

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

**FRESENIUS USA MANUFACTURING, INC.,
Respondent,**

Case No. 2-CA-39518

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445,
Charging Party.**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF
IN OPPOSITION TO RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE DECISION**

**Dated at New York, New York
This 27th of October, 2010**

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I. INTRODUCTION

Respondent's Exceptions to the Administrative Law Judge (ALJ) Decision cannot change the basic facts of this case.¹ Respondent terminated veteran employee Dale Grosso after his twelve-year service to their company. The record establishes that Grosso had an unblemished performance record and no history of discipline or inappropriate conduct. Respondent terminated Grosso solely based on his protected union activity, and proper application of the relevant legal analysis makes clear that this discharge was unlawful under the Act. Respondent's arguments here, roughly falling into six categories, are red herrings serving only to distract from these central facts. For the reasons stated herein, Counsel for the Acting General Counsel ("General Counsel") asserts that each of Respondent's arguments is without merit and should be rejected.

II. ARGUMENT

A. The ALJ Correctly Found that Grosso's Activity was Protected and Concerted Activity

There is no merit to Respondent's assertion that Grosso's conduct was not protected and concerted activity. The ALJ correctly found that Grosso's activity was protected concerted activity. (ALJD p.13, ln 16-18). General Counsel argues that Grosso's activity was protected union activity, and therefore by definition protected and concerted under Section 7. This fact is clearly evidenced by both undisputed record evidence and the ALJ's own findings of fact. The ALJ found that the comments "were written on union newsletters addressing the warehouse

¹ References herein to General Counsel's Brief in Support of Exceptions to the Administrative Law Judge Decision will be identified as "GC Brief"; references to Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision will be identified as "Resp. Brief"; General Counsel's Exhibits will be identified as "GC Ex. ___"; references to Respondent's Exhibits as "Resp. Ex. ___", references to the hearing transcript as "Tr., ___", and references to the ALJ Decision as "ALJD ___".

employees who would be voting in a decertification election within two weeks and including an issue involving their pay.” (ALJD p. 13, ln 14-16).

Moreover, the record evidence clearly establishes there can be no serious dispute that the comments were evidence of protected union activity: (1) the comments were written on union newsletters (GC Ex. 6a-c); (2) the comments were written less than two weeks before a scheduled election (GC Ex. 18a-c); (3) the first comment encouraged employees to read the newsletters, which contained articles describing the work of the Union generally and its work on behalf of Fresenius employees specifically (GC Exs. 6a, 13; Tr., 262:16-18, 264:21-265:20); (4) the second comment referred to employees’ “income”, a central part of the terms and conditions of employment encompassed by Section 7 (GC Ex. 6b; Tr. 266:2-267:8); (5) the third comment referred to the “Warehouse Workers,” the bargaining unit involved in the upcoming decertification election (GC Ex. 6c; Tr., 267:9-270:2). Respondent’s insinuation that Grosso’s testimony explaining how his comments related to the upcoming election was a false after-the-fact justification is undermined by the fact that Respondent’s own witnesses – both employees and supervisors – testified that they immediately understood upon reading the comments that they related to the Union and the decertification election. (*See, e.g.*, Tr., 114:25-115:3 (Tyler was aware comments were written on a Union newsletter); 1325:23-5, 1326:20-1327:4 (Healy sought advice of counsel precisely because he understood comments raised issues concerning “the upcoming election”)). In addition, the employee witnesses who had complained about the comments understood the comments to relate to the election. (Tr., 752:10-20, 859:12-25, 823:5-9, 903:13-904:1).

The fundamental nature of the protected activity in this case cannot be understated. As the ALJ found, “it is apparent that [Grosso] wrote the comments with the intent of discouraging

employees from abandoning their support for the Union.” (ALJD p. 20, ln 37-38). In other words, Grosso wrote comments in support of the Union in a pure exercise of his Section 7 “right to . . . self-organization [and to] assist labor organizations.” 29 U.S.C. § 157. Courts have “long accepted” that this Section 7 right of employees “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. N.L.R.B.*, 437 U.S. 483, 491-492 (1978).

Further, Grosso’s activity did not lose protection under the Act for the reasons set forth in General Counsel’s Brief in Support of Exceptions to the Administrative Law Judge’s Decision (“GC Brief”) at pages 13-31. Therefore, based on the record evidence and the ALJ’s own findings of fact, there is no dispute that Grosso’s conduct was protected union activity under the Act.

B. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) of the Act By Instructing Grosso not to Discuss the Pending Investigation

Respondent’s assertion that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by instructing Grosso not to discuss the pending investigation is without merit based on the record evidence and the settled law. As an initial matter, it is well-settled law that employees have a Section 7 right to discuss discipline or disciplinary investigations with their fellow employees. *See, e.g., Caesar’s Palace*, 336 NLRB 271 (2001), *SNE Enterprises, Inc.*, 347 NLRB 472, 492 (2006). Therefore, when an employer seeks to limit employees’ discussion of such matters, the Board must consider whether the employees’ interests in discussing this aspect of their terms and conditions of employment outweighs the employer’s asserted “legitimate and substantial business justifications.” *Caesar’s Palace*, 336 NLRB at 272. If the employer satisfies its burden of demonstrating that it had a “legitimate and substantial business justification” for such conduct, the Board must then “strike the proper balance between the

asserted business justifications and the invasion of employee rights in light of the Act and its policy.” *Id.*, at 272 n.6.

The Board has found that even where there is “no explicit penalty mentioned when [the employees] were instructed not to discuss their discipline with other employees, the instruction still was sufficient to tend to inhibit employees from engaging in protected concerted activity.” *Westside Community Mental Health Center, Inc.*, 327 NLRB 661, 666 (1999). This is particularly so where such an instruction “restricted [the] employees from possibly obtaining information from their coworkers which might be used in their defense.” *Id.* Further, the employer’s business justification did not outweigh the employee’s interest where the employer made a bare assertion of safety concerns without presenting sufficient detail to warrant such a conclusion. *Id.* See also *Mobil Oil Exploration and Producing, U.S., Inc.*, 325 NLRB 176 (1997) (employer’s interests in maintaining confidentiality were “exceedingly minimal” where target of investigation was already “well aware” of investigation); *SNE Enterprises, Inc.*, 347 NLRB 472, 492, (employer’s asserted concerns of harassment, employees confronting their accusers, and protecting the integrity of the investigation were not sufficient business justifications).

Here, Respondent has made “bare claims” and “failed to present sufficient information” to satisfy its burden. *Westside Community*, 327 NLRB at 666. Respondent’s purported concerns that Grosso would threaten other employees or in some unspecified way destroy the “sanctity of the investigation” were asserted without sufficient detail to justify concluding that these were legitimate and substantial concerns. (Tr., 1351:1-3). Moreover, basing such an instruction on Respondent’s purported concern that Grosso would “conduct [his] own investigation” explicitly violates Grosso’s Section 7 right to consult with fellow employees for mutual aid and protection,

including seeking information that might aid in his “defense”. *Westside Community*, 327 NLRB at 666. Given the scant evidence that Respondent had any legitimate and substantial business justification for imposing a confidentiality rule on Grosso, the ALJ correctly found that Respondent’s intrusion on Grosso’s exercise of his Section 7 rights violates the Act.

C. The ALJ Correctly Found that Certain of the *Bourne* Factors Weigh in Favor in Finding that Respondent Unlawfully Interrogated Mr. Grosso

While the General Counsel excepted to the ALJ’s ultimate conclusion that Respondent did not violate the Act in interrogating Grosso, General Counsel asserts that the ALJ correctly found that at least two factors weighed in favor of finding the interrogation unlawful. An employer’s interrogation of an employee violates Section 8(a)(1) of the Act when, Board determines “whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Scheid Electric*, 355 NLRB No. 27 (2010). In undertaking this analysis, the Board considers what are known as the “the *Bourne* factors”:

- (1) The background, *i.e.*, is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, *e.g.*, did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, *i.e.*, how high was he in the company hierarchy?
- (4) Place and method of interrogation, *e.g.*, was employee called from work to the boss’s office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.

Westwood Health Care Center, 330 NLRB 935, 939 (2000) (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). *See also Scheid Electric*, 355 NLRB No. 27 (2010) (citing *Bourne* factors). The Board has explained that “these and other relevant factors are not to be mechanically applied in each case.” *Westwood*, 330 NLRB at 939.

As the ALJ correctly found, the interrogation took place in the company conference room, after Grosso was called into “a command meeting for Grosso and attended by only Grosso

and upper level managers.” (ALJD p. 24, ln 4). The record establishes that the meeting became unnaturally formal just prior to discussion of the newsletters. The meeting began with “friendly chatter” about sports based on the New York-Boston rivalry of New York fan Grosso and Boston fans Maloney and King. (Tr., 273:4-10). Grosso and the managers then sat down and, by all accounts, the meeting took on a “serious” tone at that point. (Tr. 274:3-5. *See also* Tr., 1177:3-8). King began the conversation by showing Grosso a note he had previously given to his supervisor and asking Grosso if the note was in his handwriting. (Tr., 274:16-22). After Grosso responded affirmatively, King proceeded to show Grosso the newsletters and question him about them. (Tr., 274:24-275:7). Grosso felt that the meeting was becoming even more serious as King asked whether he had seen the newsletters and said that people had become upset by the comments written on them. (Tr., 275:7-17.) In particular, King told Grosso that “several employees had complained to [King] and felt that they were offensive, threatening and that they were vulgar.” (Tr., 1339:20-22). King then asked Grosso if he noticed similarities between the handwriting on Grosso’s note to Healy and the comments on the newsletters, and then asked Grosso directly if he had written the comments. (Tr., 275:19-24). Grosso responded that he had not. (Tr., 275:25-276:1).

As the ALJ also correctly found, the fact that Grosso did not respond truthfully only makes more apparent the coerciveness of the interrogation because Grosso “realized the severity” of the tone the meeting had taken and was concerned that honesty would result in disciplinary action. (ALJD p. 24, ln 9-13; Tr., 276:5-10). In particular, Grosso testified that he did not tell King that he had authored the comments during the September 21 meeting because “I realized the severity of the way things were proceeding, and I did not want to do any harm to myself” in the form of “[s]ome kind of disciplinary action.” (Tr., 276:5-10).

Respondent's arguments that this evidence should not count in Grosso's favor in the *Bourne* analysis amounts to nothing more than an *ad hominem* attack on Mr. Grosso that is both gratuitous and unsupported by the record. First, there is no record evidence that Grosso had any history of lies or any other bad conduct during his 12 year employment with Respondent. Second, Respondent does not cite any legal authority for what it appears to assert is a "propensity for lying" exception to the *Bourne* test. (Resp. Brief, pp. 35, 36). But most importantly, Respondent utterly mischaracterizes Grosso's testimony and the record evidence in an attempt to turn the *Bourne* factors on their head.

Respondent does not cite to any inconsistencies in Grosso's testimony, instead citing to record testimony in which Grosso admits that he was previously dishonest. However, the only dishonest statements which Respondent cites are the statements Grosso made in response to the unlawful interrogation – instances in which he was legally privileged not to tell the truth. The fact that Grosso forthrightly admitted to these instances in his testimony is a fact which the ALJ rightly counted in favor of Grosso's credibility. However, Respondent's arguments would have the Board bootstrap Grosso's admissions to being dishonest during (and immediately following) an unlawful interrogation to say that this *Bourne* factor should not be counted.

As set forth in General Counsel's brief in support of exceptions (GC Brief, pp. 9-12), the ALJ erred in failing to find that all of the factors and the totality of the circumstances required a finding that Respondent's interrogation of Grosso "would reasonably tend to interfere with or deter the exercise of employees' Section 7 rights." *Hertz Corp.*, 316 NLRB at 684. Nonetheless, the ALJ was correct in finding that at least two factors supported a finding that the interrogation was unlawful.

D. The ALJ Correctly Found that the Subject Matter of Grosso's Comments Weighed in Favor of Protection

The ALJ correctly found that the second *Atlantic Steel* factor, the subject matter of the discussion, weighs in favor of protection. Where employees are engaged in activities which go to the heart of protected activity, this factor weighs most heavily in favor of protection. Here, the ALJ found that, that “Grosso’s purpose in writing the comments can be seen in the comments themselves. The comments were written on union newsletters addressing the warehouse employees who would be voting in a decertification election within 2 weeks and including an issue involving their pay.” (ALJD p. 15, ln 1; p. 13, ln 13-16). The ALJ correctly found² that this factor weighed in favor of protection. *See* discussion at Section II.A., *supra*.

The Supreme Court has long observed that “[b]asic to the right guaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection” and, therefore, the “[v]igorous exercise of this right ‘to persuade other employees to join’ must not be stifled... .” *Letter Carriers*, 418 U.S. at 277. *See also Verizon Wireless*, 349 NLRB at 642 (this factor weighs in favor of protection where an employee was “exercising his Section 7 right to engage in self-organization” by “encouraging [coworkers] to support the Union”). Therefore, the ALJ correctly found that Grosso’s communication here involved the exercise of a core Section 7 right and this factor weighs heavily in favor of protection.

E. The ALJ Correctly Found that Exhibits 13, 14, 15, 16, 17, 19, 20, 21, and 23 Were Not Admissible for the Truth of the Matter Asserted

The Judge correctly found that nine exhibits offered by Respondent were inadmissible for the truth of the matters asserted therein: Respondent’s Exhibits 13, 14, 15, 16, 17, 19, 20, 21,

² To the extent that the ALJ’s conclusion appeared to be somewhat equivocal and did not find that this factor weighed *strongly* in favor of protection, General Counsel excepts to her narrow finding.

and 23 (the “Documents”). Respondent’s Exhibits 13, 14, 15, and 19 are memos to file created by King; 16 and 20 are memos to file created by Maloney; 17 and 21 are memos to file created by Petliski; and 23 are interview notes prepared by Healy. The ALJ found that the Documents were admissible for the limited non-hearsay purpose that they were purportedly relied upon by Tyler in deciding to terminate Grosso, and General Counsel has no objection to admitting them for that limited purpose. However, Respondent’s assertion that the documents are admissible under the business records exception to the hearsay rule is without merit.

As an initial matter, General Counsel finds it curious that Respondent is apparently so concerned with the admission of these documents. The documents have been admitted for a non-hearsay purpose, and the authors of the each document all testified at the hearing. Admitting the documents for the truth of the matters asserted therein would serve no purpose whatsoever beyond impermissibly bolstering the credibility of Respondent’s witnesses. *See, e.g., U.S. v. Arroyo-Angulo*, 580 F.2d 1137, 1146 (2d Cir. 1978) (observing the “well established rules of evidence that absent an attack on the veracity of a witness, no evidence to bolster his credibility is admissible”). Because Respondent seeks to admit these prior consistent statements into evidence as business records with their corresponding “unusual reliability,” the importance of this principle bears emphasis: because Respondent’s witnesses provided live testimony, the ALJ was able to assess their credibility, but were these documents to be admitted into the record for the truth of the matters asserted therein, nearly identical statements³ would be made part of the record absent any ability to scrutinize their credibility.⁴

³ Respondent may try to argue that its witnesses’ testimony should be credited because it was consistent with these Documents. Such arguments would only illustrate the impropriety of admitting the Documents for the truth of the matter asserted and such consistency proves nothing more than that Respondent’s witnesses prepared for the hearing by reviewing these documents.

⁴ Rule 803(5), providing for use of such documents to refresh recollection, is specifically designed to avoid this problem, but there was no indication here that these witnesses had insufficient recollection at trial.

Improper bolstering aside, the documents are simply not properly admitted as business records. The Documents do not satisfy the threshold definition of “records of regularly conducted activity”, contrary to Respondent’s assertions. Fed. R. Evid. 803(6). The Federal Rules of Evidence permit the admission of certain documents “made at or near the time by . . . a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make [such a document] . . . , unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” Fed. R. Evid. 803(6). The Documents do not satisfy Rule 803 because they were not made in the course of a regularly conducted business activity, the authors of certain of the Documents had *never* created such documents before, and there is no evidence that it was the regular practice of the company to create such Documents.

First, supervisor Frank Petliski testified that Respondent’s Exhibits 17 and 21 are the first memos to file of any kind that he ever prepared during his tenure at the company. (Tr., 1064:9-11, 1066:6-10). After he created Respondent’s 17 and 21, Petliski printed hard copies of each which he gave to King and, curiously, deleted the electronic files from his computer, did not keep copies of the documents in his own possession in any form, and is unaware whether the documents were maintained anywhere in the company. (Tr., 1115:7-10, 1118:1-4, 1118:18-24). Similarly, Maloney testified that Respondent’s 16 and 20 were the first memos to file that he prepared at any time during his tenure at the company. (Tr., 1179:23-25). Moreover, there is no evidence in the record that, even if it was not the practice of Petliski and Maloney to create such documents, that it was the practice of the company to create such records.

Given these facts, admission of the Documents for the truth of the matter asserted is improper. Courts applying Rule 803(6) have been “reluctant to adopt a rule that would permit

the introduction into evidence of memoranda drafted in response to unusual or ‘isolated’ events.” *United States v. Strother*, 49 F.3d 869, 876 (1995) (citing *United States v. Freidin*, 849 F.2d 716, 720 (1988) (excluding “isolated document” because it was not the regular practice of company or that employee to create such internal memorandum)). Further, the Investigation Documents contain subjective summaries, judgments, and narratives, which are not the sorts of records reflecting the “systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation” which provide the “unusual reliability” at the heart of the business records exception at common law and in its current codified form. Adv. Comm. Not., Fed. R. Evid. 803 (1972).

Second, even if the Board finds that the Documents satisfy the threshold definition of business records, they cannot be admitted under Rule 803(6) because their “circumstances of preparation lack trustworthiness.” Fed. R. Evid. 803(6). *See also* McCormick on Evid. § 288 (“The structure of the rule places the initial burden on the proponent of the document’s admission to show that it meets the basic requirements of the rule, and the ‘unless’ clause then gives the opponent the opportunity to challenge admissibility, albeit now bearing the burden of showing a reason for exclusion”). In particular, the Documents are unreliable because they were prepared in anticipation of litigation such as the instant one.

The law is well-settled, dating back to a 1943 Supreme Court decision, that documents prepared in anticipation of litigation do not fall within business records exception to hearsay rule because they are not kept in the course of regularly conducted business and lose indicia of trustworthiness in that context. *Palmer v. Hoffman*, 318 U.S. 109, 114, (1943) (excluding reports prepared for the purpose of litigation). As the Ninth Circuit has explained, these documents

cannot be admitted as business records because “many of the normal checks upon the accuracy of business records are not operative” *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258-1259 (9th Cir. 1984) (affirming refusal to admit documents prepared in anticipation of litigation because in such circumstances). Courts have applied this principle not only where documents were directly prepared for litigation, but also where litigation was “not far around the corner” when they were prepared. *Timberlake Const. Co. v. U.S. Fidelity and Guar. Co.*, 71 F.3d 335, 342 (10th Cir. 1995). In Board cases, the judge may exercise discretion to presume the prospect of litigation as to any documents “prepared and filed after the employee has been publicly identified as a supporter of a union in the midst of a union organizing campaign.” *Metro Transport LLC*, 351 NLRB 657, 702 (2007) (judge explaining that he “[o]rdinarily exercise[s] discretion by not receiving such documents (for the truth of their contents) as a business records exception to the hearsay rule”).

While a company may not always anticipate litigation stemming from an investigation, as Respondent correctly observes, that was quite simply not the case here. The record demonstrates that the concerns described in *Metro Transport* fully apply to these Documents, which were created during investigation of a Union supporter in the midst of an active Union campaign. Healy explained that after learning of the comments on September 10, he immediately sought guidance from legal counsel, testifying, “We had an upcoming election, and I wanted to see[k] out the advice of counsel as opposed to . . . I didn’t want somebody to say it’s a witch-hunt. . . You have harassment EEO issue[s] at the same time you have the upcoming election. . . . So I just wanted to make the correct moves at that time because there was a lot going on.”⁵ (Tr., 1326:2-5, 1326:22-1327:1). Moreover, Healy had good reason to believe that the company’s

⁵ While the Judge, over General Counsel’s objections, held that attorney-client privilege had not been waived as to the content of Healy’s initial email and subsequent communications (Tr., 1203:19-1205:22), it is fair to presume that the company was anticipating that its response to the newsletters could result in litigation.

response could result in Board charges: he knew that the Union had previously filed charges against the company with respect to employees other than Grosso.⁶ (Tr., 1314:13-16).

Indeed, the Documents themselves clearly illustrate that they were prepared with the prospect of litigation looming, if not clearly anticipated. Each Document states that it is a “Memo to File” with a “cc” to the company’s outside and inside counsel, Thomas Servodidio and Erin Martino, with a single limited exception of a document not written in memo form⁷. (Resp. Exs. 13-17, 19-21). King testified that it was not always his practice to copy counsel on investigative memoranda, but was unique to the Documents created in this investigation. (Tr., 1387:6-9, 1387:21-1388:3).

Finally, even if the Documents are deemed admissible, the Documents themselves contain hearsay and that double hearsay is certainly not admissible for the truth of the matter asserted therein. “Double hearsay exists when a business record is prepared by one employee from information supplied by another employee” and such a document may be excepted from the hearsay rule only where there is evidence that *both* the source and the recorder of the information were acting in the regular course of business. *U.S. v. Gurr*, 471 F.3d 144, 151-52 (D.C. Cir. 2006). For example, Respondent’s 13 contains statements by Moscatelli, Buxbaum, and Germino, who were undisputedly not “acting in the regular course of business” and thus, these statements may not be offered for the truth.⁸

Therefore, the ALJ correctly determined that the Documents are inadmissible hearsay and do not fall into the business records exception to the hearsay rule, and that determination should be affirmed.

⁶ Respondent objected to the relevance of this brief line of inquiry, but as demonstrated by the foregoing analysis, this issue is clearly relevant to the evidentiary analysis of the Documents.

⁷ Respondent’s 23, a document authored by Healy, is not in memo form and does not list any recipients.

⁸ General Counsel excepts to the introduction of such statements for the additional reason, as stated in General Counsel Exception 1, that the subjective reactions of the female employees are wholly irrelevant to the issues in this case. (See GC Brief p. 25-26).

III. THE ALJ CORRECTLY FOUND THAT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT CERTAIN ALLEGATIONS OF THE COMPLAINT WAS ENTIRELY WITHOUT MERIT

By an April 28, 2010, Notice, Respondent noticed its intention to move for summary judgment on May 4, 2010, the first day of the hearing before the ALJ. General Counsel submitted a response in opposition at the start of the hearing. (GC Ex. 23). On May 5, 2010, the ALJ denied Respondent's motion for summary judgment and set forth her reasons on the record. (Tr., 236:8 – 246:15). Respondent now excepts to the ALJ's denial of that motion. For the following reasons, General Counsel asserts that the ALJ correctly decided that Respondent's motion was wholly without merit and the ALJ's denial of that motion should be affirmed.

A. There Can Be No Question that the Allegations Were Timely Brought within the 10(b) Period

Respondent's assertion that certain allegations in the complaint should be dismissed because they were not brought within the applicable 10(b) period is misleading and should be dismissed out of hand. Respondent invokes the *Redd-I* line of cases to support its argument, but Respondent fails to mention that these cases establish the standard for whether *untimely* uncharged allegations may be properly brought in a complaint or amended complaint. Here, however, there can be no dispute that the Allegations at issue were asserted within the operative 10(b) period. Those allegations concern events taking place on September 21, 2009, and thus the relevant 10(b) period for those claims expired on March 21, 2010. The Complaint in this case was served on Respondent on February 4, 2010 – a full forty-five days prior to the expiration of the 10(b) period. Accordingly, all of Respondent's arguments invoking the Board's "closely related" analysis are wholly inapposite.

Respondent initially cited Section 3-220 of the NLRB Division of Judges Bench Book (the "Bench Book") for the proposition that additional allegations in a complaint filed by the

Regional Director must be “sufficiently related to or growing out of the charged conduct.” However, Respondent takes this quote out of context. Respondent ignores the fact, first, that the cited Section is entitled, “Complaint Closely Related to Timely Charge” and, second, that the Section provides the quoted language in the context of setting forth the Board’s test for adding *untimely* allegations to a complaint that were not in the charges or original complaint. Bench Book, § 3-220. The Bench Book’s summary of the *Redd-I* case, upon which Respondent also relies, makes clear that this analysis applies only to *untimely* charges: “In applying the closely related test set forth in *Redd-I*, the Board looks at . . . [w]hether the *untimely* allegation involves the same legal theory as the *timely* charge . . . [and w]hether the *untimely* allegation arises from the same factual circumstances or sequence of events as the *timely* charge.” Bench Book, § 3-220 (citing *Redd-I, Inc.*, 290 NLRB 1115, 1115-1116 (1988)) (emphasis added). *See also Nickles Bakery*, 296 NLRB 927, 928 (1989) (citing *Redd-I* for the same propositions).

In fact, the Board has held that where a complaint is served on a respondent within the six-month 10(b) period, such timely service of the complaint will cure even a failure to serve the charges at all. *Buckeye Mold & Die Corp.*, 299 NLRB 1053 (1990). Thus, where the complaint itself is timely, the sole question in allowing the inclusion of allegations not included in any charges timely served on Respondent is whether “respondent is prejudiced by such circumstances.” *Id.* Here, Respondent has suffered no prejudice, as will beset forth more fully below.

Turning to the facts, here, Respondent does not and cannot dispute that the Complaint itself was timely served within the six-month 10(b) period. As mentioned, the facts stated in the disputed Allegations concern conduct occurring on September 21, 2009, and subsequent days, and thus the relevant 10(b) period for those claims expired on March 21, 2010. The Complaint

in this case was served on Respondent on February 4, 2010 – well over a month prior to the expiration of the six-month 10(b) period. Therefore, timeliness of the Allegations is simply not at issue here, and the *Redd-I* line of cases and cited portions of the Bench Book are entirely irrelevant. Respondent’s assertions to the contrary were properly dismissed.

B. In any Event, the Allegations are Closely Related to Charged Allegations

Nonetheless, even if the *Redd-I* “closely-related” were applied – and General Counsel respectfully asserts that it should not be – there is no question that the Allegations at issue here are indeed closely related to the charged allegations.

The Charge alleges, in relevant part, that “On or about September 25, 2009, the Employer terminated Kevin Grasso [*sic*], a long time Union supporter and member of the negotiating committee because of his support for the Union and his participation in the Union’s negotiating committee.” (GC Ex. 1a) (hereinafter, the “Charge”). The Charge also included a second allegation which was not alleged in the Complaint, stating that, “During the course of an investigation, on September 22, 2009, a representative of the Employer, Kevin King, misrepresented himself over the telephone to Mr. Grasso [*sic*] . . .” and proceeded to describe that telephone call and allege that it constituted a violation of the Act. (*Id.*).

The Complaint Allegations at issue here concern an interrogation that took place on September 21, 2009, and an investigation which allegedly took place on September 22, 2009. (GC Ex. 1e). The interrogation alleged in paragraph 6(a) and the investigation alleged in paragraph 6(b) occurred a mere three and four days before Grosso was terminated and directly led to his termination. (*Id.*). Furthermore, the investigation alleged in the Complaint is the same exact investigation referenced in the Charge: “During the course of an investigation . . .” (Compare GC Ex. 1a and GC Ex. 1e). While General Counsel asserted that the investigation

violated Section 8(a)(1) under a different legal theory than that alleged in the Charge, the Charge sufficiently put Respondent on notice that the “investigation” occurring on or about September 22 and leading to Grosso’s discharge was the subject of the Region’s investigation.

Applying the *Redd-I* analysis clearly demonstrates that the allegations in the Complaint were closely related to the charged allegations. First, *Redd-I* requires that the Board consider whether the Complaint allegations involve the same legal theory as the allegations in the charge. 290 NLRB at 1115. Here, the Allegations at issue here and the charged allegation concerning the investigation are all alleged under Section 8(a)(1) of the Act. Further, the contested Allegations and the charged discharge involve the same legal theory based on the fundamental point that the writing on the newspapers was protected activity, and/or that Grosso was interrogated, investigated, and discharged in retaliation for his protected activities.

Second, *Redd-I* considers whether the uncharged allegations arise from the same factual circumstances or sequence of events as the charged allegations. 290 NLRB at 1115. Accord, *Carney Hospital*, 350 NLRB No. 56 (2007) (second prong of the *Redd-I* test is satisfied when timely and untimely allegations are part of chain of events). Here, there can be no dispute that Respondent’s interrogation and investigation concerning the writing on the newspapers on September 21 and 22 were part of the same sequence of events which culminated in Grosso’s discharge a few days later on September 25. Further, these events involved the same employee, Grosso; the same company representative, Kevin King; and arose from the same factual circumstances of the company’s response to the writing on the union newspapers. Moreover, one of Respondent’s asserted grounds for Grosso’s discharge was his “dishonesty in a company investigation” – the very same investigation on which the contested Allegations are based. (GC

Ex. 1g, ¶ 7(b)). Thus, Grosso's discharge and Respondent's investigation are inextricably interwoven by Respondent's own admission.

Therefore, even if the Board were to apply the *Redd-I* "closely related" test, there is no question that the Allegations at issue here satisfy that test, and accordingly, Respondent's Motion was properly denied.

C. Under *Buckeye* Analysis, Respondent has Suffered No Prejudice

Respondent also argues that it has suffered prejudice due to the Allegations, and thus those allegations should be dismissed under *Buckeye Mold & Die*. 299 NLRB 1053 (1990). While General Counsel does not dispute the applicability of the *Buckeye* analysis, Respondent's complaints of prejudice are utterly preposterous.

Under the *Buckeye* analysis, when the complaint itself is brought within the 10(b) period, as it was here, the only relevant question for the Board is whether Respondent has been prejudiced by the inclusion of uncharged allegations. Here, precisely because the Allegations are so closely related to the charged allegations, as described above, Respondent has been afforded ample opportunity to provide evidence on these allegations in the Regional investigations, and indeed, did provide evidence to the Region. To the extent Respondent sought to provide additional exculpatory evidence or legal argument to the Region, it has had ample time to do so after Complaint issued on February 4, 2010, nearly three months before Respondent filed its Motion on April 28, 2010.

Further, Respondent is not prejudiced because Respondent does not even dispute the facts alleged in the contested Allegations. In its Answer, Respondent *admitted* to all of the facts alleged in Paragraph 6(a); the only issue in dispute is whether, as a legal matter, the admitted "interview[]" constituted an unlawful interrogation as defined by Section 8(a)(1) of the Act. (GC

Ex. 1g, ¶ 6(a)). Similarly, Respondent admitted that it conducted an investigation on September 22 concerning the comments on the Union newsletters, and denied only that the investigation was unlawful under Section 8(a)(1).⁹ (GC Ex. 1g, ¶ 6(b)). Thus, there are only legal questions at issue with respect to these Allegations, and, accordingly, Respondent could not have been prejudiced by any asserted inability to provide evidence on these points.

Respondent contended that it was prejudiced because the contested Allegations expanded the scope and prolong the length of the hearing. First, the Allegations did not prolong the hearing because these allegations were part and parcel of the sequence of events leading to Grosso's discharge and thus formed part of the testimony at the hearing in any event. Moreover, the September 21 interrogation (or "interview" as Respondent terms it) and September 22 investigation are necessarily at issue in this case, forming part of the testimony at the hearing regardless of whether these allegations are specifically alleged. Notably, this fact is due to Respondent's own defense that Grosso was discharged, in part, for dishonesty in the September 21 interrogation and September 22 investigation. Finally, Respondent's assertion that it was prejudiced in the presentation of its case flies in the face of the fact that Respondent won on these allegations before the ALJ.

For the foregoing reasons, the record is clear that Respondent was in no manner prejudiced under *Buckeye*.

D. Under Section 102.24 of the Board's Rules and Regulations the Motion Was Untimely and Procedurally Defective

Finally, in the very first sentence of the Motion, Respondent asserts that it is moving pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board

⁹ Respondent also asserted denials with respect to General Counsel's characterization of the comments on the Union newspapers as "words of opposition to the warehouse unit decertification" and to the characterization of the investigation as occurring only on September 22.

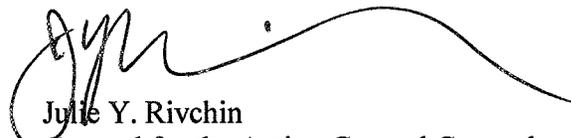
("NLRB"). (Resp. Mot., p. 1). However, the Motion fails to comply with the rules set forth in that Section. Section 102.24 provides, in relevant part, "All motions for summary judgment or dismissal shall be filed with the Board no later than 28 days prior to the scheduled hearing." NLRB Rules & Regs., § 102.24. Respondent did not file the Motion with the Board and it served the Motion on General Counsel less than a week before the hearing date, rather than the required twenty-eight days.

IV. CONCLUSION

For the reasons set forth above, the undersigned respectfully requests that the Board reject Respondent's exceptions and affirm the ALJ's decisions and findings on the limited issues discussed herein.

Dated: October 27, 2010
New York, New York

Respectfully submitted,

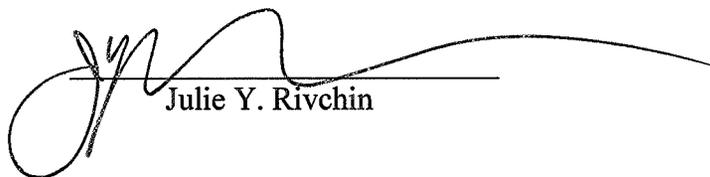

Julie Y. Rivchin
Counsel for the Acting General Counsel

CERTIFICATE OF SERVICE

This is to certify that on October 27, 2010, I caused the foregoing Counsel for the Acting General Counsel's Brief in Opposition to Respondent's Exceptions to the Administrative Law Judge Decision to be served, via electronic mail, addressed as follows:

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Dated this 27th of October, 2010