

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD	:	Case No. 03-CA-242367
PACKAGING - NIAGARA, A DIVISION OF	:	03-CA-243854
CASCADES HOLDING US, INC.	:	03-CA-248951
	:	
<i>and</i>	:	
	:	
INTERNATIONAL ASSOCIATION OF	:	
MACHINISTS AND AEROSPACE WORKERS	:	
DISTRICT LODGE 65, AFL-CIO	:	

**RESPONDENT’S REPLY BRIEF TO GENERAL COUNSEL’S ANSWERING BRIEF
TO RESPONDENT’S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO
DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE PAUL BOGAS**

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Dated: June 1, 2020

Cascades Containerboard Packaging – Niagara, A Division of Cascades Holdings US, Inc., the Respondent in the above-captioned cases (the “Respondent”), hereby submits this Reply Brief (the “Reply”) to the Answering Brief (the “Brief”) filed by the Counsel for the General Counsel (the “General Counsel”) on March 17, 2020. ¹

ARGUMENT ²

I. The General Counsel is Unable to Legitimize the Judge’s § 8(a)(1) Finding

The Brief does not refute the arguments set forth by the Respondent’s Exceptions Brief relative to the Judge’s § 8(a)(1) findings (BSE 16-19), and does not grapple with the questions posed by the Respondent about being held liable for alleged statements regarding actions allegedly taken by an entirely separate legal entity. See BSE 17. In the singular case where the General Counsel **did** attempt to enhance the Judge’s analysis, the General Counsel egregiously overstepped the boundaries of good faith by baselessly accusing the Respondent of “refusing to turn over” a handwritten letter that Pozzobon allegedly read to employees. AB 11. This outrageous claim is thoroughly contradicted by the record, which illustrates that the Respondent conducted a good-faith search for the letter in question, and that no such document existed. (Tr. 296) The Brief does reveal, however, the General Counsel’s fundamental agreement that the alleged statements, when combined with the Judge’s adverse inferences, constitute the poisonous tree from which all fruit

¹ Notations shall be the same as in the Respondent’s Exceptions Brief. References to the Respondent’s Exceptions and Exceptions Brief shall be notated “Exceptions ____” and “BSE ____”. References to the General Counsel’s Brief shall be notated “AB ____”.

² The General Counsel’s querulous complaints concerning the many errors in the Decision must be rejected. AB 2-4. The Respondent has simply followed the process required by the Board’s Rules and Regulations for contending with errors in the Decision. Even those errors which the General Counsel attempts to overcome in its Brief had an impact on the Judge’s findings of fact and ultimate conclusions, and thus the Respondent was required to take exception to each one. Similarly, the Respondent’s Exceptions to the Judge’s conclusions of law, recommended order, and remedy are based upon the fact that those sections of the Decision rely upon all of the wrongly-decided components of the Decision.

later supposedly fell. See AB 9, 26 (acknowledging that the statements were part of the basis for the Judge's finding of animus); AB 18 (relying on the statements to support the finding of animus); AB 25 (claiming the statements support the conclusion that the Respondent controlled the profit-sharing plan). Therefore, once the Judge's §8(a)(1) finding is struck down, then so too must fall the Judge's many conclusions that hinge upon this finding.

II. The General Counsel Wholly Misunderstands the Respondent's Motion to Dismiss

Next, the Brief's arguments concerning the Judge's denial of the Respondent's Motion to Dismiss the profit-sharing allegations of the Complaint misconstrue the Respondent's argument entirely. The Respondent has consistently argued that the Judge should have dismissed the Complaint due to the lack of evidence marshalled by the General Counsel pre-Complaint concerning the profit sharing allegations - which raised serious concern over whether a complaint ever should have issued in the first place, and whether the General Counsel abused its authority by issuing the Complaint in violation of the Respondent's due process and equal protection rights. See (Tr. 259-260); PHB 30-32; BSE 28-29, FN 27. The Brief completely misunderstands this argument, claiming that the Respondent alleged that the record was "inadequate", and further claiming that dismissal was inappropriate because the General Counsel met his burden over the course of the hearing. AB 6, 7. The arguments raised by the General Counsel, such as whether the Respondent resisted the General Counsel's trial subpoena, or whether evidence elicited at the hearing supported the Complaint, are therefore irrelevant to the pre-Complaint argument espoused by the Motion to Dismiss.

III. The General Counsel Mischaracterizes the Record Concerning the Judge's Adverse Inference and Fails to Recognize the Import of Respondent's Lack of Control

The General Counsel next addresses the Judge's decision to draw an adverse inference against the Respondent.³ First, the General Counsel insinuated that the Respondent had "simply ignored" the subpoena and "failed to produce the documents, defying the ALJ's direction to do so". AB 7. In fact, the Respondent began producing documents to the General Counsel immediately after the Judge denied the Respondent's Petition to Revoke. See (Tr. 16). Similarly, the General Counsel suggested that the Respondent failed to substantially comply with the subpoena. AB 7. This, too, is refuted by the record, which illustrates that the Respondent produced all documents in its possession responsive to the subpoena, created documents to further its compliance with the subpoena, and that those documents not produced - because they were not possessed - constituted only three of the General Counsel's total requests and related to only one of the approximately ten allegations contained in the Complaint. The record additionally illustrates, contrary to the General Counsel's assertion, that the Respondent raised the question of possession from the outset. See BSE 23-27; See Also G.C. Ex. 1; R. Ex. 1; G.C. Ex. 1(x-2); (Tr. 23) ("I will advise Your Honor and Counsel for the General Counsel and the Union **that we do not possess or control possession of the information** that is being sought by the subpoena").

Finally, with regard to those documents not possessed by the Respondent, the General Counsel's description of the Respondent's arguments as "comical" (AB 8) illustrates that the General Counsel either does not understand, or does not respect, the very legitimate questions of

³ Notably, the General Counsel acknowledged, but made no effort to dispute, the Respondent's arguments that the Board lacks authority to impose sanctions. See BSE 19, FN 16; AB 7. Nor does the General Counsel make any effort to refute the arguments concerning Electrical Energy Services (BSE 20-22), or the arguments that the General Counsel had wholly failed to make the requisite showing of prejudice to warrant the imposition of sanctions (BSE 27).

comity raised by the Canadian blocking statutes, which prevent the disclosure of certain of the information not in the possession of the Respondent. Moreover, the General Counsel entirely fails to address the Respondent's arguments concerning the ambiguity of the General Counsel's subpoena, and the lack of legal right on the part of the Respondent to demand the production of responsive documents from any other wholly separate legal entity.

IV. The Judge's §§ 8(a)(5), (3), and (1) Profit-Sharing Plan Findings
a. *The General Counsel Cited No Direct Evidence of the Alleged Alteration*

Like the Judge, the General Counsel remains entirely incapable of proving that the profit-sharing plan was "altered" on the basis of the existing record.⁴ The General Counsel advances the inaccurate claim that three witnesses testified to "the change in the profit-sharing plan and decrease in payments". AB 6. The General Counsel's witnesses could not testify to the formula or calculus used to calculate payments. They could not testify to whether that formula had changed. Nor could any General Counsel witness testify as to whether payments to employees other than themselves were even alleged to have been changed. At best, a few of the General Counsel's witnesses claimed to be able to "guesstimate" the amount of profit-sharing payment they personally would receive, but it is entirely unclear how they would have done so; their testimony offered no further explanation; and no evidence in the record independently corroborated these claims. Thus, without the adverse inference improperly drawn by the Judge, the Judge could never have held that the profit-sharing plan had been altered. Indeed, the Judge *admits* this fact in the Decision. See Decision 13 ("[t]he record evidence does not establish exactly how much the profit-sharing plan's operation was changed.") The General Counsel's claims to the contrary are thus hamstrung by the evidentiary record, and the Judge's own words, and therefore must be rejected.

⁴ Contrary to the General Counsel's assertion (AB 6), the burden was the General Counsel to prove the Respondent "altered" the subject profit-sharing plan, rather than the other way around.

b. The General Counsel Ignored Critical Evidence of Respondent's Lack of Control

Next, the General Counsel attempts to construct an evidentiary record in order to show that the Respondent controlled the profit-sharing plan payments, claiming that the “Respondent had a critical role in determining the size of the payments” to employees, and that the Respondent’s assertion of corporate control over the profit-sharing plan was “unsubstantiated”. AB 21, 25. These assertions are patently wrong. Zilbauer testified explicitly that his *only* role with regard to the profit-sharing plan payments was to: (1) confirm that all eligible employees were listed, with correct information about their earnings as provided by the corporate office, and (2) verify that nobody who had been terminated or had left the employ of the Respondent had remained on the list. (Tr. 425) These ministerial tasks in no way suggested that Zilbauer computed earnings, or even knew what would constitute the “correct information” for the purposes of calculating employees’ profit-sharing payments. In point of fact, Zilbauer testified that he had no firsthand knowledge of the formula utilized to perform such calculation. See (Tr. 425-246) Likewise, his alleged knowledge that a change was made by the corporate parent does not suggest, let alone prove, any Respondent involvement in that decision-making.⁵ AB 23.

In order to downplay unrebutted testimony concerning corporate control of the profit-sharing plan, the General Counsel (like the Judge) takes great pains to discredit Laporte. AB 4, FN 4; AB 17. However, review of the Decision makes clear that the Judge did not follow the

⁵ The General Counsel’s position on corporate control of the profit-sharing plan is confusing, at best. The Brief repeatedly credits Zilbauer’s testimony that David Guillemette informed him that there was a change to the profit-sharing plan. AB 6, 22-23, 25, 26. There is no dispute that Guillemette is employed by the corporate parent, rather than the Respondent. The General Counsel then furthers this argument, claiming that the corporate parent chose to retaliate against the Respondent’s employees on the basis of “reports of [Respondent’s] supervisors”. AB 23. Therefore, the record evidence that the General Counsel repeatedly relies upon establishes the corporate parent, rather than the Respondent, controlled the profit-sharing plan, as well as any alleged alteration thereto.

standard for credibility set forth by the General Counsel’s own Brief (AB 4). There is no indication that the Judge found Laporte to be a nervous witness. Furthermore, the Judge failed to consider the full weight of the evidence offered by Laporte. The Judge’s sole claim, repeated by the Brief, that Laporte contradicted himself was easily explained by the Respondent in its Exceptions Brief. See BSE 42, FN 40. Moreover, it is telling that both the Judge and General Counsel point to a singular exchange of sentences between Laporte and the Judge to entirely discredit Laporte’s roughly ninety pages of otherwise unrefuted testimony. Like the Judge, the General Counsel errs by extrapolating without support that, on the basis of the Judge’s credibility finding related to a certain, small portion of Laporte’s testimony, the entirety of his testimony must be disregarded. AB 21, 25. Laporte’s testimony on the subject of corporate control over profit-sharing plan payments was clear and unrefuted. The General Counsel makes no effort to refute this assertion, and instead tries to boot-strap this argument into the Judge’s findings concerning Laporte’s credibility on other issues, which must fail. Finally, the record does not support the General Counsel’s contention that the profit-sharing plan payments are based upon “profits and ‘other compensation’ employees received [...] in addition to employee years of service, hourly wage, and hours worked in the past six months.” AB 21. Indeed, none of the General Counsel’s own witnesses testified that they had any knowledge concerning the specific calculation or formula by which each employee's amount of profit share was, or is now, determined.⁶ (Tr. 90, 92, 133, 154, 171, 196)

⁶ Similarly misguided is the General Counsel’s claim that the Respondent had previously held town hall meetings with employees to announce the amount of profits that were going to be distributed to employees. AB 21-22. The town hall meetings were held to explain that the profit-sharing plan would be impacted not only by the profitability of the Respondent’s mill, but that the corporate parent would also consider the profitability of other mills that it operated –further evidence of the undefined and amorphous nature of the profit-sharing calculation performed by the parent corporation. See (Tr. 45, 106, 148, 167-168-169, 210-213)

c. The General Counsel Fails to Distinguish the Profit-Sharing from a Gift

With regard to the General Counsel’s argument that profit-sharing was not a gift to employees, it bears repeating that both the Judge and the General Counsel relied heavily on their claim that the profit-sharing payments incorporated “work-related factors” (AB 25) to distinguish Bob’s Tires - which, as has been explained repeatedly, was never proven. Furthermore, it should be noted that the General Counsel did not even attempt to refute the Respondent’s argument that the Board lacks the statutory authority to require Cascades to accept the proposal submitted by the Union as a part of its Initial Proposals on September 18, 2019, to include the profit-sharing plan as a “term and condition of employment” in an initial collective bargaining agreement. See BSE 37-38. Accordingly, the arguments espoused by the Judge and General Counsel alike must fail.⁷

V. The General Counsel’s Arguments Regarding the Cessation of Posting Facility Profits

The Brief’s argument concerning the posting of facility profits is deeply flawed, rests upon multiple mis-statements of the evidentiary record, and wholly fails to dispense with the credible points and arguments raised by the Respondent’s Exceptions Brief. First, as explained above, the General Counsel’s claim that employees “used the monthly profit information to estimate their profit-sharing payments” (AB 14) is not proven by the evidentiary record. Indeed, the specific testimony cited by the Brief to prove this point in fact proves the opposite. In fact, Cracknell

⁷ The final elements of the profit-sharing allegations – animus and the Union’s information requests – merit little discussion. With regard to animus, the link the General Counsel attempts to draw between the decision to stop posting monthly profits and the corporate parent’s alleged changes to the profit-sharing plan (AB 26) are particularly tenuous, and combined with the Judge’s heavy and improper reliance upon timing, demonstrate the overall weakness of the evidence of animus. With regard to the Union’s request for information, the General Counsel fails to rebut the Respondent’s claim that the Union was able to put forth a proposal regarding the profit-sharing plan in bargaining without the information, which goes to the relevance of the Union’s request, and serves as further, unrefuted evidence that the Union did not need the requested evidence in order to participate fully in the negotiating process.

explicitly admitted during his direct testimony that he did not know the formula by which the amounts of employees' profit-sharing payments were calculated, and Reed explained that the profits of other mills, which were not known to employees of the Respondent, affected the amount of profit-sharing payment employees would receive. See (Tr. 133, 211-212, 237-238) Equally incredible is the General Counsel's continued insistence that the Union was not responsible for the flyer. AB 15, 17, 18. In the factual circumstances, the Respondent's inference that the Union had created the flyer was more than reasonable, particularly given the General Counsel's failure to recall either Dahn or Warner to refute the Respondent's claim that that it was a Union flyer. See BSE 44, FN 43. Next, the General Counsel's insistence that Laporte testified that he was instructed by the memorandum to cease sharing profit information with employees is tired and baseless. AB 16. Beyond those arguments asserted in the Respondent's Exceptions Brief, it would have been impossible for Laporte to glean a clear instruction to stop sharing profit information employees from the memorandum, which states only that the company *may not* share information anymore⁸ – it does not even state with certainty that any cessation will occur. R. Ex. 4.⁹

As regards the requisite proof of animus, the General Counsel first claims that Laporte testified that he did not like unions. AB 18. Unsurprisingly, the General Counsel provides no relevant record citation for this outrageous claim, as Laporte *literally never* uttered this statement during his testimony. To the contrary, even under intense pressuring by the General Counsel,

⁸ For this same reason, the General Counsel's attempts to date the cessation of the sharing of profit information with employees to April 29, 2019 – the date on the memorandum – must also fail. AB 16-17. Because the memorandum does not state with any certainty that the company will cease sharing profit information – only that they *may* choose to do so in the future – it is not at all clear that the cessation occurred contemporaneously with the distribution of the memorandum.

⁹ However, the Brief demonstrates that the General Counsel agrees with the Respondent that Laporte received an instruction from the corporate parent to cease sharing profit information with employees, rather than the Respondent itself making that determination, and therefore, the Respondent cannot have been found to have so violated the Act. See AB 16.

Laporte explicitly and clearly denied that the flyer made him mad, that he “blamed” the Union for the flyer, or that he had any anger towards unions, and testified only that he was “disappointed” by the Union’s flyer, and that he felt “disrespected” by the Union’s having spread provable falsehoods about him, personally. (Tr. 374-376) Next, the General Counsel’s contention that Laporte’s statements to Cracknell and Reed regarding the flyer establish animus (AB 18) fall well short of the mark, particularly where – as here – Laporte was, if anything, simply relaying to Reed and Cracknell a decision made by the Respondent’s corporate parent, rather than a decision reached by himself or the Respondent. Finally, the General Counsel’s claim that the flyer constituted “protected activity”, and thus could not serve as the basis for the company’s decision to stop posting profit information at the mill, is deeply flawed, and wholly unsupported by the Act or any Board precedent. Simply put, the Act protects employees’ §7 rights, not the publication of a flyer by a labor organization. To argue that the “protection” of the Act applies to the Union as a separate entity is nonsensical, and runs contrary to the Board’s black letter law.¹⁰ Accordingly, the General Counsel’s framework for review of the flyer’s content is completely inapposite.

VI. The Layoff and Subcontracting Findings

Both the General Counsel’s arguments concerning the layoffs and the Respondent’s use of an independent vendor to perform janitorial work necessitate little discussion in this Reply, as these sections of the Brief once again simply parrot the rationales and arguments advanced by the Decision, itself. As such, arguments countering the points made by the Judge, and thereafter borrowed and repeated by the General Counsel, are already set forth in much greater detail in the

¹⁰ Indeed, the cases cited by the General Counsel in support of its claim are readily distinguishable on the grounds that the flyers that were found by the Board to constitute protected activity in those cases were created and distributed by employees, rather than the unions, themselves. See AB 19, *citing Valley Hospital*, 351 NLRB 1250 (2007); *Mount Desert Island Hospital*, 259 NLRB 589 (1981).

Respondent's Exceptions Brief. ¹¹ See BSE 45-50. Thus, for all these reasons, it remains the case that the Judge's findings related to the May 2019 subcontracting and the janitorial work must also be reversed.

CONCLUSION

For all the reasons set forth above, the Respondent respectfully requests that the Board reject the arguments set forth by the General Counsel's Brief, reverse the Judge's Decision, and dismiss the underlying Complaint in its entirety. ¹²

Respectfully Submitted,



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¹¹ The General Counsel's claim that the Union responded to the Respondent's notice of the impending layoffs by way of "formal letter" rather than email because of the "seriousness of the Respondent's plan" (AB 30) is completely fabricated. No representative of the Union ever claimed that this was the underlying rationale. Similarly, the General Counsel's claim that the Respondent "wholly ignored" (AB 30) or "never responded" (AB 31) to the Union's request to bargain is also contrived. In fact, the record proves that the Respondent attempted to engage the Union on the subject of the layoffs, and was rebuffed and told to bring the matter to another Union representative. See (Tr. 329, 404). Finally, the General Counsel's claim that the Union was simply insisting on restoration of the status quo before it would bargain over the janitorial position (AB 35) is similarly disproven by the record, which illustrates the Union's flat refusal to consider bargaining over the janitorial position, regardless of whether the status quo was temporarily restored. See G.C. Exs. 10, 11, 12, 13, 14; (Tr. 10); (Tr. 101); See Also, (Tr. 103).

¹² Finally, the Brief requests that the Board modify the Judge's order within the Decision to require the Respondent to produce appropriate W-2 forms to the Regional Director, and thereafter advances arguments in favor of this modification. AB 36-37. If the General Counsel sought a modification to the Judge's recommended order, the General Counsel was required by the Board's Rules and Regulations to file Cross-Exceptions to the Judge's Decision. NLRB Rules §102.46(c). Because the General Counsel did not, this request must be rejected by the Board.

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CERTIFICATE OF SERVICE

The Undersigned, Don T. Carmody, Esq., being an attorney duly admitted to the practice of law, do hereby certify, pursuant to 28 U.S.C. § 1746, that I e-filed, on June 1, 2020, on behalf of Cascades Containerboard Packaging – Niagara, a Division of Cascades Holding US, Inc. (Respondent”), the original of “Respondent’s Reply Brief to General Counsel’s Answering Brief to Respondent’s Exceptions and Brief in Support of Exceptions to Decision of Administrative Law Judge Paul Bogas” (“Respondent’s Reply Brief”), *via* the National Labor Relations Board website, www.nlr.gov, with the following:

Hon. Roxanne L. Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570

As an attorney duly admitted to the practice of law, I do hereby further certify, pursuant to 28 U.S.C. § 1746, that I e-mailed a copy of the Respondent’s Reply Brief to the following on June 1, 2020:

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Dated: June 1, 2020
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