

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 2**

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FRESENIUS USA MANUFACTURING, INC.

and

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 445

: Case No. 2-CA-39518

**RESPONDENT’S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE’S DECISION**

The Respondent, Fresenius USA Manufacturing, Inc. (“Fresenius” or the “Company”), pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, files the following exceptions to the decision of the Honorable Margaret G. Brakebusch in the above-captioned matter:

1. Respondent excepts to the conclusion that nothing in the General Counsel’s proposed amendments to the Complaint alleging that Grosso’s suspension and termination were violations of both Sections 8(a)(1) and 8(a)(3) of the Act was prejudicial to the Respondent.

ALJD p. 1, n.1. <sup>1</sup>

2. Respondent excepts to the conclusion that the General Counsel’s attempt to clarify the allegations in the Complaint by removing certain allegations regarding Respondent’s purported motives for “interrogating” and investigating Grosso was not prejudicial to the

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<sup>1</sup> The following abbreviations are used throughout the document: ALJD refers to the Administrative Law Judge’s Decision and is cited with page and line number. TR refers to the transcript of the hearing in this matter. Also, references to the Counsel for the General Counsel’s exhibits are referred to as “GCX \_\_\_” and references to the Respondent’s exhibits are referred to as “RX \_\_\_”. Also, the Counsel for the General Counsel will be referred to as the “General Counsel” in this document for ease of reference.

Respondent for the reasons more fully articulated in Respondent's Opposition to Counsel for the General Counsel's Motion to Amend. ALJD p. 1, n.1. RX 45.

3. Respondent excepts to the granting of the General Counsel's Motion to Amend the Complaint since the record indicates that the Respondent was prejudiced by the change in allegations on the eve of trial. ALJD p. 1, n.1. Tr. at 16-17; 248-49; RX 45.

4. Respondent excepts to the finding of fact that Shane Healey served as Respondent's distribution manager for Respondent's Chester, New York facility since Mr. Healy served as the Distribution Center Manager for Respondent's Chester, New York facility. ALJD p. 3; lines 9-10. Tr. at 1217.

5. To the extent they constitute findings of fact, Respondent excepts to any findings about Grosso's explanations of his purported motives for writing the comments on the union newsletters on September 10, 2009. ALJD p. 4; lines 37-50; p. 5; line 1.

6. To the extent they constitute findings of fact, Respondent excepts to any findings that when Grosso said "Hey, the Red Sox RIP" to King, he meant that the Red Sox's season was dismal and coming to an end without their being in contention for the pennant. ALJD p. 8; lines 25-28.

7. To the extent they constitute findings of fact, Respondent excepts to any findings that Grosso purportedly stated in the September 21, 2009 interview that he did see similarities between the May 11, 2009 letter he authored and the handwritten comments on the union newsletters. ALJD p. 8; line 40.

8. Respondent excepts to the finding of fact that King asked Grosso whether he had written the comments on the union newsletters in the September 21, 2009 interview. ALJD p. 8; line 50.

9. To the extent they constitute findings of fact, Respondent excepts to any findings about Grosso's explanations of his purported motives for lying in the September 21, 2009 interview. ALJD p. 9; lines 5-6.

10. To the extent they constitute findings of fact, Respondent excepts to any findings about Grosso's version of the telephone conversation with King on September 22, 2009. ALJD p. 9; lines 16-27.

11. Respondent excepts to the finding of fact that Grosso told King, during the interview on September 23, 2009, that by writing the comments on the newsletters he had acted as a football coach, rallying the team. ALJD p. 10; lines 21-22.

12. Respondent excepts to the finding of fact that Grosso told King, during the interview on September 23, 2009, that he didn't like bullies. ALJD p. 10; lines 22-23.

13. Respondent excepts to the finding of fact that Grosso told King, during the interview on September 23, 2009, that he denied that he was Dale Grosso during the phone call on September 22, 2009 between Grosso and King because he discovered that he was not talking with Ebert. ALJD p. 10; lines 24-25.

14. Respondent excepts to the conclusion that it is not significant that Grosso failed to articulate his reasons for writing the comments during the course of the investigation and/or that there is nothing to indicate that the Respondent would have viewed Grosso's conduct differently had he given a full explanation for his conduct. ALJD p. 12; lines 15-18.

15. Respondent excepts to the finding that the record reflects nothing to contradict Grosso's assertions that he wrote the comments as a means of encouraging the warehouse employees to vote for the Union in the decertification election. ALJD p. 12; lines 18-20.

16. Respondent excepts to the conclusion that Grosso's apparent purpose for writing the comments would fall within the framework of Section 7 rights as envisioned by the Board and the courts. ALJD p. 12; lines 20-22.

17. Respondent excepts to the conclusion that there is no requirement that Grosso seek or obtain the authorization of other employees to write the comments on the newsletters. ALJD p. 12; lines 22-23.

18. Respondent excepts to the conclusion that the very act of writing the offensive and threatening comments on the newsletters was an effort to communicate with other employees about their terms and conditions of employment. ALJD p. 12; lines 24-25.

19. Respondent excepts to the conclusion that Grosso's writing the comments on the newsletters in the employee break room constituted concerted activity protected by the Act. ALJD p. 12; line 25.

20. Respondent excepts to the failure to find that Grosso's conduct was not concerted, as contemplated by Section 7 of the Act.

21. Respondent excepts to the finding that the Board's decisions in the cases cited by the Respondent (G.V.R., Inc., 201 N.L.R.B. 147 (1973) and Bron Constr. Co., Inc., 241 N.L.R.B. 276 (1979)) do not support the argument that Grosso's conduct was not protected because he was not similarly situated to the warehouse unit employees. Respondent further excepts to the finding that there are not any Board or court decisions supporting such an argument. ALJD p. 13; lines 2-5.

22. Respondent excepts to the finding that "Grosso's purpose in writing the comments can be seen in the comments themselves." ALJD p. 13; lines 13-14.

23. Respondent excepts to the conclusion that Grosso's actions in writing the comments on the newsletter fall within the parameters of protected concerted activity and that Grosso engaged in protected concerted activity by writing the newsletter comments. ALJD p. 13; lines 16-18.

24. Respondent excepts to the failure to find that Grosso's conduct falls outside the protection of Section 7 because Grosso was not similarly situated to the employees at whom the comments were directed – the warehouse unit employees.

25. Respondent excepts to the conclusion that the subject matter of the comments weighs in favor of protection under the Atlantic Steel analysis. ALJD p. 14; line 50 to p. 15; line 1.

26. Respondent excepts to the finding that the apparent purpose of Grosso's comments was to communicate concerns to other employees about terms and conditions of employment and concerns about whether the warehouse employees would continue to have union representation. ALJD p. 15; lines 1-4.

27. Respondent excepts to the failure to find that the subject matter of Grosso's comments was vulgar and threatening language (such as "pussies," "catfood lovers" which was an admitted play on the word "pussies" and "RIP" meaning "Rest in Peace" or death), and therefore this factor weighs in favor of the conduct losing the protection of the Act under the Atlantic Steel analysis.

28. Respondent excepts to the finding that Grosso's comments on the union newsletters were only "arguably offensive" and "debatably threatening" since the three female employees (Buxbaum, Germino and Moscatelli) all testified that they did in fact feel offended, threatened and unsafe due to the nature of the comments. ALJD p. 15; lines 32-33.

29. Respondent excepts to the finding that the working environment at the Chester facility was not as “pristine and proper” as Respondent’s witnesses described with respect to the amount of cursing and profanity which took place at the facility in general, and more specifically in front of management. ALJD p. 18; lines 37-38.

30. To the extent they constitute findings of fact, Respondent excepts to any findings about the use of profanity in the workplace as described by Kevin Farrell. ALJD p. 19; lines 1-4.

31. Respondent excepts to the finding that there is little basis to substantially credit the Respondent’s eleven (11) sequestered witnesses (including both former employees and current employees no longer working at the Chester facility) with respect to the prevalence of profanity or vulgarity at the Chester facility. ALJD p. 19; lines 11-12.

32. To the extent they constitute findings of fact, Respondent excepts to the finding that “Grosso testified that he used the word ‘pussies’ in the newsletter to mean that the warehouse employees should ‘man up’ and not be like wimps.” ALJD p. 19; lines 35-36.

33. To the extent they constitute findings of fact, Respondent excepts to the finding that Grosso “testified that he was not specifically directing his comments to the female warehouse employees.” ALJD p. 19; lines 39-40.

34. Respondent excepts to the finding that while an employer may lawfully discipline an employee for making prounion (or antiunion) statements that threaten fellow employees, an employer may not lawfully discipline an employee for making prounion (or antiunion) statements that merely cause another employee to feel uncomfortable. ALJD p. 20; lines 2-6.

35. Respondent excepts to the finding that while an employer has a valid interest in protecting its employees, legitimate managerial concerns to prevent harassment do not justify

discipline on the basis of other employees' subjective reaction to an employee's protected activity. ALJD p. 20; lines 7-10.

36. Respondent excepts to the finding that Grosso wrote the comments without any intent to offend or frighten employees in the warehouse unit. ALJD p. 20; lines 35-36.

37. Respondent excepts to the finding that it is apparent that Grosso wrote the comments with the intent of discouraging employees from abandoning their support for the Union. ALJD p. 20; lines 37-38.

38. Respondent excepts to the finding that Grosso did not mean any ill-will to any other employees in writing the comments. ALJD p. 20; lines 41-42.

39. Respondent excepts to the finding that Grosso engaged in protected activity. ALJD p. 21; line 38.

40. Respondent excepts to the finding that Grosso wrote his comments on the newsletters with the purpose of getting employees not only to read the papers but also to support the union in the upcoming election. ALJD p. 21; lines 38-40.

41. Respondent excepts to the conclusion that two of the five Bourne factors support a finding of an unlawful interrogation of Grosso on September 21, 2009. ALJD p. 23; lines 43-45.

42. Respondent excepts to the conclusion that the location and method of interrogation at the September 21, 2009 interview of Grosso weighs in favor of finding that the interview was an unlawful interrogation. ALJD p. 23; line 47 to p. 24; line 1.

43. Respondent excepts to the finding that it is reasonable that any employee would have appreciated the gravity of the September 21, 2009 interview and would not have mistaken the meeting as casual or insignificant. ALJD p. 24; lines 6-7.

44. Respondent excepts to the finding that Grosso's denial of the conduct which was the subject of the meeting weighs in favor of finding that the interview was an unlawful interrogation. ALJD p. 24; lines 9-10.

45. Respondent excepts to the finding that had Grosso felt sufficiently comfortable and not threatened, it is reasonable that he may have told the truth instead of lying during the September 21, 2009 interview. ALJD p. 24; lines 11-12.

46. Respondent excepts to the conclusion that since Grosso responded untruthfully during the interview this fact weighs in favor of finding that the interview was an unlawful interrogation. ALJD p. 24; lines 12-13.

47. Respondent excepts to the finding that the circumstances of the instant case are distinguishable from the facts before the Board in Caesar's Palace, 336 N.L.R.B. 271 (2001). ALJD p. 26; lines 17-19.

48. Respondent excepts to the finding that the Respondent was already in possession of all of the statements from the four female employees who complained about the handwritten comments on the newsletters as of the time Grosso was requested to maintain the investigation as confidential. ALJD p. 26; lines 26-27.

49. Respondent excepts to the finding that the circumstances of the instant case are comparable to the facts before the Board in Mobil Oil Exploration & Producing, U.S., Inc., 325 N.L.R.B. 176 (1997). ALJD p. 26; lines 30-31.

50. Respondent excepts to the failure to find that Respondent's interest in protecting the female witnesses to the investigation was substantial enough to justify the request for confidentiality during the pendency of the investigation since the female warehouse workers who

were witnesses during the investigation into Grosso's conduct were afraid as a result of his conduct. Tr. at 652, 800, 873, 1353.

51. Respondent excepts to the failure to find that Respondent's interest in protecting the integrity and sanctity of the ongoing investigation was substantial enough to justify the request for confidentiality during the pendency of the investigation since, at the time Respondent requested confidentiality, the investigation was still ongoing. Tr. at 184; 1239; 1353.

52. Respondent excepts to the conclusion that King's request for confidentiality was "just as restrictive as a directive with a threat of discipline." ALJD p. 26; lines 45-46.

53. Respondent excepts to the conclusion that King's request for confidentiality was made in conjunction with a notice of suspension since there is no indication that the suspension was investigatory as opposed to disciplinary. ALJD p. 26; lines 46-47.

54. Respondent excepts to the conclusion that King's request for confidentiality was a "directive under the circumstances." ALJD p. 27; line 1.

55. Respondent excepts to the conclusion that King's request that Grosso keep the investigation confidential during its pendency violated Grosso's Section 7 right to consult with fellow employees for his mutual aid and protection, violating Section 8(a)(1) of the Act. ALJD p. 27; lines 3-5.

56. Respondent excepts to the finding that the female employees' statements included in King's memorandum to the file dated September 21, 2009 are hearsay, as the statements are not being offered for their truth and are therefore not precluded from being admitted under the hearsay rule. ALJD p. 28; lines 11-15.

57. Respondent excepts to the conclusion that the evidence is insufficient to demonstrate that it was the regular business practice for Respondent to make the notes to the file during the investigation into Grosso's conduct. ALJD p. 28; lines 13-15.

58. Respondent excepts to the finding that Healy had good reason to believe that Respondent's actions during the investigation of Grosso's conduct could result in Board charges. ALJD p. 28; lines 41-43.

59. Respondent excepts to the conclusion that the trustworthiness of the documents at issue (Respondent's Exhibits 13, 14, 15, 16, 17, 19, 20, 21, and 23) is reduced by the anticipation of litigation. ALJD p. 28; lines 48-50.

60. Respondent excepts to the finding that Healy's notes of the September 23, 2009 interview of Grosso are "simply Healy's recall of statements made by the various interview participants." ALJD p. 29; lines 4-5.

61. Respondent excepts to the finding that because Healy testified at the hearing, his notes regarding the September 23, 2009 interview of Grosso are not relevant to establish the substance of the interview. ALJD p. 29; lines 5-6.

62. Respondent excepts to the finding that there is not a sufficient basis to admit Respondent's Exhibits 13, 14, 15, 16, 17, 19, 20, 21, and 23 as business records within the meaning of Rule 803(6) and to receive them to show the truth of the matters asserted. ALJD p. 29; lines 8-10.

63. Respondent excepts to the conclusion that the memoranda or "additional notes" tracking the testimony of the Respondent's witnesses is superfluous. ALJD p. 29; lines 11-14.

64. Respondent excepts to the conclusion to not receive Respondent's Exhibits 13, 14, 15, 16, 17, 19, 20, 21, and 23 for the truth of the matter asserted. ALJD p. 29; lines 19-21.

65. Respondent excepts to the failure to find that Respondent's Exhibits 13, 14, 15, 16, 17, 19, 20, 21, and 23 are business records within the meaning of Rule 803(6) of the Federal Rules of Evidence, and are therefore admissible for the truth of the matter.

66. Respondent excepts to the conclusion that "By directing Kevin 'Dale' Grosso not to speak with any employees about the investigation, Respondent violated Section 8(a)(1) of the Act." ALJD p. 30; lines 6-7.

67. Respondent excepts to the conclusion that Respondent engaged in "certain unfair labor practices," that Respondent must be ordered to cease and desist and requiring Respondent to take certain affirmative actions designed to effectuate the policies of the Act. ALJD p. 30; lines 13-15.

68. Respondent excepts to the conclusion that "The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act and not prohibit their speaking with each other about their discipline and other terms and conditions of employment." ALJD p. 30; lines 17-19.

69. Respondent excepts to the conclusion that the Respondent violated the Act. ALJD p. 30; lines 27-29.

70. Respondent excepts to the Order set forth in the Administrative Law Judge's decision since the Respondent did not violate the Act, it did not engage in any unlawful conduct for which it must cease and desist, and the reference to "discipline" in Section 1(a) of the proposed Order is not accurate in that no disciplinary suspension was issued to Grosso at the time of the confidentiality request. ALJD p. 31; lines 1-15.

71. Respondent excepts to the Order set forth in the Administrative Law Judge's decision since the Respondent did not violate the Act for which any affirmative action is

necessary to effectuate the policies of the Act including, but not limited to, the posting of a notice at Respondent's Chester facility. ALJD p. 31; lines 20-50.

72. Respondent excepts to the "Notice to Employees" set forth in the Administrative Law Judge's decision since the Respondent did not violate the Act for which any notice is necessary to post at Respondent's Chester facility. ALJD Appendix, p. 32.

73. Respondent likewise excepts to the "Notice to Employees" set forth in the Administrative Law Judge's decision which includes a provision that "We Will Not tell our employees that they cannot talk with other employees about discipline or other matters affecting their terms and conditions of employment" since the reference to "discipline" is not accurate in that no disciplinary suspension was issued to Grosso at the time of the confidentiality request. ALJD Appendix, p. 32.

74. Respondent excepts to the Administrative Law Judge's failure to make a finding about Grosso's credibility as a witness in light of the findings that the Respondent's witnesses who contradicted Grosso's testimony (Dopheide, Dobkowski and Rogers) were all found to be credible and since Grosso admitted to multiple instances of untruthfulness during the investigation.

75. Respondent excepts to the Administrative Law Judge's failure to expressly make credibility determinations as to certain portions of King's testimony that were contradicted by Grosso since King was a credible witness in that he testified consistently twice at the trial separated by nearly one month in time and his testimony on all key events during the investigation into Grosso's conduct was corroborated by multiple witnesses (i.e., Maloney, Healy, Petliski, Sereno, Dopheide, Rogers, Tyler, Dobkowski, Moscatelli, Buxbaum, and

Germino) who were all sequestered, some were non-management employees, and at least one was a former employee involuntarily terminated by the Company.

76. Respondent excepts to the Administrative Law Judge's failure to expressly make credibility determinations as to certain portions of Maloney's testimony that were contradicted by Grosso since Maloney was a credible witness in that his testimony on all key events during the investigation into Grosso's conduct was corroborated by multiple witnesses (i.e., King, Healy, Petliski, Sereno, Dopheide, Rogers, Tyler, Dobkowski, Moscatelli, Buxbaum, and Germino) who were all sequestered, some were non-management employees, and at least one was a former employee involuntarily terminated by the Company.

77. Respondent excepts to the Administrative Law Judge's failure to expressly make credibility determinations as to certain portions of Healy's testimony that were contradicted by Grosso since Healy was a credible witness in that his testimony on all key events during the investigation into Grosso's conduct was corroborated by multiple witnesses (i.e., King, Maloney, Petliski, Sereno, Dopheide, Rogers, Tyler, Dobkowski, Moscatelli, Buxbaum, and Germino) who were all sequestered, some were non-management employees, and at least one was a former employee involuntarily terminated by the Company.

78. Respondent excepts to the denial of Respondent's Motion for Partial Summary Judgment. Tr. at 239.

79. Respondent excepts to the conclusion that Respondent was not prejudiced by the improper allegations in the Complaint regarding Respondent's alleged unlawful interrogation and investigation which were not contained in the Charge or the Amended Charge. Tr. at 245.

80. Respondent excepts to the conclusion that Respondent was on notice of the allegations regarding Respondent's alleged unlawful interrogation and investigation since the

interrogation and investigation were part of the “sequence of events” leading to Grosso’s termination. Tr. at 240.

81. Respondent excepts to the ruling allowing testimony of Germino’s Facebook page to be admitted during the cross-examination of Germino, as such evidence was admitted without proper foundation or a sufficient showing of relevance and should have been excluded. Tr. at 833.

82. Respondent excepts to the rulings allowing testimony regarding the alleged use of profanity in Respondent’s facilities around the country other than the Chester facility as well as testimony regarding the alleged use of profanity at the Chester facility years prior to the events at issue. Illustrative examples of these rulings are located at Tr. at 619, 977-78, 1039, 1111.

83. Respondent excepts to the ruling to not allow testimony regarding Rathbun’s purported weekend job because the testimony was relevant and properly admissible for purposes of further impeaching Rathbun’s credibility. Tr. at 1256.

The bases for Respondent’s exceptions set forth above are that these findings and conclusions of the Administrative Law Judge are misleading, improper, and/or not supported by the record considered as a whole, and are inconsistent with applicable legal precedent. The reasons for Respondent’s exceptions, together with appropriate and precise citations to the record, are more fully set forth in Respondent’s accompanying brief.

Respectfully submitted,

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Dated: October 13, 2010

**CERTIFICATE OF SERVICE**

This is to certify that on October 13, 2010, I caused the foregoing Exceptions to the Administrative Law Judge's Decision to be served electronically, properly addressed as follows:

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Dated: October 13, 2010