

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:

**UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION**

Charging Party,

v.

BOAR'S HEAD PROVISIONS CO., INC.,

Respondent.

Consolidated Case Numbers:
07-CA-209874; 07-CA-212031

**RESPONDENT BOAR'S HEAD PROVISIONS CO. INC.'S REPLY IN SUPPORT OF
EXCEPTIONS TO THE NATIONAL LABOR RELATIONS BOARD**

Respectfully Submitted by:

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A. Introduction

The General Counsel's ("GC") Answering Brief to Respondent's Exceptions to the Administrative Law Judge's ("ALJ") Decision ("ALJD") failed to meaningfully address or engage Respondent's Exceptions. As detailed in this Reply, the GC's Answering Brief 1) did not address egregious mischaracterizations of Record testimony pointed out by Respondent; 2) failed to address material factual errors raised by Respondent; 3) failed to respond to any of the numerous inaccurate citations to the record raised by Respondent; and 4) recycled black letter Board law from its Post Hearing Brief in an attempt to sidestep the aforementioned mischaracterizations and factual errors. Perhaps most illustrative of the disjunction between the Record facts and the GC's Answering Brief is the GC's averment that "[t]he ALJ was correct to find that Giron's statement created an impression of surveillance in violation of Section 8(a)(1)." (GC Answering Brief p. 32). In fact, the ALJ found the opposite and dismissed this allegation. (ALJD p. 37 at 36-38). The ALJ found that Giron, one of Respondent's supervisors, did not create an impression of surveillance. *Id.* While the GC's argument for upholding an already dismissed allegation stands as its most conspicuous error, similar inaccuracies permeate its Answering Brief, many of which are the result of copying and pasting from its Post Hearing Brief. These substantial failings led to unsupported factual and legal conclusions that require reversal and/or modification by the Board.

B. Exception 1 – The ALJ Denied Due Process to Respondent

The GC argued that the ALJ properly allowed the GC to amend its Complaint after the close of testimony to add a surveillance charge. (GC Answering Brief p. 20). However, this argument is contradicted by Respondent's numerous examples of how it would have presented its defense differently and elicited different testimony had it known of the amendment before testimony

closed. (Res. Except. Brief p. 10) The D.C. Circuit has held, in no uncertain terms, that “[w]hen a late amendment deprives an employer of notice and the opportunity to fairly litigate its liability, we will find prejudice warranting reversal so long as there is even a chance that the company could have successfully defended against the charge.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 24 (D.C. Cir. 2015) (emphasis added); *see also Stagehands Referral Service, LLC*, 347 NLRB 1167 (2006). The GC’s post-testimony amendment, here, left Respondent without notice of the amendment and no chance to respond. Respondent stood every chance of defending itself, had it been given any opportunity to do so.

The GC never addressed this clearly-stated Board and circuit precedent. Instead, it made the conclusory assertion that the matter had been fully litigated and cited inapposite case law addressing radically different procedural circumstances. For example, *Pincus Elevator* involved a respondent that introduced evidence it had questioned employees without providing required *Johnnie’s Poultry Co.* assurances. *Pincus Elevator and Electric Co.*, 308 NLRB 684, 684-85 (1992). In *Pincus*, the GC amended its complaint during the hearing to include a charge related to interrogations in contravention of *Johnnie’s Poultry Co.* and called witnesses the respondent had the opportunity to cross examine. *Id.* The respondent also called witnesses, including its attorney, to address the circumstances of the allegedly unlawful interrogations. *Id.* The amendment during the hearing in *Pincus* bears little resemblance to the post-hearing amendment here. Other cases cited by the GC, *Braswell Motor Freight Lines* and *Recycle America* addressed the propriety of amendments to a complaint before hearing commenced. *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973); *Recycle America*, 308 NLRB 50, fn. 2 (1992). Yet another case, *Outboard Marine Corp.*, dealt with revocation of a settlement agreement and reinstatement of charges, which again, occurred before hearing commenced.

Outboard Marine Corp., 307 NLRB 1333, 1334 (1992). None of the cases cited reflect similar procedural circumstances to this case. The GC's conclusory assertion the post-hearing amendment was fully litigated, coupled with the its disregard of the *Bruce Packing Co.* standard, and citation instead to inapposite case law, reveals that Respondent was denied due process.

C. Exceptions 8-10 – Erroneously Alleged Interrogations and Threats by Supervisors

The GC failed to address miscited and mischaracterized Record testimony, cited in Respondent's Exceptions, regarding alleged interrogations and threats by supervisors Guadalupe Rodriguez and Maria Mendoza. The GC's Answering Brief merely reasserted allegations from its Post Hearing Brief, which rested on underlying factual mistakes and misstatements.

The ALJ assumed, without basis, that Mendoza and Rodriguez did not have offices to buttress the alleged coercion. (ALJD p. 29 at 14-24). Respondent identified that the ALJ got this fact entirely wrong, citing numerous instances of record testimony that confirm both Mendoza and Rodriguez had offices. (Res. Except. Brief p. 49-50). The GC failed to address this fact, which is tantamount to an admission that no indicia of coercion could exist based upon the location of Mendoza and Rodriguez's alleged interrogations.

The GC also failed to address the fact that Aguilar alleged Rodriguez stated negotiations would "start from zero to the minimum" only once, and in response to a leading question. (Res. Except. Brief p. 46). Aguilar failed to mention the alleged statement on cross examination on any of the three instances he was asked to relate everything Rodriguez said. *Id.* at 46-7. Moreover, by Aguilar's own recollection of events, Rodriguez based his statements that picnics or bonuses could be lost on his own experiences as a union member. *Id.* Rodriguez's recitation of his own experiences as a union member are permissible under Board law. *Dish Network Corp.*, 358 NLRB 29, slip op. at 1 (2012); *FGI Fibers*, 280 NLRB 473, 473 (1986).

Similarly, the GC did not address the substantial deficiencies in the testimony relied upon by the ALJ to conclude that Mendoza questioned employees on the Beef Trim Line. (ALJD p. 19 at 10-15); (Res. Except. Brief p. 24). Respondent pointed out that the ALJ ignored and mischaracterized testimony to reach the erroneous conclusion that Mendoza was only speaking with Elba Rivas and “other nearby employees.” *Id.* Rivas was the only GC witness to testify about Mendoza’s alleged questioning of employees on the Beef Trim Line. (ALJD p. 21 at 3-9) By Rivas’s own account, Mendoza’s alleged questioning was aimed at a group of 14-18 employees spread along the 30 foot length of the Beef Trim Line, while the Line was operating – not the small group the ALJD mischaracterized her testimony to state. *Id.*; (Res. Except. Brief p. 24). Respondent’s Exceptions also noted the ALJD ignored uncontroverted testimony that communicating to a group of at least 14 employees on the Beef Trim Line, while in operation, would be physically impossible due to the intense noise and distance. (Res. Except. Brief p. 24-5). The GC’s Answering Brief addressed none of these deficiencies and thus failed to carry its burden of proof.

D. Exception 24 – Companywide Payment for Maintenance Tools Permissible

The GC’s only response to Exception 24, regarding subsidizing tools purchases for maintenance employees, was that Larry Helfant, in his meetings with employees, mentioned that Respondent would purchase tools for maintenance employees. (GC Answering Brief p. 26). This constitutes the entirety of the GC’s proof that the union campaign prompted the change. Notably missing is any mention of the critical facts that: 1) the employee meetings referenced by the GC occurred on August 29, 2017, as is confirmed by the record references cited and 2) on August 10, 2017, less than 24 hours after learning that the Holland plant was the only Boar’s Head facility that did not pay for maintenance tools, Helfant directed Scott Habermehl to immediately ensure

that all plants across the company were consistent in paying for maintenance tools. (Res. Exh. 11(b)(1)).

Referring more than two weeks later to a change in the maintenance tool policy is hardly evidence of a scheme to undermine union organizing. The record confirms that the action was taken solely to ensure consistency among the various plants on what equipment was supplied to employees free of charge. (Tr. 65: 17 - 66: 7); (Res. Exh. 11). A legitimate and necessary business decision was made irrespective of the union, as the Act requires. The change also precluded an allegation of discriminatory treatment of the Holland maintenance employees in violation of Section 8(a)(3). Lacking record support, the ALJ's findings must be reversed.

E. Exceptions 20-22 – Changes to the Vacation and Attendance Policies

Perhaps the ALJD's most glaring factual error was concluding the vacation and attendance policy changes were only considered after the union campaign began. (ALJD p. 44 at 6-12). While the ALJ cited Respondent's Exhibit 12, which confirms through internal emails Habermehl's extensive efforts to refine and obtain approval of the modifications beginning in February 2017, the ALJ failed to appreciate the significant timeline (specifically, from 2016 through August 8, 2017) established by the Exhibit. *Id.*; (Res. Exh. 12(j)-(n)). To start, the early 2017 efforts were preceded in 2016 by extensive cost analysis on increasing vacation benefits. (Res. Exh. 12(b)-(i)). On July 17, 2017, Habermehl sent an email to Senior Vice President Jeff Szymanski seeking assistance on costing the vacation increases in view of President Mike Martella's direction to expand the proposed changes to all employees at all facilities. (Res. Exh. (O)). On August 8, 2017 Habermehl sent an email to both Szymanski and Helfant scheduling a conference call for August 10, 2017, to discuss the details of the final proposal, which Habermehl attached. (Res. Exh. (q)(1-4)). It is uncontradicted that the first knowledge of union

organizing at the Holland plant came on August 9, 2017. (GC Exh. 3); (Tr. 1565: 19-21). The ALJ's conclusion that knowledge of union organizing prompted the change to the vacation and attendance policies is thus negated by the timeline established by the Record Exhibits.

Two other significant facts that drove the need for an improvement to the vacation and attendance policies, unmentioned by either the ALJ or the GC, were: 1) the over 100% increase in turnover costs to \$7.6 million and 2) the need to remain competitive in hiring in a difficult job market. Finally, the ALJ summarily and incorrectly dismissed the fact that the changes applied *to all Boar's Head non-union plants organization wide*, by again, wrongly concluding that the change was only considered after the union organizing began. (ALJD p. 46 at 32-44). The ALJ's failure to acknowledge the critical facts and established law is ample basis for reversal of the ALJ's findings.

F. Exception 7 – The Legitimate Basis for Apolonia Rios' Pay Increase

The failure on the part of the GC to respond to any of the numerous inaccurate factual conclusions cited by Respondent in support of Exception 7, regarding Apolonia Rios's wage adjustment, confirms their total lack of contrary evidence. It was precisely those unsupported conclusions that led to the finding that the wage adjustment was unlawful.

The ALJ adopted the GC's incorrect assertion, without any citation to the record, that Rios had been told she was being "given a new position," but that her job duties never changed. (ALJD p. 48 at 18-21). The ALJ viewed apparently this as a deception to facilitate an unlawful wage increase. *Id.* No record evidence whatsoever supports the claim that Rios was told that she was given a new position during the union campaign. (Tr. 444: 11-15). Rios remained in the "General Labor" position, to which she was properly demoted in March 2017, but was given a pay increase commensurate with her 18 years of seniority to the rate she should have received

upon her demotion. (Res. Except. Brief p. 18-19). The incorrect pay rate, given her seniority, prompted Rios to ask for Helfant's help. *Id.* The record confirms repeated references to the concern over her seniority and pay rate, all ignored by the GC and ALJ. (*Id.* at 18).

The ALJD also cited the timing of the pay adjustment as evidence of its illegality. (ALJD p. 49 at 5-6). The wage correction and back pay resulted from a legitimate complaint by Rios to Helfant in late August 2017 that she was being paid incorrectly. (Tr. 403: 7-11; 404: 8-21). The fact that she was incorrectly paid the entry level rate was unknown to Respondent until she brought it to the company's attention. Failure to correct an obvious pay error because of union organizing would have been a violation of Section 8(a)(3). The correction of Rios's pay from the entry-level rate to the correct rate mandated by her seniority, was similar to the change in job classification and pay rate of Nelson Langarita, another chief union organizer, who also made a similar, legitimate complaint. (ALJD p. 14 at 25-27). The ALJ dismissed the Complaint allegation regarding Langarita. (ALJD p. 49 at 27-32). The circumstances in Rios's case warrant the same result.

G. Exceptions 2 – 5 – Badges and Pins Were Permitted Outside Production Areas

The GC's response to Exceptions 2-5 regarding the "Dress Code Rule" fails to address the unambiguous testimony and exhibits cited in Respondent's Except. Brief that negate the ALJ's unsupported conclusion. (Res. Except. Brief p. 12-13). The GC repeats the demonstrably false assertion that Respondent had "an absolute prohibition on badges and pins in non-production areas" from its Post Hearing Brief. (GC Answering Brief p. 21) The ALJ adopted this striking error verbatim in the ALJD. (ALJD p. 38 at 12-15, 25-28).

The ALJ and GC both acknowledge that a rule "proscribing unauthorized badges or other items on helmet or exterior garments" for food safety purposes is reasonable and constitutes

special circumstances justifying the rule. *Id.* at 12-15; (GC Answering Brief p. 22). However, the ALJ ignored substantial record evidence in erroneously concluding the prohibition applies to non-production areas and is therefore unlawful.

The record is replete with evidence that the prohibition of jewelry, pins, and similar items on “exterior garments” applies only in production areas and is so understood by all employees. (Res. Ex. 7); (Res. Exh. 8(a)-(b)); (Tr. 822: 16 - 823: 10). Record testimony and exhibits confirm the rule is based upon Boars Head’s Good Manufacturing Practices for food safety and the “exterior garments” referenced in the rule are the blue or white sanitary gowns worn only in production areas. *Id.* Employees are unequivocally aware that the prohibition applies only to such “exterior garments,” and not their street clothes, and this understanding is the result of regular training that begins on the first day of employment. (Tr. 822: 16 - 823: 10). The uniformity of this understanding is confirmed by the fact that Respondent has never issued discipline for a violation of the prohibition, and no GC witness testified he/she was unaware the prohibition applied only in production areas. (*See e.g.* Tr. 81: 8-14; Tr. 818: 7 - 820: 25; 821: 19-25; 824: 1 - 827: 25; Tr. 1571: 5 - 1572: 22). A cursory review of the photographic exhibits of “exterior garments” and contrary testimony confirms the ALJ’s misinterpretation of the scope of the rule warranting reversal.

H. Exceptions 25-28 – Neither “Bargain From Scratch” Nor Any Similar Phrase Was Said During Employee Meetings

The GC’s response to Exceptions 25-28 regarding the ALJ’s conclusion that Habermehl “in at least one meeting with employees, stated that if the union came in, negotiations would start at ‘zero to the minimum,’” is nothing more than a restatement of its original argument. (ALJD p. 8 at 25-27) The GC failed to address a single factual error or mistaken Record citation raised in Respondent’s Exceptions that contradict the ALJ’s specious conclusion. The ALJ adopted almost

verbatim the error-filled factual conclusions and arguments from the GC's Post Hearing Brief, and thus sowed the seeds for reversal of his findings. *Id.*; (GC Post Hearing Brief p. 9, fn. 15).

The ALJ relied solely upon the testimony of one of the chief union organizers, Walter Aguilar, for the conclusion that Habermehl said negotiations would start from "zero to the minimum" at the 6:30 a.m. employee meeting. (ALJD p. 6 at 42-43). The ALJ repeated, without citation to the Record, the GC's erroneous conclusion that the contrary testimony of two other employees, Abigail Forster and Gabriela Esquivel, could not be relied upon because they did not indicate they attended the same 6:30 a.m. meeting as Aguilar. (ALJD at 7, GC Post Hearing Brief fn. 15). Record testimony, however, confirms both employees testified they attended the same 6:30 a.m. meeting as Aguilar. (Res. Except. Brief p. 70). Forsten testified Habermehl never spoke the alleged words in that meeting. (Tr. 1158: 11-18). Esquivel, who speaks both Spanish and English, similarly confirmed those words were never spoken or translated to Spanish. (Tr. 1166: 2-7; Tr. 1387: 4-12).

VanNoy testified that she attended every employee meeting. (Tr. 794: 9-12). She testified that Habermehl never spoke the words "bargain from scratch" or "zero to minimum." (Tr. 794: 9-18, 795: 1-6). At no point did the ALJ discredit VanNoy's testimony. Rather, again parroting word-for-word the GC's irrelevant non sequitur, the ALJ stated only that VanNoy did not speak Spanish.¹ (ALJD p. 7 at 21). In total, eight witnesses, including Habermehl, testified that Habermehl never said "bargain from scratch" or any similar phrases. Four of the eight witnesses were fluent in both English and Spanish. Finally, the ALJ found that for any conflict in the testimony, he credited the GC's witnesses as a "general matter." (ALJD p. 8 at fn. 17). He made this finding in the context of Vicente Nunez's denial that Habermehl made the alleged statement,

¹ The meetings were conducted in English and translated to Spanish.

despite Nunez being in the best position to know because he translated Habermehl's 6:30 a.m. meeting. *Id.* Aguilar, Forsten, Esquivel, VanNoy, and Rodolfo Rodriguez also attended this same 6:30 a.m. meeting. (Tr. 794: 9-12; 1224: 16-24; 1166: 2-7; 1225: 13-15; 1387: 4-12).

This generalized credibility finding is improper, and in this case, the specific testimony cited by the ALJ as the basis for finding Nunez not credible states precisely the opposite of the ALJ's finding. (*See* Tr. 1120-1125) Nothing the ALJ claims to rely upon to find Nunez not credible is present in the testimony he cited. (ALJD p. 8 at fn. 17) Neither this credibility finding, nor the ALJ's overall conclusion can stand and must be reversed.

I. Conclusion

The GC's Answering Brief asserts "the substantial weight of the record evidence establishes that Respondent" violated the Act. (GC Answering Brief p. 18). Board law holds "the evidence must be viewed in light of the whole record, '[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.'" *Dish Network Corp. v. NLRB*, 953 F.3d 370, 376 (5th Cir. 2020) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). The ALJD both failed to address substantial record evidence as well as mischaracterized record evidence, which in part resulted from the ALJ's unverified adoption of the GC's mistaken factual conclusions in its Post Hearing Brief. *Compare* (ALJD p. 7 at 20-29 and GC Post Hearing Brief p. 9 fn. 15); (ALJD p. 13 at 34 – p.14 at 11 and GC Post Hearing Brief p. 15-16); (ALJD p. 38 at 25-28 and GC Post Hearing Brief p. 30). The ALJD's factual errors resulted in flawed and unsubstantiated legal conclusions that Respondent noted in its Exceptions, and the GC failed to address in its Answering Brief. Respondent respectfully submits that the multitude of significant failings in both the factual and legal conclusions by the ALJ, addressed in detail in Respondent's Exceptions and Supporting Brief, merit reversal and/or modification by the Board.

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CERTIFICATE OF SERVICE

The undersigned, on behalf of Respondent, Boar's Head Provisions Co., Inc. (Boar's Head), filed and sent a true and correct copy of Respondent Boar's Head Provisions Co. Inc.'s Reply in Support of Exceptions to the National Labor Relations Board, e-filed this day, July 20, 2020, in the NLRB Office of Executive Secretary/Board, and to the parties by email at the addresses set forth below:

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