

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

IN THE MATTER OF:)
)
OS TRANSPORT LLC and HCA)
MANAGEMENT, INC.,)
)
Respondents,)
) NLRB Case Nos. 32-CA-25100
and) 32-CA-25399
) 32-CA-25490
)
TEAMSTERS LOCAL UNION NO. 350,)
INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS, CHANGE TO WIN,)
)
Charging Party.)
_____)

RESPONDENT'S BRIEF IN REPLY TO ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RECONDENT'S EXCEPTIONS

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1. Sencion, Sr.'s Statement that he Wouldn't Rehire Escobar did not Violate Section 8(a)(1)

Respondent excepted to the ALJ's finding that Oscar Sencion, Sr. violated the Act by telling Miguel Reynoso that a former employee, Jose Escobar, wouldn't be rehired because of his union activity, on the grounds that Reynoso never testified that Sencion, Sr. actually made that statement. General Counsel tacitly admits Respondent's point that Reynoso only testified that Sencion, Sr. said he wouldn't rehire Escobar, and never gave a reason why. General Counsel nevertheless asserts that the ALJ correctly "inferred" that Sencion, Sr. meant he wouldn't rehire him because of his union activity, even though he didn't say it. General Counsel then tries to use the associative principle to contend that since Sencion, Sr. made other 8(a)(1) statements, his comment about Escobar should be interpreted as an unlawful threat as well.

All of General Counsel's arguments are simply attempts to deflect attention from the ALJ's mistaken finding that Sencion, Sr. said he wouldn't rehire Escobar due to his union activity. The ALJ's decision does not contain any of the reasoning attributed to him *sub silentio* by General Counsel. Instead, he flatly declared that Sencion, Sr. told Reynoso that he wouldn't rehire Escobar because of his union support, when he undeniably did not. (ALJD, p. 29, lines 1-2)

Furthermore, General Counsel's arguments that an unlawful effect should be imputed to Sencion, Sr.'s facially neutral statement are not persuasive. General Counsel relies on the ALJ's note that Escobar signed the protest letter to argue that Sencion, Sr. had the intent to punish him for his union activity, but neither the ALJ (or Reynoso) claimed that Sencion, Sr. mentioned the protest letter in connection with Escobar. (ALJD, p. 9, lines 1-9) Instead, Sencion, Sr. mentioned Escobar's refusal to sign the incorporation papers, which led to his resignation, but this was not alleged as protected concerted activity in the Complaint, or found as such by the ALJ. Thus,

Sencion, Sr. did not make in statements in connection with his declaration that he wouldn't rehire Escobar to tie his decision to union or protected concerted activity. Consequently, there is no basis for finding that his facially neutral statement violated Section 8(a)(1).

2. There was Insufficient Evidence to Establish that Respondent Unlawfully Decreased Wages and Changed Work Routes and Hours Worked of Certain Alleged Discriminatees

General Counsel failed to substantively address Respondent's Exceptions based on the ALJ's failure to set forth any findings of fact and reasons behind his conclusion that the Respondent discriminated against certain employees who signed the protest letter. (G.C. Ex. 4). Instead, General Counsel's brief blithely asserts that the ALJ didn't have to make specific findings, but instead could simply issue a blanket conclusion that all of the employees suffered discrimination without any factual findings or reasoning to support the conclusion. General Counsel's position indisputably conflicts with the plain text of Section 102.42(a) of the Board's Rules and Regulations and the cases cited in Respondent's Brief in Support of Exceptions. The lack of specific findings requires remand of the decision.

General Counsel mischaracterizes Respondent's exceptions to the ALJ's finding that certain employees suffered decreased wages and changes to work routes and hours worked on account of their union activity. Respondent did not base its exceptions solely on the fact that most of these employees did not testify, or that some of them suffered less of a reduction than other employees. General Counsel focuses on these strawmen instead of addressing Respondent's contention that the necessary evidence to establish a *prima facie* violation of Section 8(a)(3) was lacking with respect to these employees. The fact that they didn't testify merely illustrates the overall lack of evidence that they suffered any reduction due to action by the Respondent.

General Counsel attempts to cover for the lack of evidence by making blanket, conclusionary statements that Respondent retaliated against all the employees who signed the letter, and again relying extensively on the associative principle, repeating the evidence that Respondent retaliated against some employees who signed the protest letter in an effort to establish that it must have retaliated against them all. Such logical fallacies cannot sustain the General Counsel's burden of coming forward with some evidence that the employees at issue were actually denied hours or routes by the Respondent. Without such evidence, the deviation between employees' monthly earnings compared to prior years, or the differences between the earnings of those who signed the letter versus those who did not, do not prove that the employees suffered some adverse action, because the mere deviation in earnings can be explained by so many other factors outside the Respondent's control.

General Counsel misconstrues the initial burden of proof under Wright Line, 251 NLRB 1083 (1980). It is not merely showing that there was a loss of wages or loss of work; that is not sufficient to shift the burden to the Respondent to prove that the loss was unrelated to union activity. Instead, General Counsel must show that some adverse action was taken by the Employer, resulting in the loss for the employee. For example, payroll records showing that an employee no longer works at the employer don't establish that the employee lost his job due to some action by the employer; there has to be some evidence that the employer terminated the employee to establish a *prima facie* showing.

The distinction is clearly illustrated by General Counsel's argument that all of the employees at issue didn't work extra shifts on Saturdays after signing the protest letter. The mere fact that an employee didn't work, however, does not establish that the Respondent took some action to deny the employee the opportunity to work. The Respondent isn't required to prove a negative, that it

didn't deny the opportunity, as General Counsel argues. Instead, General Counsel was required to prove at the outset, through either testimony or other evidence, that the employees in question wanted to work on Saturdays but weren't called in or were told they couldn't work by the Respondent. Since General Counsel didn't introduce such evidence, there was no *prima facie* case established that the Respondent discriminated by denying them Saturday work, and the burden never shifted to the Respondent.

It is illuminating that General Counsel's Brief never refers to any record evidence to support the ALJ's conclusion on most of the employees in question, but instead focuses nearly exclusively on the evidence regarding those employees that were not the subject of Respondent's exceptions. This demonstrates General Counsel's awareness that its case and the ALJ's decision finding that Respondent discriminated against these employees suffers from a fatal lack of supporting evidence. Despite General Counsel's unconvincing attempts to paper over the missing evidence, it is readily apparent that Respondent's exceptions on this issue are meritorious and the decision must be reversed.

3. Conclusion

For the reasons set forth in its initial Brief in Support of Exceptions to the Decision of the Administrative Law Judge and this Reply Brief, Respondent respectfully requests that its

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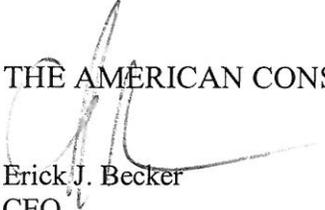
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Exceptions be sustained.

DATED: October 14, 2011

Respectfully submitted,


THE AMERICAN CONSULTING GROUP, INC.

Erick J. Becker
CEO

PROOF OF SERVICE BY ELECTRONIC MAIL

I, Erick Becker, am a resident of Orange County, over eighteen years of age, and I am not a party to this action. My business address is:

23361 Madero, Suite 220
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On October 14, 2011, I served the RESPONDENT'S BRIEF IN REPLY TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS in Case Nos. 32-CA-25100, 32-CA-25399, and 32-CA-25490 on the following parties to this action by sending a file including the documents by electronic mail to the following address:

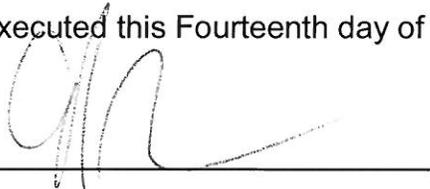
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this Fourteenth day of October, 2011 at Mission Viejo, California.



Erick J. Becker