UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ABF FREIGHT SYSTEM, INC.

and CASES 09-CA-208379
09-CA-210267

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), LOCAL 957

GENERAL COUNSEL'S RESPONSE TO THE EMPLOYER'S SUPPLEMENTAL BRIEF

This brief is submitted by the General Counsel in response to the Supplemental Brief submitted by ABF Freight System, Inc. ("Employer") on January 29, 2020, addressing questions posed by the Board in its October 31, 2019 invitation to file briefs in the instant case.[1] In short, the Employer's brief misstates and misapplies *MV Transportation* and ordinary principles of contract law and consistently misrepresents record evidence.

I. Summary of the Argument

First, the Employer failed to apply the clear dictates of *MV Transportation* and ordinary principles of contract law by ignoring the plain, specific, and unambiguous language of *all* of Article 26's terms found in the parties' National Master Freight Agreement ("NMFA") and attempted inappropriately to use extrinsic evidence to manufacture ambiguity in those terms. Second, the Employer's attempt to ignore Article 26's "change clothing" language and manufacture a general definition of employees' "right to privacy" (Emp. 8) fails to interpret the plain contractual meaning of "privacy" as employees' right to privacy *from the Employer*, not

[1] Hereinafter, "Employer's Brief" will reference the Employer's January 29, 2020 Supplemental Brief. References to the Employer's Supplemental Brief will be presented herein as "Emp." References to the ALJ hearing official transcript will be presented as "Tr."

each other; thus, the Employer's focus on privacy between employees is immaterial. Third, the Employer cites record evidence that is consistently mischaracterized, mispresented, and at times simply wrong. Accordingly, the Board should find that the Employer's actions were not covered by the NMFA and the Employer unlawfully unilaterally installed cameras in the shacks[2] where employees regularly change clothes and have a contractual right to privacy.

II. Argument

A. *MV Transportation* Looks First to Clear, Unambiguous Language and Allows Extrinsic Evidence Only Where There is Ambiguity

MV Transportation, Inc. clearly states that the Board will "give effect to the *plain meaning* of the relevant contractual language, *applying ordinary principles of contract interpretation*[,]" (emphasis added). 368 NLRB No. 66, slip op. at 11 (Sept. 10, 2019). Accordingly, the Employer's attempt to argue that "[t]he Board does not need to rest its analysis on the [Article 26] language alone . . . because record evidence demonstrates the parties agree that the language grants the [Employer] the right to unilaterally install cameras[,]" (Emp. 14) ignores the clear dictates of *MV Transportation* and well-settled principles of contract interpretation that unambiguous language is to be interpreted according to its clear meaning; extrinsic evidence is considered only where an ambiguity exists. *See, e.g.*, *Am. Fed'n of Gov't Emp. v. FLRA*, 470 F.3d 375, 383 (D.C. Cir. 2006) (parties may not create ambiguity in contract terms by using extrinsic evidence when the disputed language was unambiguously clear to begin with); *Aeronautical Indus. Dist. Lodge 91 of the Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. United Tech. Corp.*, 230 F.3d 569, 576 (2d Cir. 2000) (unambiguous contract terms must be given effect as written—extrinsic evidence may only be considered if

[2] Hereinafter, "shacks" refers to Shacks A and B, which are where employees' break/locker rooms are located at the Employer's Dayton, Ohio facility.

terms are ambiguous). Indeed, the Employer failed to cite any authority for the novel proposition that the Board may skip past unambiguous language and consider extrinsic evidence. (Emp. 14).

First, the Employer's characterization of Article 26's language ignores the specific contractual limitation placed on the Employer's right to install cameras—i.e., it "shall not" install cameras in places that would violate employees' right to privacy, which are clearly defined as "places where employees change clothing[.]" *See Carr v. Gates Health Care Plan*, 195 F.3d 292, 298 (7th Cir. 1999) ("[i]t is a well-settled principle of contract construction that where a contract contains both general and specific provisions relating to the same subject, the specific provision controls."). The Employer is correct that the parties agree the Employer has a right to install cameras in non-privacy areas of its facility, but the parties most certainly do not agree that the Employer has an unfettered right to place them anywhere. (Emp. 3, 4, 14, 15; Tr. 80–82). By ignoring Article 26's clear, unambiguous, and specific limiting language, the Employer failed to correctly apply *MV Transportation*.

Second, the Employer neglected to abide by well-settled principles of contract interpretation, as required by *MV Transportation*, by attempting to use extrinsic evidence to create ambiguity where none exists and then using additional extrinsic evidence to float an antithetical interpretation of Article 26. Even if Article 26 were ambiguous so as to allow for consideration of extrinsic evidence, the evidence cited by the Employer is self-serving and consists merely of management officials testifying to what they observed on *occasional* visits to the shacks. (Emp. 9–11). This evidence was thoroughly rebutted by employee witnesses who testified they use the shacks *regularly* to change clothes. (Tr. 41–42, 66, 119–120, 133–34). Critically, the Employer failed to cite the parties' past practice of treating the shacks as privacy spaces within the meaning of Article 26 for over 20 years.

Accordingly, the Employer's attempt to apply a contract-coverage analysis failed to heed the basic commands of *MV Transportation* and the Employer's conclusions should be rejected.

B. Employees Have a Contractual "Right to Privacy" From the Employer, Not Each Other

The Employer claims that, during the ALJ hearing, the "parties were attempting to define places of privacy." (Emp. 8). However, the Employer's brief appears to interpret language not even in the contract because it claims its evidence focused on the phrase, "places that would violate the employee's right to privacy," *which is not the language of Article 26*. (Emp. 8). The correct language is:

> The Employer shall not install or use video cameras in *areas of the Employer's premise 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 (emphasis added).

The distinction is important because the Employer is attempting to substitute the contractual words "areas of the Employer's premises," the clear words of Article 26, with the general word places to create a claim that only where employees have a general, undefined expectation of privacy will they have a right to privacy under the contract. Because Article 26, Section 2 is titled "Use of Video Cameras for Discipline and Discharge," which is something only the Employer would use, and states what the Employer "shall not" do, that section is regulating the right of employees' privacy in relationship to the Employer, not privacy between employees. Accordingly, the contract grants employees a right to privacy exclusively *from the Employer*; that they may not have it in fact between themselves is immaterial.

Then, the Employer claims that the presence of lockers does not create a right to privacy. (Emp. 16). However, the contract does not define the privacy limitation on employer cameras to the presence of lockers. According to the plain language of the contract, employees' right to

privacy from the Employer's video recording is triggered by "places where employees change clothing," not where there are lockers present. Therefore, since the testimony established that employees indeed "change clothing" in the shacks, employees have rights to privacy under the clear, specific, and unambiguous terms of Article 26.

C. The Employer Mischaracterizes and Misrepresents Testimony

Throughout its brief, the Employer made assertions that are simply not correct and fly in the face of record evidence by either misrepresenting testimony or twisting it to serve its own unsupported definition of "privacy." For example, the Employer claimed that "all the witnesses agreed the locker rooms in Shacks A and B are not areas of privacy," (Emp. 8) and quotes employee Tony Jackson's testimony that he tries to sneak to an area of the lockers where fewer people may see him. (Tr. 119–20). Although Mr. Jackson may have attempted to shield himself changing in front of other employees, it does not mean he agreed that the Employer's cameras should watch him do it.

Shockingly, the Employer claimed, "[a]ll witnesses for the General Counsel admitted the [s]hacks are not places where people would remove more than weather related outerwear." (Emp. 16). This statement is simply wrong and is contradicted by clear and unambiguous record evidence. For example, Employee Jackson testified he uses the shacks to change into gym clothes after work. (Tr. 120). Employee White testified he has come to work from another location and changed from his street clothes to his work clothes. (Tr. 133). Some employees, including employees Webb and Jackson, use the shacks to fully change their clothes, including undressing to their underwear. (Tr. 42, 66, 119, 133–34). This evidence is clearly sufficient to establish employees changed clothing in the shacks as defined in Article 26. There is no contractual requirement that employees change all their clothes or even any particular item of

clothing. Finally as noted, whether employees might be willing to change some clothing in front of other employees cannot remove the contractual prohibition against the employer using a camera to capture the event.

Accordingly, the Employer's evidentiary conclusions throughout its brief are consistently without merit.

III. Conclusion

The Employer misunderstands and misapplies *MV Transportation* despite that decision's clear mandate to follow the plain meaning of unambiguous contract terms without reference to extrinsic evidence, in accordance with well-settled principles of contract interpretation. The Employer further misconstrues the contract's language as requiring an expectation of privacy among employees when the contract regulates only the privacy the Employer must afford to employees. The Employer habitually and brazenly misrepresents the record in this case and its characterization and conclusions on record evidence should therefore be viewed with skepticism. Accordingly, the Board should find the Employer's actions were not covered by the NMFA and the Employer unlawfully unilaterally installed cameras in the shacks where employees change clothing.

Respectfully submitted,

/s/ Chad Wallace

Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1015 Half St., SE
Washington, DC 20570
Ph. 202-273-2489
chad.wallace@nlrb.gov

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TABLE OF AUTHORITIES

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the General Counsel's Response to the Employer's Supplemental Brief in Cases 09-CA-208379 and 09-CA-210267 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 12th day of February 2020.

Electronic Mail
jdoll@djflawfirm.com

John R. Doll
Doll, Jansen & Ford
111 W. First St.
Suite 1100
Dayton, OH 45402-1156
Counsel for the Charging Party

Electronic Mail
Mtheodore@proskauer.com

Mark Theodore
Proskauer Rose, LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067
Counsel for the Respondent

Electronic Mail
Salonso@proskauer.com

Sophia Alonso
Proskauer Rose, LLP
11 Times Square, (8th Ave & 41st St)
New York, NY 10036
Counsel for the Respondent

/s/ Chad Wallace
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1015 Half St., SE
Washington, DC 20570
Ph. 202-273-2489
chad.wallace@nlrb.gov