Party. (Tr. 78-

⁵ The General Counsel did not except to this finding.

79, 206, 240-41). The undisputed practice is that the Company can and does install cameras throughout its facilities without talking to the Union. Union Business Agent Dan Webb agreed with this interpretation during cross-examination:

Q: Okay. And so we're all clear here, I just want to make sure I understand it. The Union is not objecting to the installation of cameras in other areas [besides the shacks] of the facility, correct?

A: No, sir.

Q: Okay. The company wants to focus a camera on where the trucks back into the dock, no problem with that?

A: They have them currently. It's not a problem.

Q: No problem in the exterior areas, right?

A: Other—no—

Q: No problem in any hallways that might exist in the –

A: Just so long as they're not pointed at the locker rooms, it's not a problem.

Q: ***And they can install those cameras without talking to you at all, correct? That's your—***

A: ***To your knowledge yes.***

Q: ***And that would be pursuant to the language, correct?***

A: ***Yes, sir.***

(Tr. 80 – 82) (Emphasis supplied).

Because the parties agree ABF can act unilaterally with respect to the installation of cameras, the General Counsel's always was dependent on an interpretation of Article 26's prohibition of installing cameras in places "that would violate the employee's right to privacy, such as bathrooms or places where employees change clothing or provide drug or alcohol testing specimens."

C. All Evidence Elicited Focused on Article 26's "Right to Privacy"

The General Counsel's and Charging Party's evidence focused on the Article 26's words "change clothing," while ABF's evidence focused on the phrase "places that would violate the employee's right to privacy." In reality, both parties were attempting to define places of privacy.

In addition to the testimony of Mr. Webb and Mr. Evans, which establishes the Agreement grants a unilateral right to install cameras except in areas of privacy, all witnesses testified about the meaning of privacy in an attempt to interpret the NMFA. In the end, all the witnesses agreed the locker rooms in Shacks A and B are not areas of privacy.

Bargaining unit employee Tony Jackson testified:

Q: Okay. So can you tell me about how you would change your clothes in that area?

A: Well, there's an area behind the lockers back there, probably about two foot wide, that you can kind of *sneak behind* and if you have to strip down to your underwear or whatever, *you can sneak back there and change real quick before anybody comes in and sees you. Or there's people standing in there, they can kind of block you off, so that way, nobody sees you.*

(Tr. 119-20) (Emphasis added).

Bargaining unit employee James White testified:

...

A: Have I seen women? I've seen women in the break room.

Q: They're allowed to go in the break room as well?

A: Yes.

Q: Okay. And have you seen women changing their clothes in the break room?

A: I've not seen women change their clothes in the break room, no.

Q: Have you changed your clothes while women are present in the break room?

A: No.

(Tr. 136-37).

The testimony of several Company officials, each with a long history working for ABF, echoed the utter lack of privacy in the break rooms. During 40 years working with Company, Vice President of Employee Relations David Evans has made thousands of visits to break rooms nationwide, but has never seen a male or female employee fully undress to their underwear. (Tr. 158, 169, 180). Mr. Evans confirmed he has not observed employees taking off their clothes in a break room:

Q: And at any time in the last four years, have you seen somebody dressing in any terminal in the company down to their underwear?

A: Absolutely not.

Q: Have you ever seen anybody nude in a break room?

A: No, I have not.

(Tr. 158).

In the 22 years that Regional Manager of Employee Relations Steve Dusko has worked for ABF, he has never seen an employee undress down to their underwear in any break room.

(Tr. 199-200, 219-20). Mr. Dusko, whose office is in the Dayton facility, explained:

Q: [. . .] In your current position, do you have access to the break room at the Dayton facility?

A: If I'm there, yes, absolutely.

Q: And you occasionally visit them?

A: On occasion.

Q: And the times that you have been in there more recently in 2018, for example, have you seen anybody fully undress in either break room A or break room B?

A: No, ma'am.

Q: Before the cameras were installed [in the Shacks] in 2017, so before September of 2017, did you ever visit the break rooms?

A: Yes.

Q: And the times that you visited the break rooms, did you ever see any employee fully undress in break room A or B?

A: Ma'am, in the 22 years I've been involved with that facility, the times I've been in any break room, I've never seen anybody undress down to their underwear. Have I seen them take heavy coats and gloves and shoes off? Absolutely. I've never seen anybody get completely undressed.

(Tr. 219 – 220).

Greg Lyle Adams has worked 33 years for ABF largely as the Operations Manager, primarily overseeing the dock employees. (Tr. 276). He shares an office with other supervisors in Shack B, including a female supervisor. (Tr. 288, 290). The supervisors' office has a window that opens to the break room, (Tr. 292-93, R. Exh. 2), and Adams confirmed he has never seen employees undressing:

Q: In the time that you have worked with the company, have you ever seen any employee fully undress in any of the break rooms?

A: No, I have not.

Q: Have you ever seen any employee down to their underwear in any of the break rooms?

A: No, I have not.

Q: Have you ever seen an employee nude in any of the break rooms?

A: No, I have not.

(Tr. 299).

Matthew Godfrey has worked for ABF for approximately 14 years and has been the Service Center Manager at Dayton since 2017. (Tr. 236-37). Godfrey also confirmed employees do not undress in the break rooms:

Q: [. . .] Since 2017, when you started [at Dayton], have you ever seen any employee undress in the break room of Shack A?

A: No.

Q: [. . .] Have you ever seen an employee undress in the break room of Shack B?

A: No.

(Tr. 261).

The General Counsel's rebuttal evidence confirmed the Shacks are not areas of privacy. Initially, Union Representative Webb testified that he was "sure" women employees changed their clothes in the Shacks but, inexplicably, added that "when they do, they have somebody block the doors" [to the break room], which of course refutes any notion of privacy. (Tr. 311). On cross examination, Webb backtracked and stated he was not aware of an actual example of a woman changing clothes in the break room and was just "assuming" that if women changed clothes they would need two additional employees to block the doors to the break room to maintain privacy. (Tr. 314).

D. The Union Pursued its Grievance While Pursuing These Charges

As the title of the Agreement suggests, the parties' contract is a national one. The grievance was filed under the national agreement. Bargaining unit member Tony Jackson filed a grievance alleging a violation of Article 26, Section 2. (GC. Exh. 7). The grievance alleges that the installation of cameras in the Shacks is an "invasion of privacy."⁶ This grievance was pursued by the Union. The Company initially put the grievance on hold due to the absence of Mr. Dusko who was participating in national labor negotiations. (Tr. 72-73). The grievance was scheduled to be heard on the day of the trial in this case and so the Union placed it on hold in June 2018. (Tr. 74). Other than these common scheduling postponements, there is no evidence

⁶ Mr. Jackson testified at the trial in this matter, and his testimony clearly shows there is no expectation of privacy in the Shacks. ("Q: Okay. And I think you testified that when a person wants their privacy, they can sneak behind the locker bank; is that correct? A: In the back area of the locker, yes. Q: Out of view? A: Right. Q: Okay. And, in fact, I think you said they might change really quickly otherwise, correct? A: That's correct. Q: And that's because somebody might come in? A: That's correct." (Tr. 126)).

the grievance's processing has been affected. Counsel for the General Counsel acknowledged that the reason these cases had not been deferred to the arbitration process was due to the information request allegation. (Tr. 20).

ARGUMENT

I. *MV TRANSPORTATION* SHOULD BE APPLIED TO THIS CASE

A. The Board's Adoption of the Contract Coverage Standard Was Not Available at The Time the Case Was Tried.

The General Counsel in this case asserts that the ALJ failed to apply the correct standard of law, which was “clear and unmistakable waiver” of bargaining over the installation of cameras in break rooms. GC Exceptions, p. 7. The General Counsel made a deliberate choice to not assert a Section 8(d) violation, admitting that “the ramifications are that the General Counsel must prove a unilateral change case, not a contract modification case, with the clear and unmistakable waiver standard.” *Id.*, p. 6. In other words, the General Counsel wished to avoid any discussion of the contract coverage in favor of a much-criticized and now defunct standard.

In *MV Transportation*, 368 NLRB No. 66 (2019), Slip op. 1 the Board abandoned the “clear and unmistakable waiver” standard for unilateral change cases and adopted the contract coverage standard. The Board applied this new standard retroactively to the case before it, and “in all pending unilateral-change cases where the determination of whether the employer violated Section 8(a)(5) turns on whether contractual language granted the employer the right to make the change in dispute.” *Id.*, Slip op. 2. This case was pending at the time *MV Transportation* was decided. Further, this case turns on whether the existing language in the parties' collective bargaining agreement granted the employer the right to make the change.

B. Application of *MV Transportation* Renders the Unilateral Change Allegation Meritless.

In *MV Transportation*, the Board addressed the case where an “employer defends against an 8(a)(5) unilateral-change allegation by asserting that contractual language privileged it to make the disputed change without further bargaining.” 368 NLRB No. 66 at Slip op. 11. In such cases the Board assesses the merits of the defense by giving “effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation...” *Id.* When applying the standard the Board “will be cognizant of the fact that ‘a collective bargaining agreement establishes principles to govern a myriad of fact patterns,’ and that ‘bargaining parties [cannot] anticipate every hypothetical grievance and address it in their contract.’” *Id.* (citing *National Labor Relations Board v. United States Postal Service*, 8 F.3d 832, 838 (D.C. Cir. 1993)).

All elements of this standard have been met.

1 ABF Raised Article 26, Section 2 of the NMFA as a Defense

The Board in *MV Transportation* stated, “We solely address those cases in which the employer defends against an 8(a)(5) unilateral-change allegation by asserting that contractual language privileged it to make the disputed change without further bargaining.”

ABF raised the contractual language of Article 26, Section 2 as a defense triggering an evaluation of the contractual language. ABF made clear from the very beginning of the case through its closing argument that it was asserting the contractual language as a defense. In ABF’s closing argument, it stated: “Contrary to the General Counsel’s position, this is really not a unilateral change case. The entirety of the evidence has to do with interpretation of Article 26” which has been relied upon to place cameras in break rooms nationwide. (Tr. 53).

Accordingly, the contract coverage standard should apply.

2 The Parties' Own Interpretation of Article 26 Contemplates Unilateral Installation of Cameras as Long as it Does Not Infringe on an Employee's Right to Privacy.

In *MV Transportation* the Board stated it:

will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation; and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer right to act unilaterally.

368 NLRB No. 66, Slip op. 11.

The plain meaning of Article 26 is that the employer may unilaterally install cameras in all places except those that involve an employee's right to privacy. The record contains evidence that ABF has installed cameras pursuant to Article 26 for years without bargaining and without objection from the Charging Party. The ALJ concluded this past practice existed. *See, e.g.,* ALJD, p. 8.⁷ The Board does not need to rest its analysis on the language alone, however, because record evidence demonstrates the parties agree that the language grants the Company the right to unilaterally install cameras. ABF's lead negotiator in national contract negotiations, David Evans, testified the language was an adoption of the practice accepted by the parties of allowing cameras to be installed unilaterally by ABF except in certain limited circumstances such as where employees had to give a urine specimen or areas where employees would be expected to fully undress, like if showers were present. (Tr. 152, 154-156). Mr. Evans was the only witness who could testify as to the parties' meaning of Article 26 "changing clothes" and he unequivocally stated the phrase was limited to areas where employees could expect to fully undress without being observed. A break room which has no locks, is not limited to one gender,

⁷ The General Counsel did not except to this conclusion.

contains an internal window to a supervisor's office where a male and female supervisor work, and where employees eat food is not an area of privacy.

The Charging Party's Secretary Treasurer, Dan Webb, essentially agreed with this interpretation, testifying that the Union had no issue with cameras in most places and that the unilateral installation was authorized by the ABF NMFA. (Tr. 80-82).

The ALJ credited ABF's evidence: "Based on this testimony [Mr. Webb's] and the record as a whole, I find that Respondent did have an established past practice, not contested by the Union, of placing cameras anywhere except personal privacy spaces." ALJD, p. 8. This practice was codified in Article 26 of the ABF NMFA.

Application of the contract coverage standard set forth in *MV Transportation* shows ABF raised the contractual language as a defense and that the alleged change – the unilateral installation of cameras- falls within the compass and scope of the ABF NMFA. This case should be dismissed without further inquiry into, or interpretation of, the contractual language. However, there is sufficient evidence to show that the parties' themselves interpret the language to include the placement of cameras in the break rooms.

3 The Presence of Lockers in Shacks A and B Does Not Raise a Right to Privacy

The ALJ concluded the General Counsel's witnesses' attempt to portray the break rooms as areas of privacy was not credible, deeming the times employees allegedly changed clothes as "infrequent" and "surreptitious" and that the attempt to portray the area as a privacy space was akin to an attempt at adverse possession. ALJD, p. 8.⁸ ABF witnesses testified that cameras are

⁸ The General Counsel did not file exceptions to these findings.

often placed in areas where employees change outer-garments, such as coats, gloves and boots, which is consistent with the Shack areas in this case. (Tr. 157, 296-97).

Further, the record evidence establishes that not only are cameras placed in break rooms throughout the country, but the presence of lockers does not create a right to employee privacy. All witnesses for the General Counsel admitted the Shacks are not places where people would remove more than weather related outerwear. The witnesses agree there is no privacy in the break rooms: Bargaining unit member James White (acknowledged the public nature of the break room and never saw a woman change clothes there and never changed clothes while women were present, Tr. 136-37); Bargaining unit member Tony Jackson (the only way you could change your clothes would be to “sneak behind” the lockers but he wouldn’t do that if others were present (Tr. 126), and no women change clothes in the break room , including his wife who works for ABF (Tr. 127)); Mr. Webb, the Union representative (has never seen any women changing in the break room but assumed that if they did they would have to “get a couple of guys” to watch the doors (Tr. 314)); Mr. Evans, ABF’s Vice President of Employee Relations (has visited thousands of break rooms and never seen anyone change their clothes in a manner requiring privacy (Tr. 299)); Mr. Dusko, ABF Labor Relations Representative in Dayton (“Ma’am, in the 22 years I’ve been involved with that facility, the times I’ve been in any break room, I’ve never seen anybody undress down to their underwear. Have I seen them take heavy coats and gloves and shoes off? Absolutely. I’ve never seen anybody get completely undressed (Tr. 119-120)).

The documents in evidence, including videos and photographs, show that the Shacks are not areas where there can be any expectation of privacy. (*See, e.g.*, GC Exh. 5; R. Exh. 2.)

The Board has before it more than enough evidence to conclude that the contractual language in the Agreement permits cameras to be placed in break rooms (with or without lockers) and no violation of the Act occurred.

II. THE GRIEVANCE IS NOT SIGNIFICANT TO A DETERMINATION IN THIS CASE

The Board can and should decide this case without regard to the grievance. The grievance asserts a breach of the ABF NMFA based on an “invasion of privacy” while the complaint alleges a unilateral change in violation of Section 8(a)(5). The General Counsel exercising its power as “master of the complaint” deliberately chose to plead the case this way so as to avoid any discussion of the history of Article 26, its potential breach, or the parties’ interpretation of the language. This gambit ultimately failed, of course. The Charging Party did not contest the Company’s right to place cameras, either in this case or in the last several years.

Application of the contract coverage standard merely, and rightfully, disposes of the Section 8(a)(5) allegation. The grievance, which seeks redress under the ABF NMFA, is pending under the parties’ negotiated grievance procedure. A dismissal of the unfair labor practice allegation will not in any way impede grievance processing which, according to the record evidence, the parties continued to process with no deleterious effects from, and without regard to, the unfair labor practice proceeding.

CONCLUSION

This case falls squarely within *MV Transportation’s* “contract coverage” analysis. ABF raised the language of Article 26, Section 2 as a defense. Further, the dispute clearly falls within the compass and scope of the collective bargaining agreement, and the evidence shows there is

no question cameras are appropriate in Shacks A and B (and C). Case No. 09-CA-208379, the entirety of which consists of the unilateral change allegation, should be dismissed.

Los Angeles, California

PROSKAUER ROSE LLP

By: /s/ Mark Theodore
Mark Theodore, Esq.
Attorney for Respondent,
ABF FREIGHT SYSTEM, INC.

Dated: January 29, 2020

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that: I am employed in the county of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2029 Century Park East, Suite 2400, Los Angeles, California 90067-3010.

On January 29, 2020, I served the following document, described as:

SUPPLEMENTAL BRIEF OF RESPONDENT ABF FREIGHT SYSTEM, INC.

- (By Electronic Filing) By transmitting a true and correct copy thereof via electronic filing through the National Labor Relations Board's website.
- (By Email) By transmitting a true and correct copy thereof via electronic transmission to the email address listed on the attached Service List.
- (By Fax) By transmitting a true and correct copy thereof via facsimile transmission to the addressee.
- (By Mail) I am "readily familiar" with the Firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- By causing such envelope to be delivered by the office of the addressee by OVERNIGHT DELIVERY via Federal Express or by other similar overnight delivery service.

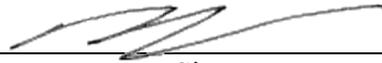
SEE ATTACHED SERVICE LIST

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 29, 2020 at Los Angeles, California.

Robert Linton

Type or Print Name



Signature

SERVICE LIST

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