UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

K-VA-T FOOD STORES, INC.
D/B/A FOOD CITY

and **Cases 9-CA-46125**
9-CA-46126
RETAIL, WHOLESALE & DEPARTMENT **9-CA-46127**
STORE UNION, UFCW, CLC **9-CA-46152**
9-CA-46153

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

The Acting General Counsel's Answering Brief does little more than recite the very grounds relied upon by Administrative Law Judge Paul Bogas (the "ALJ"), as opposed to providing further support refuting the Respondent's, K-VA-T Food Stores, Inc. d/b/a Food City's ("Food City") exceptions. The truth remains that Food City was operating its business in accordance with its established and lawful policies and procedures when it terminated the employment of two employees for clear violations of those policies, and when it laid off a temporary employee. As such, Food City excepts to the ALJ's determinations that it committed violations of Sections 8(a)(1) or 8(a)(3) of the National Labor Relations Act (the "Act").

I. ARGUMENT

A. The General Counsel has failed to refute Food City's position that the alleged discriminatees have settled their claims and are not entitled to any additional relief.

Food City reached settlement agreements with the alleged discriminatees in this matter, and those agreements should be given their full effect.[1] The Board mandated in *Independent Slave Co.*, 287 NLRB 740 (1987), that four specific factors be considered in evaluating the

[1] The General Counsel has moved to strike portions of Respondent's brief in support of its exceptions concerning this argument. There is absolutely no valid basis for this Motion, and therefore Respondent will respond to the General Counsel's Motion to Strike under separate cover.

validity of waiver and release agreements. Here, the ALJ applied only the first of these four factors and summarily dismissed not only Food City's argument, but also the efforts of all those involved in privately negotiating a fair and adequate compromise of these disputes.

The General Counsel has attempted, but failed, to support the ALJ's decision in two ways. First, the General Counsel cites to case law in which similar agreements were rejected because of the lack of the General Counsel's or the union's assent to those agreements. However, ***in each of the cases cited, the Board still considered each of the four factors*** set forth in *Independent Slave* in detail – something that the ALJ made no attempt to do in this case. The General Counsel then spends four more paragraphs than the ALJ did in attempting to justify this decision through the application of factors two and three. This argument completely ignores the fact that the ALJ completely failed to apply these two additional factors, and it further shows the unwillingness of both the ALJ and the General Counsel to apply the full four-factor test set forth by the Board. This deficient analysis warrants a decision from the Board overturning his decision. *See, e.g., American Pacific Concrete Pipe Company, Inc.*, 290 NLRB 623 (1988) (overturning ALJ's decision to award additional damages despite a settlement agreement where full test was not applied); *see also Hughes Christensen Company*, 317 NLRB 633 (1995). This is particularly true where, as set forth in Food City's initial brief (Brief of K-VA-T Food Stores, Inc. d/b/a Food City, filed May 12, 2011), the application of all four factors demonstrates that these private settlement agreements should be given their full effect.

The General Counsel, like the ALJ, also completely ignores Food City's argument that, even if they are not given their full effect, these agreements operate as an accord in satisfaction as to any relief available to the alleged discriminatees. *See Keppard v. International Harvester Co.*, 581 F.2d 764 (9th Cir. 1978); *see also American Pacific Concrete Pipe Company, Inc.*, 290

NLRB 623 (1988) (same rule applies in discharge cases). As such, the alleged discriminatees are barred from any further relief.

B. Contrary to the ALJ's finding, the General Counsel did not meet its burden of proving that Food City was motivated by union animus.

As Food City has made clear, it cannot be motivated by that which it is not aware. In this case, Food City could not have taken action against the alleged discriminatees because of their participation in union activities because it was not aware of any such activity. This lack of knowledge, which is unequivocally demonstrated on the record, prohibits any finding that Food City was guilty of an unfair labor practice in connection with the discharge of Ms. Kirk, Ms. Burton or Ms. Smith. *See, e.g., Philips Industries, Inc.*, 295 NLRB 717 (1989); *see also Continental Oil Company*, 161 NLRB 1059 (1966).

In response, the General Counsel contends that the evidence presented by Food City was not ignored by the ALJ, but instead was rejected because it lacked credibility. The ALJ further contends that a credibility determination by the ALJ must be afforded great deference by the Board. However, this is only ***one-half*** of the analysis to be applied to this case. In *Standard Drywall Products*, the very case cited by the General Counsel in making this argument, the Board reminds the parties that:

> The Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence. Accordingly, in all cases which come before us for decision, we base our findings as to the facts based upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings.

91 NLRB at 544-45 (internal citations omitted). While it is true that credibility determinations are afforded great weight, such weight is only attached to the ALJ's evaluation of the witness's demeanor, and a Trial Examiner's resolutions as to credibility may be overruled where "the clear

preponderance of all the relevant evidence convinces the Board that the Trial Examiner's resolution was incorrect." 91 NLRB at 545.

The clear preponderance of the evidence in this case demonstrates that the General Counsel did not meet its burden of proving that Food City was motivated by union animus. In fact, all the General Counsel has offered in rebuttal to Food City's exceptions is a recitation of the ALJ's decision while dismissing the evidence proffered by Food City under the guise of a pure credibility determination. However, a closer examination of the direct evidence offered by Food City against the circumstantial and speculative evidence supplied by the General Counsel can lead to only one conclusion: Food City had no knowledge of the alleged discriminatees' protected activities, and as this Board has held, an employer cannot be motivated by factors of which it is not aware. *Philips Industries, Inc.*, 295 NLRB at 718.

As it applies to each alleged discriminatee, the objective and direct evidence shows that Food City was without knowledge of the alleged discriminatees' involvement in protected activity, and this evidence clearly outweighs the circumstantial and speculative evidence offered by the General Counsel, as set forth below:

1. Ms. Kirk

As the following evidence demonstrates, Food City had no knowledge that Ms. Kirk was engaged in any form of protected activity until after her employment with Food City had ceased.

- Ms. Kirk admitted that she had been secretive about her involvement with the union and that any union involvement occurred when she was awaiting layoff or after she was laid off. (Tr. 95, 127, 130).
- Ms. Kirk never testified that she told Mr. Balridge or any other member of Food City's management team that she was involved with the union before she was laid off.
- The ALJ conceded that there was no direct evidence that Food City was aware of Ms. Kirk's union activities.

The only rebuttal offered by the General Counsel is in the form of circumstantial evidence, such as the timing of Ms. Kirk's discharge, the rumors circulating at Food City, and the General Counsel's own, unsubstantiated interpretation of Mr. Balridge's "surprised reaction" to Ms. Kirk's statement that she could have helped him get rid of the union. In contrast, Ms. Kirk's own admissions and the other corroborating evidence make a clear showing by a preponderance of the evidence that Food City had no knowledge that she was engaging in protected activity. Without this knowledge, Food City could not have been motivated by an anti-union animus when it laid off Ms. Kirk.

2. Ms. Burton

Although the General Counsel cites to the ALJ's observation that Ms. Burton "was one of the most, if not *the* most, active supporters of the Union," the objective evidence does not prove that Food City had any knowledge of this information. (ALJD p. 22, II. 19-21). Instead, the following objective evidence was presented to the ALJ:

- Ms. Burton admitted that no one in management at Food City knew that she had signed an authorization card, that she was holding meetings with union representatives or that she had delivered a list of employee names and addresses to the union.
- No witness, not even Ms. Burton, testified that Food City was aware of her involvement in the union's organizing campaign.
- Even Union organizer Mr. Burns testified that he did not inform anyone in management that an organizing drive was occurring. He also testified that the union maintains a policy of secrecy as to who signs authorization cards. (Tr. 482-484).

The only response offered by the General Counsel to this direct evidence is that the ALJ properly made a credibility determination and simply "believed" Ms. Burton. Indeed, the only objective evidence offered by the ALJ is a meeting in 2009 between Ms. Burton and Mr. Balridge, about which the ALJ admitted the hearsay testimony of witnesses who were not a party

to the conversation and ignored the testimony of two witnesses for Food City who were present for it, as well as an email from 2004 – six full years before the present dispute – in which Ms. Burton's husband mentioned something about a union. This simply does not outweigh a preponderance of the objective evidence.

3. Ms. Smith

With respect to Ms. Smith, the General Counsel merely recites the ALJ's decision without any additional reasoning. Meanwhile, the objective evidence demonstrates that:

- Ms. Smith testified she had not told anyone in management that she signed a union authorization card.
- Ms. Smith testified that she did not tell anyone in management that she gave Daniel Cole a DVD concerning the union, or that management knew she was attending union meetings at employees' homes.
- Although an exchange occurred between Ms. Smith and Mr. Cecil in which Ms. Smith commented on the superior wages at an organized competitor, there was no testimony provided by any witness stating that such comments were a showing of support for the union. Indeed, Mr. Cecil testified that he was not upset at all with Ms. Smith for asking questions of him.

Rather than relying on the actual testimony, the ALJ has simply taken the exchange between Ms. Smith and Mr. Cecil and concluded that Ms. Smith's question was a showing of union support, and therefore Food City had to have developed both animus and motivation based on that animus to terminate her employment. This is contrary to the evidence on the record and cannot outweigh the objective facts.

4. Tommy Bush

The General Counsel argues that the ALJ made the "reasonable inference" that, because Mr. Bush told Mr. Balridge that Ms. Burton had asked him about his interest in a union more than fourteen (14) months before the time at issue, he must have reported the involvement of Ms. Kirk and Ms. Smith in protected activity as well. To say this is a stretch is an understatement.

This was not even an issue that was tried before the ALJ; indeed, neither side called Mr. Bush to the stand, as his testimony was irrelevant, and there was never any allegation suggesting that Mr. Bush was an agent of Food City. The only testimony on the record on this issue was that of Assistant Manager Kevin Garrett, who denied that Mr. Bush provided him with any information about the alleged discriminatees' protected activity. This was merely a speculative conclusion drawn by the ALJ to bolster his decision that was not grounded in any form of evidence, and it is not a proper basis on which to base this decision.

In sum, the direct evidence on the record clearly shows the lack of knowledge on the part of Food City with respect to any form of protected or concerted activity. Standing against the circumstantial evidence, conclusory statements and attempts to pass this evaluation off as a mere credibility determination, the ALJ's finding that Food City had knowledge of the alleged discriminatees' protected activity is erroneous.

C. Despite the General Counsel's blanket assertions, the evidence does not support a finding that Food City was motivated by anti-union animus in taking adverse action against Ms. Burton and Ms. Smith and in laying off Ms. Kirk.

Even if the General Counsel were able to meet its burden of proving that Food City had knowledge that the alleged discriminatees were participating in protected and concerted activity – and it cannot – the evidence on the record still does not support a finding that Food City was motivated by an anti-union animus when it discharged Ms. Burton, Ms. Smith, and laid off Ms. Kirk.

1. There were substantial business justifications for the actions taken by Food City in enforcing its rules.

The General Counsel attempts to downplay the importance of "shrink" and the policies and procedures necessary to contain it while ignoring one cardinal rule of the workplace: Food City has the right to lawfully "run its business as it pleases." *Detroit Newspaper Agency v.*

NLRB, 435 F.3d 302, 310 (D.C.Cir. 2006) (internal citations omitted). This includes enforcing the basic principle that "work time is for work." *New Process Company*, 290 NLRB 704, 717 (1988). As set forth more fully in Food City's initial brief, the high shrink levels in the Louisa store were a tremendous business justification to crack down and work harder to avoid preventable losses. While that may not sound important enough to the General Counsel or the ALJ, it is not their right to impose their values on the company; Food City has the right to attach importance to controlling shrink, and the measures taken in this case were certainly justified for business reasons, not based on union animus. As such, the ALJ's finding must be overturned.

2. The ALJ improperly colored Food City's communications with employees as evidence of union animus.

The mere fact that Food City distributed literature to its employees does not constitute evidence of union animus. *See* 29 U.S.C. § 158; *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (employers may communicate with employees on general views of unionism so long as there is no threat of reprisal or promise of benefit). Nonetheless, the General Counsel wants to make perfectly lawful behavior into something unlawful. While it is true that anti-union views or expression may be used in considering whether an employer holds a level of animus towards unions, it may only be considered as ***background*** evidence, not an independent wrong standing alone. Indeed, no such allegation was even made in this case. The General Counsel cannot now rely upon lawful actions alone to say that Food City acted unlawfully. As such, the ALJ erred in making such a finding.

3. The ALJ ignored legal precedent in finding irrelevant the fact that the union campaign had stalled.

At the time of the challenged actions, the union's organizing activity had stalled, and yet the ALJ found this irrelevant, citing to a *Miami Coca-Cola Bottling Co.*, 140 NLRB 1359, 1368

(1963) *enf'd in part*, 341 F.2d 524 (5th Cir. 1965), a case that is factually inapposite to the present matter. Despite the General Counsel's dismissal of this exception simply because the timeline in the legal authority is slightly different from the present case, the fact remains that the Board's decision in *Neptco, Inc.*, 346 NLRB 18, 20 (2005), is clearly applicable here. Where there was no "active" campaigning going on, and where there was some level of distance in between the end of the campaign and the decision to discharge employees, the *Neptco* decision comports with basic principles of logic in that one cannot be said to have taken action motivated by something that does not exist. The ALJ's dismissal of this relevant precedent and reliance upon a much more ill-fitting case was improper, and his decision that Food City was motivated by union animus was flawed.

D. The ALJ erred in finding that Food City would not have taken the same action in the absence of the alleged discriminatees' protected activities.

The evidence and supporting case law clearly show that Food City would have taken the same action regardless of the alleged discriminatees' protected activities. The ALJ's criticism and the General Counsel's arguments supporting it amount to nothing more than an effort to tell Food City how to run its business. The fact remains that, in each of the four issues raised in the General Counsel's Answering Brief, Food City met its burden of proving that its actions were warranted and lawful, not premised on any alleged (and frankly, unknown) union activities.

Indeed, the objective evidence clearly shows that, in each instance complained of by the General Counsel, the employee clearly violated Food City's policies. The same holds true for the decision to discharge these two employees. Indeed, the General Counsel's own response to Food City's brief illustrates the problem, making the argument that other employees were permitted to use the back door so long as Ms. Burton was there – it was her violation of this trust by ***not*** being there that led to her discharge. Ultimately, both Ms. Burton and Ms. Smith were

made aware of their duties and the expectations of them, and they made the choice – at a time when Food City was making a concerted effort to correct its most challenging problem in the form of shrink – to put their work obligations aside, and for that reason alone, they were discharged.

II. CONCLUSION

For the reasons stated herein and in Food City's Brief in Support of its Exceptions, Food City asks the Board to overturn the ALJ's recommended decision that it violated Sections 8(a)(1) and 8(a)(3) of the Act and to give full effect to the settlement agreements entered into between Food City and the alleged discriminatees.

Respectfully submitted,
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D/B/A FOOD CITY

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CERTIFICATE OF SERVICE

I, Ashley C. Pack, counsel for K-VA-T Food Stores, Inc. d/b/a Food City, do hereby certify that the foregoing **Respondent's Reply Brief In Support Of Its Exceptions To The Decision Of The Administrative Law Judge** was filed via the National Labor Relations Board's electronic filing system on the following this 21st day of September, 2011:

Lester A. Heltzer, Executive Secretary
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and that a true and exact copy of the same was served on the following via electronic mail this the 21st day of September, 2011:

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