

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

<p>In the Matter of:</p> <p>MCCLAIN & CO., INC.,</p> <p>Respondent,</p> <p>and</p> <p>CRAIG H. LIVINGSTON, An Individual,</p> <p>Charging Party</p>	<p>Case No. 22-CA-29792</p>
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BRIEF IN SUPPORT OF RESPONDENT McCLAIN & COMPANY, INC.'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE ELEANOR MACDONALD'S DECISION

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INTRODUCTION

This matter was transferred to the Board following the issuance of Administrative Law Judge Eleanor MacDonald's decision, which followed two (2) days of hearing conducted on May 24 and June 2, 2011. The Board granted Respondent's request for an extension of time to November 30, 2011 to file exceptions to the decision.

STATEMENT OF THE CASE

Respondent McClain & Co., Inc. (the "Company" or "Respondent") is in the business of supplying "bridge access equipment to various engineering firms in government entities" and traffic control services. (Tr. 200)¹. Traffic control involves setting "up work zones on highways form[ing] traffic patterns to create work zones for bridge and sign inspections," which inspections are performed by "[e]ngineering firms that receive contracts from the Department of Transportation." (Tr. 13). Respondent's headquarters are in Culpepper, Virginia, and it has offices in various locations around the United States, including Upstate New York and Lyndhurst, New Jersey. Respondent's New Jersey location is the focus of this action. (Tr. 13).

Matthew Pasquale is Respondent's New York Regional Manager who also became responsible for the New Jersey branch in March 2010. Reporting to Pasquale during the relevant time period were Joseph Ferrer, Project Manager and Alan Ladd, Equipment Manager. (Tr. 199-201). Ferrer was promoted from Traffic Control Technician ("TCT") to Project Manager in June 2010, and is responsible for "hiring, scheduling, customer service, [and] customer relations."

¹ Throughout this Brief, we abbreviate references to the Administrative Law Judge Decision as "ALJD," references to the hearing transcript as "Tr.," and references to the exhibits as "Ex. GC" or Ex. R." (for General Counsel exhibit or Respondent exhibit, respectively).

Ferrer received no specialized training upon assuming this position. (Tr. 254). Ladd worked in a separate equipment yard and was responsible solely for repairing and maintaining all of Respondent's equipment.

Alleged discriminatees Frank Bruno, Ivan Casiano and Danny Brattoli each worked for Respondent as a TCT, whose duties are

to provide safe lane closures for engineers to do inspections of bridges, sign structures, things of that nature. [TCTs] also set out signs warning commuters and drivers ... that there is road work being performed ahead. [TCTs] provide traffic devices to deter them from the area where we're working, as well as provide TMA's, also known as truck mounted attenuator which protect the workers ahead and, also, gives anyone who's not paying attention or who may have a circumstance, a safer option to crash into.

(Tr. 63-64). TCTs do not have regular work schedules and only work when needed, which could vary on a weekly basis. Crews are scheduled based on the needs of each specific job and the qualifications of each employee, without regard to seniority or length of service. (Tr. 203-205).

Upon assuming the Project Manager position, Ferrer began making changes to scheduling, such as eliminating the prior management's practice of allowing employees to work double and triple shifts. "A double is pretty much working one shift and then coming back and working the night shift. Or be working the night shift and be working the next day shift." (Tr. 257). Ferrer also tried to even out the assignments so more employees would have the opportunity to work rather than allowing certain employees to work a lot of overtime. These changes were necessary to ensure the operation was in compliance with U.S. Department of Transportation regulations, which limit working hours for truck drivers. (Tr. 257).

Ferrer issued an email to all New Jersey employees on June 11, 2010 in which he described these changes and gave some explanation as to the reasons. In this email, Ferrer

cautioned employees that he would not show favoritism or give preferences in scheduling, but would try to accommodate individual scheduling conflicts. (Ex. R-10).

Ferrer's changes resulted in some employees receiving fewer shift assignments. As a result, some employees complained about their shift assignments to Ladd when they saw him in the yard at the start and end of each assignment. Some employees spoke to Ferrer about their individual scheduling issues when he visited the yard, but never in the office. None of the employees met with either Ferrer or Ladd as a group. (Tr. 20; 275-276). Brattoli testified that he called Respondent's President, Dan McClain ("Mr. McClain"), in Virginia in June or July to express his concerns about his scheduling assignments, but did not know if Mr. McClain ever did anything with the information. (Tr. 101-102). Brattoli made the call on his own behalf and "was calling for myself," but did tell Bruno and Casiano about his call. (Tr. 127). There is no evidence that any other employee spoke to Mr. McClain or anyone in Virginia regarding scheduling or any other issue. (Tr. 113)

Ladd soon became frustrated with the questions about work assignments because he had nothing to do with scheduling, so he referred employees to Ferrer. (Tr. 21). Ladd complained to Ferrer that employees continued to ask him scheduling questions and to disrupt his work. To address this concern, Ferrer sent out an email on July 21, 2010, in which he told employees to bring scheduling issues or complaints to him or Pasquale and to stop bothering Ladd, and that if they continued to bother Ladd, they risked being removed from the schedule, although Ferrer never removed any employee from the schedule for complaining. (Ex. GC-2; Tr. 225, 293).

In mid-August 2010, Ferrer told Pasquale that he was concerned that business was slowing down and he anticipated it would get slower into the fall and winter, and suggested that they layoff some employees. (Tr. 273). Pasquale agreed and asked Ferrer to prepare a list. (Tr.

207). Respondent's policy on layoffs lists four (4) factors supervisors should consider to identify employees to be laid off. These factors, listed in order of importance, are: Company work requirements; the employee's abilities, experience, and skill (performance); the employee's potential for reassignment within the organization; and length of service. (Ex. R-8). After getting some input from Ladd from an equipment perspective, Ferrer examined the files of all New Jersey employees and applied the four (4) factors to develop a list of six (6) employees for layoff, including Bruno, Casiano and Brattoli. About a week after first speaking to Pasquale, Ferrer presented Pasquale with a list, which Pasquale approved without any changes. No one else from Respondent had any input into who was selected for layoff. (Tr. 257-259).

Ferrer selected Bruno because he had more accidents and warning notices than any other New Jersey employee, including an accident on August 13, 2010 when he caused extensive damage to an arrow board that was attached to a trailer behind the truck. (Ex. GC-5, Ex. GC-6; Tr. 260). Bruno received Warning Notices for this accident as well as for prior incidents, including three (3) others based on a customer complaint, a safety violation, and causing damage to an attenuator on a truck. (Ex. R-5, R-6, Ex. R-7; Tr. 155-157). All of these incidents occurred between April 26, 2010 and August 13, 2010. (Ex. GC-5, Ex. GC-6; Ex. R-5, R-6).

Casiano worked as a TCT until March 2010, when he agreed to transfer to the yard and work with Ladd repairing and maintaining the equipment. Ferrer selected Casiano for layoff based primarily on an arrangement Casiano and Ladd made when they first agreed to this assignment, whereby, if it didn't work out for Casiano in the yard, he could not return to traffic and would leave the Company. (Tr. 212, 289). Casiano's predecessor in the yard position also left the Company after things did not work out in that position. (Ex. GC-9; Tr. 68). At the end of June, 2010, Casiano decided he did not want to continue working in the yard. Ferrer made a

limited exception and allowed Casiano to return to traffic for a couple of months because, at that time, Respondent had a project that required a driver with a CDL and Casiano had a CDL. (Tr. 212, 289). Casiano received two (2) Warning Notices during the brief period he returned to traffic. (Ex. R-1, R-2).

Ferrer selected Brattoli for layoff because on August 17, 2010, Brattoli came into the New Jersey office and had a “meltdown,” whereby, “he was yelling at Joe Ferrer and using foul language in the presence of the women that we had working in the office.” (Tr. 210). Brattoli’s “meltdown” was so inappropriate, loud and disruptive, that Pasquale heard it through the telephone when he happened to call the office that day. Pasquale had Brattoli come to the telephone and directed him to leave the office immediately. (Tr. 210-211). In evaluating Brattoli for layoff, Ferrer also noted that Brattoli’s file included two (2) recent Warning Notices. (Ex. R-3, R-4).

Ferrer implemented the layoffs effective after the employees finished their assignments on August 25 or 26, 2010. Nevertheless, he did try to schedule Bruno for work out of town the following week, but Bruno did not accept the assignment. (Tr. 180-181; Ex. GC-8b 4:14-21). Ferrer also subsequently offered work to Brattoli on two (2) separate occasions, but Brattoli declined the first offer and the second job was cancelled. (Tr. 110-111).

On August 25, 2010, five (5) of Respondent’s New Jersey employees met with a representative from a Teamsters union local to gather information about unions and what they do. The five (5) employees alleged to have attended included Bruno, Casiano, Brattoli, Michael Alvarez and Alex Lopez; the witnesses each identified Alvarez, who only started working for Respondent on June 15, 2010, as the organizer of the meeting. (Tr. 37; Ex. GC-9). Within hours

after meeting, Bruno contacted at least three (3) other employees who did not attend, and told them what happened at the meeting. (Tr. 41).

On August 30, 2010, Ferrer issued another email to all employees, including Bruno, Casiano and Brattoli, in which he again tried to get employees to stop bothering Ladd about scheduling by telling employees that Ladd no longer would receive a copy of the schedule. In the same email, Ferrer implemented a new requirement that employees should not come into the office unannounced, which was in direct response to Brattoli's "meltdown" two (2) weeks earlier. (Ex. GC-3; Tr. 271-273). In the hopes of having the employees be more accepting of his directives than they had in the past (particularly with regard to Ladd and scheduling), Ferrer wrote that these changes originated in Virginia, although Virginia really had no involvement in the decisions. (Tr. 272; 272-273). In the email, Ferrer also mentioned his expectation that work would be slowing down, and encouraged employees to apply for unemployment to make up for reduced hours. (Ex. GC-3; Tr. 273). Throughout this time, Ferrer had no knowledge of any union activities among employees. (Tr. 273-274).

On September 7, 2010, Bruno came into the office for a meeting he scheduled with Ferrer to discuss his layoff; Bruno brought a concealed recorder and recorded the conversation. Bruno asked why he had been laid off and Ferrer put the blame on Virginia, saying that they told him to give Bruno a "pink slip" based in large part on his recent accident with the arrow board. Although Ferrer made the decision to include Bruno in the layoff, Ferrer mentioned Virginia because he believed it would give him more credibility and Bruno would not bother Ferrer about the layoff. (Tr. 259-260). Bruno became frustrated and defensive and told Ferrer he was going to speak with Ladd and Pasquale. (Ex. GC-8b).

Bruno left Ferrer's office and went directly to the yard to speak with Ladd and again secretly recorded the conversation. Bruno and Ladd discussed the "arrow board Warning Notice" and Bruno's layoff, and in the course of the conversation, Ladd opined that the "union meeting that you guys went to. That didn't help it." When Bruno indicated he did not know what Ladd meant, Ladd inferred that he knew about a meeting from others who attended, and mentioned that he understood a second meeting had been planned for the following night. Ladd did not ask any questions about a union, Bruno's involvement or interest, or about any other employee. Ladd also suggested that it was Virginia's suggestion for Ferrer develop a list of six (6) employees to be laid off, and recommended to a frustrated Bruno that he speak to Pasquale. (Ex. GC-8a 2-11).

Bruno met with Pasquale on September 13, 2010, and again Bruno secretly recorded the conversation. Bruno and Pasquale discussed the layoff and Pasquale referenced Bruno's accidents and damage to the arrow board, and Pasquale said that he was responsible for the layoff decision, not Virginia or anyone else.

Bruno then told Pasquale that Ladd suggested Bruno's layoff had something to do with him attending a union meeting. In trying to understand Bruno's statement, Pasquale asked if Bruno had attended a union meeting and when Bruno said it was not a union meeting, Pasquale asked what the meeting was. Pasquale then dropped the subject, but did encourage Bruno to join a union if that is what he wanted to do. When Bruno asked if attending a union meeting might have been a reason for his layoff, Pasquale honestly said that it might have been because, although he had not heard about a union prior to his conversation with Bruno, Pasquale did not know whether Ferrer knew about a union meeting or if he considered that when selecting Bruno for layoff. (Ex. GC-8a 12-22; Tr. 232).

Following the meeting, Pasquale spoke to Ferrer, who said that this was his first awareness of a union. Pasquale was satisfied that Ferrer knew nothing about a union and had not considered it in the layoff decision. (Tr. 233-234). In the weeks following the layoff, Brattoli contacted Bruno, Pasquale and Ladd and each said there was no work for him. Casiano contacted only Ferrer and received a similar response.

ARGUMENT

POINT I

RESPONDENT’S EMPLOYEES DID NOT ENGAGE IN PROTECTED CONCERTED ACTIVITIES WHEN THEY COMPLAINED ABOUT THEIR INDIVIDUAL SCHEDULING ISSUES TO LADD OR FERRER.

Although some of the Respondent’s Employees complained about their work assignments during the summer of 2010, the employees were not engaged in protected concerted activities at the time because those who complained focused only on their own individual concerns. (ALJD 17:4). In *Meyers Industries*, 268 NLRB 493, 497 (1984) (“Meyers I”), the Board adopted the following definition of “concerted activities”: “In general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” The Board clarified this definition in *Vought Corp.*, 273 NLRB 1290 (1984), *enf’d.* 788 F.2d 1378 (8th Cir. 1986), when it adopted language from the Third Circuit’s decision in *Mushroom Transportation Corp. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964), stating:

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Vought, 273 NLRB at 1294 (citing *Mushroom Transportation*, 330 F.2d at 685). Moreover, “the question of whether an employee has engaged in concerted activity is a factual one based on the

totality of the record evidence.” *Meyers Industries, Inc.*, 281 NLRB 882 (No. 118) (1986) (“*Meyers II*”) discussing *Meyers I*. The actions of Respondent’s employees in the present case do not satisfy this definition of “concerted activities” because there is no evidence that any of the employees acted “with the object of initiating or inducing or preparing for group action....” *Mushroom Transportation*, 330 F.2d at 685. Accordingly, the ALJ erred in reaching a contrary conclusion.

A. Any Employee Complaints Were Limited to Individual Scheduling Issues

The ALJ based her ruling on the following conclusions, which are not supported by the record evidence. For example, the ALJ found that

numerous employees of Respondent were concerned that recently hired men were getting more work than seasoned workers and the employees expressed these concerns to management. Employees were also concerned about favoritism in the allocation of work. The record shows that senior employees discussed these concerns among themselves and then complained to Ladd in the yard. Bruno’s testimony that he was present when other employees complained to Ladd establishes that the complaints were made as a group and that they expressed general dissatisfaction about the allocation of work as between senior men and new hires.

(ALJD 16). Contrary to the ALJ’s statement, a review of the record finds no evidence that Bruno ever testified that other employees spoke as a group or on behalf of the group. Rather, Bruno testified with regard to other employees, “I definitely heard people complain to Al Ladd *about their shifts.*” (Tr. 20) (Emphasis added). Additionally, while all three (3) of the General Counsel’s witnesses testified that other employees complained, none testified that the employees complained collectively or as a group. Also, Casiano was the only one of the three (3) witnesses who identified another employee who he heard complain about his own situation to Ladd.

Moreover, Ferrer’s uncontradicted testimony is that some employees complained to him, but they always spoke to him individually, “[n]ever together,” and only about their individual

circumstances. (Tr. 276) (“I’m not getting prevailing shifts, this guy’s doing more than me.”)). The employees did not demonstrate any group objective; they spoke to Ladd or pulled Ferrer aside in the yard to plead their individual case. (Tr. 275-276). Such conduct does not constitute concerted activities.

The ALJ also found that,

Casiano’s uncontradicted testimony establishes that a group of employees, including team leader DeCarlo, complained to Ladd that new hires were getting more prevailing rate work than senior employees ... Casiano’s testimony establishes that DeCarlo’s complaint cited senior employees as a group that was disadvantaged by the assignments; DeCarlo was not only complaining about his own job assignments.

(ALJD 16). A review of Casiano’s testimony also does not support the ALJ’s conclusion that DeCarlo was speaking on behalf of a group. According to Casiano, DeCarlo “was making comments to Al Ladd specifically pertaining to, I guess, the unfair advantage that new hires were getting. He couldn’t understand why someone like him, who has had much more seniority, been there much longer, was much more competent, would not be working, when newer guys who just started were working anywhere from three to five prevailing shifts a week.” (Tr. 70) Thus, DeCarlo was complaining about his own situation and not on behalf of other employees.

Moreover, Casiano’s testimony contradicts the ALJ’s conclusion that, “[d]uring that conversation DeCarlo wondered aloud whether the situation would be the same if there were a union on the premises, thereby confirming that the complaints were a matter of collective concern and action.” (ALJD 16) Casiano’s actual testimony demonstrates that neither DeCarlo nor Casiano had any thought of collective action at the time DeCarlo mentioned a union in front of Ladd. As Casiano explained,

The way the union got introduced to that conversation was he [DeCarlo] made an offhand comment says, I wonder if we had a union, if things like this would be happening, *not towards any action or involving the union in the company*, but

wondering, like, man, would this -- would this really happen if we had the protection of the union.

(Tr. 71) (Emphasis added). Casiano further testified that he could not remember if any other employee in the yard that day voiced any opinion on the subject, and recalled that they all simply left the yard and went home. (*Id.*)

Furthermore, the ALJ's reliance on testimony regarding telephone calls placed by Brattoli and Bruno also is misplaced. First, contrary to the ALJ's conclusion that Brattoli's calls to Dan McClain were concerted activities, Brattoli himself testified that he told Mr. McClain, that he (Brattoli) was "speaking on his own behalf" and, although he "did mention that [he] wasn't the only person upset about the lack of hours," Brattoli was definitive in stating, "*I was calling for myself.*" (Tr. 127) (Emphasis added). Casiano also testified Brattoli "mentioned he was going to take *his complaint* further up the ladder and call Dan McClain." (Tr. 77) Thus, the testimony of Brattoli and Casiano, upon which the ALJ relies for her conclusions about Brattoli's actions, are contrary to the ALJ's conclusion. Brattoli was acting on his own behalf when he called Mr. McClain.

Second, the the ALJ's statement that, "Bruno also left a message for Daniel McClain voicing similar concerns" (ALJD 16:34) is not based on any evidence in the record. Bruno testified only that he tried to call Dan McClain and left a message, but Bruno offered no testimony about the content of the message(s) he left. (See Tr. 25). The ALJ inappropriately assumed facts not in evidence with regard to calls by Bruno.

Indeed, the record includes evidence of only one (1) employee's telephone conversation with Virginia about scheduling, which was Brattoli's call to Mr. McClain. Any other testimony was limited to alleged unsuccessful telephone calls, for which Mr. McClain did not respond to the message. Thus, the employees made only one telephone call to Virginia during which

Brattoli plead his own case, and such action is insufficient to constitute “concerted activities.” See *Herbert F. Darling, Inc.* 287 NLRB 1356, 1360 (No. 148) (1988) (a finding of concerted activities requires some “ongoing group activity...”).

In *Meyers I*, the Board addressed a somewhat similar scenario and found no concerted activities, stating,

the most that can be inferred from this scenario is that another employee was individually concerned, and individually complained, about the truck's condition. Taken by itself, however, *individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert action.

268 NLRB 493 (emphasis in original). Multiple employees individually expressing complaints about similar issues does not constitute concerted activities. See *Tri-State Truck Service, Inc. v. NLRB*, 616 F.2d 65, 71 (1980) (“...the employer may justifiably conclude that, although two or more employees act in the same fashion, they are acting individually.”).

B. No Employees Acted With the Object of Initiating, Inducing or Preparing for Group Action

The record evidence does not support that any of Respondent’s employees engaged in any conversation or activity “with the object of initiating or inducing or preparing for group action or [which] had some relation to group action in the interest of the employees.” *Meyers II*, 281 NLRB 882. Significantly, all of the testimony by the General Counsel’s witnesses demonstrates no linkage between the complaints of some employees about scheduling, and the August 25, 2010 meeting with a union representative that five (5) of Respondent’s employees allegedly attended.

First, the focus of any complaints was primarily that some of the more senior employees were concerned about receiving fewer shifts than in the past, and than what they believed less senior employees were receiving. Bruno, Casiano and Brattoli each testified that he was

contacted by fellow employee, Mike Alvarez, about attending a meeting with a union representative. See Tr. 37 (Bruno “received a call from Mike Alvarez inviting me to hear what this union rep from Teamsters Local 210 had to say.”); Tr. 78-79 (Casiano “was informed by another employee by the name of Michael Alvarez, that he had made contacts with the president of Local 210 Teamsters and arranged this meeting...”); Tr. 105 (Mike Alvarez invited Brattoli to the meeting). Alvarez’ role is significant because he was hired June 15, 2010 (see Ex. GC-9) and, therefore, as a new employee, would not have had the same scheduling concern as any of the three (3) witnesses. Thus, Alvarez’ interest in scheduling the meeting was not based on a concern that was common to other employees who attended.

Second, the only testimony regarding a prior reference to anything involving a union was Casiano’s testimony about a statement that DeCarlo made to Ladd in or about May 2010. In relating the exchange, Casiano testified that DeCarlo,

made an offhand comment says, I wonder if we had a union, if things like this would be happening, not towards any action or involving the union in the company, but wondering, like, man, would this -- would this really happen if we had the protection of the union.”

(Tr. 71). Thus, Casiano made it clear that DeCarlo’s comment was not made “towards any action or involving the union in the company,” which further demonstrates that the employees’ complaints were not made “with the object of initiating or inducing or preparing for group action [and had no] relation to group action in the interest of the employees.” *Meyers II*, 281 NLRB 882.

Third, the purpose and discussion at the August 25 meeting related to general information about the union and the potential benefits of unionization, and there was no discussion of scheduling or favoritism. For example, Casiano testified,

Bob Bellick at that point discussed with us exactly what it was that the union could do for us. He informed us as to what were myths and what were truths in particularly pertaining how a union can protect an employees. [sic] Additionally, he informed us as to what some of our rights were and, also, educated us on how to proceed if we were going to go ahead and introduce the union into the company.

Tr. 79. Likewise, Brattoli testified,

Basically, we spoke about how to -- how to get unionized how to get unionized. How it would help our security with the company. How we would stop getting neglected and taken advantage of. And, basically, how to get the cards signed. We needed 50 percent plus one to be able to, you know, get a union in there. And, he basically broke down all the mechanics of the union.

Tr. 105. See Tr. 38 (Bruno testified, “Basically, they were just trying to explain how unions worked...”). It is inapposite to say that when some employees complained about their schedules, they had “the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees,” yet when they did get together for some collective action, the subject of schedules never arose. See *Meyers II*, 281 NLRB 882.

Therefore, any individual complaints by individual employees were not “an indispensable preliminary step to employee self-organization.” *Holling Press*, 343 NLRB 301, 303 (No. 45) (2004) (citing *Meyers I*, 268 NLRB at 887 (citing *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951))). The testimony supports only that some of Respondent’s employees were *griping* about the way management was assigning work to them, but to find concerted activity, the statements must go “beyond mere griping”. *Id.* See *Mushroom Transp.*, 330 F.2d at 687 (“Activity which consists of mere talk must, in order to be protected, be talk looking toward group action... and if it looks forward to no action at all, it is more than likely to be mere “griping!” Therefore Respondent’s Employees were not engaged in concerted action and the ALJ’s finding that they were, must be rejected.

POINT II

THE ALJ ERRED IN FINDING ANTI-UNION ANIMUS BASED ON A SINGLE COMMENT BY LADD

The ALJ erred in finding that Ladd had anti-union animus, which was imputed to the rest of Respondent's managers, based on a single comment he made during a casual conversation with an employee. Specifically, as mentioned above, Casiano testified that he overheard an exchange between DeCarlo and Ladd in the yard, during which DeCarlo complained about the number of shifts he was receiving as compared with some newer employees. In the course of the conversation, DeCarlo made "an offhand comment ... I wonder if we had a union, if things like this would be happening..." and Ladd responded that "unions really don't do anything for you. They don't really do anything for you other than take money for dues...." Casiano also said that, "[t]he second part to that response was [Ladd] specifically saying that in the event [the employees] were to unionize, Dan McClain would most likely pack up and run the operation out of our Connecticut location." (Tr. 71). Given the comment itself and the context in which it arose, the ALJ erred in finding that Ladd's comment was sufficient to constitute evidence of anti-union animus on the part of Respondent. (ALJD 17:35) See *Mosher Steel Co.*, 220 NLRB 336, 343 fn. 19 (1975) (finding employer's supervisor engaged in noncoercive and protected speech in making "statements to employees that they needed no union, that the union was only interested in getting a contract, that the union's positions in the negotiations were unreasonable, and that the plant would remain open and employees would have no 'problem' working in the event of a strike.").

In *Crown Bolt, Inc.*, 242 NLRB 776, 779 (No. 86) (2004), the Board discussed alleged threats of plant closure in the context of pre-election conduct, stating,

While common intuition suggests that a clear and unequivocal threat of plant closure is more likely than not to be disseminated, we cannot turn a blind eye to the reality that the probability of the dissemination of a threat of plant-closure and the extent of its dissemination may be reduced by the circumstances, including the manner in which the threat is conveyed, to whom, by whom and under what circumstances, and the size and makeup of the unit. Words that convey a threat of plant closure to one person may not necessarily carry the same meaning to another. Words spoken by a plant owner or hospital chief executive officer in a formal meeting have a different level of seriousness than different words used during casual conversation by a low-level plant supervisor.

Applying the *Crown Bolt* analysis, *supra*, to Ladd's comment demonstrates that it does not constitute a threat nor evidence of anti-union animus.

First, Ladd's comment was not "a clear and unequivocal threat of plant closure...." *Id.* Rather, Ladd expressed his opinion about what he thought Mr. McClain "most likely" would do in the event of unionization. Ladd's expression of his opinion did not contain any threat of reprisal or force, nor did it include any promise of benefits. As such, Ladd's comment was protected under 29 U.S.C. § 158(c) (1976), which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Second, Ladd was a low-level supervisor, whose primary responsibility was over equipment, not staffing. (Tr. 17, 255) Third, the conversation did not arise in the context of a union organizing campaign, but rather, was simply an "offhand comment" by an individual employee in the course of a casual conversation that the employee initiated outside in the equipment yard. (Tr. 71). In fact, Casiano described the conversation as "[o]n Mr. DeCarlo's side, it was more of a quizzative (sic) conversation ... On Mr. Ladd's side of the conversation, as I mentioned, it was somewhat comical." (Tr. 93-94).

Thus, the scenario in which Ladd's single comment arose is very different than the types of situations where the Board has found threats to be coercive and evidence of anti-union animus. For example, in *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62 (3rd Cir. 1978), the Court affirmed the Board's finding of unlawful threats to close a plant based on statements made by a team leader and the Vice President for Labor Relations, who "made similar statements at team meetings ... and at a mandatory employees' meeting ... the day before the election." *Id.* at 66. See *In Re S. Monterey County Hosp.*, 348 NLRB 327 (2006) (Board adopted ALJ's findings that the Respondent violated Section 8(a)(1) based on multiple instances of threats by multiple supervisors); *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 98-99 (2d Cir. 1985) (enforcing relevant portions of Board order finding of anti-union animus based on a numerous violations by vice-president/corporate officer of employer with authority to control daily operations in the entire facility, including interrogation of employees about union activities, threats to close the company if a union were voted in, extra benefits promised in an attempt to stave off the union, and the threats to fire another employee for his union support); *NLRB v. Herman Bros. Pet Supply, Inc.*, 325 F.2d 68, 71 (6th Cir. 1963) (enforcing Board's finding of an unfair labor practice based, in part on the owner of the company's anti-union animus and threats to close his business to avoid dealing with the union).

Finally, although Casiano testified that he believed there were other employees in the yard at the time of the conversation between DeCarlo and Ladd, there is no evidence in the record that Ladd's comment was disseminated to any other employees. The Board has established that dissemination of plant-closure threats or other kinds of coercive statements will not be presumed, and "[w]here proof of dissemination of coercive statements, including threats of plant closure is required, the objecting party will have the burden of proving it ... by direct

and circumstantial evidence.” *Crown Bolt* 343 NLRB at 779. Casiano testified that neither Bruno nor Brattoli was in the yard at the time of Ladd’s comment, and neither Bruno nor Brattoli testified that they ever heard about Ladd’s comment. (Tr. 71). Thus, because the record contains no evidence of dissemination of Ladd’s comment, the ALJ erred in finding Ladd possessed anti-union animus based on his single casual comment.

POINT III

THE RECORD IS DEVOID OF ANY EVIDENCE AS TO WHEN ANY MANAGEMENT EMPLOYEE(S) LEARNED ABOUT THE “UNION MEETING,” WHAT THEY KNEW ABOUT IT, AND WHETHER IT WAS A FACTOR IN THE LAYOFF DECISION

A. There is No Factual Support for the ALJ’s Finding that Ladd “Knew All About the Union Meeting When He Helped Decide Who Was To Be Laid Off

Building on her erroneous conclusion that Ladd had anti-union animus based on his single casual comment to DeCarlo, the ALJ then compounded the error by finding that “[i]t is clear that Ladd knew all about the union meeting when he helped decide who was to be laid off” based on a conversation between Ladd and Bruno on September 7, 2010. (ALJD 19:8)

In her ALJD, the ALJ stated that

It is not necessary for purposes of this ALJD to decide what involvement headquarters in Virginia had when Ladd and Ferrer made up the layoff list and Pasquale approved it. It is clear that Ladd knew all about the union meeting when he helped decide who was to be laid off. ... Consistent with Ladd’s comment that “everything got back to Virginia,” I find that Respondent’s managers in Lyndhurst and in Virginia were aware of the union meeting when the layoff list was compiled.

(ALJD, 19:7-15). The ALJ’s findings in this regard must be rejected because they are not based on evidence in the record.

On September 7, 2010, Bruno went to Ladd to complain about being laid off, and in the course of Bruno’s complaining, the following exchange occurred:

Bruno²: I just think it's bullshit. Joe should fucking stick up for the guys that are up here doing the right thing. I didn't rob from McClain. I don't get high on the job. I do my job and I go home. These all fucking guys, all cause all sorts of problems, get high on the job, fucking crash. Nothing happens to them. It happens to me. That's fair?

Ladd: I'm sure the union didn't fucking help it.

Bruno: What union?

Ladd: The union meeting you guys went to. That didn't help it.

Bruno: What union meetings? (sic)

Ladd: The union meeting you guys went to. I'm sure that didn't help it.

Bruno: I don't know what you're talking about.

Ladd: Okay. Well, then, people are lying.

Bruno: What people? What? What?

Ladd: I don't know. Whoever went to the union meeting. There's another one on the eighth, right, tomorrow?

Bruno: I don't know nothing. I don't know what you're talking about.

Ladd: Okay. Well, then ---

(Ex. GC-8a 9:8-10:2) Respondent acknowledges that, based on this exchange, as of September 7, 2010, Ladd knew that Bruno had attended a meeting with the union representative on August 25, 2010, and that he knew that a second meeting had been scheduled for the following day. There is no evidence in the record beyond this transcript as to when or how Ladd learned this information or as to the extent of his knowledge. Nevertheless, the ALJ found that "Ladd knew all about the union meeting when he helped decide who was to be laid off." (ALJD 19:7-9)

² For the Board's convenience, we used names instead of "Speaker 1" and "Speaker 2" based on the parties' agreement that Speaker 1 is Frank Bruno and Speaker 2 is Alan Ladd. (Tr. 129).

In reaching this finding the ALJ disregarded the direction decreed by the Supreme Court and adopted by the Board, that presumptions of fact must be based on “a sound factual connection between the proved and inferred facts.” *Crown Bolt*, 242 NLRB at 778 (“the Supreme Court has cautioned the Board that our presumptions of fact ‘must rest on a sound factual connection between the proved and inferred facts.’ ... The Court described this connection ... as one in which ‘proof of one fact renders the existence of another fact ‘so improbable that it is sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it.’” (citing *NLRB v. Curtin Matheson Scientific, Inc.* 494 U.S. 775, 778-789 (1990) (*quoting* E. Cleary, ed., *McCormick on Evidence* § 343, at 969 (3 ed. 1984) (additional citations omitted). There is no sound basis between Ladd’s statements to Bruno on September 7, 2010 and the ALJ’s finding that Ladd knew all about the meeting at the time of the layoff decision. Therefore the ALJ’s findings in this regard must be overturned.

B. There is No Factual Basis for the ALJ to Conclude That Ladd and Respondent’s Other Managers Had Full Knowledge of the Meeting at the Time of the Layoff Decision.

The ALJ identifies no factual support for her presumption about what Ladd knew about the meeting and when, he knew it because none exists in the record. The General Counsel did not offer any testimony about how Ladd learned about Bruno’s attendance at the meeting, when Ladd learned this information, and what else, if anything, he knew about the meeting. Correspondingly, because the ALJ has no factual basis for her assumption, her further finding that Ladd knew “all about the meeting when he helped decide who was to be laid off...” and that Respondent’s managers in Lyndhurst and Virginia also had the same knowledge at the time of the layoff decision, must be overturned.

Ferrer and Pasquale each testified that Ferrer prepared the layoff list in mid-August, prior to the union meeting. (Tr. 257-258, 207) Ferrer also testified that he reviewed the records of

each employee before finalizing the list. The ALJ completely disregarded this testimony, even though the General Counsel did not present any evidence to refute it.

Ferrer and Pasquale each testified that he had no knowledge of Bruno meeting with a union representative, prior to Bruno telling Pasquale, and Pasquale telling Ferrer, on September 13, 2010. (Tr. 284-285; 233-234; 230; 266-267). The General Counsel offered no evidence to indicate that anyone told either of them prior to Bruno telling Pasquale. Clearly, the transcript of the exchange between Bruno and Ferrer on September 7, 2010 does not indicate that Ferrer had any knowledge of Bruno's attendance at the meeting at that time. In addition, Pasquale's questions to Bruno strongly support that he had no prior knowledge of Bruno attending a union meeting, as indicated by the following exchange:

Bruno: And, meanwhile, when I go to speak to Al he's telling me some other story about some kind of union, meeting, that I went to the union meeting. That's -- that's ---

Pasquale: All right. Did you go to a union meeting?

Bruno: It wasn't a union meeting.

Pasquale: What was it?

(Ex. GC-8a 14) If Pasquale knew that Bruno attended the meeting with the union, he would have had no reason to ask Bruno if he attended. Clearly, Ladd's definitive statements suggest that he knew that Bruno attended and, alternatively, Pasquale's questions suggest that he did not know whether Bruno attended. Therefore, the ALJ's finding cannot stand because it does not "rest on a sound factual connection between the proved and inferred facts." *Id.*

Moreover, the basis for the ALJ's conclusion that Ladd had anti-union motivation, which was imputed to Pasquale as the decision-maker, also lacks factual support. The facts in this case are very different than in *Bruce PackingCo.*, 357 NLRB No. 93 (2011), which the ALJ cites in support of her holding, where the Board held that "anti-union motivation of a supervisor will be

imputed to the decision-making official, where the supervisor has direct input into the decision.” In *Bruce*, the supervisor who had “‘substantial input’ into the layoff selection decisions, ... admitted that his selections were motivated solely by antiunion animus.” *Id.* at 4. There is no such testimony in this record that Ladd was motivated by anti-union animus when he gave input to Ferrer about the layoff list Ferrer was developing. Indeed, the basis for the ALJ’s conclusion that Ladd had anti-union motivation is his single, casual comment to DeCarlo in May or June

Accordingly, there is no legal or factual basis for the ALJ’s finding that Ladd had anti-union animus, and his single comment in May or June 2010³ is an insufficient basis on which to conclude that Ladd and all of Respondent’s managers “knew all about the meeting” at any time, no less at the time Ladd gave input to Ferrer about the layoff. Likewise, there is no factual or legal basis for the ALJ to infer that Respondent’s managers also “were aware of the union meeting when the layoff list was compiled.” Therefore, these findings must be overturned.

POINT IV

THE ALJ ERRED IN CONCLUDING THAT CASIANO AND BRATTOLI WERE LAID OFF BECAUSE THEY ATTENDED A MEETING WITH A UNION REPRESENTATIVE⁴

The Board discussed the standard for finding a Section 8(a) (3) violation in *Waste Management of Arizona*, 345 NLRB 1339 (2005), stating:

³ See Tr. 70 (Casiano testified that the conversation occurred during the period of time he worked in the yard) and Tr. 66 (Casiano testified he worked in the yard until the end of June 2010).

⁴ The ALJ used the same factual basis to find, incorrectly, that Respondent had knowledge that Casiano attended the union meeting and that Brattoli attended the union meeting, despite the absence of any record evidence to support these findings. In the interest of brevity and to avoid repeating the identical argument twice, we will argue the absence of employer knowledge simultaneously for both Casiano and Brattoli. The pretext arguments will be argued separately below.

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a) (3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity.

345 NLRB at 1355(citing *Wright Line*, 251 NLRB 1083 (1980), *enf'd*. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982)) (additional citations omitted). Thus, the key elements that the ALJ must have found to reach her findings with regard to Casiano and Brattoli are "union activity, employer knowledge, timing and employer animus." *Id.* As demonstrated, *supra*, there was an insufficient basis on which the ALJ can find employer animus by Ladd, which the ALJ then imputed to Respondent generally. In the case of both Casiano and Brattoli, not only is there no evidence of employer animus, but also, there is no evidence in the record that Respondent had knowledge of any concerted activity by Casiano or Brattoli and, specifically, that Respondent knew Casiano or Brattoli attended the meeting with the union.

A. There is No Evidence in the Record That Respondent Knew That Casiano or Brattoli Attended a Meeting with a Union.

The ALJ relied on the same portion of the conversation between Ladd and Bruno to find that Respondent selected both Casiano and Barttoli for layoff because each man attended a meeting with a union representative. The ALJ specifically stated, "I have quoted above Ladd's statement that the employees' attendance at the union meeting didn't help in the layoff selection and Pasquale's statement that Bruno's attendance at the union meeting could be part of the reason he was laid off." (ALJD 21:7-10). Once again, the ALJ is reaching factual and legal conclusions that are not consistent with the record evidence.

A review of the relevant portions of the September 13, 2010 conversation between Bruno and Ladd demonstrates that it had nothing to do with either Casiano or Brattoli. (Ex. GC-8a 9:8-

10:2). Specifically, Bruno came to Ladd to ask about the August 13, 2010 warning, and why he was laid off, and then complained that he was being treated unfairly, and Ladd responded that he was sure the union didn't help. When Bruno feigned ignorance, Ladd said, "The union meeting you guys went to. That didn't help it." At no point during this exchange did Ladd reference of identify any other employees relative to a union meeting. (*Id.*)

Neither Casiano's name nor Brattoli's name was mentioned in this exchange, nor in any other portion of the transcribed conversation. (See Ex. GC-8a) Likewise, neither Casiano's name nor Brattoli's name is mentioned in either of Bruno's other two (2) transcribed conversations with Ferrer and with Pasquale. (See Ex. GC-8a, GC-8b). Although Ladd implies that Bruno was not the only person who attended the meeting, Ladd does not identify any other employee or give any indication of how many other employees he believes might have attended. Indeed, it is clear that Bruno is speaking only about himself when he is talking to Ladd. Nothing in this exchange can be read to identify Casiano or Brattoli, or indicate that Respondent had any knowledge whether either Casiano or Brattoli attended a union meeting.

The same is true for the conversation between Bruno and Pasquale. Bruno went to Pasquale because "Al he's telling me some other story about some kind of union, meeting, that *I went to the union meeting.*" (Ex. GC-8a 14 -15) (Emphasis added). Nothing about Bruno's statement even suggests that Ladd said that any other employee attended.

Thus, without justification or substantial support, the ALJ extended Ladd's comments to include Casiano and Brattoli, when the only employee Ladd identified as having attended a meeting was Bruno. The ALJ assumed facts not in evidence and drew no correlation between the facts and the inference, other than the timing that Casiano and Brattoli did not work after August 25 or 26, 2010. As discussed, *supra*, "presumptions of fact 'must rest on a sound factual

connection between the proved and inferred facts.’ ... ‘proof of one fact renders the existence of another fact ‘so improbable that it is sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it.’” *Crown Bolt*, 242 NLRB at 778 (citations omitted). There is simply no basis in the record for the ALJ to infer that Ladd had any knowledge of whether either Casiano or Brattoli attended the August 25, 2010 meeting, either at the time Ladd gave input to Ferrer on the layoff list, on September 7, 2010 when he spoke to Bruno, or at any time prior to Respondent’s receipt of the complaint in this matter.

Clearly the General Counsel did not meet its burden of proof regarding Casiano or Brattoli based “upon the preponderance of the testimony taken,” and did not establish its case in this regard by ‘substantial evidence.’” *Hanlon & Wilson Company v. NLRB*, 738 F.2d 606 (3rd Cir. 1984) (*citing* 29 U.S.C. § 160(c)). Rather, the ALJ relied on a mere “scintilla” of evidence that does little “more than create a suspicion of the existence of the fact to be established.” *Id.* at 610 (*citing* *NLRB v. Columbia Enameling & Stamping Co.*, 306 U.S. 292, 59 S.Ct. 501, 83 L.Ed. 660 (1939)). Accordingly, the Board must overturn the ALJ’s findings with regard to Casiano and Brattoli because there is not more than a scintilla of evidence to indicate that at the time of the layoff decision, Respondent had any knowledge that either Casiano or Brattoli attended the union meeting. Thus, the ALJ erred in finding that the General Counsel met its burden of proving the elements of “union activity, employer knowledge, timing and employer animus.” *Wright Line*, 251 NLRB 1083.

B. Respondent Selected Casiano for Layoff for Legitimate Reasons Unrelated to His Attendance at a Meeting With a Union Representative.

Even if the General Counsel had met this initial burden, the ALJ incorrectly found that the General Counsel satisfied his burden of proof on pretext.

A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.

Limestone Apparel Corp., 255 NLRB 722 (1981), *enf'd. sub. nom.* 705 F.2d 799 (6th Cir. 1982).

Ferrer testified that he selected Casiano for layoff primarily because prior to being accepted for transfer to the yard to train as Ladd's replacement, Casiano made "an agreement with Al Ladd in the yard ... that if Ivan -- basically if he doesn't abide it, we weren't going to put him back into the traffic." (Tr. 269). Pasquale likewise testified that Casiano was selected for layoff because "Ivan had an agreement with Al Ladd at the yard that he was to take over Al's position, so he transferred to the yard and was starting to train to take over that position. And the agreement was if that did not work out, he would not go back out on traffic control." (Tr. 212). Pasquale first learned about his arrangement from Ladd around the time when Casiano started working in the yard. (*Id.*).

The ALJ rejected this explanation as a pretext, despite Ferrer's and Pasquale's testimony, and despite Pasquale's prior consistent statement on the subject set out in his February 2011 Affidavit. (ALJD 21:5; Ex. GC-11 5-6) The ALJ also disregarded evidence of a prior example of this same arrangement, whereby, Casiano's predecessor in the position, Scott Ahlers, left Respondent's employ immediately after stopping work in the yard. (Ex. GC-9; see Tr. 68 (Casiano testified that he replaced Ahlers in the yard). The ALJ gave undue weight to the fact that Ferrer allowed Casiano to return to traffic control briefly "because he had a CDL license and ... there was a project that we needed him on" at the time. (Tr. 212).

The ALJ also disregarded the two (2) Warning Notices issued to Casiano in the short time he returned to traffic after leaving the yard. Casiano first received a Warning Notice on July 6, 2010 for failing to ensure the vehicles were emptied upon return to the yard. (Ex. R-1).

On cross-examination, Casiano tried to belittle the Warning, even though it was a clear violation of Company policy, and even he accepted the Warning Notice, initially. (Ex. R-1).

Casiano also tried to dismiss a second Warning Notice issued to him on August 17, 2010 (Ex. R-2) by claiming he never saw it and mocking the date, which inadvertently was written as 8/17/81. First, the Warning clearly could not have been issued in 1981 because neither Ferrer nor Casiano worked for Respondent then. Second, Ferrer confirmed that he issued the Warning Notice in 2010 and that he must have written 8/17/81 instead of 8/17/10 because 8/17/81 is his date of birth, which the ALJ acknowledged is an understandable mistake. (Tr. 270 - 271).

Nevertheless, the ALJ refused to give any weight to this document, and in so doing, ignored the fact that Michael Alvarez, the identified organizer of the August 25, 2010 union meeting, signed the Warning Notice as a witness. (*Id.*; Tr. 32, 78-79, 105). Not only did Alvarez start with the Company in June 2010, giving credence to the date of the notice, but also, it is highly unlikely that just one week before the August 25, 2010 meeting, Alvarez would sign a Warning Notice to Casiano that was blatantly false. Accordingly, the ALJ erred by failing to recognize and give weight to documentary evidence in the record and found pretext based primarily on Casiano's unsubstantiated testimony.

C. Respondent Selected Brattoli for Layoff for Legitimate Reasons Unrelated to His Attendance at a Meeting With a Union Representative.

Ferrer testified that he selected Brattoli for layoff

Mainly because he stormed into the office flipping out, demanding to know what was going on with his work, kind of startled the young ladies in the office. He also had some write-ups. I worked with him in the past also. He has been here for a while, and we still had to instruct him on what to do. I mean after a while you should kind of pick it up on your own.

(Tr. 267). Pasquale provided a similar explanation, stating, "Danny had, what I'll call a meltdown in our office in New Jersey. And he was yelling at Joe Ferrer and using foul language

in the presence of the women that we had working in the office.” (Tr. 210). Pasquale was able to pinpoint the exact date of Brattoli’s meltdown as August 17, 2010 because Pasquale called into the office while out working with another regional manager. Pasquale heard Brattoli yelling, heard one of the female employee’s reaction to the yelling, and spoke directly to Brattoli, telling him to leave the office immediately. (Tr. 210-211)

Nevertheless, the ALJ found that “it is clear that Brattoli stormed into Ferrer’s office after he was laid off” so this could not have been the cause of his layoff. (ALJD 14:29; 21:30) Once again, the ALJ made a finding that not only is not supported by the facts in the record, but actually is inconsistent with evidence in the record.

First, the ALJ concluded that “[t]he failure to write up Brattoli for the incident in Ferrer’s office confirms that it took place after Brattoli was laid off.” On this point, the ALJ failed to consider that August 17 was the same time period when Ferrer was finalizing the layoff list, so he did not need to write up the Brattoli incident because Ferrer simply included Brattoli in the layoff instead.(Tr. 257-258, 207)

Second, the ALJ concluded that Brattoli’s meltdown occurred after his layoff, on August 30, 2010, the date Ferrer wrote the second email discussed, *infra*. The ALJ ignores the record evidence and practicality that Brattoli’s last day of work was August 26, 2010, which was a Thursday, so August 30, 2010 was a Monday. (Ex. GC-9) Brattoli testified that he spoke to Ladd, Ferrer and Pasquale about why he was not working “[w]ithin the next following weeks, a week or two, you know. I mean, if you go a week without work, you’re starting to worry....” (Tr. 117-118) Thus, based on Brattoli’s own testimony, his meltdown could not have happened

on Monday, August 30, 2010 because he had worked just two (2) days earlier, and he would not start to get worried until he had not worked for at least a week.⁵ (*Id.*)

The ALJ also erroneously used the fact that Ferrer, Pasquale and Ladd did not specifically tell Brattoli that his meltdown was the reason for the layoff as confirmation the meltdown that it was a pretext and not the true reason for Brattoli's layoff. (ALJD 21:24, 42) The testimony is not specific as to whether Brattoli specifically asked why he was selected for layoff or simply why he was not working that week. Because Respondent did not have enough work to assign to all employees, then the answer was accurate. Further, given their recent experience with Brattoli's tirade, it is probable that Ferrer, Pasquale and Ladd did not want risk a recurrence by mentioning the earlier meltdown as the reason for Brattoli's layoff.

In summary, the ALJ's finding that Brattoli was selected for layoff due attending a union meeting and not due to his meltdown, is based on assumptions that are not supported by record evidence, and are contradicted by specific testimonial and documentary evidence. In addition, as discussed, *supra*, the ALJ's finding that Respondent's managers had knowledge of Brattoli's attendance at the meeting based on Ladd's conversation with Bruno, is contrary to the unrefuted facts and the law. Therefore, the Board must overturn the ALJ's finding that Brattoli was selected for layoff due to protected conduct.

⁵ Notably, the email shows a time of 11:12 a.m., relatively early in the morning, which supports that Ferrer did not prepare it the same day after Brattoli's meltdown, but, that the meltdown occurred sometime prior to the date of the email. (Ex. GC-3)

POINT V

LADD DID NOT CREATE THE IMPRESSION OF SURVEILLANCE WHEN HE TOLD BRUNO HE KNEW BRUNO ATTENDED A MEETING WITH A UNION.

Ladd did not create the impression of surveillance when he mentioned to Bruno about this attendance at a union meeting, both as a matter of law and based on the specific content of his comments. The ALJ erred when she found that on September 7, 2010 Ladd “created the impression that the employees’ protected concerted activities were under surveillance” when he told Bruno that he knew employees had attended a union meeting and asked, “There’s another one [union meeting] on the eighth, right? Tomorrow?” (ALJD 22:10-14) The ALJ erred because she based her finding on only a portion of Ladd’s comments; when considered more completely, the facts demonstrate that Ladd’s statements do not satisfy the standard to prove that Respondent created an unlawful impression of surveillance.

In *Bridgestone Firestone South Carolina and United Steelworkers of America, AFL-CIO*, the Board discussed the standard for analyzing allegations that an employer created an impression of surveillance, stating:

In determining whether an employer’s statement has created an unlawful impression of surveillance, the test is “whether the employees would reasonably assume from the statement that their union activities had been placed under surveillance.” *Flexsteel Indus.*, 311 NLRB 257, 257 (1993); *United Charter Serv.*, 306 NLRB 150 (1992). The standard is an objective one, based on the perspective of a reasonable employee. *Flexsteel, supra*. The General Counsel has the burden of establishing, by a preponderance of the evidence, that the employer unlawfully created the impression of surveillance. *Grouse Mountain Lodge*, 333 NLRB 1322, 1323 (2001).

Not all employer statements about employees’ union activities are unlawful. An employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily provided. As we recently reaffirmed in *North Hills Office Services*, “The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer*”. 346

NLRB No. 96, slip op. at 6 (2006) (emphasis in original)). Thus, merely telling employees that their coworkers have volunteered information about ongoing union activities does not create an impression of surveillance, particularly in the absence of evidence that management solicited that information.

350 NLRB 526, 527 (2007).

In addition to the portion of the exchange cited by the ALJ, in fact, in between the referenced statements, Bruno said he did not know what Ladd meant about Bruno attending a union meeting, and Ladd said, “Okay. Well, then, people are lying. ... I don’t know. Whoever went to the union meeting. There’s another one on the eighth, right, tomorrow?” (Ex. GC-8a 9:8-10:2) When viewed more completely, it is readily apparent that Ladd did not create an unlawful impression of surveillance because he plainly indicated that he was reporting information he heard from “[w]hoever went to the union meeting,” and had not observed Bruno personally.

In addition, Bruno knew that the five (5) who attended the meeting were not the only employees who knew about it because Bruno testified that he told at least three (3) other employees who did not attend about what happened at the meeting. Tr. 41 (“I basically spoke to, I believe, Gabe [Scianna] on my way home in the car, [about] what was said. Dave DeCarlo, I think I spoke to him the following day. Dave Mellie, I think I spoke to that evening when I got home.”). Based on the number of employees that Bruno knew had knowledge of the meeting, Ladd’s

statement that he knew that employees had held a union meeting would not have reasonably implied that [Ladd] had monitored employee’s activities, given the various other ways in which [he] might have learned of the nonsecret meeting. [Ladd] did not say or even suggest that he had learned of the meeting in any covert manner, nor did he suggest that he had any detailed knowledge about the extent of the employees’ organizing activity [other than knowing of a possible next meeting].

Waste Management of Arizona, 345 NLRB 1339 (2005).

In addition, Ladd did not create an impression of surveillance by mentioning a union meeting and not specifying the source of his knowledge. The Board discussed this type of scenario in *Mosher Steel*, where even if it were held though supervisors discussed with employees the number of employees who attended a union meeting, they did not give an impression of surveillance “[S]ince neither supervisor indicated the source of his knowledge, it was just as reasonable for the employees to assume that the source was innocuous and lawful (e.g., information voluntarily supplied by employees) as was forbidden and unlawful (i.e., surveillance of union activities).” 220 NLRB at 344 fn.22. At most, Ladd merely suggested to Bruno “that [his] coworkers have volunteered information about ongoing union activities” but such a suggestion “does not create an impression of surveillance, particularly in the absence of evidence that management solicited that information.” *Id.*

Thus, when Ladd’s complete statement is examined in the context in which it arose, the General Counsel did not meet its burden to prove that Ladd’s statement would cause employees “reasonably [to] assume ... that their union activities had been placed under surveillance.” *Flexsteel Industries*, 311 NLRB at 257. Accordingly, the ALJ erred in her finding and must be overturned.

POINT VI

RESPONDENT DID NOT THREATEN EMPLOYEES WITH LOSS OF JOBS TO DISCOURAGE THEM FROM COMPLAINING ABOUT WORK SCHEDULES

Ferrer issued three (3) email memos to employees between June and August 2010, and the ALJ found that two (2) of them threatened employees with loss of jobs if they continued to complain about work schedules. (ALJD 17:25) The ALJ’s determination must be overturned because a) the employees were not engaged in protected concerted activities, but rather, were

pursuing individual agendas without an intention to pursue collective action; and b) the ALJ applied an interpretation of the email that is not supported by the language of the email and the context in which Ferrer issued it.

A. Ferrer's July 21, 2010 Email is Not a Threat to Cease Protected Concerted Activities.

Ferrer issued an email on July 21, 2010 which states, in relevant part,

I have been getting numerous complaints from AL that some, NOT ALL of you are complaining to him about your shifts and who's doing what and getting what. I'm not going into the topic of how you should mind your own business and stuff like that. All I have to say is some of you aggravate him and then he aggravates me, so easiest way to remedy this is 1. You aggravate him. 2. He aggravates me. 3. I take you off schedule. Simple as that. He has nothing to do with the schedule so leave him out of it. You have a question, ask me. If I don't answer, keep trying. For those who analyze the schedule and notice an error by all means let me know via email or text and I will correct it, but don't call me about this guy doing this and that guy doing that, I need this, and I need that. I will not cater to your needs, so don't ask me to. And as always, please feel free to contact your Regional Manager if you are not cool with whats going on....have a nice day.

(Ex. GC-2).

In reaching her finding with regard to this email, the ALJ decreed that, "Ferrer made it clear to employees that their complaints had the ultimate effect of aggravating him and would result in their being taken off the schedule and not receiving any more work. Thus, Ferrer warned the employees not to call him with complaints about favoritism and decrease in hours of work on pain of losing their jobs." (ALJD 17:12-16). Based on the language quoted above, the ALJ misinterpreted the email and reached an erroneous conclusion.

First, the express language in the email indicates that its purpose was not to stop employees from raising complaints or concerns, but rather, to redirect those complaints and questions away from Ladd who, as the Equipment Manager, had no input into scheduling decisions, and to Ferrer, who is responsible for making assignments and scheduling. This is evident by Ferrer's statement that Ladd "has nothing to do with the schedule so leave him out of

it. You have a question, ask me. If I don't answer, keep trying." The express language of the email makes it patently clear that Ferrer was not saying that employees could not complain or ask questions about scheduling, but just that they should not complain to Ladd because scheduling was not part of his job. Notably, Ferrer specifically testified on cross-examination that the email was not his "response to workers complaining about not getting work," but rather, was "about them complaining to Al..." (Tr. 291). Notably, the GC offered no evidence that any employees stopped raising issues with Ferrer, or that any employee was removed from the schedule for complaining about scheduling, after July 21, 2010.

Ferrer, also testified, that without contradiction, Ladd had no input in "decisions as to who gets what assignment" and "[a]ll he had input to was equipment." (Tr. 279). Bruno sustained Ferrer's testimony when Bruno testified that if employees complained to Ladd about scheduling, he told them that he didn't make the schedules and to speak to Ferrer. (Tr. 21) (Ladd "was always complaining -- that we were complaining to him. He says, I don't make the schedules. It's not coming from me, so there's nothing I can do for you. Speak to Joe."). Bruno also testified that Ferrer was the person responsible for schedules. (Tr. 153).

Second, Ferrer specifically invited employees to complain to him if they found any errors in the schedule, but attempted to cut down on individual employees griping about how much work they received. (Ex. GC-2) ("For those who analyze the schedule and notice an error by all means let me know via email or text and I will correct it, but don't call me about this guy doing this and that guy doing that, I need this, and I need that. I will not cater to your needs, so don't ask me to.") Ferrer did not violate the Act by discouraging griping because "mere griping" does not constitute concerted activity. *Holling Press*, 343 NLRB at 303 (citing *Meyers I*, 268 NLRB

at 887 (citing *Root-Carlin, Inc.*, 92 NLRB at 1314 (1951)); *Mushroom Transportation Corp. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964).

The statements in Ferrer’s email are not coercive and do not to discourage concerted activities, but rather, they are an attempt to encourage employees to direct their complaints to the appropriate person, rather than one who has no authority to address these concerns. Ferrer specifically invited employees to bring any concerns to Ferrer’s supervisor, Pasquale. (Ex. GC-2) (“And as always, please feel free to contact your Regional Manager if you are not cool with whats going on...”). As such, the General Counsel has not proven, and the ALJ erred in finding, that Ferrer’s July 21, 2010 email violates the Act. See *NLRB v. K&K Gourmet Meats, Inc.*, 640 F.2d 460, 464 (3rd Cir. 1981) (“Absent a coercive character the statements cannot be considered violative of §8(a) (1) of the Act.” (citing *NLRB v. Gentithes*, 463 F.2d 557, 560 (3rd Cir. 1972)).

B. Ferrer’s August 30, 2010 Email Was Not a Threat to Cease Protected Concerted Activities.

The ALJ also found that Ferrer’s August 30, 2010 email threatened employees because it “referred to complaints made directly to headquarters in Virginia” and told employees that

if they had questions about payroll or if they had a question for him they could no longer come to the office to solve their problems on pain of being taken off the schedule. Ferrer implied that he had been directed to adopt this rule, thereby giving employees the impression that headquarters in Virginia had imposed the new procedure as retaliation for their concerted complaints.

(ALJD 17:19-24). The ALJ also discredited Ferrer’s explanation that he wrote the email in response to Brattoli’s “meltdown” in the office (see Tr. 268) based on the ALJ’s separate finding that the incident “took place after Brattoli was laid off...” (ALJD 21:25). As discussed, *supra*, in Section IV-C of this Brief, the ALJ’s finding with regard to the timing of Brattoli’s meltdown is not supported by Brattoli’s own testimony and must be overturned. Likewise, the ALJ’s determination regarding Ferrer’s August 30, 2010 email must be overturned because a) the

employees were not engaged in protected concerted activities makes no sense if they do not use, and b) the ALJ relied on an inaccurate understanding of the email.

In his August 30, 2010 email Ferrer wrote:

Hi everyone, just want to let everyone in on some changes made as of as late. Al no longer gets a copy of the schedule as you may already know. This is coming from Va. Apparently, a call may have been made down there and complaints were made about certain things that will not be mentioned so please don't ask. Also effective today, no one is allowed to come up to the office. If you have a payroll issue, please either call or email Chrystal with your concerns. If it's a question directed towards me, either call, email or wait at the yard. If anyone comes unannounced to the office, they will be taken off the schedule. Sorry it has to come to this guys, but it's out of my hands and I have to follow the rules given to me as you must follow the ones given to you.

And lastly, if your not getting enough work, filing for partial unemployment is your right so please pursue it. We are hitting September and anyone who's been in the game for a while knows how it gets toward the end of year. So don't be shy and apply....

(Ex. GC-3).

First, the plain language of the email makes it clear that Ferrer did not tell employees “they could no longer come to the office to solve their problems on pain of being taken off the schedule,” as the ALJ states. The email plainly states, “If anyone comes *unannounced* to the office, they will be taken off the schedule.” (*Id.*) (Emphasis added). Ferrer did not forbid employees from coming to the office, he merely wanted them to give him advanced notice that they were coming. Indeed, just one (1) week after sending out this email, Ferrer scheduled a meeting with Bruno in the office at Bruno's request. (Tr. 41-42)(“we had set up an appointment for the Tuesday right after Labor Day ... I went into the office....”). Also, Ferrer's request was reasonable, given his concern about unannounced visits based on his recent experience in the office with Brattoli, just 2 weeks earlier (See Tr. 268)(“It would have been much better if he had called and asked if he could come in, but he came in just flipping out.”).

Second, the ALJ's assertion that Ferrer's email "told employees that if they had questions about payroll or if they had a question for him they could no longer come into the office" is not consistent with the testimony that Ferrer interacted with employees by email, text or phone rather than coming into the office. For example, Brattoli testified that "[t]he office is in Lyndhurst on Stuyvesant Ave., which we almost were never at [sic]." (Tr. 98). Also, Bruno testified that Ferrer "just happened to be a person that just like to email and text..." (Tr. 41). See also, GC-2 (Ferrer wrote, "For those who analyze the schedule and notice an error by all means let me know via email or text and I will correct it..."). Ferrer also testified that when employees did not come to the office to raise complaints or questions to him. Instead, they waited until he came to the yard, and then pulled him aside individually to talk. (Tr. 275-276). Given that employees rarely came to the office, it is illogical to assume that Ferrer put in a requirement of prior notice as a means of threatening or retaliating against employees. If that was Ferrer's intention, he could have selected a rule change that would impact many employees, rather than a few.

Third, in an email dated June 11, 2010, which the ALJ did not even reference in her ALJD, Ferrer encouraged employees to register their complaints with Virginia, stating, "If you can't work under these conditions or feel you've been mistreated, report it..tell upper management that I'm not allowing guys to work dangerously multiple shifts, or not allowing guys to make overtime so that other guys cannot work." (Ex. R-10). Given that Ferrer suggested on June 11, 2010 that employees could contact Virginia with any complaints, it is inopposite that he would later threaten to discipline employees for following his suggestion just two (2) months later. Moreover, the facts do not support the ALJ's conclusion that employees would view the email as retaliatory for complaining to Virginia because Brattoli was the only employee who actually called Virginia to complain, and Brattoli was laid off before Ferrer issued the email.

Therefore, based on logic and reason the testimony and document evidence the most acceptable scenario is that Danny Brattoli melt-down on 8/17 and Joseph Ferrer email 8/30 in response to that was the reason he was selected for layoff.

C. Ferrer Explained Why He Referenced a Call to Virginia in His August 30, 2010 Email Even Though He Had No Knowledge of Any Actual Employee Complaints to Virginia

The ALJ questioned Ferrer's credibility based on her misimpression that Ferrer did not explain an "obvious contradiction" between his reference in his August 30, 2010 email to "calls to Virginia in which employees complained about certain matters," and his testimony that when he wrote the email, he did not know that "employees had called Virginia to complain." (ALJD 16:3-5) The ALJ's justification for finding Ferrer an unreliable witness is contrary to the record evidence, which establishes that Ferrer did explain why he referenced a call to Virginia in his email, and testified that he was not aware of any specific calls.⁶

Ferrer testified that one of the reasons he sent the August 30 email was because "Al was getting a copy of the schedules and guys knew that, so ... I just told everyone Virginia just changed everything, so Al gets no longer [sic] a copy of the schedule." Ferrer then explained that Virginia had not "changed everything" but he mentioned Virginia in the email because the employees "don't care much about Virginia. If I say, 'Virginia says this,' they all just leave me alone." (Tr. 272). (See Tr. 293 ("If I say [I take you off the schedule], they'll leave me alone. It's the same when I say Virginia say something, they'll leave me alone."))

Ferrer was an inexperienced manager, and used the reference to Virginia as "a scare tactic," but that does not mean that he knew about a single employee's call to Virginia that

⁶ Contrary to the ALJ's characterization, the evidence shows that only one (1) employee, Brattoli, made a call to Virginia and expressed any complaint or question to Mr. McClain.

happened a month or two prior to the date of his email. (Tr. 272; see Tr. 101 (Brattoli called Mr. McClain in the “June, July area.”)). The ALJ might not agree with Ferrer’s style of management and use of scare tactics, but “[m]anagement is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision.’ Only when such business judgment is inspired by motives prescribed by the Act can it be questioned....” *Kendall Co.*, 185 NLRB 947 (197)(citing *NLRB v. McGehey*, 233 F.2d 406, 413 (5th Cir. 1969). Likewise, “[t]he Act imposes no requirement that an employer exercise good business judgment and exacts no penalty because he exercises bad business judgment.” *Evening News Ass’n*, 258 NLRB 88 (1981). The ALJ’s criticisms of Ferrer go to questions about his management style and decision-making, which is beyond the scope of her authority.

Thus, based on the actual language of the emails, considered in the context of what else was happened at the time, the ALJ erred in finding that on July 21 and August 30, 2010 Respondent threatened its employees with loss of jobs if they continued complain about their work assignments. In addition, the ALJ erred by failing to consider Ferrer’s actual testimony and improperly discredited his business judgment, in finding that he threatened employees through his July 21 and August 30 emails. Therefore, the ALJ’s findings with regard to these emails must be overturned.

POINT VII

RESPONDENT DID NOT ENGAGE IN UNLAWFUL INTERROGATIONS BASED ON LADD’S AND PASQUALE’S CONVERSATIONS WITH BRUNO

As discussed, *supra*, Ladd and Bruno had a conversation on September 7, 2010, in which Ladd stated that he knew Bruno attended a union meeting. Pasquale and Bruno had a conversation the following week on September 13, 2010. Bruno initiated and secretly recorded

each of these conversations. The ALJ found that portions of each conversation constituted a coercive interrogation, however, the ALJ's findings are not sustainable and should be overturned based on the context and content of each conversation, and the applicable Board law.

The Board's test for evaluating whether an alleged interrogation violated the Act is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Sunnydale Medical Clinic*, 277 NLRB 1217 (1985) (citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), *aff'd*. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). and *Blue Flash Express*, 109 NLRB 591 (1954)). "Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation." *Demco New York Corp.*, 337 NLRB 850 (No. 135) (2002) (citing *Rossmore House*, 269 NLRB at 1178 fn. 20; *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Sunnydale Medical*, 277 NLRB at 1218.

In *Sunnydale Medical*, the Board confirmed that this test involves "a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation and does not ignore the reality of the workplace," regardless of whether the alleged interrogation involved "open and active union supporters" or employees "whose sympathies were unknown to the employer...." 277 NLRB 1217 (citing *Blue Flash*, *supra*). "It is well established that interrogation of employees is not illegal per se...." *Rossmore House*, 269 NLRB at 1177. Moreover, an "interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards." *Bourne*, 332 F.2d at 48 (citations omitted).

A. Ladd's Question to Bruno Did Not Constitute a Coercive Interrogation

In the course of Bruno's conversation with Ladd, Ladd said, "There's another one on the eighth, right, tomorrow?" (Ex. GC-8a 9:8-14) Contrary to the ALJ's finding, this single question in the context of the conversation did not constitute a coercive interrogation by Ladd.

As a preliminary matter, Ladd's one question is insufficient to constitute an interrogation. Nevertheless, an analysis of Ladd's exchange with Bruno under the applicable standards confirms that the ALJ erred in finding Ladd's question to be an unlawful interrogation.

Bruno was not an "open and active union supporter," although at the time of the conversation, Ladd presumably knew that Bruno attended a meeting, and Bruno also had told at least three (3) other employees about the meeting on or about the day it occurred. (Tr. 41) The record does not demonstrate any history of hostility or discrimination by Respondent against unions, and the conversation at issue occurred at Bruno's initiation when he approached Ladd.

As to the nature of information sought, Ladd did not actually seek any information. Ladd's statement, "There's another one on the eighth, right, tomorrow?" arose as part of Ladd's statement, "I don't know. Whoever went to the union meeting. There's another one on the eighth, right, tomorrow?" (Ex. GC-8a 9:22-24) Although a question, Ladd was confirming information he already knew, not making a new inquiry, so his conduct is not unlawful. See *Rossmore House*, 269 NLRB at 1178, 1180 (finding questions by a high level supervisor and by the owner of the company that merely confirmed information but did not contain any threats, did not violate §8(a) (1) of the Act).

Ladd did not ask Bruno about whether he supported the union or who else was involved, or anything else. Nothing about Ladd's "question" supports that he was seeking information on which to base taking action against individual employees. *Cf. Raytheon Corp.*, 279 NLRB 245 (1986) (finding a supervisor unlawfully interrogated employees by asking how many attended a

union meeting, who attended, whether specific employees attended, and if anyone signed union cards).

As to the identity of the questioner, Ladd was a first line supervisor with no direct supervisory responsibility over Bruno or other employees. (See Tr. 153 - Bruno confirms that Ferrer was his supervisor) Ferrer sought Ladd's input on certain employee-related issues, but "[a]ll he had input to was equipment. (Tr. 279). The conversation occurred outside "in the Lyndhurst yard" (Tr. 57:3), and as the initiator, Bruno determined the location. This was not a situation where a supervisor called an employee into an office to interrogate the employee.

The conversation began casually, although Bruno became agitated at times, he was calm during the portion of the conversation when Ladd asked the alleged question. When Bruno indicated he knew nothing about the topic, Ladd simply dropped it and the conversation continued without ever returning to the subject of a union or a union meeting. (See GC-8a 10:2 ("Okay. Well, then ---")).

Ladd offered no opinion regarding future events or consequences, and, therefore, did not make or imply any threats. In the course of the conversation, Ladd encouraged Bruno to speak to higher level managers. Also, based on the tone of the conversation and the language Bruno used, the conversation was informal and not coercive by Ladd. Cf. *In Re Celtic Gen. Contractors, Inc.*, 2-CA-32313, 2002 WL 715365 (NLRB Div. of Judges Apr. 19, 2002) (questioning found to be coercive where, *inter alia*, the supervisor initiated the conversation and made threats).

Based on the totality of the circumstances surrounding this conversation, there is insufficient evidence on which to find that the General Counsel satisfied these "fairly severe standards" and has not shown that Ladd's statement "reasonabl[y] tend[ed] to restrain, coerce, or

interfere with rights guaranteed by the Act.” *Sunnydale Medical Clinic*, 277 NLRB 1217. Therefore, the ALJ erred in finding Ladd’s “question” constitutes an unlawful interrogation and the ALJ’s finding must be overturned.

B. Pasquale’s Conversation with Bruno Did Not Constitute a Coercive Interrogation

The ALJ improperly found that Pasquale’s questions to Bruno during their conversation on September 13, 2010 amounted to a coercive interrogation because, in response to Pasquale Bruno’s answer whether Ladd was correct that Bruno’s attendance at a union meeting was a reason for his layoff, Pasquale explained that he wanted to be honest with Bruno and Ferrer also that he did not know about any union and did not consider it in selecting for layoff, he had not yet confirmed with Ferrer, that “might be part of it,” rather than simply saying no (Tr. 232 (“I didn’t know of Mr. Ferrer knew about any Union business. He’s the one that made the decision.”)). Immediately following the conversation with Bruno, Pasquale spoke to Ferrer and confirmed that Ferrer had no knowledge of union activities and that it did not play a part in Bruno’s selection for layoff. (Tr. 233-234).

Nevertheless, an analysis of Pasquale’s exchange with Bruno under the applicable standards confirms that the ALJ erred in finding Pasquale’s questions to be an unlawful interrogation. In her decision, the ALJ once again quotes only excerpted statements from the conversation, thereby, disregarding the full context of the conversation and the specific questions the ALJ found to be coercive.

After some preliminary conversation, Bruno raised the matter of a union, stating, “And, meanwhile, when I go to speak to Al he’s telling me some other story about some kind of union, meeting, that I went to the union meeting. That’s – that’s ---“ Trying to understand Bruno’s story, Pasquale responded by asking, “All right. Did you go to a union meeting?” When Bruno

said, “It wasn’t a union meeting.” Pasquale asked, “What was it?” Bruno replied, “It was a bunch of guys talking,” and Pasquale said simply, “Okay,” but when Bruno continued to pursue the issue, Pasquale offered, “All right. Well, I mean, if you’re so jacked on the union, go join the union.” Bruno then stated, “No one was joining the union. I went to listen to what somebody was telling me. It wasn’t a union meeting. It was a bunch of guys talking. That’s what it was.” Pasquale again responded, “Okay” and did not pursue the subject further, until Bruno again raised the issue of a union.

Specifically, Bruno said,

But then--but then when I go to speak to somebody I speak to Joe, ask Al. Al did it. I ask Al, Joe did it. I ask them, they say speak to you. And then I got to get Al’s remark about well, that union meeting didn’t help. Meanwhile, there wasn’t no union meeting. I went to hear what a guy had to say. That’s all it was. But now you’re saying it may have played into it, so, obviously, they went—it affected my job.

In a continuing effort to understand Bruno’s point, Pasquale responded to Bruno’s statement by asking, “Was it a union guy?” Bruno answered and Pasquale did not ask any follow up questions, and neither of them mentioned the union or the meeting again. (Ex. GC-8a 14:14-15:2, 20:5-21:14). When Pasquale’s questions are considered in context and analyzed in accordance with the standards set out in *Rossmore House, supra*, and *Sunnydale Medical, supra*, it is apparent that the ALJ erred in her finding that Pasquale coercively interrogated Bruno.

Bruno was not an “open and active union supporter,” however, it was Bruno, not Pasquale, who initiated the subject of a union and a union meeting, and it was Bruno who kept returning to the topic during the conversation. As to the background, there is no proven history of hostility or discrimination by Respondent against unions, and the conversation at issue occurred at Bruno’s initiation when he contacted Pasquale and made an appointment to see him.

As to the nature of the information sought, each of Pasquale's questions corresponded to statements made by Bruno. When Bruno told Pasquale that Ladd said Bruno's layoff related to him attending a union meeting, Pasquale naturally asked Bruno if he went to such a meeting. Bruno did not respond simply by saying, "no." Instead, Bruno responded, "[i]t wasn't a union meeting," which naturally led Pasquale to ask, "What was it?" (Ex. GC-8a 14:14-23). Based on Bruno's response, Pasquale's question was not seeking information about a union or union involvement because Bruno already told Pasquale that Bruno did not attend a union meeting. When Bruno's answer revealed some connection to protected conduct, Pasquale did not pursue the matter further. Thereafter, Bruno brought the conversation back to the subject of a union meeting when he said, in part, "Meanwhile, there wasn't no union meeting. I went to hear what a guy had to say. That's all it was." Pasquale simply asked a clarifying question about the "guy" Bruno went to hear, and did not pursue the matter any further.

Pasquale did not ask Bruno if he supported the union and did not ask anything else about who was involved with the union or what was happening. Indeed, twice during their conversation Bruno described the meeting as: "It was a bunch of guys talking." (Ex. GC-8a, 14:24-25, 15:14-15). These statements were a clear opening for Pasquale to ask follow up questions to Bruno about the names of these guys or the subject of their conversation, but instead, Pasquale's response in each instance was simply, "Okay." (Ex. GC-8a, 15:1, 16). Pasquale also did not ask Bruno anything about his interest in or support of the union or whether Bruno planned to join or, indeed, anything about any plans the union might have relative to Respondent. Based on this conversation, Pasquale "does not appear to be seeking information on which to base taking action against individual employees."

Pasquale is the Regional Manager with overall responsibility for the New Jersey location. Nevertheless, Bruno sought out Pasquale; Pasquale did not initiate or pursue a conversation with Bruno. The nature of Pasquale's questions was "general and nonthreatening" and did not indicate that Pasquale was exercising any power or influence over Bruno. See *Sunnydale Medical Clinic*, 277 NLRB 1217.

Bruno scheduled an appointment with Pasquale at Respondent's office, and the conversation occurred in a vacant storage room located across the hall from office. Pasquale did not have a private office in New Jersey, so he offered to go across the hall to the vacant room in order to allow them to speak privately, given that Bruno clearly had something that he wanted to discuss with Pasquale. The transcript confirms that the conversation was informal and directed primarily by Bruno. (See Ex. GC-8a). Again, this was not a situation where the supervisor called a subordinate employee in for a meeting and questioned the employee about protected concerted activities. The conversation was casual and relaxed for both parties.

Pasquale's questions and the conversation with Bruno cannot be classified as a coercive interrogation because there was nothing coercive in Pasquale's question or tone. *Cf. Demco*, 337 NLRB at 851 (finding that question was coercive because "the tone of the questioning changed to hostile as soon as the union was mentioned.") Pasquale did not make any threats or promises to Bruno and, if anything, expressed support for Bruno if he wanted to join a union. (Ex. GC8(a) 15:8-10 ("All right. Well, I mean, if you're so jacked on the union, go join the union.")).

Significantly, Bruno gave Pasquale several opportunities to delve deeper, but he did not take the bait; Pasquale did not ask Bruno about his or any other employee's participation or level of support for the union and did not discuss possible consequences. Even if any of Pasquale's questions could be interpreted as an inquiry about Bruno's view of the union, the conversation

still could not be found to be a coercive interrogation because “section (8)(a)(1) does not proscribe all inquiries into employees’ union sympathies, it is only ‘when doing so suggests to the employees that the employer may retaliate because of those sympathies’ that a violation occurs. *NLRB v. K&K Gourmet*, 640 F.2d at 465 (citation omitted). Moreover, Section 8(a)(1) does not limit employers’ constitutional right to ask their employees non-coercive questions with regard to unions. *Rossmore House*, 269 NLRB at 1177.

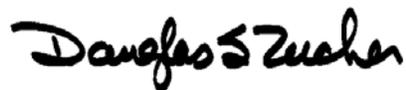
Therefore, based on the actual conversation between Pasquale and Bruno, considered in the context in which it Pasquale’s questions arose, Pasquale did not engage in a coercive interrogation of Bruno. Accordingly, the contrary finding by the ALJ must be overturned.

CONCLUSION

For the foregoing reasons, Respondent, McClain & Company, Inc., respectfully requests that the Board grant each of the Exceptions listed in the attached listing of Exceptions to Administrative Law Judge Eleanor Macdonald’s Decision in this matter.

Respectfully submitted,

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