

**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**

REPLY BRIEF OF RESPONDENT ABF FREIGHT SYSTEM, INC.

TABLE OF CONTENTS

	Page
SUMMARY OF REPLY	1
I. The Term “Change Clothing” Mutually Reinforces the Phrase “Areas of the Employer’s Premises That Violate An Employee’s Right to Privacy”	3
A. The General Counsel’s Recitation of Facts Omits The Most Salient Parts of the Record.....	3
II. The General Counsel Failed to Apply the Contract Coverage Standard Correctly	6
A. The General Counsel’s Cited But Unapplied Authority Supports ABF’s Position.....	7
B. The Plain Meaning of the Term “Change Clothing” Mutually Reinforces the Term “An Area of the Employer’s Premises That Violate an Employee’s Right to Privacy”	8
C. The General Counsel’s Objection To Evidence It Fostered and Developed Is Inappropriate.....	9
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Aeronautical Indus. Dist. Lodge 921, IAMAW, AFL-CIO v. United Tech Corp.</i> , 230 F.3d 569 (2d Cir. 2000).....	9
<i>AFGE, Local 2924 v. FLRA</i> , 470 F.3d 375 (D.C. Cir. 2006).....	8, 9
<i>MV Transportation</i> , 368 NLRB No. 66 (September 10, 2019).....	1
NLRB Regulations	
Section 102.46(f).....	6

Respondent ABF Freight System, Inc. (“ABF” or “Company”) files this Reply to the Supplemental Brief of the General Counsel.

SUMMARY OF REPLY

In its Supplemental Brief Counsel for the General Counsel (“General Counsel”) acknowledges that the contract coverage standard set forth in *MV Transportation*, 368 NLRB No. 66 (September 10, 2019) (“*MV Transportation*”) applies to this case yet asserts the plain language of the parties’ contract still is not sufficient to warrant a dismissal of the allegation. The General Counsel misapplies the standard both with respect to the facts and law.

The Board in *MV Transportation* held that if the complained of action that is the subject of the unilateral change case falls within the “compass” or “scope” of the parties’ agreement, then no Section 8(a)(5) and (1) violation will be found. 366 NLRB No. 66, Slip op., p. 11. The parties do not disagree the unilateral action falls within the compass and scope of the contract. Despite this clear test, the General Counsel continues to attempt to shoehorn what is an otherwise straightforward case *back into* the abandoned “clear and unmistakable waiver,” an allegation which failed at trial. The General Counsel does this by asserting that two words in Article 26, Section 2 of the parties’ agreement, “change clothing,” must be read in complete isolation from the rest of the provision, ignoring the practice of the parties and the plain meaning of the term. While the General Counsel does not explain how the term “change clothing” should be defined, he appears to assert the plain meaning of the phrase “change clothing” is what employees say it is regardless of whether it occurs in an area of privacy. In support of this interpretation the General Counsel cherrypicks the record omitting entirely the most important facts concerning the public nature of break rooms.

Throughout this proceeding, ABF has maintained that the plain language of Article 26, Section 2 can have only one meaning: that cameras cannot be installed in an “area of the employer’s premises that violate the employee’s right to privacy.” The term “change clothing” in that Article is simply an example of an area of privacy. The two terms are dependent on each other, and therefore, the term “change clothing” must be an area where employees are able to completely disrobe in privacy. Thus, “change clothing” is meaningful only if it is interpreted as mutually reinforcing an area of privacy. A public break room where males and females have an unfettered right to congregate and eat meals is not an area in which there exists a right of privacy.

Despite ABF’s consistent assertions that Article 26 must be read in its entirety, the General Counsel erroneously maintains that one must parse the language in a manner that renders the “right to privacy” language superfluous in a manner contradicting contract interpretation principles. It is not ABF that is attempting to introduce ambiguity; rather, the General Counsel’s arguments demonstrate that it is the General Counsel that is trying to create an ambiguity where none exists. The General Counsel cites case law concerning contract interpretation but does not apply any of these cases to the facts in this case. Application of the cases cited by the General Counsel support the ABF’s position that the plain meaning of Article 26 privileged the Company to install cameras in the break rooms.

Finally, the General Counsel’s complaints that evidence concerning the meaning of “change clothing” was somehow inappropriate should be disregarded and stricken from the General Counsel’s brief. This evidence was promoted at trial *by the General Counsel*, who as “master of the complaint” decided to introduce such evidence. To assert that such evidence is now inappropriate illustrates the weakness of the General Counsel’s case. No party raised any

objection to the evidence. More important, such an argument was not part of the General Counsel's Exceptions or Argument in Support of the Exceptions. Even granting some leeway for the new analytical framework set forth in *MV Transportation*, the objection to the evidence is inappropriate. The General Counsel waived this argument.

I. The Term "Change Clothing" Mutually Reinforces the Phrase "Areas of the Employer's Premises That Violate An Employee's Right to Privacy"

In response to the Board's Invitation to File Briefs, the General Counsel continues the same erroneous argument regarding the definition of the term "change clothing" in Article 26 as was put forth at trial: that this term must be considered disconnected from the rest of the provision. Article 26, Section 2 is clear:

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.

GC Exh. 2 (Emphasis supplied).

The General Counsel continues to maintain, citing zero credited evidence, that the term "change clothing" should be interpreted as "anytime an employee decides to change clothes anywhere in the facility." Such an interpretation is absurd, of course, given the layout of the break rooms, the practice of the employees, the past practice of the parties and commonsense.

A. The General Counsel's Recitation of Facts Omits The Most Salient Parts of the Record

In order to bolster its claim that "change clothing" is a disembodied phrase to be viewed only in isolation, the General Counsel ironically only asserts fragmentary items from the record that would, if they were the only facts, support a conclusion that the break room is an area of privacy; focusing on such facts would be unnecessary if the plain language of Article 26 did not address areas of privacy. The General Counsel is attempting to have it both ways: claim the

contract language is subject to different interpretation but also prove the break room is an area of privacy. The General Counsel cannot have it both ways. Thus, the General Counsel asserts the following fragments in its Supplemental Brief on page 6. Each is followed by the factual portions of the record refuting the assertion.

- “Nowhere at the Dayton facility is an area specifically designated as a place where employees may change clothes.” There is no requirement at ABF that there be a “specifically designated place” for dockworkers to remove clothes. ABF dockworkers do not wear uniforms and there is no need to designate an area to change clothes. Contrast this claim with the testimony of Mr. Evans, Vice President of Human Resources, who testified that in some service centers mechanics are accorded an area with a shower and do change clothes at work due to the dirty nature of the work; a changing room with a shower would be an example of an area of privacy because the expectation is that employees would need to remove their clothing. (Tr. 152, 154-156). There is no such expectation of dockworkers who wear their own clothing to work.
- “No windows look in on the locker portion of the break room.” Even if this is true (which it is not), it ignores the fact the doors to the break room do not lock and anyone, male or female, can enter the area at any time without warning. *See, e.g.*, Union Representative Webb’s testimony speculating that if a woman wanted to change clothes in the break room she would need two people to “block the doors.” (Tr. 311, 314). The presence of windows or lack thereof does nothing to negate the fact the Shacks are break rooms, the primary function of which is for men and women to eat meals and take a break.

- “Supervisors’ offices are set up in each of the shacks that look over part of the break room and can see where the lockers end but cannot see into the locker area.” ABF disputes the scope of vision from the supervisor’s office and contends that male and female supervisors using the office can see into the locker area. Even if they could not, anyone can enter the break rooms at any time. This also ignores the facts that the break room tables are a few feet from the lockers, there are no benches in the locker area and there is no partition separating the lockers from the rest of the common area.
- “There are no signs in the locker room prohibiting changing clothes.” ABF asserts, as would any rational employer, that no workplace has a sign that prohibits changing clothes in a common area used freely by female and male employees to eat lunch. This is just commonsense.

In addition to ignoring the most important physical aspects of the break room, the General Counsel omits the parts of the testimony of all witnesses that are devastating to his case. While the General Counsel cites to testimony of employees who asserted they “change clothing” in the break room, the government’s brief fails to mention that all General Counsel’s witnesses admitted on cross-examination that they could not freely take off their clothing. Among the points omitted by the General Counsel: Bargaining unit member Tony Jackson testified that he would only change “quickly” and only in an area where he had to “sneak behind” because someone “might come in” but still wouldn’t change clothes if women were present (Tr. 126), and Mr. Jackson’s wife who works for ABF has “never” changed her clothes in the break room (127); bargaining unit member White never saw a woman change in the break room and would not do it himself if women were present (Tr. 136-37). The General Counsel also downplays or ignores the testimony of all managers who work for ABF, none of whom have seen anyone take

off their clothes in the shack. Such cherry-picking of the record demonstrates the General Counsel's contentions lack merit.

After this skewed recitation of the facts, the General Counsel boldly asserts "Employees regularly change clothes in the shacks." GC Supp. Brief, p. 6. This assertion is the exact opposite of the conclusion reached by the Administrative Law Judge, who found that assertions by employees that they changed clothes in the break room could not convert the public area into an area of privacy. Thus, the presence of lockers in a public area did not make it an area of privacy nor did claims of employees that they changed clothes in the break room change alter the practice of the parties as embodied in Article 26:

However, employees *cannot simply convert an area intended for public use into a personal privacy space* without the Respondent's knowledge or approval. The law of adverse possession does not apply, and in any event, *I find that instances in which people changed clothes in the break room were infrequent at most, and surreptitious.*

ALJD, p 8 (Emphasis supplied). This conclusion was not specifically challenged in the General Counsel's Exception 1 or in the Argument in Support of Exceptions. Therefore, this challenge to the conclusion is waived. NLRB Rules and Regulations, Section 102.46(f).

II. The General Counsel Failed to Apply the Contract Coverage Standard Correctly

It is undisputed that ABF, pursuant to Article 26, Section 2, can unilaterally install cameras except for areas of privacy. Under *MV Transportation*, the inquiry should end there and no violation of the Act should be found. Despite the fact the Union and ABF agree that the contract grants this right, the General Counsel continues to assert that the plain language of the ABF NMFA does not mean what it says. What is worse is that the General Counsel accuses ABF of introducing ambiguity in the language when nothing of the sort happened.

In its Supplemental Brief, the General Counsel mischaracterizes ABF's defense and misapplies the Board's contract coverage analysis.

A. The General Counsel's Cited But Unapplied Authority Supports ABF's Position

The General Counsel asserts "Giving effect to the relevant, specific, and unambiguous NMFA terms, the Employer cannot identify any contractual language that would privilege it to unilaterally install cameras in shacks where cameras have not been installed in the past 21 years."¹ GC Brief, p. 11. The General Counsel does not identify which "relevant, specific, and unambiguous" contract terms to which the government is "[g]iving effect" but presumably this means "change clothing." This assertion mischaracterizes ABF's position, the record evidence, and the Administrative Law Judge's Decision ("ALJD"). As noted, ABF consistently has identified Article 26, Section 2 as the contractual language privileging it to install cameras and interpreted the language to mean that "change clothing" is in the context of an area of privacy. (*See, e.g.*, Tr. 17-19; 353). Mr. Evans provided direct testimony about how Article 26 codifies the past practice of the parties of allowing ABF to install cameras except in areas of privacy. The parties agree Article 26 allows ABF to install cameras unilaterally. (Vice President of Human Resources Mr. Evans, Tr. 152, 154-156; Union Representative Webb, Tr. 80-82). The ALJD adopted and relied on this evidence. None of this evidence is mentioned in the General Counsel's Supplemental Brief.

The General Counsel misinterprets the plain language of Article 26 by quoting the contractual language and then arguing, "The implied right of the Employer to install cameras in

¹ The reference to a time span is a red-herring inserted by the General Counsel to distract attention from the obvious fact that unilateral installation of cameras falls within the compass and scope of Article 26. There is no timeframe listed in Article 26 and a right that exists pursuant to contract does not somehow disappear if it is not fully exercised.

non-privacy areas does not negate the specific unambiguous language of Article 26 prohibiting the Employer from installing cameras where employees change clothing.” GC Brief, p. 11. Respectfully, this argument does not withstand even the slightest scrutiny. The right to install cameras is not an “implied” right: ABF and Charging Party agree on this point. The express language of the ABF NMFA gives the right to ABF to install cameras unilaterally anywhere except where the presence would “violate the employee’s right to privacy;” the General Counsel simply refuses to acknowledge this interpretation. The language of Article 26 contains examples of areas of privacy “*such as* bathrooms or places where employees change clothing or provide drug testing specimens.” No amount of linguistic gymnastics can avoid the fact the parties meant “change clothing” to be read in concert with, and mutually reinforcing of, an area where employees have a right to privacy.

B. The Plain Meaning of the Term “Change Clothing” Mutually Reinforces the Term “An Area of the Employer’s Premises That Violate an Employee’s Right to Privacy”

The General Counsel cites a number of cases outlining the law on contract interpretation but curiously does not apply any of this authority to the facts of this case. GC Supp. Brief, p. 10. Application of the case law does not support the General Counsel’s assertion. For example, the General Counsel cites *AFGE, Local 2924 v. FLRA*, 470 F.3d 375, 383 (D.C. Cir. 2006) for the proposition that parties may not create ambiguity by using extrinsic evidence when the CBA terms at issue are unambiguous. GC Supp. Brief, p. 10. *AFGE Local 2924* supports ABF’s position. There, the parties had entered into an agreement that stated “Referral for diagnosis and acceptance of treatment should in no way jeopardize an employee’s job security or promotional opportunities.” The employer terminated employees who tested positive for controlled substances yet were in rehabilitation. The Federal Labor Relations Authority agreed with the employer’s witnesses who testified that when the provision was bargained it did not mean to

afford job security to employees who tested positive for drugs and entered rehabilitation. The Court stated, “In analyzing the ulp in this case, the Authority seemed not to comprehend the principle of ‘plain meaning.’” *Id.* at 381. The Court went on to note that the “CBA reveals mutually reinforcing terms” first the diagnosis of drug abuse as an illness, second, the agreements “guarantee employees help in rehabilitation” without fear of job loss, which was a “safe harbor for employees, guaranteeing that the employer will not dismiss any employee during the course of rehabilitation.” *Id.* ABF always has asserted the terms of Article 26 are mutually reinforcing. First, cameras can be installed except in “areas of the Employer’s premises that violate the employee’s right to privacy” and as an example of a violation of a right to privacy is a place where employees “change clothing.” The terms must all be read together, just as the provisions of the contract at issue in *AGFE, Local 2944*.²

C. The General Counsel’s Objection To Evidence It Fostered and Developed Is Inappropriate

For the very first time in this case, the General Counsel asserts that “[t]he Employer’s development of testimony at the ALJ hearing regarding the meaning of ‘change clothing’ is an impermissible attempt to use extrinsic evidence to create an ambiguity where none exists by reading additional terms into Article 26.” GC Supp. Brief, p. 12. The General Counsel also claims that ABF is interpreting the phrase “change clothing” as in reference to providing a drug specimen. *Id.* These assertions are patently absurd.

² ABF does not see the need to analyze every unapplied authority cited by the General Counsel but notes that another such citation, *Aeronautical Indus. Dist. Lodge 921, IAMAW, AFL-CIO v. United Tech Corp.*, 230 F.3d 569 (2d Cir. 2000), is also very helpful to ABF’s position. There, the Court noted that “as with all contracts, courts should attempt to read CBAs in such a way that renders no language superfluous.” *Id.* at 576. The General Counsel’s focus on “change clothing” with little or no regard to the qualifying language of “areas of the Employer’s premises that violate the employee’s right to privacy” render the latter term superfluous and should be avoided. ABF asserts all language in Article 26, Section 2 must be considered.

First, as noted, ABF has never sought to insert ambiguity in this case and always looks to the plain meaning of the contract terms. The language of Article 26 is clear to the Charging Party and ABF. The General Counsel's attempted reading of the language differently simply has no support in the record (or anywhere else).

Second, by making this argument the General Counsel ignores that it was the party that chose to introduce evidence as to the interpretation of the contractual language. As "master of the complaint" pleading a lack of "clear and unmistakable waiver" the General Counsel ordinarily would have simply limited its evidence to the undisputed facts that: a) cameras were installed in the break rooms without talking to the Union and b) the language of the collective bargaining agreement did not evidence a "clear and unmistakable waiver." The General Counsel could have then simply rested its case and argued that since the installation of cameras is an alleged mandatory subject of bargaining the Company had no right to install them *anywhere* without negotiating with the Union because the language of the agreement did not support a waiver. The General Counsel had a problem, though. The General Counsel knew the parties agreed the contractual language permitted the installation of cameras in the facility. In other words, the General Counsel knew that the decision to install cameras fell within the compass and scope of the ABF NMFA. This is exactly what ABF contended in its Supplemental Brief as to why installation of cameras necessarily must be within the compass and scope of the contract: the parties already were attempting to interpret the language of Article 26 because both acknowledged a right to unilateral installation of cameras. ABF Supp. Brief, 6. By pleading the case the way it did, the General Counsel was forced to explain how the installation of cameras in the break room was somehow different from the years of history. The only way to do this was to

bring in evidence of the meaning of the ABF NMFA, something the General Counsel feels is now inappropriate.

The General Counsel made the strategic decision to call three witnesses, two of whom (Messrs. White and Jackson) testified exclusively about their alleged changing of clothes in a public area of the facility and one (Mr. Webb) who testified mainly about the same thing (both from his experience as a former ABF employee and a current Union representative). ABF, not being master of the complaint, simply did what any reasonable party would do in a trial: attempt to refute the proof through cross-examination and its own testimony and documents. Besides, ABF always has contended the issue of camera installation is inextricably intertwined with the interpretation of the ABF NMFA and that it was privileged to unilaterally install the cameras. (Tr. 353). There was no reason for ABF to object to this evidence the General Counsel brought to the forefront.

Second, in scouring the record, ABF is unable to find a single objection lodged by the General Counsel or the Union to questions asked by ABF on cross examination or direct about the circumstances under which employees allegedly change clothes in the break room.³ Further, this was not an issue raised by the General Counsel in the Exceptions or in the Argument in Support of Exceptions. The Invitation to File Briefs in this case did not re-open the case generally in order to relitigate old issues or to lodge new objections or exceptions.

Third, nowhere in any of the arguments, pleadings or testimony has ABF ever linked the phrase “change clothing” to giving a drug specimen. ABF objects to this mischaracterization. The testimony of Mr. Evans clearly states that the practice of the parties has been to not install

³ In the one day trial, there were only approximately 3 actual objections, one by each party. All seem to have been overruled. The issue of the interpretation of the contract was not contested at all.

cameras in areas of privacy, which in the case of the presence lockers was situational. If the lockers were in a place where employees showered, that would be an area of privacy. If the lockers were in the break room, then it would not be an area of privacy. (Tr. 156). At no time has ABF asserted the giving of drug specimens was linked to “change clothing.”

CONCLUSION

The parties agree this case falls squarely within *MV Transportation’s* “contract coverage” analysis. The complained of action clearly falls within the compass and scope of Article 26, Section 2. The plain language of the contract can be interpreted only as prohibiting cameras in areas of privacy. The public break room cannot be an area of privacy no matter how hard the General Counsel tries to assert otherwise. The General Counsel’s attempts to object to evidence it fostered and developed should be rejected. This 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: February 12, 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 February 12, 2020, I served the following document, described as:

REPLY BRIEF OF RESPONDENT ABF FREIGHT SYSTEM, INC.

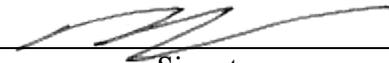
- (By Electronic Filing) By transmitting a true and correct copy thereof via electronic filing through the National Labor Relations Board’s website.
- (By Email) By transmitting a true and correct copy thereof via electronic transmission to the email address listed on the attached Service List.
- (By 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 February 12, 2020 at Los Angeles, California.

Robert Linton
Type or Print Name


Signature

SERVICE LIST

Chad Wallace
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1015 Half Street SE
Washington, D.C. 20570
Email: chad.wallace@nlrb.gov

Via E-Mail

John Doll, Esq.
Doll, Jansen & Ford
111 W. First St., Suite 1100
Dayton, OH 45402-1156
Email: jdoll@djflawfirm.com

Via E-Mail