

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

**ARAKELIAN ENTERPRISES, INC.,
D/B/A ATHENS SERVICES**

and

TEAMSTERS LOCAL 396

**Cases 31-CA-223801
31-CA-226550
31-CA-232590
31-CA-237885**

**COUNSEL FOR THE GENERAL COUNSEL’S REPLY BRIEF IN SUPPORT OF
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Board’s Rules and Regulations, in the matter captioned above, Counsel for the General Counsel submits this Reply Brief in support of its Exceptions to the Decision issued by Administrative Law Judge Jeffrey D. Wedekind (ALJ).

1. Richard Gonzalez is Respondent’s Section 2(13) agent and his angered reaction to, and surveillance of, employees’ Section 7 activity is binding on Respondent

Foreman/Lead Richard Gonzalez is Respondent’s agent under Section 2(13) of the Act. Gonzalez’s job description provides that he “is responsible for the management and leadership of the fleet maintenance operations” and works closely with management to assign employees’ tasks and ensure that employees comply with policies. GC Ex. 28. The evidence establishes that Gonzalez was a conduit between management and shop employees and possessed implicit and apparent agency authority to bind Respondent.

Gonzalez, who is not in the unit, works at desk and walks around to monitor employees performing mechanical tasks. Gonzalez reports to Manager Mark Martorana about employees’ work and shop operations. Employees regularly saw Gonzalez go directly to Manager

Martorana's office after speaking with them to relay information. Tr. 98-100 (J. Maldonado); Tr. 286-288 (D. Maldonado). In this connection, Gonzalez spent about 1 hour per day meeting with Martorana in Martorana's office and shop employees received directives from Gonzalez or a supervisor. For instance, Gonzalez would regularly notify employees of assignments to perform "road calls" to change flat tires. Tr. 98-99, 100-103 (J. Maldonado); Tr. 273, 279, 286, 294-296 (D. Maldonado). When employees had issues like schedule requests, they notified Gonzalez or the supervisor, depending on who they see first. Gonzalez informed employees if their schedule requests were approved. Tr. 63-64, 73, 97-99, 115, 232 (J. Maldonado); Tr. 254-255, 273, 286-287 (D. Maldonado). Gonzalez told mechanics Jose Maldonado and David Maldonado what time to come in on Saturdays. The facts show that Manager Martorana held Gonzalez out to employees as an individual who is authorized to speak for him. Accordingly, employees reasonably believed Gonzalez reflected Respondent's policy, acted on management's behalf, and spoke for management. *Southern Bag Corp.*, 315 NLRB 725, 725 (1994).

When Union steward Jose Maldonado brought a concerted schedule-change request to Manager Martorana in July 2018,¹ Gonzalez was in Martorana's office as per usual. The judge found that "Gonzalez responded first, angrily saying that he would fire all of them." JD 6:15. While Respondent characterizes Gonzalez's direct reaction as "isolated" and "off-hand," an incensed response to employees engaging in group activity is not a stray outlier when it comes to evidencing animus. Manager Martorana did not cure the direct hostile reaction of Gonzalez or even effectively disclaim it. In those circumstances, Gonzalez's hostility is attributable to Respondent under agency principles.²

¹ All dates in 2018 unless otherwise stated.

² Respondent cites *Central Plumbing Specialties*, 337 NLRB 973, 975-976 (2002), but the case involved circumstances poles apart from here. There, a supervisor told an employee that signing

Furthermore, in August 2018, Gonzalez appeared in the training room to eat lunch as employees engaged with Union officials. Gonzalez never ate with the employees in the training room before that instance. Tr. 92, 94-95, 208, 232, 234, 279. Gonzalez's unusual presence under all the circumstances gave employees good reason to think that management directed Gonzalez to monitor their union activities and that Gonzalez would report to management consistent with his known role as leader of shop operations and employees' liaison to Manager Martorana. Accordingly, insofar as Gonzalez monitored employees' Union activity and reacted to group action by threatening to fire participants, his conduct is attributable to Respondent.

2. Jose Maldonado did not commit an attendance violation in May 2018

Contrary to Respondent's arguments, the judge expressly found that *no weight* is warranted for Martorana's testimony that he expected Jose Maldonado to be at work on Saturday May 19, 2018. JD 8:fn. 18. To be sure, while Martorana testified that he told employees that May 19 was "all hands on deck," this claim was contradicted by other credible witnesses and the record as a whole. *Id.* Furthermore, despite Martorana insisting that there is *no such thing* as an alternating Saturday schedule between David and Jose Maldonado (Tr. 1798), the judge found that Martorana in fact agreed to the rotating schedule in 2016, and thereafter, the mechanics routinely rotated Saturdays. JD 6:26-30. Respondent's timekeeping records underscore the long-established rotating Saturday schedule. The credited evidence shows that Respondent did not require two tire mechanics on Saturdays absent contrary instruction and that Respondent did not instruct both mechanics to report on May 19.

a union card could cost him his job. A year later, the initial supervisor was not involved in the daily operations, and different officials fired the employee. The supervisor's statement did not serve as animus. The case has no bearing on whether the contemporaneous reaction to Section 7 activity by an agent of the company demonstrates animus.

In light of the above, when Jose failed to report to work on May 19, he did not violate attendance policies or practices. David Maldonado violated the attendance policy, however, and he accepted responsibility for his absence. The judge's finding that Martorana "would not necessarily have known or assumed that only one of [the tire mechanics] was supposed to work after the barbeque on May 19," JD 7:33, is inherently flawed because Martorana had already disciplined David by the time he called on Jose to discuss Jose's own absence. At that point, Martorana had no legitimate basis to discipline Jose, and in any event, Jose stated that he did not think it was right to receive a write-up on several occasions. The record supports finding that after Respondent issued valid discipline to David for missing May 19, it seized on the opportunity to also discipline Jose in retaliation for him bringing the concerted group schedule-change request that many employees ultimately did not honor. The judge erred in failing to find that the disciplinary decision was based on animus for the reasons stated in General Counsel's Exceptions Brief. Moreover, Respondent has not demonstrated a good faith or mistaken belief that Jose violated attendance policies.

3. Manager Martorana created an impression of surveillance by telling Jose Maldonado that if he gave the Union 30 minutes, he had to give the Company 30 minutes

While Respondent appears to suggest that it is an open question whether Manager Martorana made the at-issue statement, the facts of this incident are not in dispute. The judge expressly found that Martorana and Foreman/Agent Richard Gonzalez approached Jose just before the lunch hour and "Martorana commented that, if Maldonado gave the Union 30 minutes, he had to give the Company its 30 minutes." JD 9:10-11. As a result, the only issue is whether under a totality of circumstances, the statement would reasonably cause an employee to feel that Respondent had placed union activities under surveillance.

Here, that standard is met because the statement, made only to Jose, suggested that Respondent was taking detailed note of how much time he spent on Union activity during off-the-clock, non-work time.³ Given that break time is not work time, Manager Martorana's comment bore no relationship toward ensuring that production is not impeded during working time and instead suggested that perfectly lawful union activity during breaks was being monitored down to the minute. Although Respondent argues that there is no violation because Jose's union activity was no secret, union activity need not be clandestine for an employer to imply it is monitoring those activities, specifically:

The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. . . . Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means.

United Charter Serv., Inc., 306 NLRB 150, 151 (1992).

While Respondent makes much of the fact that Jose may not have talked with the Union before his shift on the particular day in question, Jose testified that it was his usual practice to arrive before his shift and meet with the Union. Tr. 174. Moreover, the judge found that later on July 12, Jose went outside to the Union tent during his break and was subjected to actual surveillance and the impression of surveillance by Guard Furquan. JD 11:10-18, 12:15-21. This string of events, directly on the heels of the decertification petitions, had the effect of diffusing and seeking to restrain employee's lawful engagement with the Union. Therefore, the Board

³ By contrast, in *Nat'l Hot Rod Ass'n*, 368 NLRB No. 26 (2019), the supervisor's statement to group that "I know that some of you have been approached and talked to about perhaps going in the union" did not imply surveillance, where no specific details of the union activity were revealed and the supervisor did not suggest she knew the identify of employees who were approached.

should find that under all the circumstances, Manager Martorana's "30-minute" comment violated Section 8(a)(1) by suggesting that employees' Union activities were under surveillance.

4. Respondent coercively surveilled employees in August 2018

On August 2, Guard/Agent Furquan engaged in Section 8(a)(1) surveillance by video recording employees engaged in Union activities. Even assuming *arguendo* that Guard Furquan acted lawfully, Foreman/Agent Gonzalez's presence in the training room a few minutes after Furquan left served no legitimate purpose in connection with addressing trespass. Rather, Gonzalez, acting as Respondent's agent for reasons explained above, entered a room he never previously used for lunch, sat in the back, and monitored employees as they continued their discussions with the Union.

While Respondent argues Gonzalez is a mere coworker to unit employees, the evidence shows he enjoyed a much closer relationship to management, relayed assignments to employees, was the shop's leader, and in turn reported on employee's work to Manager Martorana. Despite Respondent's contrary argument, the facts show it was highly unusual for Gonzalez to eat lunch in training room on August 2. Tr. 92, 94-95, 208, 232, 234, 279. In this connection, Respondent has consistently argued that the training room is a work area not used for eating. Nevertheless, Gonzalez arrived immediately after Guard Furquan had fully recorded the employees, causing employees to feel that he was there just to monitor Union activities for management. The evidence is clear that Gonzalez's uncomfortable presence made employees speak Spanish to prevent him from eavesdropping. Gonzalez could have eaten his pizza outside of the training room or anywhere else for that matter, but instead, he went to a room where he never lunches just to monitor the final minutes of employees' already-documented Union activity. By this conduct, Respondent engaged in surveillance in violation of Section 8(a)(1).

5. Respondent's closure of the training room violates Section 8(a)(5) and does not fall into an applicable exception to *Bottom Line*

In its Answering Brief, Respondent argues it had no duty to bargain over closing the training room on August 3. As support, despite the Union operating pursuant to the parties' Labor Peace Agreement and past practice, Respondent contends they did not follow directives on August 2 to vacate.⁴ Respondent's contentions do not address the fact that the ALJ failed to properly apply, let alone address, controlling precedent in *Bottom Line Enterprises*. 302 NLRB 373, 374 (1991) (in first-contract cases, employer obligation to refrain from unilateral changes extends beyond giving notice and an opportunity to bargain and requires the employer refrain from implementation unless and until there is overall impasse on an overall contract). The Board has recognized only limited exceptions to *Bottom Line*, such as economic exigencies⁵ and situations where an employer seeks to implement a proposal concerning "a discrete event, such as an annually scheduled wage review...that simply happens to occur while contract negotiations are in progress."⁶

Here, none of the exceptions to *Bottom Line* are invoked to excuse Respondent from notifying and bargaining with the Union over closing the training room, which remains closed to date. Even if the events of August 2 were "extenuating circumstances" that might have justified temporarily locking the training room as an immediate means of protecting property

⁴ Notably, Respondent never advanced that argument to the ALJ as a basis to justify unilaterally closing the training room on August 3. Instead, Respondent contended that as a factual matter, there was no "change" because employees were never allowed to eat in the training room in the first place and employees claiming otherwise are not credible, that closing the training room is not a material or substantial change giving rise to a bargaining duty, and that Respondent provided the Union notice and bargaining opportunity.

⁵ See *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *Port Printing AD and Specialties*, 351 NLRB 1269 (2007) (finding a hurricane causing a citywide evacuation is an economic exigency excusing bargaining)

⁶ *Stone Container Corp.*, 313 NLRB 336 (1993).

prerogatives, that is not what happened here. Importantly, with respect to the Union conduct that the judge found supports a reasonable belief of trespass, such conduct ceased entirely on Thursday August 2 at 7pm. To be sure, on August 2, around 6:47pm while the Union was on the premises to meet with employees as it usually did on Thursdays, Respondent's General Counsel and HR Vice President Michael Pompay made the decision "to let the union representatives stay another 13 minutes, until 7 pm," after which they had to leave. JD 16:10-11. The Union complied and left at 7pm. Multiple witnesses testified that the Union usually visited on Thursdays. The ALJ should have found that Respondent's swift next-day response on Friday of locking the training room and prohibiting employee access to their preferred lunch area was grossly disproportionate to the events of the prior day, for reasons stated in the General Counsel's Exceptions Brief, pages 37-39. The closure prevented employees from accessing a room where they had, for years, eaten lunch together and, for many months, met with Union representatives to confer. At the time of the closure, there were no extenuating circumstances to excuse notice and bargaining.

The judge's decision leaves little doubt that closing the training room is a material and substantial change to working conditions, made the without notice or bargaining, prior to impasse or overall agreement. As such, the change violated Section 8(a)(5). The remedy should be amended to require that Respondent rescind the change at request, notify the Union of proposed changes to working conditions, and bargain with the Union regarding any proposed changes until agreement or impasse.

Respondent relies mistakenly on case law holding that there is a reciprocal duty between employers and unions to bargain in good faith. Lacking in the present case is evidence that the Union bargained in bad faith or was engaged in any unlawful conduct on the date the change was

made. By contrast in *Phelps Dodge Copper Products Corp.*, 101 NLRB 360 (1952), the union expressly directed employees to engage in an unprotected slowdown, and the employer's refusal to negotiate with the union during the slowdown did not violate the Act. In *Valley City Furniture Co.*, 110 NLRB 1589, 1592 (1954), involving a factually inapposite situation of a union calling partial intermittent strikes, the Board noted that "an employer's duty to bargain is suspended while a union is engaged in unprotected activity." Both of these cases predated *Bottom Line*. Tellingly, Respondent did not rely on this precedent in closing the training room or in contending that closing the training room was lawful. In any event, the Union did not direct *employees* to do anything unlawful. More importantly, the above cases have no application to the facts of this case, in which the alleged improper activity by the Union concluded and finalized in full, before Respondent made a unilateral and substantial change to the unit working conditions. In this case, the events of August 2 are not equivalent with the two cases cited above where unprotected strike conduct justified refusing to negotiate while that conduct was in progress. Finally, unlike unlawful slowdowns and strikes – which involve a union's use of economic weapons to directly impact the parties' bargaining strength during negotiations – the Union's access to the training room, even if reasonably believed to be trespass, did not likewise impact the parties' bargaining such that the Employer's failure to comply with its obligation to provide the Union notice and an opportunity to bargain prior to locking the training room should be excused. In sum, the applicable standard for this allegation is *Bottom Line*, Respondent established no exception to that rule, and closing the training room without notice and bargaining violated Section 8(a)(5).

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