

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

CASE NOS. 25-CA-264907
25-CA-265798

GAVILON GRAIN, LLC

And

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,
LOCAL 1392

RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

Patrick J. Barrett (#17246)
FRASER STRYKER PC LLO
500 Energy Plaza
409 S. 17th Street
Omaha, NE 68102
Telephone: (402) 341-6000
Facsimile: (402) 341-8290
Email: pbarrett@fraserstryker.com
Attorney for Gavilon Grain, LLC

I. ARGUMENTS

A. THE ALJ ERRED IN FINDING THAT ZACHARY BAXTER WAS DISCHARGED IN VIOLATION OF THE ACT

1. The General Counsel's *Wright Line* Burden was not Met.

There was no evidence of any causal relationship between Zachary Baxter's resignation and his alleged protected activity. In *Tschiggfrie Properties*, 368 NLRB No. 120 , slip op. at 1 (2019), the Board held that "to meet the General Counsel's initial burden [under *Wright Line*], the evidence of animus must support a finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." There was no testimony of any union activity on the part of Zach Baxter. Indeed, the ALJ did not find that the Employer was aware of Baxter's alleged lead organizer role in the union activity (ALJ Dec. 13, fnote 14). Zachary Baxter testified that no Manager knew about the union activity until August 12 when Mr. Casey met with the Company.

Zach Baxter testified that employees wore union T-shirts and hats on the morning of August 12 when the Laborers Business Manager visited Location Manager Trevor Hamilton and requested voluntary recognition (T. 38:15-21). He says, however, that they took off the clothing because it was hot (T. 38:15-21). No one testified that Fanton or Hamilton ever saw him in any union T-shirt or hat. Yet, General Counsel argues that it is insincere to argue that Hamilton never saw employees wearing Union attire (G.C. Brief, p. 12) even though there was no evidence of same.

No one testified that management was aware that Zach Baxter was engaged in protected activity. In fact, he testified that he did not interact with Mr. Hamilton after the Union left the facility on the morning of August 12 (T. 41:20-22). He testified that Derrick Fanton, the Regional Superintendent, came to the plant "later on that day" (T. 41:24-25). There was,

however, no showing that Fanton ever saw Baxter or any other employee dressed in Union garb. Harold Baxter did not remember whether Hamilton even came down to the elevator on August 12 (T. 178:15-179:2). Harold Baxter also testified that he didn't even remember if Derrick Fanton was there while he was still employed after the Union requested voluntary recognition (T. 182:23-183:17).¹

- Animus

The basis for a finding of animus is a statement made by the Location Manager to the effect, "if that is the way they want to play, then that's [the] way we're going to do it." (ALJ Dec. 8:27-32). Zach Baxter testified that Hamilton's demeanor was very defensive (T. 43:23) yet he testified that he never even talked to Mr. Hamilton after August 12 (T. 58:21-24)(T. 75:22-25). Moreover, Hamilton spoke to none of the workers after the Union left on August 12 (T. 76:1-7). There is completely no basis for arguing that management demonstrated the necessary animus towards him to support the conclusion that he was discriminated against because of his protected activity.²

2. The ALJ Erred in Finding Baxter was Terminated

¹ Having a meeting to discuss how to respond to the Union's request or inquire of another supervisor does not substitute for knowledge of Zach's involvement to meet the **Wright Line** burden. Harold Baxter said that he did not know who was involved (T. 178:8-14). The General Counsel argues that knowledge of the Union activity is established because the Company officials discussed it and asked the Assistant Superintendent who was involved (G.C. Brief, p. 12).

² The Counsel for the General Counsel argues that Fanton and Hamilton had "somewhat frantic, hostile and defensive demeanor" during their visits on August 12 and 13 (G.C. Brief p.4). The basis for the General Counsel's argument that Hamilton had a frantic, hostile and defensive demeanor was based on Zach Baxter's testimony. But Baxter testified he never talked to Hamilton on August 12 (T. 58:21-24; 75:22-25; 76:7) and was not working on August 13. So the testimony that was of the witness credited by the Administrative Law Judge did not establish that Hamilton was "frantic, hostile, and defensive" because no one testified as such except in a conclusory manner. Thus, the witness credited by the Administrative Law Judge to support the allegation that somehow the Company had animus against them because of the meeting with the Union could not establish that he even spoke with Hamilton after the visit from the Union (T. 76:7). Counsel for the General Counsel argues that on August 13, Hamilton was "barking orders" to employees so excessively that Harold Baxter suggested that Hamilton return to the front office to calm down. There was no showing he was barking orders at employees but at Harold Baxter. That is not animus.

The ALJ also erred in concluding that Zachary Baxter was "discharged" (Exception 20). According to his own testimony, Zach Baxter resigned. There is no question but that Zachary Baxter voluntarily resigned his employment. See: *U.S. Plastics Corp.*, 213 NLRB 323, 331 (1974) (Whether employee "was discriminated against turns, first, on whether he was discharged or quit."). Before any Union activity Zach Baxter gave his father notice of his resignation (T. 74:14-19). On August 11, he told Hamilton that Friday, August 14th would be his "last day" of employment (T. 75:9-13). The ALJ both credits Baxter's testimony and then ignores it. The ALJ's finding that his father cleared up what he meant by a supplemental Affidavit ignores what Zach Baxter said he said. August 14 would be his "last day" of employment (T. 75:9-11). No supplemental Affidavit by this father is needed to clarify what Zach said.

More importantly, there was no analysis of the periods during which Zachary Baxter had worked part-time in the past. There was no testimony about whether he worked part-time during harvest season. There was no evidence of the number of employees who worked at the location at that time or whether work was available or what type of work was being performed. There was no showing that the Company utilized any part-time workers or that the work load justified a part-time employee or that Gavilon wanted a part-time employee who was working full time for another employer.

The ALJ's Decision ignored the need for such evidence even though such evidence is necessary. For example, in *Hogan Transports, Inc.*, 363 NLRB No. 196 (2016) the Board found that not allowing an employee to rescind his resignation violated of the Act. It did so, however, after receiving evidence that the employer needed drivers and was paying bonuses to other employees to refer drivers. *Id.* at 206 LRRM 1708. No such evidence was presented in this case. Just because Baxter had worked part-time when going to school or working another part-time job in the past meant that he was entitled to a part-time job whenever he felt like it.

Both the ALJ and General Counsel ignore the realities of the workplace in finding and urging that Baxter was "discharged" in violation of the Act. First, there was no showing that another employee ever left Gavilon, accepted a full time job and returned to work part-time at Gavilon (T. 74:14-18). Zach Baxter testified that he was the only one who was able to do so and his father was the Superintendent at the time (T. 73:14-18). This was confirmed by Harold Baxter (T. 166:12-15) and Pat Baxter (T. 130:17). The General Counsel argues and the ALJ found that because Zach Baxter indicated that he wanted to quit for another full time job and wanted to work part-time that he should be allowed to do so. Both ignore that there was never a showing that part-time work was needed by the Company. Indeed, Hamilton testified that they did not have part-time work available (T. 118:14-15).

Second there was no showing that Hamilton ever approved his request for part-time work. Zach Baxter merely testified Zach Baxter, testified that Hamilton "didn't really have much to say about it" (T. 34:7-8). Baxter's testimony (T. 33:25-34:1-8) is non-committal as to whether Baxter agreed or disagreed. He only states that he (Hamilton) didn't have any problems with it (T. 34:1-2), which is exactly the same response as his father (T. 33:23-24). That is not a conversation but a description of what he believed Hamilton was thinking. The ALJ's conclusion to the contrary is clearly erroneous (Exceptions 21, 22). Even if his testimony is credited, all Hamilton allegedly said was that he "did not have a problem with it." Saying you do not have a problem with it is a far cry from saying there is work available, especially in light of the fact Harold, his Supervisor, was terminated and replaced the next week.

Moreover, there was no showing that Gavilon hired anyone to work part-time if that there was a need for part-time work. The Company did use temporary employees but there is no evidence that they worked weekends or part-time. Hamilton testified they are full-time employees (T. 120:25-121:1). Harold Baxter, himself, confirmed that part-time employees are

different than temporary employees (T. 166:14-18). Zach Baxter, himself, testified that he knew of no Gavilon employees who quit but came back to work part-time (T. 74:4-13). That Zach Baxter was willing to work after 4:00 p.m. and on Saturdays and Sundays is irrelevant, without any evidence there was work available for him to perform. There was no showing of a need to work after 4:00 p.m. or on weekends.

B. THE ALJ ERRED IN FINDING THAT THE COMPANY WAS CLOSELY SCRUTINIZING THE WORK OF EMPLOYEES IN VIOLATION OF §8(a)(1).

There was also a dearth of evidence indicating that Fanton and Hamilton closely scrutinized the work of employees in violation of the Act. The only testimony to this effect was that they watched employees loading a barge and Hamilton was barking out orders on one occasion (ALJ Dec. 8:27-28)(ALJ Dec. 8:36-42) and watched employees in a "pit" from close distance (ALJ Dec. 8:40-42). This hardly qualifies as closely scrutinizing the work of employees. In fact, the one order supposedly given by Hamilton was countermanded by Harold Baxter. There was no specific testimony that employees performed any tasks at Hamilton's direction other than cleaning the elevator, as ordered by Harold Baxter.

C. THE ALJ ERRED IN FINDING THAT DIRECTING EMPLOYEES TO CLEAN UP GRAIN DUST DURING THE DAY VIOLATED THE ACT (ALJ DEC. 14:33-35)(EXCEPTION 1)

There is no question but that Elevator Technicians are required to perform "housekeeping" (R. Exs. 1, 2)(T. 267:15-23)(268:1-11)(T. 268:16-19). In grain elevators, there is always grain dust to be swept up (T. 145:1-20). Harold Baxter testified that the Company had a Housekeeping Program, which predated any Union activity (T. 213:19). Housekeeping is part of the job and employees would clean up grain dust whenever they could (T. 213:23-24). Housekeeping is paramount in a grain elevator to prevent fires and explosions (R. Ex. 2). According to the Respondent's policy (R. Ex. 2), if grain dust becomes excessive (exceeds 1/8

inch) then the plant must be shut down (R. Ex. 5)(3.3.1 of R. Ex. 5 p. 2 of 12). The reason that employees continuously perform housekeeping duties is to avoid shutting down the facility. Elevator employees had to clean the facility, which is one of their tasks (R. Ex. 1). According to the Job Description, housekeeping must be performed to "conform to Company expectations" (R. Ex. 1). In fact, there is a memo which indicates that employees should be expected to make the facility cleaner and look better which predates any Union activity. That was one of the directives that Tom Lechtenberg gave to Derrick Fanton in June (R. 20). Moreover, the policy provides the Facility Manager will inspect the facility to evaluate housekeeping standards (3.4 of R. Ex. 5). Employees are required to clean "as needed" (3.1.1 of R. Ex. 5). How can that now be a basis for an unlawful change in working conditions?

The General Counsel called a single non-supervisory employee in support of its allegations. Zach Baxter was no longer present after August 14. His brother, Patrick Baxter, who remained employed for several months thereafter testified that employees would usually clean at the end of the day (T. 129:9). On direct examination, he testified that if they were shorthanded or it was slow, they would clean during the day. But during harvest, they just cleaned at the end of the day (T. 129:12-14). August 12 was not harvest time. Harold Baxter confirmed as much (T. 165:11-15). There was no showing that the elevator was so busy that employees could not be cleaning during the day. So the only employee who remained employed after August 12 testified that it was not unusual to do cleaning during the day, except during harvest season. This completely contradicts the ALJ's decision that somehow, employees were only required to clean at the end of the day. Management retained the right to direct employees to clean, "as needed." Exercising that discretion is not an unfair labor practice.

D. A CHANGE IN WORKING CONDITIONS WITHOUT EVIDENCE AND ANTI-UNION MOTIVATION IS NOT A VIOLATION OF §8(A)(1)

The General Counsel has alleged and the ALJ found that the Company changed working conditions at the facility in several respects. First, the ALJ found that the Employer unlawfully told an employee to get his personal belongings out of a warehouse. This is not a term or condition of employment. There is no evidence that any other employee was allowed to store his belongings in a warehouse that had been leased to another entity. Telling an employee to remove his belongings does not violate the Act because it is not a term or condition of employment for employees. It was, at best, a privilege that a particular employee enjoyed.

The evidence involving the change of starting time did indicate that there was a violation of the Act. There cannot be a change in an established practice if there is no established practice. The General Counsel concedes there was no starting time (G.C. Brief, p. 4). The credited testimony of Harold Baxter established that hours were not ever normal (T. 165:5). If that is true, the direction of the Company after Harold Baxter was gone that employees should not be clocking in earlier than 6:45 a.m. was not a violation of the Act. The Company has every right to determine starting times at work. The Union's witness, Patrick Baxter, also one of Harold's children, could not remember who told employees that they wanted to "quit clocking in early" (T. 128:16). He believes, however, that it happened after Harold Baxter was let go (T. 128:18). The parties have agreed that Harold Baxter was terminated on August 17, 2020 (Jt. Ex. 1). That contradicts the time frame that this change happened immediately upon the Union's request for voluntary recognition on Tuesday, August 12. Therefore, according to Patrick Baxter, the discussion about not clocking in early happened after the Assistant Superintendent was terminated. With a new acting supervisor, Derrick Fanton, the Company had every right to establish hours when employees should come to work.

The touchstone of §§8(a)(1) and (3) is that the motivation has to be in retaliation for Union activity. Without a supervisor in charge, Fanton had to establish a consistent and uniform

starting time (T. 242:24-243:6)). Many of the employees did not clock in before 6:45 a.m. anyway. How then is the motivation judged to be because of protected activity? If there is no showing that the employees adversely affected were Union supporters, there can be no violation of the Act. The motivating factor for the change was there was no starting time. Gavilon or any employer cannot effectively run a business if employees are coming to work whenever they feel like it. If there was no established practice of clocking in at a particular time, telling them not to do so before 6:45 a.m. cannot be a violation of the Act.

II. CONCLUSION

For the reasons stated herein, the Board should sustain the Respondent's Exceptions to the Administrative Law Judge's Decision that the Company's actions violated §§8(a)(1) and (3), and to vacate the Administrative Law Judge's Remedy and Order, in its entirety.

DATED this 6th day of August, 2021.

GAVILON GRAIN, LLC,
Respondent

BY: /s/ Patrick J. Barrett
Patrick J. Barrett, #17246
FRASER STRYKER PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102-2663
(402) 341-6000
pbarrett@fraserstryker.com
ATTORNEYS FOR RESPONDENT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

GAVILON GRAIN, LLC

and

LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA,
LOCAL 1392

)
)
)
)
)
)
)

Case Nos. 25-CA-264907
25-CA-265798

CERTIFICATE OF SERVICE

I certify that a copy of Respondent Gavilon Grain, LLC's Reply Brief in Support of its Exceptions to the Decision of the Administrative Law Judge was emailed on August 6, 2021, to the following parties:

Patricia K. Nachand
Regional Director - Region 25
575 N Pennsylvania St Ste 238
Indianapolis, IN 46204-1520
patricia.nachand@nrlb.gov

Vince Casey
Laborers' International Union of North
America, Local 1392
827 Old Hartford Rd
Owensboro, KY 42303
vcasey1392@yahoo.com

Timothy L. Watson
Regional Director
Region 16
National Labor Relations Board
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6178
timothy.watson@nrlb.gov

Grace Stranch
Branstetter, Stranch & Jennings, PLLC
515 Park Avenue
Louisville, KY 40208
graces@bsjfirm.com

Maxie Gallardo Miller
Field Attorney
NLRB Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6178
Maxie.Miller@nrlb.gov

/s/ Patrick J. Barrett