

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

**BASHAS', INC., d/b/a BASHAS',
FOOD CITY, and A.J.'S FINE FOODS**

and

**Cases 28-CA-21435
28-CA-21501**

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

and

**Cases 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**

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION**

**GENERAL COUNSEL'S ANSWERING BRIEF AND MOTION TO STRIKE
RESPONDENT'S EXHIBIT 1 TO EXCEPTIONS BRIEF**

Sandra L. Lyons
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Ave., Suite 1800
Phoenix, AZ 85004
Telephone: 602-640-2123
Facsimile: 602-640-2178

TABLE OF CONTENTS

I. PROCEDURAL HISTORY 2

II. RESPONDENT’S EXCEPTIONS..... 3

III. DISCUSSION AND ANALYSIS..... 3

 A. Subcontracting of the Baler Operation and Resulting Discharge of Baler
 Employees 3

 1. ALJ’s Findings 3

 2. Facts 4

 3. Discussion 11

 B. Transfer of Maria Acosta 21

 1. ALJ’s Findings 21

 2. Facts 22

 3. Discussion 24

 C. Transfers and Suspensions of Cano, Salazar and Romero 29

 1. ALJ’s Findings 29

 2. Facts 30

 3. Discussion 31

IV. CONCLUSION 35

TABLE OF AUTHORITIES

<i>Alp Petfoods, Inc. v. NLRB</i> , 2126 F.3d 246 (4th Cir. 1997)	12
<i>AMC Air Conditioning Co.</i> , 232 NLRB 283 (1977)	26
<i>Baker Electric</i> , 351 NLRB No. 35 (2007)	1 n. 1
<i>Birch Run Welding & Fabricating, Inc. v. NLRB</i> , 761 F. 2d 1175 (6th Cir. 1985).....	13
<i>Bruce Duncan Co.</i> , 233 NLRB 1243 (1977), enfd. in relevant part 590 F. 2d 1304 (4th Cir. 1979)	13
<i>Cosmo Graphics</i> , 217 NLRB 1061 (1975)	32, 32 n. 5
<i>Darlington Manufacturing Co.</i> , 165 NLRB 1074 (1967).....	13
<i>Dawson Cabinet Co.</i> , 228 NLRB 290 (1977), enf. denied on other grounds 566 F. 2d 1079 (8th Cir. 1977)	32 n. 5
<i>Enloe Medical Center</i> , 346 NLRB 854 (2006)	26, 31
<i>Healthcare Employees Union, Local 399 v. NLRB</i> , 463 F. 3d 909 (9th Cir. 2006).....	12
<i>Independent Metal Workers Local 1 (Hughes Tool)</i> , 147 NLRB 1573 (1964)	32
<i>LCF, Inc. v. NLRB</i> , 129 F. 3d 1276 (D.C. Cir. 1997), den. enf. 322 NLRB 774 (1996)	21
<i>Lear Siegler</i> , 295 NLRB 857 (1989).....	12
<i>Leeward Nursing Home</i> , 278 NLRB 1058 (1986).....	17
<i>Liberty Homes, Inc.</i> , 257 NLRB 1411 (1981).....	17
<i>Manhattan Day School</i> , 346 NLRB 992 (2006)	19, 21
<i>Monroe Feed Store</i> , 112 NLRB 1336 (1955)	26, 31
<i>NLRB v. Joy Recovery Tech. Corp.</i> , 134 F. 3d 1307 (7th Cir. 1998), enfg. 320 NLRB 356 (1995)	12
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983).....	11
<i>Owens-Corning Fiberglass v. NLRB</i> , 407 F.2d 1357 (4th Cir. 1969).....	25, 26, 31
<i>Pergament United States</i> , 296 NLRB 333 (1989)	32
<i>Reno Hilton Resorts v. NLRB</i> , 196 F. 3d 1275 (D.C. Cir. 1999), enfg. 326 NLRB 375 (1998)	12
<i>Sports Coach Corp.</i> , 218 NLRB 992 (1975).....	32 n. 5
<i>St. Vincent Medical Center</i> , 349 NLRB No. 36 (2007)	12
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).....	14
<i>Textile Workers Union v. Darlington Mfg. Co.</i> , 380 U.S. 263 (1965).....	12
<i>Timken Co.</i> , 236 NLRB 757 (1978), enf. denied on other grounds 652 F. 2d 610 (6th Cir. 1981).....	32 n. 5
<i>Underwriters Laboratories, Inc. v. NLRB</i> , 147 F.3d 1048 (9th Cir. 1998).....	16
<i>Wilmington Fabricators, Inc.</i> , 332 NLRB 57 (2000)	12

Woodline Motor Freight, 278 NLRB 1141 (1986), enfd. in
pertinent part 843 F. 2d 285 (8th Cir. 1988) 32

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899
(1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)..... 11, 12, 20, 22, 28, 29, 31, 34

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

**BASHAS', INC., d/b/a BASHAS',
FOOD CITY, and A.J.'S FINE FOODS**

and

**Cases 28-CA-21435
28-CA-21501**

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

and

**Cases 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**

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION**

**GENERAL COUNSEL'S ANSWERING BRIEF AND MOTION TO STRIKE
RESPONDENT'S EXHIBIT 1 TO EXCEPTIONS BRIEF¹**

By its exceptions, Bashas', Inc., d/b/a Bashas', Food City, and A.J.'s Fine Foods

(Respondent) seeks to have the Board ignore the record evidence which establishes that

Respondent engaged in the following unlawful conduct: the discriminatory subcontracting of

its baler operations; the discriminatory transfer of employees Maria Acosta (Acosta), Teresa

¹ As a preliminary matter, Counsel for the General Counsel (CGC) moves to strike Respondent's Exhibit 1 to Respondent's Exceptions Brief (CGC's Motion). Respondent's Exhibit 1, attached to its brief in support of its exceptions, is a copy of its July 12, 2009, voluntary petition for Chapter 11 bankruptcy protection. This document, as well as any other evidence of the July 2009 bankruptcy filing, are not part of the record in this case, were not offered during the hearing before the ALJ, and relate solely to Respondent's actions occurring more than 11 months after the close of the hearing in this matter. Accordingly, Respondent's Exhibit 1, as well as references to and argument based on its bankruptcy filing contained in Respondent's exceptions brief, should be stricken or, in the alternative, disregarded by the Board.

Moreover, by appending its Exhibit 1, Respondent exceeds the page limitations set forth in Section 102.46(b)(1) and 102.46(j) of the Board's Rules and Regulations, which set a strict 50-page limit for exceptions briefs. Therefore, Exhibit 1 to Respondent's exceptions brief should be stricken or, in the alternative, disregarded by the Board. See *Baker Electric*, 351 NLRB No. 35, slip op. 1 at fn. 2 (2007) (Board finds it unnecessary to formally strike brief exhibits which exceed the Board's page limitation since the attachments were disregarded).

Cano (Cano), and Ruben Salazar (Salazar); and the suspensions of Cano and employee Paul Romero (Romero), as well as the well-reasoned conclusions and credibility determinations of Administrative Law Judge William L. Schmidt (the ALJ). As discussed below, Respondent's exceptions are without merit and should be denied.

I. PROCEDURAL HISTORY

The hearing in this matter was held on dates between April 15 and August 13, 2008, in Phoenix, Arizona, upon the allegations contained in the Third Consolidated Complaint (the Complaint). (GCX. 1(bs)) The ALJ issued his Decision on September 24, 2009 (ALJD), finding that Respondent engaged in a campaign of unfair labor practices intended to thwart its employees' rights to organize and to disrupt the bargaining relationship that existed between Respondent and the United Food and Commercial Workers Union, Local 99 (Union) at eight of its stores. Respondent was found to have violated Section 8(a)(1), (3) and (5) by the following acts and conduct:

- denying wage increases to union represented employees (ALJD at 23);
- refusing to bargain with the Union over wage increases (ALJD at 26);
- threatening employees with further withholding of wage increases and other benefits (ALJD at 22);
- undermining and disparaging the Union (ALJD at 23);
- suspending and transferring employees Teresa Cano and Ruben Salazar (ALJD at 43);
- suspending employee Paul Romero (ALJD at 43);
- transferring employee Maria Acosta (ALJD at 57);
- subcontracting its baler operations, resulting in the lay-off of approximately 31 employees (ALJD at 93);
- interrogating employees (ALJD at 37-38, 43, 66, , 74-78, 80);
- creating an impression of surveillance (ALJD at 38, 74-78, 81);
- intimidating and harassing employees by subjecting them to an unwarranted investigation and interview because they engaged in union and other concerted activities (ALJD at 43);
- threatening employees with discharge (ALJD at 43, 82);
- threatening to transfer employees to other stores (ALJD at 59);
- threatening employees with unspecified reprisals (ALJD at 68-70); and,

- orally promulgating an overly-broad and discriminatory rule prohibiting its employees from distributing, during working hours, material not provided to them by Respondent (ALJD at 77).

In addition to the standard remedies for the violations found, the ALJ also ordered Respondent to restore its baler operation to how it existed the day before the subcontracting took effect. (ALJD at 94)

On December 7, 2009, Respondent filed with the Board three Exceptions to the ALJD and a supporting brief.

II. RESPONDENT’S EXCEPTIONS

Respondent takes exception to the following findings and conclusions of the ALJ:

- that Respondent violated Section 8(a)(1) and (3) of the Act by terminating the baler employees and subcontracting the baler operations of its distribution center to an outside contractor (TBG Logistics, LLC);
- that Respondent violated Section 8(a)(1) of the Act by transferring employee Maria Acosta due to her protected concerted activities; and,
- that Respondent violated Section 8(a) (1) and (3) of the Act by transferring employees Teresa Cano (Cano) and Ruben Salazar and suspending employees Cano and Paul Romero.

As shown below, Respondent’s exceptions are without merit inasmuch as the credible record evidence and extant case law fully support the ALJ’s findings and conclusions regarding such violations.

III. DISCUSSION AND ANALYSIS

A. Subcontracting of the Baler Operation and Resulting Discharge of Baler Employees

1. ALJ’s Findings

The ALJ, based on the credited record evidence, found that Respondent violated Section 8(a)(1) and (3) of the Act on January 26, 2008, by terminating its baler employees and

subcontracting its baler operations to an outside contractor. Respondent excepts to such findings and conclusions on the bases that the ALJ erred in finding Union animus as the motivating factor for such terminations and subcontracting; the ALJ failed to consider the business reasons for such outsourcing; and the ALJ failed to give sufficient weight to certain other evidence. Contrary to Respondent's exceptions, the record supports the ALJ's findings and conclusions.

More particularly, the ALJ correctly found that Union animus was the motivating factor in Respondent's decision to subcontract its baler operation, a finding supported by direct evidence. Moreover, the ALJ considered but then rejected Respondent's defense of economic hardship and business justification as the reason for its outsourcing and, contrary to Respondent's assertions, the ALJ gave appropriate weight to the evidence proffered by Respondent.

2. Facts

a. Respondent's Distribution Center Operations

In February 2007, Respondent employed approximately 30 balers at its Distribution Center (DC). (ALJD at 82, fn. 96) Respondent's DC is a large warehouse that is divided into four fairly distinct sections. (Tr. 1076) Prior to Respondent's subcontracting of its baler operation in January 2008, Respondent's baler employees worked in Respondent's DC with approximately 700 other employees, using the same time clock, the same break room, and sharing supervision, in the person of Mel Kelley, Dry Receiving Dock Manager. (Tr. 144)

b. Decision in February 2007 to Not Outsource

Though Respondent discussed and considered outsourcing its baler operations in February 2007, the record establishes, and the ALJ found, that it decided not to do so, despite

its increasing costs evident at that time. Respondent made that decision to retain the baler operations before it learned of Union activity among its baler operations employees. It was not until after it learned of such activity that Respondent changed course and decided to subcontract the baler operation.

More specifically, in February 2007, Respondent's high-level managers, including Michael Basha (Basha), Donny Felix (Felix), and Steve Schrade (Schrade), met to discuss annual compensation adjustments for Respondent's Distribution Center (DC) employees. When Schrade, Respondent's DC Human Resources Director, presented ideas and operating alternatives to Basha and Felix, he suggested that in order to remain competitive, Respondent would need to increase the wages of the balers, and other employees, by 20%, or, in the alternative, outsource some of DC functions. (ALJD at 82). At that time -- a time prior to any knowledge of Union activities among DC or baler operations employees -- Respondent, by Basha, decided that Respondent was not going to outsource any operations, including the balers, despite increasing costs. (Tr. 2529)

c. Respondent's Failure to Establish That it Decided to Outsource the Balers Prior to July 2007

Respondent's assertion that it had a plan in place to subcontract the baler operation prior to July 2007 is without merit. The evidence that Respondent proffered in support of its assertions fails to establish such a plan. To the contrary, the record shows that Respondent did not adopt a plan to subcontract its baler operation until after it knew of union activities among the baler employees. Respondent's evidence of such a purported plan to subcontract amounts to one email, from 2006, (Tr. 1640; GCX 29) wherein Schrade discussed outsourcing of the Ocotillo warehouse.² There is no mention of outsourcing the baler operation in this

² The Ocotillo warehouse is a separate and distinct building and function from the DC.

email. The record evidence shows that Respondent's discussion at that time focused on the outsourcing of the reclamation process at the Ocotillo warehouse, an operation Respondent never outsourced. (GCX 29)

Respondent also argues that Schrade had a discussion about outsourcing the reclamation function at the Chandler and Ocotillo with Mark Gage (Gage), Sales Director of World Super Services (WSS), a logistics company, in February 2007. No documentary evidence that these discussions occurred was proffered by Respondent nor did Respondent call Gage as a witness to these discussions. (Tr. 1640) The ALJ found that the fact that Respondent's failure to revisit this earlier effort to subcontract the reclamation project supports the conclusion that Respondent's motivation to subcontract the baler operation was other than pure economics, as urged by Respondent. The next evidence of any contact with Gage or any other third party was a June 20, 2007, meeting with Gage. (Tr. 1644-1645; RX 48) Respondent argues that because this discussion took place prior to Respondent's knowledge of Union activities on the baler dock, the ALJ erred in finding that Respondent's decision to subcontract was motivated by its Union animus. Despite Respondent's assertions to the contrary, the record clearly establishes that on June 20, 2007, Respondent had made no decision regarding any outsourcing.

d. Respondent's Knowledge of Union Activities
Among Baler Employees and Respondent's Anti-
Union Campaign

Respondent argues that the ALJ erred in finding that Union animus was the motivating factor in Respondent's decision to outsource the baler operation. Contrary to this assertion, the ALJ correctly found that Respondent began a corporate campaign against the Union in July 2007 and that this anti-Union campaign was intertwined with Respondent's decision to

outsource the baler operation. (ALJD at 92) Respondent's own email gives direct and unequivocal evidence that Respondent was motivated by its Union animus in deciding to outsource the baler operation. (GCX 30)

More specifically, in July 2007, Respondent began a corporate campaign against the Union due to its discovery of Union flyers being distributed among employees. This flyer was discussed on July 17, 2007, when Schrade was conducting what he called "2(11) training" with supervisors -- training supervisors on how to deal with Union issues among employees. (Tr. 1104) At this training, Schrade was informed that several of the employees whose pictures appeared on the Union flyer were baler employees. (Tr. 1104)

The very next day, July 18, 2007, Schrade sent an email to Gage wherein he states, "We have union issues with members on the baler dock. I have asked Michael to consider outsourcing this operation." (Tr. 1095; GCX 30) At trial, Schrade admitted that he was referring to the Union flyer and the pictures of the baler employees as being the Union issues he was referring to in this email. (Tr. 1104)

Schrade became so concerned with employees' Union activities that he began to hold mandatory anti-Union meetings with each and every employee in the DC in August 2007. (Tr. 1575) Schrade also kept track of Union support among his employees by maintaining a folder in his office containing documents showing the Union activities of employees, identifying which employees attended Union meetings or were talking positively about the Union, and any issues these Union-supporting employees had concerning wages, hours and

working conditions. (Tr. 1117; GCX 32-34)³ Respondent's worries and concerns about the growing Union support appearing among its employees are evidenced by the numerous anti-Union documents placed on bulletin boards and in employees' paychecks. (Tr. 1575-76, 1578; GCX 59-66)

Despite Respondent's anti-Union campaign, its DC employees continued to show support for the Union. Beginning in June and continuing until they were outsourced, baler employees passed out Union authorization cards, attended Union meetings directly across from the DC, and wore Union shirts to work. (Tr. 1697-1701, 1730-1733, 1768) In August 2007, a large group of DC employees, including several baler employees attempted on two occasions to present to Basha a signed petition regarding safety concerns at the DC, an action Respondent believed was prompted by the Union. (Tr. 1593) Further, two baler employees, Robert Smith (Smith) and Jaime Lazaro (Lazaro), submitted a complaint to the Arizona Industrial Commission, Occupation Safety and Health Act Division, resulting in an on-site visit by state officials in November 2007. Many of the employees' complaints were sustained. (Tr. 161; GCX 57-58) Clearly, Respondent's anti-Union campaign was having no effect in stemming the tide of Union activities.

e. Respondent Makes the Decision to Outsource the Baler Operation

Respondent argues that the ALJ failed to consider and address Respondent's evidence of Basha's deliberative process concerning the decision to outsource the baler operation and

³ Respondent argues that this information, including GCX 34 (dated June 15, 2007), does not show that the baler employees were specifically involved in Union activities, only that some employees in the DC were involved. It does, in fact, show Respondent's serious concerns about Union activities at the DC and, upon confirmation that it was specific baler employees on July 17, 2007, Respondent immediately linked the baler employees to outsourcing. (GCX 30)

that Basha himself had little knowledge of employees' Union activities. Respondent asserts that the ALJ improperly concentrated on Schrade's actions instead of those of Basha.

Contrary to Respondent's assertions, the ALJ fully and appropriately considered the process Respondent undertook in deciding to outsource the baler operations and was justified in giving weight to Schrade's conduct. Despite Basha's testimony that he was the ultimate decision-maker regarding the subcontracting of the baler operations, the record shows that Schrade was the moving force behind Basha's decision. Schrade suggested the outsourcing, was tasked with investigating outsourcing, and was responsible for presenting his recommendation that the baler operations should be outsourced. The ALJ fully considered Schrade's testimony and Respondent's other evidence designed to mask and obfuscate Respondent's true motive in outsourcing its baler operations, and found it self-serving and contradictory. (ALJD at 92)

For example, before the final decision to outsource the baler operation was reached, Schrade wrote down notes concerning the pros and cons of outsourcing. One of the "pros" was to "...remove associated employee issues...." (Tr. 1557; GCX 13) Schrade incredibly testified that this meant his concern with I-9 issues. (Tr. 1557-1558) Yet, the record fails to show that there were I-9 or immigration issues with any member of the baler employee component. In fact, the evidence of Respondent's consideration of subcontracting shows that the only "employee issue" discussed was the Union activities of the baler employees. (GCX 30) The ALJ properly saw such evidence and Schrade's testimony as what it was -- pretext. (ALJD at 61)

Moreover, Respondent's sudden decision to outsource the baler operation to TGB Logistics is further evidence of its unlawful motive. Respondent, after having a long-standing

relationship with WSS, abandoned WSS's bids to take over the baler operations and instead contacted Matt Connors, an individual with no company, no employees, but who had some logistics experience. (Tr. 458-468) Within a matter of days after being contacted by Respondent about the baler operations, Connors created TBG Logistics, a concern of which he is the only owner and officer. (Tr. 456) Comparing WSS's proposals to TBG's evidences a stark difference in the quality and thought that went into the outsourcing. (RX 96 compared to RX 90-94). Respondent's decision to enter into a last minute deal with Connors and abandon all further negotiations with WSS indicates Respondent gave little thought to the quality of the work to be performed in the baler dock. Instead, Respondent wanted to send those employees a strong message. In so doing, Respondent showed that its desire to promptly send such a message was worth the price of outsourcing the baler operation to a start-up company with no experience in performing the functions of the baler department.

f. Respondent Ensures that DC Employees Are Made Aware of the Outsourcing

The ALJ, as supported by the record, found that Respondent engaged in a widespread dissemination among the DC employees of its decision to outsource the baler operation, including by holding meetings and publishing an article in the newsletter distributed among employees. (Tr. 1554; GCX 53; ALJD at 91) The ALJ correctly concluded that this was done not to reassure other workers that outsourcing would not happen to them, but to emphasis industry competitiveness, local market conditions, and the trend toward outsourcing. (ALJD at 91) The inference is that Respondent was informing other employees that it could justify outsourcing at any time so you better not go the way of the baler employees in terms of supporting the Union.

g. ALJ's Conclusions

The ALJ correctly found that the record evidence established that the Union organizing taking place throughout Respondent's operations played a pivotal role in its decision to outsource the baler operations. (ALJD at 91) The ALJ relies on, among other record evidence: (a) Schrade's July 18 email to WSS; (b) the Direct Offloading Sources (DOS) bid to Respondent that included an extensive screening process to insure that Respondent hired the "right" people⁴; (c) Schrade's January 16, 2008, memorandum stating that a benefit of outsourcing would be to remove "associated employee issues"; (d) Schrade's calculated informational briefings about the outsourcing presented to non-baler employees, making sure that employees were aware of the adverse impact suffered by balers -- employees who supported the Union; and (e) Respondent failure to revisit earlier proposals to outsource other functions at both its Chandler and Ocotillo facilities. The ALJ correctly noted that despite Respondent's claims of economic difficulties and its exploration of outsourcing of several other operations -- outsourcing that would have potentially resulted in greater savings to Respondent -- the only operation that was outsourced was the baler operation. (ALJD at 91)

3. Discussion

a. Legal Analysis

As set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983), the General Counsel has the

⁴ The ALJ notes that Respondent did not call Cash Eagan (C. Eagan), the high-ranking official of Respondent to whom the DOS bid was submitted, to explain to what the "right" people refers. The ALJ was correct in inferring, in the absence of C. Eagan's testimony to the contrary, that DOS was aware of the Union campaign and felt it was to their benefit to make a commitment to hire only non-Union employees. (ALJD at 91)

initial burden of making a *prima facie* showing that anti-union animus “contributed” to the employer’s decision to take adverse action against an employee. CGC presented a strong *prima facie* showing in this case. The baler employees were heavily involved in Union activities at the DC, Respondent was aware of those activities (GCX 30), and, as found by the ALJ, Respondent’s outsourcing of the baler operation was motivated by Union animus. (ALJD 91) Moreover, the record shows, and the ALJ found, that Respondent failed to sustain its affirmative burden under *Wright Line*. (ALJD 93)

More specifically, the ALJ correctly found that Respondent violated the Act by outsourcing its baler operations due to the Union activities of its baler employees. (ALJD 93) In addition to his application of *Wright Line*, in finding a violation the ALJ also correctly states that an employer violates Section 8(a)(3) by closing a part of its operations, discharging the employees involved and subcontracting the work for anti-union reasons. (ALJD 89) See *Healthcare Employees Union, Local 399 v. NLRB*, 463 F. 3d 909, 918-19 (9th Cir. 2006), on remand sub nom. *St. Vincent Medical Center*, 349 NLRB No. 36 (2007); *Reno Hilton Resorts v. NLRB*, 196 F. 3d 1275, 1282-83 (D.C. Cir. 1999), enfg. 326 NLRB 375 (1998); *NLRB v. Joy Recovery Tech. Corp.*, 134 F. 3d 1307, 1314-15 (7th Cir. 1998), enfg. 320 NLRB 356 (1995); *Lear Siegler*, 295 NLRB 857, 860 (1989). Cf. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 272 n. 16 (1965) (distinguishing complete business closings from situations where “a department is closed for anti-union reasons but the work is continued by independent contractors”).

Even if an employer did not get rid of all union supporters, the Board can still find that the employer’s actions were unlawfully motivated. See *Wilmington Fabricators, Inc.*, 332 NLRB 57, 57 (2000); *Alp Petfoods, Inc. v. NLRB*, 2126 F.3d 246, 255-56 (4th Cir. 1997).

Additionally,

[T]he General Counsel may...prevail by showing that the employer ordered general layoffs for the purpose of discouraging union activity or in retaliation against its employees because of the union activities of some. This theory is viable even though some employees who actually opposed the union were laid-off with their pro-union counterparts. Moreover, the theory can be valid even though not all union adherents were laid-off. The focus of the theory is upon the employer's motive in ordering extensive lay-offs rather than upon the anti-union or pro-union status of particular employees. The rationale underlying this theory is that general retaliation by an employer against the workforce can discourage the exercise of Section 7 rights just as effectively as adverse action taken against only known union supporters. *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F. 2d 1175, 1180 (6th Cir. 1985) (citation omitted).

Absent direct evidence of the proscribed chilling motivation and its reasonably foreseeable effect, the Board will rely on the "fair inferences arising from the totality of the evidence, considered in the light of then-existing circumstances." *Darlington Manufacturing Co.*, 165 NLRB 1074, 1083 (1967). "[P]roof of motive may be supplied by circumstantial evidence which affords a sound basis for drawing inferences." *Id.* The types of circumstantial evidence the Board considers include whether there is "contemporaneous union activity at the employer's remaining facilities," the "geographic proximity of the employer's facilities to the closed operation," "the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact," and any "representations made by the employer's officials and supervisors to other employees." *Bruce Duncan Co.*, 233 NLRB 1243 (1977), *enfd.* in relevant part 590 F. 2d 1304 (4th Cir. 1979).

All of these factors are present in this case and support a finding that Respondent, in electing to subcontract its baler operations, was motivated by its desire to chill employees' support for the Union. First, there was contemporaneous Union activity at Respondent's other

facilities, including at Respondent's retail stores and other sections of the DC. Second, many other employees worked adjacent to the baler operations in the DC, employees who had also been involved in Union activities. These employees shared a break room with the balers, used the same time clock, and worked alongside them. Third, there can be little doubt that Respondent's employees would discover Respondent's unlawful conduct, and were, in fact, specifically informed of Respondent's actions. Respondent's notification to the employees through meetings at the DC as well as the DC newsletter announcing the outsourcing made certain that all employees were informed that a section of the DC, where union activities were taking place for the prior six to seven months, was outsourced.

b. Credibility of Respondent's Witnesses

To be successful, Respondent's exceptions, in large measure, would require that the Board overrule and reject the ALJ's credibility resolutions. Respondent fails to establish that doing so is warranted. In any event, as is evident from the ALJD and the record as a whole, the ALJ's credibility resolutions are well-founded and reasonable. Moreover, the Board has a longstanding and established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

i. Schrade's Testimony

Respondent has no legitimate basis for asserting that the ALJ's determination that Schrade's testimony was self-serving and contained numerous contradictory proclamations was inaccurate. (ALJD at 92)

The ALJ points to several areas of Schrade's testimony in support of his determination that Schrade's testimony was not credible. For example, Schrade's attempts to argue that his memorandum of January 16, 2008 -- in which he states that the outsourcing will remove "associated employee issues" -- refers to immigration problems, is correctly characterized as unsupported and untruthful by the ALJ. (Tr. 1557-1558; GCX 13; ALJD at 92) Further, Schrade's attempts to claim that dry shipping supervisor David Vasquez' Union activity memorandum in mid-June 2007 referred to an old Teamsters campaign was found by the ALJ to be "simply not believable at all." (ALJD at 92) The ALJ correctly states that this "reporting on union activity" to Schrade by Vasquez is no small matter because the timing of that report and Schrade's first contact with WSS on June 20, 2007, provides a compelling link between Respondent's starting its serious search for a subcontractor and its knowledge of Union organizing. (ALJD at 92)

ii. Respondent's Failure to Call Cash Eagan to Testify

The ALJ correctly concluded that he could place little confidence in other Respondent witnesses concerning the outsourcing of the balers, and was troubled by Respondent's failure to call a key decision-maker involved in the decision to outsource, Cash (C. Eagan). (ALJ at 92) Respondent's suggestion that because Basha was the final decision-maker concerning the outsourcing, the ALJ did not need to hear from C. Eagan is without merit, and Respondent's exceptions in this regard completely miss the point. The ALJ wanted to hear from C. Eagan concerning his interaction with DOS and the disturbing notation in DOS's email concerning screening of potential employees in order to find the "right" people. C. Eagan met with the DOS representatives on behalf of Respondent, spent time with them, and is the person whom DOS contacted by email after its visit to the DC. (RX 95) The ALJ was concerned about

what was discussed during this visit and wanted to know why DOS felt the need to include this notation in its email. The ALJ was correct in taking into consideration the fact that Respondent failed to call C. Eagan as a witness.

Additionally, Matt Connors, the owner of TBG Logistics, testified that a conversation with C. Eagan is what led him to make important modifications to his bid in December 2007. (RX 97) The ALJ was appropriately curious as to what occurred between Connors and C. Eagan that led Connors to make changes in his proposal. Without any witness from Respondent to explain the provision in the DOS email, and given the ongoing anti-Union campaign of Respondent, it is quite logical and warranted for the ALJ to have concluded that the “right” screeners meant “non-Union.” Deciding whether to draw an adverse inference “lies within the sound discretion of the trier of fact,” and an adverse inference may be drawn where a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party. *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998).

iii. Basha’s Testimony

Having found that Respondent was motivated in outsourcing its baler operation by its employees’ Union activities and its animus against the Union, the ALJ specifically rejected Respondent’s defense of economic difficulties testified to by Basha. The ALJ found that Respondent’s proffered reasoning for the outsourcing was untruthful and the fact that Respondent reduced its costs by subcontracting the baler work was only an added incidental benefit gained from the outsourcing. (ALJ at 93) As a result, the ALJ was correct in concluding that the outsourcing of the baler operations was violative of Section 8(a)(1) and (3) of the Act.

c. Timing of the Decision to Subcontract and Knowledge of Union Activities by Respondent

Respondent argues that because the topic of subcontracting was “discussed” prior to Respondent’s knowledge of Union activity, the ALJ cannot find that the subcontracting decision was the result of an unlawful motive. Not only is such a contention not supported by the record, Respondent’s argument is not supported by controlling case law.

More specifically, the ALJ correctly rejected Respondent’s legal support for this proposition. (ALJD at 91-92) Cases cited by Respondent are wholly distinguishable from the case at hand. In *Leeward Nursing Home*, 278 NLRB 1058 (1986), the respondent, which operated a nursing home, learned *before* the union campaign that its reimbursement under Medicaid programs was being determined under a new formula that would result in a reduction in the reimbursements it would receive. This fact, as well as the administrative law judge’s credibility determinations in favor of the employer’s managers, resulted in a finding that the subcontracting was for a legitimate, business reason.

Moreover, in *Liberty Homes, Inc.*, 257 NLRB 1411, (1981), respondent, a mobile home company, became aware that its vehicles were inadequate to haul the larger and heavier homes and of a 20% rise in production of the heavier homes; inasmuch as respondent’s gasoline-powered tractors were inadequate to deal with the increased production and design changes, respondent decided to subcontract the hauling of the homes to a trucking firm that had diesel tractors that were able to haul the larger, heavier mobile homes. Further, the actual decision to subcontract, not just a casual discussion about whether to subcontract in the future to cut costs, was made *before* the knowledge that employees were seeking union representation. *Id.*

These two cases are readily distinguishable and do not support Respondent's assertion that because it may have contemplated outsourcing one part of its operation or another in the past, it did not violate the Act in outsourcing its baler operations after the advent of Union activity.

d. Respondent's Other Proffered Defenses

i. Respondent's Bankruptcy Filing, 21 Months After it Subcontracted its Baler Operation, is Irrelevant and Not Part of the Record

Respondent's suggestion that it faced economic problems after the decision to subcontract took place is irrelevant and should be disregarded. Further, Respondent's attempts to obfuscate the issues before the Board by attaching exhibits concerning its bankruptcy proceedings, initiated in July 2009 -- a year after the record closed -- and its references to such bankruptcy proceedings, should be rejected (see CGC's Motion, above, at footnote 1).

Moreover, Respondent's request to reopen the record for the purpose of presenting evidence of economic woes occurring after the hearing closed should also be rejected as irrelevant. The relevant facts are those that existed prior to and at the time when the unfair labor practices were committed, not what occurred almost a year later. Under Section 102.48 (d)(1) of the Board's Rules, a motion to reopen the record shall only be granted in extraordinary circumstances, along with reasons as to why it was not presented previously and why it would require a different result. Respondent's filing of a bankruptcy petition almost a year and a half after Respondent made the decision to subcontract the baler operations is not an extraordinary circumstance, nor is such a bankruptcy filing relevant. First, it is irrelevant as to the decision to subcontract in this case, a decision that was made in 2007. Second, the

ALJ is required to look at the reasons for the subcontracting as they existed in 2007, not 2009. Finally, this is not evidence that was recently discovered and should have been admitted during the hearing. These are circumstances occurring subsequent in time to the acts and conduct at issue in this case and have no relations to what occurred in 2007. For these reasons, Respondent's motion to reopen the record should be denied. (These facts also provide further support for CGC's Motion to strike Respondent's Exhibit 1 to its exceptions brief, discussed at footnote 1, above.)

ii. Economic Considerations

Respondent cites *Manhattan Day School*, 346 NLRB 992 (2006), as support for its contention that if Respondent proffers evidence of economic concerns as the reason for subcontracting, the ALJ was wrong in finding that the subcontracting was unlawful. *Manhattan Day School's* facts are in no way similar to those presented by the instant case. *Manhattan Day School* concerned allegations of bad faith bargaining with a certified union regarding the employer's subcontracting of bargaining unit work. In that case, the parties had a subcontracting clause in the collective-bargaining agreement that allowed the respondent to subcontract if it gave notice and if the subcontracting was justified by economic circumstances. The facts of the instant case present an entirely different factual and legal framework.

Specifically, in the instant case, there is no collective-bargaining agreement addressing subcontracting. Moreover, in *Manhattan Day School*, the contract provision required the respondent to have justifiable economic reasons for subcontracting. The administrative law judge and the Board found in that case that the respondent was entitled to subcontract unit work under the collective-bargaining agreement and that the credible evidence showed

justifiable economic considerations, as evidenced by respondent's checks being returned for insufficient funds, respondent's difficulty paying its bills and obtaining supplies immediately preceding the decision, and the fact that respondent provided notice to the union that it would be subcontracting employees.

Respondent argues that the subcontracting of the baler operations was done to save some money and cut costs. However, Respondent's bare assertions -- without more -- do nothing to persuade the Board to overrule the ALJ's considered analysis, under *Wright Line*, supra., by which he appropriately concluded that Respondent's subcontracting of its baler operation violated Section 8(a)(1) and (3) of the Act. (ALJD at 90)

Moreover, though Respondent tries to repeat in its exceptions the same arguments it made to and rejected by the ALJ, the fact remains that the ALJ's decision in this regard is based in large measure on adverse credibility determinations concerning Respondent's witnesses. More to the point, the ALJ found that Respondent "failed to provide a truthful explanation for subcontracting the baler operation," that the assertions of Respondent's witnesses were "pretext to hide the real reason for subcontracting that work," and the fact that Respondent "reduced its costs by subcontracting the baler work was only an added incidental benefit from taking that step." (ALJD 90 - 91) Respondent's repetition of its "done to save money" arguments, as is its suggestion that its bankruptcy filing is proof that its economic concerns were justified, are completely off the mark. The ALJ rejected the reasons proffered at trial as being untruthful and mere pretext. Respondent's attempts to rehash the same arguments, and to insinuate its subsequent bankruptcy into the mix, should be rejected by the Board as baseless.

Moreover, given the size of Respondent's operation, Respondent's purported gain, in the amount of \$100,000 from its outsourcing of approximately 30 of its approximately 14,000 employees, does not suggest that its decision to outsource its baler operation was because it was "suffering financial adversity" amounting to "sever economic difficulties," *Manhattan Day School*, supra, or because it's "prospects were grim" due to an "extremely serious financial decline." *LCF, Inc. v. NLRB*, 129 F. 3d 1276 (D.C. Cir. 1997), den. enf. 322 NLRB 774 (1996).

e. Casual Conversations Concerning Outsourcing

Respondent suggests that it is a hard and fast rule that if any discussion by an employer, however casual, concerning subcontracting occurs before an employer learns of union activity, an ALJ can never determine that the subcontracting was discriminatory. (R. Exceptions at page 9) It is common knowledge that companies' managers and executives often discuss and strategize concerning all aspects of their operation, and that many of the ideas or proposals are never acted upon. In this case, a casual conversation occurred about subcontracting three separate operations of which the baler was one. Respondent made no decision until after Union activity was well on its way. As noted by the ALJ, the baler operation was the only part of Respondent's operations that was subcontracted despite Respondent's earlier discussions concerning other subcontracting options.

B. Transfer of Maria Acosta

1. ALJ's Findings

The ALJ found that Respondent violated Section 8(a)(1) of the Act by transferring employee Maria Acosta (Acosta) from one store to another because she engaged in protected concerted activities, including by raising complaints about the conduct of a former supervisor,

Victoria Zamora (Zamora) and engaging other employees for mutual aid and protection. Respondent has excepted to this finding, arguing that Acosta was not a credible witness; that the ALJ erred in finding her transfer to be violative of Section 8(a)(1) when the Complaint pled her transfer as a violation of Section 8(a)(1) and (3); that the ALJ erred in finding that Acosta engaged in protected concerted activities; and that CGC had met its *Wright Line* burden.

Though the ALJ did not find Acosta's testimony credible in all aspects, the ALJ was correct in crediting her testimony when it was corroborated by other credible evidence, including such evidence in support of the finding that she had been unlawfully transferred. The ALJ also correctly found that the transfer of Acosta in retaliation for her protected concerted activities was closely related to the Section 8(a)(3) allegation set forth in the Complaint and, in any event, was fully litigated in the hearing. There is ample evidence in the record of Acosta's protected concerted activities to conclude that the ALJ's findings and conclusions regarding Acosta's transfer are well founded and fully supported by the record.

2. Facts

a. Acosta's Employment

Acosta began her employment with Respondent in 1999 and worked for approximately three to four years before transferring, voluntarily to Store 20, sometime in 2005. (Tr. 587) Acosta worked at Store 20 as a courtesy clerk bagging groceries for customers. (Tr. 590) Acosta worked at Store 20 for approximately two years before she was unlawfully transferred to Store 162 on September 23, 2007, where she worked in different positions, including as a custodian and later as a helper in the tortillaria department.

b. Acosta's Protected Concerted Activities

The record supports the ALJ's findings and conclusions that Acosta engaged in protected concerted activities. Specifically, while at Store 20, Acosta worked under an acting supervisor, Victoria Zamora, and then, after Zamora was demoted, worked with her as a co-worker during her final two months at Store 20. Almost immediately after transferring to Store 20, Acosta began to experience conflicts with Zamora. As a result, Acosta received a "conference memorandum," similar to a "write-up," for conflicts with Zamora, accusing her of "gossiping, spreading rumors and making threats towards a member of management." (RX 24)

Thereafter, Acosta made concerted complaints about Zamora to Perla Castillo (Castillo), Respondent's Human Resources manager, complaining that not only did she have problems with Zamora but other employees did as well. As a result, Castillo took it upon herself to investigate this claim by speaking to other employees at Store 20. Castillo found that Acosta's claims were accurate -- other employees were having difficulties with Zamora, as well. (Tr. 2330) During this period, Acosta went to Castillo's office on three separate occasions, and spoke to her on the phone, as well, about Zamora and the conflicts occurring at Store 20. (Tr. 2301-2310)

In early September 2007, Acosta also met with Robert Ortiz (Ortiz), Respondent's Food City Sales and Marketing Vice President. Acosta again concertedly raised with Respondent issues regarding Store 20, in particular those involving Zamora, that she had already brought to Castillo's attention. At this time, she told Ortiz that she planned to go to the Union for help if Ortiz was unable to help her.

Respondent's witnesses confirm that Acosta engaged in protected concerted conduct regarding Zamora. For example, Rae O'Connor (O'Connor), Respondent's Human Resources Director, testified that Zamora complained to her about Acosta going to other employees and discussing with other employees whether Zamora was being mean to them as she was to Acosta. (Tr. 1484-1485)

c. Acosta's Transfer to Store 162

Respondent argues that Acosta's transfer was voluntary because Acosta wanted to get away from Zamora. The ALJ appropriately rejected this assertion, finding that Acosta was involuntarily transferred from Store 20 to Store 162. (ALJD at 56)

Respondent's assertion that it transferred Acosta to Store 162 to address her concerns about Zamora is without merit. At the time Acosta was informed she would be transferred, Zamora had already been transferred to another store and no longer worked at Store 20. Acosta protested the transfer, stating that "it wasn't just with me that Zamora was bad, that [she] was bad with everybody, that she treats us badly" and that she was "always swearing at us and damning us." (Tr. 627) The record also shows that when Acosta was transferred to Store 162, effective September 23, 2007, she began to experience a reduction in her hours of work. (Tr. 626-627; 637)

3. Discussion

The ALJ found that Acosta's involuntary transfer to another store was in violation of Section 8(a)(1). The ALJ did not rule on the allegation that the transfer violated Section 8(a)(3) as it would add nothing to the affirmative remedy ordered by the ALJ. (ALJD at 57) As shown above, the ALJ was correct when he found that the record evidence established that Acosta had engaged in protected concerted activities in complaining to managers and other

employees about working with Zamora, and that this was the reason Acosta was transferred. The Respondent's Exceptions are without merit.

a. Acosta's Credibility

Respondent asserts that because the ALJ was critical of Acosta's credibility, given her difficulty on the witness stand in understanding the proceedings and the questions posed to her, the ALJ must not find any allegations concerning Acosta to have been established. The ALJ, however, makes clear in his decision that he does not credit anything Acosta testified to without credible, corroborating evidence. (ALJD at 54) The ALJ consistently applies this ruling throughout his decision, primarily relying on the testimony of Respondent's own witnesses when making such findings. By arguing that the ALJ erred in finding that Respondent violated the Act by its treatment of Acosta, Respondent is, in essence, asking the Board to discredit its' own witnesses.

b. The ALJ Can Find Violations that are not Specifically Plead in the Complaint

Respondent argues that because the Complaint does not specifically allege Acosta's transfer as a Section 8(a)(1) violation but only as a violation of Section 8(a)(1) and (3), the ALJ erred in finding the Section 8(a)(1) violation. Contrary to Respondent's assertions, the Complaint alleges that Acosta's transfer was in violation of the Act under *both* Section 8(a)(1) and Section 8(a)(3). Encompassed in the Complaint's Section 8(a)(1) and (3) allegation is the Section 8(a)(1) theory by which the ALJ found Acosta's transfer to be illegal.

Even if the Board finds that the allegation that Acosta was transferred due to her protected concerted activities was not specifically alleged in the Complaint, the allegation is closely related to the allegations specifically set forth in the Complaint and, in any event, the matter was fully litigated. *Owens-Corning Fiberglass v. NLRB*, 407 F.2d 1357, 1361 (4th Cir.

1969). In this regard, Respondent was provided -- and exercised -- the opportunity to present evidence as to its reasons for the transfer, Acosta's concerted activities, Respondent's knowledge of such activity, and other material elements of the violation. In fact, Respondent presented a zealous defense to the alleged unlawful nature of Acosta's transfer. It cross-examined Acosta at length, presented witnesses in an effort to rebut Acosta's testimony, and offered evidence it believed would show that the transfer was lawful. The ALJ did not, however, credit Respondent's proffered defense, as discussed above.

The Board and the courts have long held that the Board is entitled, if not affirmatively obligated, to make findings on fully litigated unfair labor practices. *Monroe Feed Store*, 112 NLRB 1336, 1337 (1955); *Owens-Corning Fiberglass v. NLRB*, supra. When an issue relating to the subject matter of a complaint is fully litigated, the ALJ and the Board are expected to pass upon it even though it was not specifically alleged to be an unfair labor practice in the complaint. *Id.* See also, *Enloe Medical Center*, 346 NLRB 854, 854 (2006). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put on his defense." *Owens-Corning Fiberglass*, supra. The complaint need state only the manner by which the unfair labor practice has been or is being committed, the absence of specifics being tolerated where there has been no specific showing of detriment. *Id.*

In *AMC Air Conditioning Co.*, 232 NLRB 283 fn. 10 (1977), the Board found that an employee was discharged in violation of Section 8(a)(1), as well as Section 8(a)(3), although it was only alleged that the discharge violated Section 8(a)(3), noting that the respondent's primary testimony and initial position covered the 8(a)(1) issue.

Here, Respondent was well aware that the Complaint alleged that Acosta's transfer and the resulting reduction in hours, as well as Respondent's inquiries into her immigration status, were unlawful. Respondent mounted a zealous and lengthy defense of these allegations and prevailed on two of the three allegations. Respondent's argument that it was not afforded due process concerning the alleged unlawful transfer found by the ALJ is baseless and should be rejected.

c. Contrary To Respondent's Assertions, the Record Shows That Acosta Engaged in Protected Concerted Activities

Despite Respondent's assertions that Acosta's conduct did not amount to protected concerted activities, the ALJ correctly found that Acosta did, in fact, engage in conduct protected by Section 7 of the Act. In addition to the references to the record which support the ALJ's finding that Acosta did, in fact, engaged in protected concerted activities, the record also shows that Respondent's own witnesses admitted that they transferred Acosta because of her protests to Castillo, O'Connor and Ortiz about Zamora's abuse, as well as her speaking to other employees about whether Zamora was mean to them as well. (Tr. 1484-1485)

Moreover, the ALJ appropriately relies upon the record evidence, as admitted by Castillo, that Acosta had told her on one or more occasions that Zamora had problems with other store employees, and that Castillo determined that Acosta's complaints were true and valid after talking to other employees. (ALJD at 55, Tr. 2330) The ALJ correctly credits Castillo's testimony that she knew of other employees complaining about Zamora and that she had investigated Acosta's statements that other employees also complained about Zamora's abuse. (ALJD at 55; Tr. 2330)

Further, the ALJ credited Respondent's manager O'Connor's testimony that Zamora had complained about Acosta's talking to other employees about whether Zamora was mean to them as well. (ALJD at 55) The ALJ correctly found that Castillo and O'Connor's testimony supported a finding that Acosta engaged in protected concerted activities and that Respondent had knowledge of such activities. (ALJD at 55)

d. General Counsel Sustained its *Wright Line* Burden

The ALJ found that the General Counsel had sustained its burden of establishing a *prima facie* case, including a causation nexus, under *Wright Line*, supra. (ALJD at 56) The ALJ also correctly found that Respondent had failed to meet its burden under *Wright Line*. (ALJD at 56) Specifically, Respondent presented inconsistent claims by O'Connor and Castillo as to who was to blame for the conflict between Acosta and Zamora. Castillo acknowledged that other employees had also had difficulty working with Zamora where as O'Connor stated that management could not determine who was at fault in the conflict. (Tr. 627; Tr. 2330)

The ALJ correctly, and based on the record evidence, also rejected other aspects of Respondent's assertions. For example, the ALJ correctly finds that a fact relied upon by Respondent in its defense -- the discipline Acosta received for threatening Zamora and spreading rumors about her -- took place well over a year before the transfer. (RX 24) If this was the reason for the transfer, the transfer should have occurred immediately after the discipline was meted out. Further, Respondent incorrectly argued that Acosta wanted the transfer and that it was voluntary. The ALJ correctly found that the credible evidence, including Respondent's refusal to return Acosta to her original store despite her requests, supports his finding that Acosta's transfer was involuntary. (ALJD at 56, fn. 61) As a result,

the record fully supports the ALJ's conclusion that Acosta's transfer was in violation of Section 8(a)(1) and motivated by her protected concerted activities.

Based on all of the foregoing, it is respectfully submitted that Respondent's exceptions regarding the ALJ's findings concerning the unlawful transfer of Acosta are without merit and should be rejected by the Board.

C. Transfers and Suspensions of Cano, Salazar and Romero

1. ALJ's Findings

The ALJ properly found that Respondent unlawfully suspended and transferred Teresa Cano (Cano), Ruben Salazar (Salazar) and Paul Romero (Romero) in violation of Section 8(a)(1) and (3) of the Act. Respondent's excepts to these findings by arguing that the ALJ erred when he determined that Salazar's transfer and Romero's suspension were violations of the Act when such acts were not specifically found in the Complaint. Respondent further argues that CGC has failed to meet his burden under *Wright Line* with regard to the unlawful treatment of Cano, Salazar and Romero.

Contrary to Respondent's exceptions, the ALJ properly found that such violations were closely related to the allegations in the Complaint and that all such allegations, including the fact that Respondent was unlawfully motivated when it initiated the investigation that resulted in the actions taken against Cano, Salazar, and Romero, were fully litigated. In addition, the ALJ properly found that the *Wright Line* burden placed upon CGC was met in all aspects.

2. Facts

a. Cano's, Salazar's, and Romero's Employment History

Cano is a night stocker who had worked at Respondent's Store 153, a Food City store, since 2001. (Tr. 228) Cano worked the graveyard shift, and was responsible for unloading products from the pallets and placing them in the proper aisles. (Tr. 228) Present with her on the night crew during the relevant times were Salazar and Romero. (Tr. 1289)

b. The Night Crew's Union Activities

The ALJ correctly found that the record evidence established that the night crew engaged in Union activities and that Respondent was aware of those activities. For example, starting on or about February 14, 2007, Cano began to attend Union meetings. (Tr. 295) Cano attended approximately six to eight Union meetings, averaging two to three Union meetings in a month. (Tr. 296) Cano also spoke to employees about the Union during her meal period at her store in the spring of 2007. (Tr. 296, 432) These employees, among others, were those that worked on the night crew -- Salazar, Romero, and Manuel Acevedo (Acevedo). Soon after Cano's Union activities began, Cano, along with the other employees, were interrogated by supervisor Balthazar Rincon about their involvement with the Union (which was found to be independently violative of Section 8(a)(1) of the Act; ALJD at 37; Tr. 243). A few days later, Rincon told these employees that they were referred to by Respondent as the "night crew infestation." (Tr. 245)

c. Loss-Prevention Investigation

After Respondent became aware of the night crew's Union activities, Respondent instigated a loss-prevention investigation concerning old complaints regarding the night crew's purported "sloughing off". (Tr. 1999-2000) Soon after, Cano was threatened and

interrogated by several other supervisors. (ALJD at 37) Based upon that investigation, Respondent determined that Cano, Salazar, and Romero had all engaged in “theft of time” by taking longer breaks than authorized. As a result, Cano and Salazar were transferred away from employees at Store 153 and Cano and Romero were suspended.

3. Discussion

The ALJ properly found that Cano, Salazar, and Romero were suspended and transferred in violation of Section 8(a)(1) and (3). In support of this finding, the ALJ found that Cano, Salazar, and Romero worked on the night crew at one of Respondent’s stores; were known Union supporters; and, that Respondent had knowledge of their Union sympathies, including based upon Rincon’s conversations with them immediately prior to Respondent’s instigation of a “loss-prevention” investigation targeting these employees. (Tr. 243; ALJD at 40) The ALJ found that the General Counsel had sustained its burden under to *Wright Line*, and that Respondent had failed to meet its burden. (ALJD at 41)

a. The ALJ Properly Found Violations Even Though They Were Not Specifically Pled in the Complaint

Respondent argues that because the transfer of Salazar and the suspension of Romero were not specifically alleged in the Complaint, Respondent has been denied due process. As stated above, the Board and the courts have long held that the Board is entitled, if not affirmatively obligated, to make findings on fully litigated unfair labor practices. *Monroe Feed Store*, supra.; *Owens-Corning Fiberglass v. NLRB*, supra. When an issue relating to the subject matter of a complaint is fully litigated, the ALJ and the Board are expected to pass upon it even though it was not specifically alleged to be an unfair labor practice in the complaint. *Id.* See also, *Enloe Medical Center*, supra. It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in a complaint if it is

fully litigated and closely related to the subject matter of the Complaint. *Pergament United States*, 296 NLRB 333, fn. 6 (1989) (a case in which an unplead violation was found based on the testimonial admissions of respondent's witnesses).⁵ Such a practice has also been followed in situations where the allegation found involved a different section of the Act than that alleged. See *Woodline Motor Freight*, 278 NLRB 1141, 1237 (1986), *enfd.* in pertinent part 843 F. 2d 285 (8th Cir. 1988) (the Board adopted the administrative law judge's finding that a work rule change violated Section 8(a)(3) and (4), despite the absence from the complaint of a Section 8(a)(4) allegation); *Cosmo Graphics*, *supra*; *Independent Metal Workers Local 1 (Hughes Tool)*, 147 NLRB 1573, 1576-1577 (1964).

The ALJ, noting that the Complaint does not specifically allege Salazar's transfer and Romero's suspension as being violative of the Act, found that both incidents were closely connected to the allegations in the Complaint regarding Cano's suspension and transfer inasmuch as they grew out of the same tainted loss-prevention investigation that resulted in the actions against Cano. (ALJD at 40) The ALJ correctly determined that he is permitted to find, and is even obligated to find and provide a remedy for, those unfair labor practices that, even though unalleged in the Complaint, are closely related to other complaint allegations and have been fully and fairly litigated. (ALJD at 40)

Respondent baldly asserts that it would have presented different evidence if it had known that Salazar's transfer and Romero's suspension were at issue. However, the ALJ found that it was the instigation of the loss-prevention investigation, as well as any discipline that resulted from it, to be violations. The record shows that Respondent did, in fact, present evidence concerning the reasons for its launching of the loss-prevention investigation and that

⁵ See *Timken Co.*, 236 NLRB 757, 757-758 (1978), *enf. denied* on other grounds 652 F. 2d 610 (6th Cir. 1981); *Dawson Cabinet Co.*, 228 NLRB 290 fn 1 (1977), *enf. denied* on other grounds 566 F. 2d 1079 (8th Cir. 1977). See also *Sports Coach Corp.*, 218 NLRB 992 fn. 1 (1975); *Cosmo Graphics*, 217 NLRB 1061 fn. 2 (1975).

Respondent was given the opportunity to, and did in fact, provide ample evidence in its defense concerning why the investigation was initiated. The ALJ properly focused on whether the investigation was launched due to the Union activities of the night crew, and found that it was. At hearing, Respondent fully defended the reasons and bases it had for initiating the investigation. The ALJ simply did not credit Respondent's witnesses in this regard, and concluded that the disciplinary actions resulting from the tainted investigation were violative of the Act.

b. Jack Eagan's Credibility Determinations

The ALJ's findings and conclusions regarding the unlawful treatment of Cano, Salazar, and Romero are based on the ALJ's credibility findings, including the adverse credibility determinations involving Respondent's witnesses. Specifically, the ALJ did not credit the testimony of Store Director Jack Eagan (J. Eagan) on several points. First, he found that J. Eagan was not credible when he testified that he instigated the loss-prevention investigation as a result of a recent discovery that the night crew was sloughing off while on the clock. (Tr. 1272-1273; ALJD at 41) The ALJ found that J. Eagan instigated the loss-prevention investigation almost immediately after learning that the night crew was interrogated by Rincon, and that it was employees' Union activities that motivated J. Eagan to investigate. (Tr. 1273; ALJD at 41)

The ALJ also found J. Eagan to not be credible concerning his explanation as to why he was demoted and transferred in close proximity to the discipline of the night crew. (Tr. 1237-1240; ALJD at 42) Appropriately, the ALJ examined Respondent's past practice and the lack of evidence showing that loss-prevention investigations had been instigated when managers heard about the night crew sloughing off. (Tr. 1310-1336; ALJD at 41) To the

contrary, the record evidence suggests that some night crew employees had been taking extended breaks for as long as two years without any discipline or investigations. (Tr. 1310-1336; ALJD at 41) The ALJ also correctly noted that there was no plausible explanation for J. Eagan to have limited the video review to a night when only three crew members were working as opposed to the next night when the entire night crew was working. (Tr. 1265; ALJD at 41) The ALJ drew the proper conclusion that Cano was the real target and was viewed by Respondent as the leader of the “night crew infestation.” (ALJD at 41)

c. *Wright Line* Analysis

The ALJ was not persuaded by Respondent’s *Wright Line* defense to these allegations. The ALJ found that Respondent failed to establish that the loss-prevention investigation was instigated as a result of legitimate business reasons rather than the Union activities of the night crew. (ALJD at 42) The ALJ considered the past behavior of J. Eagan, specifically his failure in the past to look at video when faced with production deficiencies on the part of the night crew or even when he heard rumors of them sloughing off. (Tr. 1265; 1310-1336; ALJD at 42) Again, the ALJ did not credit J. Eagan’s denial of knowledge of the night crew’s support for the Union, especially in light of Rincon’s interrogation of such employees. (Tr. 243; ALJD at 42)

The ALJ also found the timing of the investigation to be suspicious, as he did J. Eagan’s utter lack of curiosity concerning other night crew employees’ conduct, concentrating only on the Union supporters. (Tr. 243; 1265; ALJD at 42) As a result these adverse credibility findings, the timing of the investigations, and the lack of past practice regarding the use of investigations, the ALJ found that the initiation of the loss-prevention

investigation and the resulting suspensions and transfers were pretext for retaliation of union supporters. (ALJD at 43)

Respondent also argues that the ALJ failed to look at past discipline of members of the night crew. The ALJ's comment regarding two years of rumors of the night crew sloughing off refers to Respondent's failure to take immediate corrective action for theft of time. None of the examples cited by Respondent in its exceptions (R. Exceptions at 47) show employees being disciplined for theft of time, but rather for insubordination, performance issues, and lack of team work. The ALJ's comments are accurate -- no investigation was ever instigated for theft of time until the tainted investigation that resulted in the suspensions and transfers noted here. Again, Respondent, by its exceptions, dismisses the fact that the ALJ did not credit its witness, or its defense, and found that it failed to meet its *Wright Line* burden. Accordingly, Respondent's exceptions in this regard should be rejected by the Board.

IV. CONCLUSION

Based on the foregoing and the entire record in this matter, CGC respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1), (3), and (5) of the Act as set forth in the ALJD, and that Respondent's exceptions should be rejected in their entirety. It is respectfully submitted that the Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order, except as to those Complaint allegations that the ALJ did not find and which are subject to CGC's limited cross-exceptions filed this date under separate cover. It is also respectfully submitted that the Board should grant CGC's Motion regarding Respondent's Exhibit 1 appended to its exceptions brief and to strike or disregard the exhibit and all references to Respondent's post-hearing, July 2009, bankruptcy

filing. Finally, it is requested that the Board order whatever other additional relief it deems just and necessary to remedy Respondent's numerous violations of the Act.

Dated at Phoenix, Arizona, this 21st day of December, 2009.

Respectfully submitted,

/s/ Sandra L. Lyons

Sandra L. Lyons

Counsel for the General Counsel

National Labor Relations Board, Region 28

2600 North Central Avenue, Suite 1800

Phoenix, AZ 85004

Telephone-(602) 640-2133

Facsimile-(602) 640-2178

Sandra.Lyons@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that GENERAL COUNSEL'S ANSWERING BRIEF AND MOTION TO STRIKE RESPONDENT'S EXHIBIT 1 TO EXCEPTIONS BRIEF in Cases 28-CA-21435, et al., was served via E-Gov, E-Filing, E-mail and overnight delivery via Federal Express, as specified below, on this 21st day of December 2009, on the following:

Via E-Gov E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW – Room 11602
Washington, DC 20570-0001

One Copy via E-Mail:

Lawrence A. Katz, Attorney at Law
Thomas M. Stanek, Attorney at Law
Mark G. Kisicki, Attorney at Law
Steptoe & Johnson, LLP
Collier Center
201 East Washington Street, Suite 1600
Phoenix, AZ 85004-2382
E-Mail: lkatz@steptoe.com
mkisicki@steptoe.com
tstanek@steptoe.com

Michael C. Hughes, Attorney at Law
Davis, Cowell and Bowe, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
E-Mail: mhughes@dcbf.com

One Copy via Federal Express:

Bashas', Inc., d/b/a Bashas', Food City,
and A.J.'s Fine Foods
22402 South Basha Road
Chandler, AZ 85248

United Food and Commercial Workers Union,
Local 99
2401 North Central Avenue, Suite 120
Phoenix, AZ 85004
E-Mail: jimm@ufcw99.com

/s/ Katherine Stanley

Katherine Stanley
Secretary to Regional Attorney
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004
Telephone-(602) 640-2163