

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

FERGUSON ENTERPRISES, INC.,

Respondent

-and-

Case No. 7-CA-52306

JOSEPH LAPHAM, an Individual,

Charging Party

**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

INTRODUCTION

The Respondent has filed Exceptions to the Administrative Law Judge's Decision in the above-referenced matter. The basis for the Respondent's Exceptions are that based upon the evidence brought forth at the unfair labor practice hearing, it was improper for the Administrative Law Judge to find by a preponderance of evidence that the Respondent violated the National Labor Relations Act ("NLRA" or the "Act"). More specifically, the unreasonable credibility determinations made by the Administrative Law Judge regarding critical facts in the case led to an improper finding that Counsel for the General Counsel had established a prima facie case. Moreover, the Administrative Law Judge failed to examine pertinent issues before him and failed to acknowledge witness testimony which set forth the Respondent's *Wright Line* defense. Based upon the collective evidence presented at the unfair labor practice hearing, the unfair labor practice should not have been sustained.

The Charging Party and the alleged discriminatees in this matter were five individuals who worked on an underground construction crew for the Respondent (Hearing Transcript (hereinafter “Tr”) pg. 15)). Within the unfair labor practice complaint and throughout the hearing, the Counsel for the General Counsel alleged that Ferguson Enterprises, Inc. (“Ferguson” or “Respondent”) violated Section 8(a)(1) of the Act by suspending and then laying off these five individuals who were employed by Respondent.

The Charging Party and remaining discriminatees made up a work crew that was part of an egregious safety violation at the Respondent’s project site, injuring a member of the public (Tr. pg. 15 and Hearing Joint Exhibits 10, 11, 12 and 14). Subsequent to this safety violation, the crew members were brought together for a meeting at the Respondent’s office and were informed that they were being suspended indefinitely for the egregious safety violation which had transpired (Tr. pgs. 52, 299-300, and Hearing Joint Exhibits 3(a)-(e)). Contemporaneous with the suspension, the Respondent was experiencing a dramatic decrease in work due to the collapse of the construction industry in the Metropolitan Detroit area (Tr. 648, 651). In response to this financial hardship, the Respondent was forced to engage in a reduction in force, which included this work crew (Tr. pg. 652, and Hearing Joint Exhibits 5(a)-(e)).

However, Counsel for the General Counsel alleged that it was the seeking out and filing of a prevailing wage claim by Charging Party, Joseph Lapham, and another employee, David Hall, that led to the suspensions and subsequent layoffs of a number of the alleged discriminatees. Further, Counsel for the General Counsel asserted that the filing of the prevailing wage claims was protected concerted activity and that this protected concerted activity led to the suspensions and layoffs of the discriminatees. But, Counsel for the General Counsel

relied solely upon the uncorroborated and refuted testimony of the Charging Party.¹ In reviewing the uncorroborated testimony supporting Counsel for the General Counsel's theory, the Administrative Law Judge made an unreasonable credibility determination with respect to a critical piece of evidence when three separate versions of the critical evidence set forth by three separate discriminatees were inconsistent and wholly contrary to each other.

The Administrative Law Judge relied upon uncorroborated hearsay testimony to find that Counsel for the General Counsel had met her initial burden in establishing a prima facie case. Moreover, in finding that Respondent had not established a *Wright line* defense, the Administrative Law Judge failed to credit the uncontroverted testimony that the construction industry had collapsed and there was no further work for Respondent, therefore requiring layoffs.

EXCEPTION 1

The Administrative Law Judge made prejudicial credibility determinations that were not supported by substantial evidence. In order for Counsel for the General Counsel to prove her prima facie case of a violation under Section 8(a)(1) of the Act, she was required to prove that the Charging Party engaged in protected concerted activity, ***that the employer knew of the protected concerted activity***, and it was the protected concerted activity that directly led to the suspension and layoff of the discriminatees. *Cibao Meat Prods.*, 338 NLRB 934 (2003)(Emphasis added).

Here, the sole piece of evidence relied upon by the Administrative Law Judge to establish that the Respondent was ***aware*** of any protected concerted activity at the time the decisions were made to suspend and layoff the discriminatees, was a single alleged comment during an alleged conversation that took place at a meeting on May 26, 2009 at the offices of the Respondent.

¹ David Hall failed to testify at the hearing.

However, to establish this prong of Counsel for the General Counsel's prima facie case, the Administrative Law Judge solely relies upon uncorroborated hearsay testimony of the Charging Party and wholly discredits the testimony of three other individuals, all of whom all provided substantially different versions of the alleged conversation. Aside from this alleged conversation, there is no other evidence to support the proposition that the Respondent was aware of any protected concerted activity at the time of the suspensions or layoffs.

The Board's established policy is not to overrule an Administrative Law Judge's credibility determinations 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 (3rd Cir. 1951). This is one of those instances where a clear preponderance of the evidence does not support the Administrative Law Judge's findings. Furthermore, any of an Administrative Law Judge's findings that turn on express or implied credibility determinations take on a particular significance on review. *Slusher v NLRB*, 432 F.3d 715, 727 (7th Cir. 2005). Moreover, where witnesses' versions of events are at odds, credibility determinations must be examined with care. *Krispy Kreme Doughnut Corp. v NLRB*, 732 F.2d 1288 (6th Cir. 1984).

Counsel for the General Counsel's case and the Administrative Law Judge's decision rely solely upon an alleged comment made at a meeting on May 26, 2009. At this meeting on May 26, the discriminatees were called to the offices of the Respondent to be informed of their suspension as a result of the safety violation committed by the crew on May 15. It was during this meeting of May 26 that an alleged conversation occurred where Superintendent Miles Reynolds, Senior allegedly informed the discriminatees that the reason for their suspension was that the Charging Party and David Hall had filed prevailing wage claims with the City of Detroit.

Miles Reynolds, Senior was not called by the General Counsel to testify, so the evidence presented to the Administrative Law Judge was the hearsay testimony of four separate witnesses, who all told a different version of the meeting of May 26 and the alleged comment by Reynolds, Senior. The different versions testified to vary by very distinct facts, including who was present, what was said, if the alleged critical statement was made at all, and even who spoke. In the face of all of these separate versions of the story (*Note*: three versions were provided by the discriminatees themselves), the Administrative Law Judge only credited the testimony of the Charging Party and discarded the fact that the testimony of the two discriminatees who testified on behalf of Counsel or the General Counsel was completely contrary to the Charging Party's testimony. Interestingly, the Administrative Law Judge acknowledges in his decision that discriminatees, William Lewis and Miles Reynolds, Junior², both testified differently that the Charging Party (Tr. pg. 11, line 46; Tr. pg. 12, lines 27-30; Tr. pg. 12, line 32-34).

The key point of the alleged conversation set forth by the Charging Party specifically alleges that Superintendent Reynolds, Senior stated that the reason for the suspension on May 26 was a result of the Charging Party and David Hall filing prevailing wage claims with the City of Detroit. However, the Charging Party's hearsay testimony is wholly uncorroborated and is not supported by substantial evidence. The Sixth Circuit has made clear that, "The uncorroborated testimony of an interested party does not amount to substantial evidence of an unfair labor practice." *NLRB v Container Corporation of America*, 649 F.2d 1213, 1216 (6th Cir. 1981).

Completely contrary to the Charging Party's version of the alleged comments by Reynolds, Senior, discriminatee Reynolds, Junior and Human Resources Manager Gwen Young both testified that Reynolds, Senior was not even present at the meeting on May 26, 2009. (Tr. pgs. 298, 640). Charging Party testified that Reynolds, Senior made an affirmative statement

² Miles Reynolds, Junior is the son of Miles Reynolds, Senior.

that the suspension of the crew was due to the prevailing wage claim (Tr. pg. 85). To the contrary, William Lewis (a fellow discriminatee) testified that Reynolds, Senior made no affirmative state whatsoever, and that it was he, Lewis, who made the statement indicating that the suspension was due to the prevailing wage claim (Tr. pg. 133). Additionally, Reynolds, Junior testified that Reynolds, Senior was only in the area before the meeting, did not attend the meeting, and made no mention whatsoever regarding why the discriminatees were called for a meeting. In pertinent part, Reynolds, Junior testified as follows:

JUDGE CARISSIMI: -- is that correct, when you and the other individuals from your crew were there. Now, what do you recall your father saying when he came into the room?

THE WITNESS: I don't recall. I mean, just jibber -jabber, *just nothing about anything that we were there for.*

JUDGE CARISSIMI: All right. *You don't recall any statement by him about the purpose of the meeting or the accident; is that correct?*

THE WITNESS: *No, no...* (Tr. pgs. 299-300) (Emphasis added).

The alleged statement by Reynolds, Senior indicating that the reason for the suspension of the discriminatees was due the Charging Party and David Hall filing prevailing wage claims was the lynch-pin of Counsel for the General Counsel's entire case. However, Charging Party's testimony was fundamentally discredited not only by a representative of the Respondent, but when two other discriminatees specifically refuted the Charging Party's testimony.

Here, the Administrative Law Judge has decided to rely exclusively upon the uncorroborated hearsay testimony of Charging Party and failed to recognize that three other witnesses (including two other discriminatees) specifically refuted the Charging Party's testimony on this critical point. Again, the Sixth Circuit in *NLRB v Container Corporation*, 649 F.2d 1213, 1216 (6th Cir. 1981), has stated that uncorroborated testimony is not substantial

evidence to support an unfair labor practice. Interestingly, the Administrative Law Judge decided to discredit the other various versions of this alleged conversation by Lewis and Reynolds, Junior, when he had credited their demeanor and testimony on other issues within the case (ALJ Decision, pg. 6, fn. 10, lines 39-40; pg. 20, line 23). The Administrative Law Judge chooses to ignore these other versions, which severely compromise the integrity of the Charging Party's testimony. It is noteworthy that the Sixth Circuit has stated:

While recognizing that credibility determinations are generally left to the Board, *this court has declared itself unwilling to uphold unfair labor practice findings that rest upon the uncorroborated testimony of persons who stand to receive backpay if the findings are upheld*. See, *NLRB v Norbar, Inc.*, 752 F.2d 235, 241 (6th Cir. 1985); *Union Carbide Corp. v NLRB*, 714 F.2d 657, 661-62 (6th Cir. 1983); *Delco Air Conditioning Div. v NLRB*, 649 F.2d 390, 393 (6th Cir. 1981) (Emphasis added).

This is not merely an instance where the Administrative Law Judge is tasked with deciding between two contrary versions of a story. Here, the Administrative Law Judge's findings do not rise to the level of reasonable. He states that that he relies solely on the testimony of the Charging Party that Reynolds, Senior was present and made the alleged comment regarding protected concerted activity (ALJ Decision pg. 18, lines 33-35).

Interestingly, the Courts have stated that they are unwilling to uphold an unfair labor practice that rests upon the uncorroborated testimony of interested parties. *Id.* Here, two discriminatees, who could potentially receive back pay, testified that Reynolds, Senior did **not** make the alleged statement as contended by the Charging Party.

Given the overwhelming testimony that the alleged comment was **not** made, Charging Party's testimony is not reliable and should not have been credited. First, the Charging Party's testimony is hearsay, where Reynolds, Senior was not called to testify or subpoenaed by Counsel for the General Counsel. Second, William Lewis (a discriminatee) testified that Reynolds,

Senior never made the alleged statement at issue (Tr. pg. 133; ALJ Decision, pg. 12, lines 21-25). Third, Reynolds, Junior testified that not only was Reynolds, Senior *not* at the meeting, but he never made any statement whatsoever regarding protected concerted activity (Tr. pgs. 298-300). Finally, the Respondent's Human Resources Manager testified that Reynolds, Senior was not even present at the meeting (Tr. pg. 640).

When viewing the record as a whole, the Administrative Law Judge erred in crediting the testimony of the Charging Party concerning the alleged statements of Reynolds, Senior, where the testimony was uncorroborated and actually refuted by three other witnesses.

EXCEPTION 2

The Respondent takes exception to the Administrative Law Judge relying solely upon uncorroborated hearsay testimony to determine that Counsel for the General Counsel set forth a prima facie case. As stated above, in order for Counsel for the General Counsel to meet her burden in establishing a prima facie case, she must prove (1) that the employee engaged in protected concerted activity; (2) *that the employer knew of the concerted nature of the activity*; (3) that the concerted activity was protected by the Act; and (4) that the adverse action taken by the Respondent was motivated by the employee's protected activity. *Cibao Meat Prods.*, 338 NLRB 934 (2003)(Emphasis added).

In support of its position, the Respondent submitted to the Administrative Law Judge, by way of highlighted testimony, that there was no evidence to support Counsel for the General Counsel's assertion that the Respondent had knowledge of any protected concerted activity at the time of the suspensions and layoffs. More pertinently, the Respondent had no knowledge whatsoever that any of the allegedly "protected" activity was "concerted" in nature. The only objective evidence presented at the hearing was that the Respondent received a letter that three

separate individuals had filed prevailing wage claims. However, there was no evidence whatsoever that these claims were filed or acted on in a concerted fashion.

In rendering his decision that the Counsel for the General Counsel had established her prima facie case, the Administrative Law Judge enumerates that he solely relied upon the uncorroborated hearsay statement of Reynolds, Senior (ALJ Decision, pg. 18, lines 33-35), which was refuted by three other witnesses. A scrutinized review of the Administrative Law Judge's conclusions reveals that the great weight of the evidence proves that the Respondent was not aware of any protected concerted activity, and that his decision solely rests upon an uncorroborated hearsay statement.

The Administrative Law Judge's conclusions that the Respondent knew of the protected concerted activity, which appear on page 17 of the decision, will be analyzed below. The Administrative Law Judge stated as follow:

When these facts are viewed collectively, I conclude that the Respondent knew of the concerted nature of the prevailing wage claims of Lapham and Hall before the suspension notices were prepared on May 22. Lapham informed Reynolds, Sr. but he was going to file prevailing wage claims. Thereafter, he filed such a complaint with Hall. Thus, when Respondent was notified by letter that both Hall and Lapham had filed prevailing wage claims it was clear that the filing of Hall's claims arose from Lapham's announced efforts to initiate such conduct. To find otherwise would strain credulity in my view. I would have to find that Hall and Lapham, even though similarly situated as the only non-union employees working daily on the same crew, independently filed prevailing wage claims at the same time. In reaching my conclusion, I note that there is no evidence whatsoever to controvert the testimony of Lapham regarding what he stated to Reynolds Senior. regarding his intention to file prevailing wage claims and Reynolds Senior's admissions that the suspensions were motivated because 'you guys' filed prevailing wage claims.... (ALJ Decision, pg. 17, Lines 34-46).

A strict reading of the Administrative Law Judge's above conclusions reveals that there was no evidence to support a finding that the Respondent knew of any protected concerted activity at the time of the suspensions and layoffs. Rather, there is only mere supposition by the Administrative Law Judge. The Administrative Law Judge relies only on the fact that *Charging Party* indicated to Reynolds, Senior that *he* was going to file *a* prevailing wage claim. The Administrative Law Judge never cites to any evidence – because it does not exist – that Reynolds, Senior was ever informed that Hall was going to file a prevailing wage claim in concert with Charging Party.

The Administrative Law Judge then makes a leap in logic that the actions of Hall and Charging Party were “concerted” in nature, but cites no evidence to support this assumption. The Administrative Law Judge states that it would strain credulity to find that they did not act in a concerted fashion, but there is no evidence to indicate that the Respondent knew they acted in concert when filing their claims. The Administrative Law Judge's assumption is undercut by the fact that another former employee of Respondent (Mr. Laginess) also filed a prevailing wage claim with the City of Detroit at the same exact time as Charging Party and David Hall that was exclusive and separate from the Charging Party's filing. There was no evidence to refute the possibility that all three individuals went separately to file their prevailing wage claims. However, the Administrative Law Judge refused to believe this, even without any evidence to support his assumption.

Moreover, the Administrative Law Judge states that there is no evidence whatsoever to controvert the testimony of the Charging Party regarding what he said to Reynolds, Senior regarding his intent to file a claim, or that Reynolds, Senior stated that the reason for the suspension was because “you guys” filed prevailing wage claims (ALJ Decision, pg. 17, lines

42-46). Respondent will concede that there is no evidence to controvert that Charging Party informed Reynolds, Senior that *he* was going to file *a* prevailing wage claim. But, this statement does not impute any knowledge whatsoever to the Respondent that it was aware of any “concerted” activity; only that Charging Party (alone) was going to file a prevailing wage claim. Accordingly, no reasonable reading of the evidence that Charging Party informed Reynolds, Senior that he (alone) was going to file a prevailing wage claim can impute knowledge of “protected concerted activity” onto the Respondent. The evidence relied upon by the Administrative Law Judge does not reveal that Charging Party ever informed Reynolds, Senior that he was taking action along with David Hall, or that Hall was going to make a prevailing wage claim.

Therefore, the only evidence the Administrative Law Judge truly relies upon to impute knowledge to the Respondent of the alleged protected concerted activity is the alleged uncorroborated hearsay statement by Reynolds, Senior at the May 26 meeting. Further, it is rather unconscionable that the Administrative Law Judge would state in his decision that there was no evidence whatsoever to controvert Reynolds, Senior’s alleged statement at the May 26 meeting. Much to the contrary, there is overwhelming evidence that controverts and refutes the alleged statement by Reynolds, Senior when he supposedly indicated the suspensions were because “you guys” filed prevailing wage claims. As stated above in Exception 1, there are three other witnesses whose testimony reflects that the alleged statement by Reynolds, Senior was never made. William Lewis and Reynolds, Junior (both discriminatees) testified that Reynolds, Senior never made any such statement (Tr. pgs. 133, 299-300). Moreover, Reynolds, Junior and Human Resources Manager Gwen Young both testified that Reynolds, Senior was *not even*

present at the meeting where the Charging Party alleged that the statement was made (Tr. pgs. 298, 640).

In fact, this alleged hearsay statement should have been excluded from consideration in the Administrative Law Judge's decision. Generally, Administrative Law Judges do not need to invoke a technical rule of exclusion on hearsay statements and can admit hearsay and give it such weight as inherent quality justifies. *Alvin J. Bart & Co.*, 236 NLRB 242 (1978). However, the Board has routinely held that hearsay testimony may be excluded from consideration when it is not corroborated. *T.L.C. St. Petersburg*, 307 NLRB 605 (1992); *Manna Pro Partners*, 304 NLRB 782 (1991); *See Ohmite Mfg. Co.*, 290 NLRB 1036, 1037 (1988); *Auto Workers Local 651 (General Motors)*, 331 NLRB No. 59, Slip Op. at 3 (2000).

Clearly, Charging Party's testimony that Reynolds, Senior made the alleged comment on May 26 was hearsay, and was not corroborated when three other witnesses refute it. At a minimum, the Administrative Law Judge should not have afforded this statement any weight. Or, more appropriately, given the uncorroborated nature of the Charging Party's testimony, it should have been excluded.

In support of its position on this issue, in its post-hearing brief, the Respondent cited for the Administrative Law Judge the case of *Reynolds Electric Inc.*, 342 NLRB 16 (2004), a case where, due to the Respondent's lack of knowledge that the employees' conduct was "concerted" in nature when filing a prevailing wage claim, no unfair labor practice could be sustained. Again, on page 18 of the Administrative Law Judge's decision, he states "I rely upon the credited testimony of Lapham that Reynolds, Senior acknowledged on May 26 that the suspensions of the Reynolds, Junior crew was in retaliation for the filing of prevailing wage claims." What's more, the Administrative Law Judge – even in the face of NLRB precedent to the contrary – relied

upon the uncorroborated hearsay testimony of the Charging Party that was refuted by three other witnesses. Indeed, uncorroborated testimony of an interested party does not amount to substantial evidence of an unfair labor practice. *NLRB v Container Corporation of America*, 649 F.2d 1213, 1216 (6th Cir. 1981); *See also, NLRB v Norbar, Inc.*, 752 F.2d 235, 241 (6th Cir. 1985); *Union Carbide Corp. v NLRB*, 714 F.2d 657, 661-62 (6th Cir. 1983); *Delco Air Conditioning Div. v NLRB*, 649 F.2d 390, 393 (6th Cir. 1981)

Therefore, the Administrative Law Judge premised his decision that Counsel for the General Counsel established that the Respondent was *aware* of the alleged protected “concerted” activity on a single uncorroborated hearsay statement which three other witnesses refute was ever even made. Based upon the collective evidence presented and the Administrative Law Judge’s clear error, the Counsel for General Counsel has not proven by a preponderance of the evidence that the Respondent was aware of the alleged protected concerted activity at the time of the suspensions and layoff.

EXCEPTION 3

The Respondent takes Exception to the Administrative Law Judge’s decision that the suspensions and layoffs of discriminatees Cook, Lewis, and Reynolds, Junior were done to mask a discriminatory motive for the suspensions and layoffs of Charging Party and Hall, where there was no examination of this issue whatsoever and it was not supported by substantial evidence. (ALJ Decision, pg. 18, lines 37-47).

In pertinent part, the Board’s Rules, Section 102.45(a), requires that decisions “contain *findings of fact*, conclusions, and *the reasons or basis [for them]*, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations [on] what disposition of the case should be made.” *See also*, Statements of Procedure, Section 101.11(a).

(Emphasis added). Decisions which fail to make *specific factual findings* regarding issues raised by complaints, and which fail to include *analysis of contentions*, do not satisfy the obligations imposed on judges and may be remanded. *See, Webb Furniture Enterprises*, 272 NLRB 312, 312 (1984); *See also, Aramark Corp.*, 353 NLRB No. 98 (2009) (Emphasis added).

After concluding that Counsel for the General Counsel had established a prima facie case, on page 18 of his decision, the Administrative Law Judge identifies that there is clearly an issue as to whether Cook, Lewis, and Reynolds, Junior are proper discriminatees, but then makes a blanket assertion that the Respondent discharged discriminatees Cook, Lewis, and Reynolds, Junior to establish a defense for the suspensions and layoffs of the Charging Party and Hall. In pertinent part, the Administrative Law Judge stated as follows:

There is obviously an issue as to whether, if the protected concerted activity of Lapham and Hall is found to be the reason for their suspensions, are Lewis, Cook and Reynolds, Junior, alleged as discriminatees in the complaint, also entitled to a remedy. Neither Lewis, Cook nor Reynolds, Junior were involved in the filing of the prevailing wage claims by Lapham and Hall. The Board has held, however, with court approval, that when an employer discharges an employee as part of a plan to establish a defense to the discharge of a known union activist, the discharge of the other employee also violates the Act. *Jack August Enterprises Inc.*, 232 NLRB 881, 900 (1977) *enfd.* 583 F. 2d 575 (1st Cir., 1978); *Greenfield Die and Mfg. Corp.*, 327 NLRB 237, 247 (1998). Accordingly, Board law supports the proposition that, if Cook Lewis and Reynolds, Junior were suspended to mask a discriminatory motive for the suspensions of Lapham and Hall, their suspensions also violate Section 8 (a)(1) of the Act. (ALJ Decision, pg. 18, lines 37-47) (Emphasis added).

The Administrative Law Judge concludes his discussion of the Counsel for General Counsel's prima facie case as to the Charging Party and Hall, and then specifically states that ***there is obviously an issue*** regarding whether Lewis, Cook and Reynolds, Junior are entitled to a remedy under the Act. Thereafter, the Administrative Law Judge simply cites a proposition of

law and then makes a wholesale conclusion that Lewis, Cook, and Reynolds, Junior are entitled to a remedy. However, at no time does the Administrative Law Judge examine the issue whatsoever, or introduce or discuss any facts to support this legal conclusion (ALJ Decision, pg. 18, lines 37-47).

The single paragraph on page 18, lines 37-47 encompasses the Administrative Law Judge's entire examination of this issue. Aside from setting forth two cases citing a principle of law, the Administrative Law Judge makes no effort whatsoever to support his conclusion that the suspensions and layoffs of Lewis, Cook and Reynolds, Junior by the Respondent were part of plan to establish a defense for the suspensions and layoffs of the Charging Party and Hall.

The Administrative Law Judge is required to fully examine each issue and identify facts and evidence which support his decision on each issue. *See*, NLRB Rules and Regulations No. 102.45(a). Where the Administrative Law Judge failed, in total, to examine the issue or cite one piece of evidence in support of his conclusion, it cannot be found to be a reasonable finding based upon substantial evidence. Therefore, the Administrative Law Judge's decision that Lewis, Cook and Reynolds, Junior are entitled to a remedy in this matter should be reversed.

EXCEPTION 4

The Respondent takes Exception to the Administrative Law Judge's finding that no credible evidence was presented to support the Respondent's *Wright Line* defense. Once Counsel for the General Counsel has established a prima facie case, a Respondent can still prevail if it can prove that the adverse action would have occurred even in the absence of the protected activity. *USF Red Star, Inc. v NLRB*, 230 F.3d 102 (4th Cir. 2000). An employer does not violate the Act when it would have taken the same action for legitimate business reasons. *Dorsey Trailers v NLRB*, 233 F.3d 831 (4th Cir. 2000). The doctrine of entrepreneurial

discretion holds that an employer may make significant changes in its operations “so long as its change in operations is not motivated by the illegal intention to avoid its obligations under the National Labor Relations Act.” *NLRB v J.M. Lassing*, 284 F.2d 781, 783 (6th Cir. 1960).

At the hearing, the Respondent presented substantial evidence through two separate witnesses that support the methodology for the June 4 layoffs of the discriminatees, as well as a presentation of the dire economic circumstances which led to the June 4 layoffs and other reductions in force. However, the Administrative Law Judge failed to acknowledge one of the witness’s testimony and refused to consider the dire economic factors at play.

On page 22 of the Administrative Law Judge’s decision at lines 5-6, he states that “Erdman was the only witness who testified for Respondent regarding the reasons for the layoff of the Reynolds, Junior crew.” This is simply untrue. Not only did Mr. Erdman testify, the office manager and finance director, Ms. Sherry Bonds, testified regarding the state of the Respondent’s financial outlook at the time of the June 4 layoffs and continuing on until the hearing. In pertinent part, Ms. Bonds testified that the Respondent’s work had dramatically diminished, and that layoffs had been conducted in the previous year (2008) and were continuing throughout 2009 (Tr. pgs. 649, 651). There was not enough work to keep all its employees working. By May of 2009, there were only three jobs left to which to assign employees to, and no future work was in the pipe line (Tr. pg. 649). At the time of the hearing in December 2009, the Respondent only had one job remaining, with no future work (Tr. pg. 649). In fact, layoffs were conducted on May 28, June 4, and September 28, 2009, totaling 23 employees (Tr. pgs. 649-650). In 2009, the Respondent’s workforce had been cut by more than 50%. Moreover, the office employees had experienced salary reductions and other cost-cutting measures (Tr. pgs. 650-651).

The Administrative Law Judge failed to acknowledge that the Respondent was in dire economic straits. Instead of realizing the tremendous blows that had been dealt to the construction industry in the Detroit area, where a lack of available work necessitated extreme reductions in force, he instead chose to attempt to make the business decisions of the Respondent. This is contrary to the entrepreneurial doctrine allowing business owners the ability to make legitimate business decisions in difficult economic times.

The collective evidence presented to the Administrative Law Judge demonstrated that the Respondent was experiencing desperate financial circumstances necessitating the layoff of over 50% of its employees. At the time of the hearing, the Respondent had only one remaining job, with no future work. Clearly, when Respondent's one remaining job was completed, there would be no work for the alleged discriminatees to do. Therefore, the evidence presented shows that even if the discriminatees had engaged in protected concerted activity, the Respondent would have been forced to make the same layoff decisions anyway.

CONCLUSION

Respondent submits the above exceptions to the decision of the Administrative Law Judge clearly show that he erred in his findings of fact, credibility determinations, and decision to sustain the unfair labor practice charge. The Administrative Law Judge made an inappropriate credibility determination with respect to an alleged comment made at the May 26, 2009 meeting described in the record, when Charging Party's sole evidence of retaliation was refuted by three other witnesses, including two other discriminatees. Furthermore, the Administrative Law Judge erred in finding that the Respondent was aware of any protected concerted activity at the time of the suspensions and layoffs when he exclusively relied upon uncorroborated hearsay testimony of the Charging Party. Additionally, the Administrative Law Judge wholly failed to examine the

issue of whether discriminatees Cook, Lewis and Reynolds, Junior were entitled to a remedy, and merely cited a principle of law and then concluded the discussion. Also, the Administrative Law Judge erred in finding that Respondent had not set forth sufficient evidence to prove its *Wright Line* Defense, when the evidence presented reflects that it would have had to lay the discriminatees off regardless of Charging Party and Hall's alleged protected concerted activity.

For these reasons, Respondents submits to the Board that the Administrative Law Judge erred in his decision, that the decision should be reversed, and that the unfair labor practice and complaint should be dismissed.

Respectfully submitted by:

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Dated: June 28, 2010

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Respondent,

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Charging Party.

CERTIFICATION OF SERVICE

I hereby certify that on Thursday June 28, 2010, a copy of the foregoing *Brief in Support of Respondent's Exceptions to Administrative Law Judge's Decision*, together with a copy of this *Certification of Service*, were served upon the following parties/attorney(s) of record by "E-Filing," electronic mail (where applicable) and regular U.S. mail at their stated business address(es).

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Under penalty of perjury, I declare that the foregoing is true to the best of my information, knowledge and belief.

/s/Kathryn L. Johnston
Kathryn L. Johnston