

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

BASHAS' INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

and

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL**

Case 28-CA-21435

Case 28-CA-21501

Case 28-CA-21590

28-CA-21592

28-CA-21639

28-CA-21640

28-CA-21646

28-CA-21676

28-CA-21739

28-CA-21785

28-CA-21803

**BASHAS' INC.'S
REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO THE SEPTEMBER 24, 2009 DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

In its exceptions brief, Bashas' articulated several fatal shortcomings in the ALJ's decision as to three of his findings regarding: (1) Bashas' Distribution Center (DC); (2) Retail Store employee Maria Acosta; and (3) the Night Crew at Retail Store 153. Remarkably, like the ALJ, the General Counsel's Answering Brief relies upon assertions of fact that are not in the record and are actually contradicted by the evidence.¹ Moreover, the General Counsel's Answering Brief fails to address the legal issues Bashas' raised in its Exceptions Brief; instead, the General Counsel conclusory argues that the ALJ's decision was correctly decided and supported by the evidence. Notably, the Union did not file an answering brief (and did not except to any of the ALJ's findings).

I. EXCEPTION I: THE ALJ FAILED TO CONSIDER THE SUBSTANTIAL EVIDENCE SUPPORTING BASHAS' LEGITIMATE, ECONOMIC REASONS FOR OUTSOURCING THE BALER OPERATION.

Fundamentally, the General Counsel's Answering Brief failed to address Bashas' legal argument that Board law precluded the ALJ from rejecting Bashas' explanation for outsourcing the baler operation at its Distribution Center without considering and addressing the substantial evidence that gave credence to that explanation. Moreover, because the ALJ rejected (as pretextual) Mike Basha's testimony about his economic reasons for outsourcing the baler operation, the ALJ's "credibility" determinations based on the evidence and the implications he drew from it (rather than witness demeanor and conduct), his credibility determinations are not entitled to deference. *See, e.g., International Union of Elect., Tech., Salaried, Machine & Furn.*

¹ For example, the General Counsel repeats the ALJ's assertion that there was an organizing drive at the DC in which employees distributed authorization cards. The record established, based on the testimony of the General Counsel's own witnesses, that the cards employees distributed were notices of upcoming union meetings, not authorization cards. While there is no dispute that some DC employees were engaged in union activities in July, August and November 2007, there is no evidence that the Union had obtained a single authorization card, much less, that any significant move toward unionization was about to occur either in June 2007 (when the ALJ concluded Bashas' began "seriously" investigating outsourcing) or December 2007 (when Bashas' made the final decision to outsource the baler function).

Workers, 315 NLRB 495 (1995) (credibility resolutions “not based on witness demeanor, are open to broad scrutiny by the Board”); *SCA Sys. Of Ga.*, 275 NLRB 830, 832 (1985) (Board may “independently evaluate” credibility determinations not based on witness demeanor).

The ALJ credited Mike Basha’s testimony that he directed Steve Schrade to investigate outsourcing certain DC operations, and/or raising the pay rates for those employees, in February 2007. The ALJ also concluded that Schrade spoke with a potential vendor, World Staffing Solutions (WSS) after that discussion with Mike Basha, and met with WSS on June 20, 2007. The record established that WSS met with Schrade again on July 13, 2007 and, also on that day, observed the baler operation to generate a proposal to Basha’s to outsource the DC reclamation function (which included the baler operation at the DC). Without explanation, the ALJ concluded that Schrade’s discussions and meetings with WSS were not connected to the direction the ALJ found Mike Basha had given Schrade in February 2007.

Instead, the ALJ apparently concluded that those meetings and discussions were the result of Schrade learning, on June 15, 2007, that some DC employees had attended a union meeting (Schrade received a note that day stating that a group of employees, identified by name, had attended the meeting). **Yet, it is undisputed that none of the employees who attended that union meeting were balers.** Both the General Counsel and the ALJ simply ignore this crucial fact. The ALJ wholly failed to explain how Schrade could have been motivated by anti-union animus to commence his discussions and meet with WSS regarding outsourcing the baler in June and early July 2007, when there is no evidence that, at that time, Basha believed that any employee who would be affected by the outsourcing had engaged in any pro-union activity. Indeed, it defies logic to assert that Schrade would have responded to the pro-union activities of one group of employees (the loaders) by investigating the possibility of outsourcing another group (the balers); but take no adverse action of any sort against the loaders, either individually

or as a group. Neither the General Counsel nor the ALJ addressed, much less explained away, this logical conundrum.²

The failure to address and explain that illogical conclusion also undermines the General Counsel's attempt to distinguish the controlling Board case, *Leeward Nursing Home*, 278 NLRB 1058, 1075 (1986). *Leeward Nursing* held the employer's subcontracting decision could not have been motivated by discriminatory animus because, even though it made its final decision after learning of the employees' union activities, it had started investigating subcontracting before acquiring that knowledge, and "the critical evidentiary point is that Respondent embarked on a pursuit of the subcontracting option." The General Counsel's assertion that *Leeward Nursing* is distinguishable relies upon the ALJ's incorrect determination that Bashas' did not commence its investigation into outsourcing alternatives in February 2007, but in June 2007, after learning of its employees' union activities. More importantly, however, the General Counsel's argument (like the ALJ's decision) ignores the fact that Bashas' did not learn that any of the baler employees had engaged in union activities until July 17, 2007 – well after discussions with WSS had progressed to the point that WSS had met multiple times with Schrade and sent a team to observe the baler operation for the purpose of making a proposal to Bashas'.

Bashas' Exception Brief identified many other instances where the ALJ did not address or explain either clear evidence that supported the economic justification that Bashas' offered for its decision, or the only reasonable inferences that the evidence allows. For example:

1. The ALJ failed to address (or even consider) the compelling (and undisputed) fact that Bashas' saved over \$100,000 in the first six months after outsourcing the baler function, that its actual savings were consistent with those it had projected before making the final outsourcing

² Similarly, the General Counsel failed to address the fact that the ALJ based his conclusion that Schrade lacked credibility in large part on a complete misreading of Schrade's testimony that he assumed the first union meeting he learned about involving DC, albeit, non-baler employees on June 15, 2007 was a Teamsters' meeting. Instead, the General Counsel's brief adopts the ALJ's obvious mistake that Schrade testified that it was, in fact, a Teamster meeting.

decision, and that the economic savings it achieved through outsourcing was just one of several significant initiatives Mike Basha had implemented at the DC to save money. Instead of addressing those crucial facts, the ALJ dismissed them out of hand by asserting there was no evidence that Bashas' was facing "severe" economic hardship. That standard has no relevance to this case: the evidence the ALJ disregarded bolstered Mike Basha's testimony that he was making difficult decisions to save money – not because the company was facing "severe" economic hardship at that time. Of course, less than a year after the hearing ended, Bashas' did, in fact, file Chapter 11 bankruptcy.³

2. The ALJ found that one potential, albeit unsuccessful, vendor, Direct Offloading Solutions (DOS), submitted a bid to subcontract the baler operation in December 2007. That bid offered Bashas' economic savings by, among other things, selecting the "right" employees to handle the baler operation. The ALJ relied upon that bid to infer that Bashas' intended to discriminate against pro-union employees (presumably, the "wrong" employees). Yet, if the DOS bid revealed Bashas' true motivation (*i.e.*, anti-union animus) in seeking to outsource the baler operation, then it also provided Bashas' with all it wanted – begging the question, "why did Bashas' not accept it?" Perhaps the ALJ had some explanation in mind for that question, but neither he nor the General Counsel have proffered it. At a minimum, the negative inference the ALJ drew from the DOS bid also requires an inference that something other than anti-union animus was motivating Bashas' investigation into outsourcing the baler operation. The evidence in the record establishes only one possible motivation; namely, economic savings.

³ The General Counsel's objection to Bashas' request that the Board consider its pending bankruptcy is based on the premise that Bashas' should have put that evidence into the record. Obviously, Bashas' could not have put evidence of its bankruptcy into the record since the bankruptcy filing occurred 11 months after the close of evidence. Moreover, Bashas' seeks to reopen the record now to admit the bankruptcy filing only because the ALJ applied an erroneous legal standard that (incorrectly and inexplicably) made Bashas' "severe" economic difficulties relevant to the outsourcing decision.

3. The ALJ failed to consider and address the fact that the employees who worked in the baler operation did not disproportionately support the union, and were not the leaders of the openly pro-union activities at the DC. The ALJ failed to offer any explanation as to why Bashas' would target the baler operation if it was motivated by anti-union animus, rather than the openly pro-union group of employees – the loaders.

4. The ALJ ignored the undisputed evidence that, after its decision to outsource the baler operation, Bashas' told remaining DC employees that the decision was a one-time event and no further outsourcing was planned. The ALJ failed to explain why Bashas' would have told employees the outsourcing of the baler operation was a one time event if it wanted to chill the pro-union activities of the remaining DC employees (and, in fact, relied upon a document that was never received as evidence in reaching his decision). Obviously, if an employer wants to chill employees' future concerted activities by outsourcing one group of workers, it would not undermine that goal by expressly disavowing it.

5. The ALJ failed to consider or address the fact that six months had passed between June 15, 2007 – when Schrade first learned of any union activity (by non-balers) at the DC – and mid-December 2007 – when Mike Basha made the final decision to outsource the baler operation to TBG Logistics. *See Rainbow News 12*, 316 NLRB 52, 70 (1995) (“The facts that the decision to lay off employees took place 1½ months after the petition was filed lends credence to a finding that they were not made precipitously in reaction to the union campaign.”).

6. The ALJ also failed to consider or address the significance of the deliberative process that Mike Basha utilized in considering whether to outsource the baler operation. The ALJ's findings establish that, over the course of months, Mike Basha obtained multiple bids before finally awarding the outsourcing contract to TBG. When finding that employers have discriminatorily outsourced work, the Board has focused on quick decisions taken shortly after learning of employees' union activities. Instead of acting precipitously, Bashas' waited several months, got multiple bids, and conducted economic assessments of the bids before outsourcing the work. Indeed, the ALJ failed to consider and address why Bashas' did not accept the first

proposal that WSS made in August, in which it offered Bashas' (but did not guarantee) substantial savings by outsourcing the entire DC reclamation function. As with its rejection of the DOS bid later in the year, there is no reason Bashas' would have rejected WSS's initial bid in August if its true motivation was to chill employees' in the exercise of their Section 7 rights.

7. The ALJ failed to consider and explain why WSS made four additional proposals to Bashas' – and why each reflected: (1) the outsourcing of just the baler operation – not the loading department that actually had employees engaged in union activities; and (2) additional economic savings that were consistent with Mike Basha's testimony about economic considerations he directed WSS to address in each subsequent proposal. If Mike Basha's true motivation for outsourcing the baler operation was anti-union animus, the ALJ failed to explain why he wrangled with potential subcontractors over economic issues for many months.

8. The ALJ failed to consider and address the fact that there was very limited employee support for the union throughout the entire DC between the time Bashas' considered and ultimately outsourced the baler operation (as established by the General Counsel's own witnesses). Moreover, the ALJ ignored the fact that, a month before Mike Basha made the final outsourcing decision, Schrade had concluded that there was no risk of unionization (based upon voluntary reports he received that few DC employees were participating in pro-union activities or otherwise supporting the union) and informed Mike Basha of that fact.

The ALJ's decision provides only one explanation for the timing of Bashas' outsourcing decision; namely, an inference he drew that it was part of Bashas' "push-back" against the Union's corporate campaign, tied to the filing of Bashas' lawsuit against the Union. However, the General Counsel introduced no evidence showing that anyone above Mike Basha was involved in the outsourcing decision, and the uncontradicted evidence established that Mike Basha was not involved in the decision to file the lawsuit against the Union. Thus, the ALJ relied on an unfounded inference to explain the timing of the outsourcing decision, while ignoring substantial evidence demonstrating that the timing of Bashas' decision was wholly unrelated to any of its employees' union activities. The Board's impartial review of the record

evidence will prove that Bashas' outsourced its DC baler operation for legitimate, non-discriminatory, business reasons.

II. EXCEPTION II: ACOSTA'S TRANSFER DID NOT VIOLATE THE ACT.

In its Answering Brief, the General Counsel – for the first time – argues that Acosta's non-union concerted activities were the reason for her transfer. The reason for the General Counsel's extraordinary delay in raising this argument is obvious – it never intended to claim that Acosta's non-union activities were involved (in any way) with her transfer. The General Counsel intended to prosecute Bashas' for transferring Acosta due to her union activities and did just that. During its pre-hearing investigation, the General Counsel realized that Acosta's non-union activities had absolutely nothing to do with her transfer and did not advance that argument before, during, or after the hearing. Now, nearly 18 months after the close of evidence, over a year after the parties submitted their post-hearing briefs, and only after the ALJ *sua sponte* decided to address the issue in his decision, does the General Counsel claim that Acosta's transfer was unlawfully driven by non-union protected activities. The General Counsel's refusal to explain this very obvious (and fatal) change in position confirms that the protected concerted activity theory was never fully litigated, and that Bashas' was denied due process of law.

Even if the Board finds that the non-union concerted activity theory was fully litigated (which it was not), the General Counsel's Answering Brief fails to demonstrate how the record supports the ALJ's conclusion that Acosta was engaged in "concerted" activity for the "mutual aid and protection" of other employees. While the General Counsel loosely and repeatedly terms Acosta's complaints as "concerted," it cites to no evidence that Acosta actually acted in concert with other employees. Nor does it cite a single Board decision in support of its assertion. Instead, the General Counsel relies entirely on evidence regarding Acosta's personal problems with Zamora. For example, in an effort to create evidence where none exists, the General Counsel remarkably characterizes Acosta's brief discussion with Manager Robert Ortiz as "concerted" (Ans. Br. at 23-24), even though Acosta simply complained to Ortiz about her personal issues with Zamora. [RT at 610:10-612:20, 751:21-753:9; 2397:20-2402:6.] The

General Counsel also misstates Castillo's testimony in arguing that other employees had problems with Zamora, which suggests that Acosta actually conferred with other employees. [Ans. Br. at 23.] There is absolutely no evidence in the record demonstrating that Acosta spoke with other employees about her personal issues with Zamora. Instead, the ALJ (and the General Counsel) rely solely on Castillo's testimony to make this point. But, Castillo testified that Acosta told her "Zamora was having problems with other employees," not that "other employees told Castillo or Acosta that they had problems with Zamora." [RT at 2330:6-9.] Such a fleeting comment is too tenuous to find that Acosta actually acted in concert with other employees.⁴

The General Counsel also ignores the second (and more compelling) prong of the "PCA" analysis, requiring proof that Acosta's activities were done for the "mutual aid and protection" of other employees. Here, Acosta's actions in complaining about Zamora were done to help only herself. The suggestion that "Zamora was having problems with other employees" was made to validate Acosta's claims that Zamora was the cause of their personal dispute – not Acosta. See *Richdel, Inc.*, 265 NLRB 467, 467 n.2 (1982) (noting "the mere enlisting of other employee's assistance in furtherance of a personal dispute between an employee and a supervisor does not draw activity undertaken in furtherance of that dispute into the protections of the Act"). The General Counsel's brief is silent on this critical element and fails to discuss the controlling Board law cited in Bashas' brief. Indeed, the General Counsel does not cite a single Board decision demonstrating a violation under analogous facts. Thus, the ALJ's decision simply cannot stand.

⁴ The General Counsel's argument that Acosta was not transferred due to her conflict with Zamora simply because Zamora had already been transferred does not hold weight. [Ans. Br. at 24.] As Acosta admitted, O'Connor and Castillo explained that they decided to transfer both women because it was the fairest solution since Bashas' could not tell which woman was at fault for the dispute. [RT at 627:10-12; 1495:8-14; 2319:13-2320:4.] Further, the General Counsel's argument that Acosta's transfer came too long after her prior discipline for threatening Zamora is simply misplaced. [Ans. Br. at 28.] Bashas' did not transfer Acosta to discipline her for the past threats – Acosta was disciplined for those threats shortly after they were made. Rather, Bashas' referred to Acosta's disciplinary history to support its conclusion that her personal conflict with Zamora was irremediable and could only be fairly resolved by transferring both women.

III. EXCEPTION III: BASHAS' DID NOT VIOLATE THE ACT WHEN IT DISCIPLINED EMPLOYEES WHO ADMITTED STEALING TIME.

The General Counsel ignores the critical evidence that Cano's *Jencks* statement expressly stated that Rincon's alleged question occurred after April 6, which was after Eagen began his investigation into the time theft issue. The undisputed evidence proves that Eagen began his investigation on the morning of April 4. The General Counsel does not explain why Cano's affidavit – made six months earlier to the events in question – would be less reliable than her hearing testimony. Even more telling, the General Counsel never specifies when Rincon allegedly asked the night crew about their union activities because Cano's hearing testimony was limited to her generalized statement that the alleged question occurred in "the first days of April," which does not translate into April 1, 2, or 3 as the General Counsel would like the Board to assume. [RT at 243:-7.] Indeed, the "first days of April" likely means a date in "early April" but "after April 6," making her hearing testimony consistent with her *Jencks* statement.

The General Counsel attempts to avoid these unfavorable facts by arguing that the ALJ discredited Eagen's testimony regarding his motive for looking into the night crew's time theft because "some night crew employees had been taking extended breaks for as long as two years without any discipline," because Bashas' did not previously investigate "when managers heard about the night crew sloughing off" and because Eagen chose to investigate those "old complaints" only after learning about union activities (Ans. Br. at 30, 33-34), but those assertions are factually incorrect and misleading. There is absolutely no evidence that Eagen (or any other manager) was aware that members of the night crew were "stealing time" for two years. The General Counsel's entire argument hinges on Romero's statement during his May 2007 LP interview that, when asked to estimate how long he had been stealing time, he said, "You know like two years, a year. For the past maybe, maybe for like a year." [R. Ex. 66 at 40.] Romero never claimed that Eagen (or any other manager) was aware of that behavior. [RT at 1332:24-1333:7.] Admittedly, Eagen had received "complaints" about the night crew "sloughing off" (as documented in Lowderback's internal LP memo), but those complaints occurred on April 4 – the

same day Eagen initiated his investigation. [R. Ex. 58 at 1.] The fact that Eagen began his investigation immediately after receiving those complaints proves that the night crew's union activities were unrelated to the initiation of the time theft investigation.

The evidence plainly demonstrates that Bashas' had an established practice of reviewing time theft issues and disciplining employees for violations. Eagen regularly checked the security cameras for different employee issues and Lowderback had used the security cameras to investigate time theft concerns at least 10 prior times. [RT at 1303:18-20, 1336:6-12, 1987:12-20.] Contrary to the General Counsel's assertion, Bashas' point in relying on the night crew's past discipline is not that Bashas' had previously engaged in identical time theft investigations regarding those same employees (Ans. Br. at 25), but that management had consistently disciplined those employees for prior misconduct well before any alleged knowledge of union activities. The General Counsel does not dispute that the employees at issue admitted to stealing time. It is also undisputed that Bashas' regularly disciplined (and usually terminated) employees who engaged in time theft. [R. Exs. 68-71.] The fact that Bashas' treated the employees at issue better than others who committed the same infraction is proof that the legitimate business reason for the discipline (admitted time theft) was not simply a pretext for discrimination.

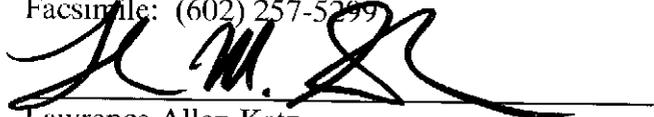
Finally, while Salazar's transfer and Romero's discipline did result from the same LP investigation as Cano's, that does not mean Bashas' would not have presented additional evidence and arguments on those issues had they been properly alleged in the Complaint. This is especially true given the fact that there is no evidence that Romero engaged in any union activities of any kind. The General Counsel's Answering Brief fails to address this point as well as the inconsistencies in the ALJ's rationale for dismissing the allegations regarding the April 6 discipline. Because Salazar's transfer and Romero's discipline were not fully litigated, Bashas' was denied due process when the ALJ considered those issues.

CONCLUSION

For the foregoing reasons and the reasons addressed in Bashas' Exceptions Brief, the Board should overrule the ALJ's conclusions and dismiss the allegations.

DATED this 4th day of January 2010.

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