

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

AMGLO KEMLITE)	
LABORATORIES, INC.)	
)	
Respondent,)	Case No. 13-CA-65271
)	
and)	
)	
BEATTA OSSAK)	
)	
Charging Party.)	

**RESPONDENT AMGLO KEMLITE’S BRIEF IN SUPPORT OF ITS
CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE’S DECISION**

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INTRODUCTION

This case involves an alleged Section 8(a)(1) violation stemming from an unprotected sit down strike following which many employees were recalled, and other employees were placed on a preferential hiring list. The Board should decline to adopt the Administrative Law Judge's (ALJ's) decision because the ALJ applied legal standards that do not apply to Section 8(a)(1) post-strike recall cases; he incorrectly applied a Section 8(a)(3) analysis when no Section 8(a)(3) violations have been alleged in the complaint; and his factual findings are clearly erroneous and contradicted by the record evidence.

The facts giving rise to the complaint center around Tuesday, September 20, 2011, at about 8:40 a.m., when all of the production and maintenance employees (about 84 employees) at Amglo Kemlite Laboratories, Inc.'s ("Amglo" or "the Company") Bensenville, Illinois facility commenced a six-hour "sit down" strike inside the Company's plant. The strikers occupied Amglo's plant for those six hours, preventing any significant work from being performed. Within the first hour of the strike the strikers presented their wage grievance to the president of the company and the plant manager, and the president and plant manager clearly and unequivocally rejected those demands, with the plant manager telling employees to either go back to work or leave the premises. But the employees neither went back to work nor left the premises. Instead, they remained inside the plant for approximately six hours, with about half of the employees staying 90 minutes past the end of their shift. When several employees attempted to work, they were shouted down and prevented from doing so.

During the sit-down strike, Amglo management learned that the strikers had plans to "occupy" the plant again the following day. Because some of the strikers had keys to the facility, the Company changed the locks to the plant. When management arrived at the plant the following day (Wednesday September 21), they found the strikers – again about 80 strong – assembled in the employee parking lot. Managers Izabela Christian, Ania Czajkowska, and

Larry Kerchenfaut, and Bensenville Police Officer Joseph Melone addressed the strikers and invited them multiple times into the plant to work. When none came, Officer Melone informed the strikers that they could not remain on Amglo property.

Immediately after addressing the strikers, Czajkowska and Christian began calling supervisors (all of whom participated in the strike), asking them to return to work, and urging them to ask their direct reports to return to work. And later that day, ten strikers returned, without condition or consequence. On Thursday and Friday September 22 and 23, Czajkowska and Christian continued to call employees, and on each morning went outside the facility to gesture to the strikers to return. On those days, an additional 18 strikers returned without condition or consequence. Additional strikers returned on Monday September 26 and the morning of Tuesday September 27 without condition or consequence.

On the afternoon of Tuesday September 27, the remainder of the strikers offered to return to work. Over the course of the next few days, Amglo recalled most of these strikers without condition or consequence. However, because the Company had both determined that its business needs could not justify the full complement of pre-strike employees, and because the Company had hired a small number of permanent replacement workers, 22 strikers were not recalled, and were, instead, placed on a preferential recall list.

On December 30, 2011, the Regional Director for Region 13 of the National Labor Relations Board (“Board”) filed a Complaint alleging that Amglo violated Section 8(a)(1) of the National Labor Relations Act (“the Act”) because: (a) the strikers were engaged in protected activity, (b) the strikers were terminated in retaliation for their protected activity, (c) Czajkowski told the strikers that “things would not end well for them” if they continued to strike, and (d) the Company transferred work from its Bensenville facility to its Juarez, Mexico facility in retaliation for the strikers’ protected concerted activity.

A hearing was held in January and February 2012, and on March 22, the ALJ issued a decision finding the strikers' actions protected, although he also concluded, correctly, that no employee had been terminated in retaliation for the strike. Rather than dismissing the Complaint on these grounds, however, the ALJ created an entirely new theory of the case – asserting that Amglo engaged in a discriminatory *layoff* of the 22 employees who were not recalled from the strike. The ALJ's new theory of the case, which was not alleged in the Complaint, was predicated on a false suggestion that *Amglo* maintained that the 22 employees had been laid off – a claim that Amglo has never made at any time.

For multiple reasons, the ALJ's decision is wrong on the facts, wrong on the law, and should be reversed.

First, the strikers' conduct on Tuesday September 20 removed their actions from the protection of the Act. The strike severely interfered with production, as essentially no work was done at the Bensenville facility on September 20. The strikers very clearly had an opportunity – within the first hour of the six hour strike – to present their wage grievance to management; yet despite that grievance being clearly, unequivocally, and repeatedly rejected, and despite being unambiguously told to return to work or leave the premises, the strikers remained in the plant, not working, for more than five additional hours, with about half of the employees staying 90 minutes past the end of their scheduled shift.

Second, the ALJ violated Amglo's due process rights by creating an entirely new theory of the case that was not alleged in the Complaint and was not fully litigated, and by attributing to Amglo positions that the Company plainly did not assert in this case. The Regional Office in this case had months to investigate the charge and compile multiple position statements, interview notes, and witness affidavits before issuing the Complaint. The Complaint contains the specific allegation that employees were *terminated* after they initiated a work stoppage, and this allegation was properly rejected by the ALJ. Thus, the complaint should have been dismissed

based on the ALJ's rejection of the theory espoused by the General Counsel. There was never an attempt to amend the Complaint to include other allegations, and the Board should not countenance the ALJ's attempt to do so here, without Amglo being able to present specific defenses to any such new claim. As noted above, the ALJ incorrectly applied Section 8(a)(3) standards, for example – centering around intent and motivation – when no Section 8(a)(3) violation has ever been alleged in this case.

Third, the ALJ also reviewed the case under the wrong legal standard, suggesting that the employer had the burden of establishing a nondiscriminatory motive for implementing “layoffs,” when neither the General Counsel nor Amglo argued that “layoffs” occurred in the instant case. The ALJ thus ignored the decades-old *Laidlaw* standard that applies to the return of striking employees, in favor of a *Wright Line* analysis – that the ALJ once again got wrong.

Finally, even if the new allegations are accepted, they still do not support a violation in this case. The ALJ decision is clearly erroneous in its factual finding that Amglo acted with a discriminatory motive (even if one assumes, contrary to established Board law, that discriminatory motive is material to the Section 8(a)(1) violation alleged in this case). The ALJ also erred by ignoring massive and undisputed evidence that Amglo had legitimate and substantial business reasons for not recalling some employees when the strike ended.

For all of these reasons, the Board should reject the ALJ's reasoning, reverse his decision, and dismiss the Complaint.

STATEMENT OF FACTS¹

A. Amglo Kemlite Laboratories

Amglo Kemlite Laboratories, Inc. manufactures and markets lamps and related lamp components, and has facilities in Bensenville, Illinois; Juarez, Mexico; Largo, Florida, and China. (Tr. 295, Christian; 323-24, Kerchenfaut). Most of the employees at the Bensenville plant work on one of two main shifts – 5:00 a.m. to 1:15 p.m (about 50 employees), or 6:30 a.m. to 2:45 p.m. (about 40 employees) (Tr. 211, Czajkowska).²

Jim Hyland is Amglo's owner and CEO. (Tr. 318, Christian). He works out of the Company's Florida facility. (Tr. 189, Czajkowska). Larry Kerchenfaut is Amglo's Managing Director and CFO, and works at the Company's Bensenville facility. (Tr. 323-24, Kerchenfaut).

Izabela Christian is the President and COO of Amglo, and is based at the Company's Florida facility. (Tr. 294-95, Christian). As President and COO, Christian oversees everything related to operations, including production, quality control, purchasing, marketing, and engineering. (Tr. 301, Christian).

Grant Hyland works at the Company's Bensenville facility, and is the Company's Vice President of Sales and Marketing. (Tr. 350, Hyland). In this job, Hyland is responsible for finding new business, working with new customers to develop and design product, and being the interface between the customer and the design team. (Tr. 350-51, Hyland).

Finally, Ania Czajkowska is the Plant Manager of Amglo's Bensenville facility. (Tr. 170, Czajkowska). As Plant Manager, Czajkowska oversees production, maintenance, and

¹ References to the hearing transcript will appear as "Tr. __," with the name of the witness following in parenthesis. References to exhibits introduced at the hearing will appear as "GCX ___" for General Counsel Exhibits, "CX __" for Company Exhibits.

² The Bensenville plant also operates a much smaller second (evening) shift. (Tr. 211, Czajkowska).

quality control at the Bensenville facility. (*Id.*). Czajkowska reports to Izabela Christian and Larry Kerchenfaut. (Tr. 170, Czajkowska).³

B. The Relationship Between Amglo's Bensenville and Juarez Facilities.

Amglo's Juarez plant opened in 2001. (Tr. 185, Czajkowska; Tr. 365, Hyland). The Bensenville and Juarez facilities are "sister" facilities, and make, for the most part, the same customized Xenon flash lamps. (Tr. 350-51, Hyland). Because labor costs at the Juarez plant are far lower than labor costs at the Bensenville plant, and because there is "too much capacity in the industry for a declining market," the Company's business model centers around substantial ongoing transfers of Bensenville production to Juarez, which dates back at least to 2004 or 2005. (Tr. 363, 365, Hyland). Hyland testified that price competition is "the most important factor" in remaining competitive. (Tr. 359, Hyland).

However, the Bensenville facility remains very important to Amglo as an "incubator" facility to design and develop products, even though most of them end up being transferred to Juarez. (Tr. 364, Hyland). As Grant Hyland explained at the hearing:

Bensenville is very important in terms of an incubator. We design and develop product there which is a very important function because we've got to get the product out to the customer. Maybe we have to redesign it three or four times before it eventually becomes approved for production. So it fulfills an incubator function as well as a light manufacturing function. If there is a lamp in our product line that has small volume but a high margin, that's a lamp that generally we make the decision to keep in the Bensenville facility. We like to use the Mexico plant for higher volume runs in areas where we know we're in a competitive price situation to win a piece of business.

(*Id.*).

Indeed, the Company commonly provided bids to customers on certain products using Mexico labor rates rather than Bensenville labor rates for regular production. (Tr. 194,

³ A majority of the Bensenville employees are Polish. (Tr. 132, Ossak).

Czajkowska). In fact, as part of the ongoing work transfer process, the Company created a new, regular position, “Work Transfer Coordinator,” in 2010, which was a year before the work stoppage and occupancy of the premises that gave rise to the complaint (Tr. 195, Czajkowska; Tr. 304, Christian). The “Work Transfer Coordinator” position since its inception has been staffed by Margaret Chlipala. (*Id.*).

C. On September 19, Before Any Work Stoppage Occurred, President Christian Travels to Bensenville to Increase Transfers of Work from Bensenville to Juarez.

As part of her duties as President, Christian regularly travels to the Company’s facilities to meet with employees and spend time with them, and for other purposes as well. (Tr. 303-04, Christian). Christian had scheduled such a trip to the Bensenville facility for September 18, 2011.⁴ (Tr. 305, Christian). The September trip was for this purpose, but the “main reason” for the September trip was to see what could be done to accelerate the process for transfer of work from Bensenville to Juarez. (Tr. 302-03, Christian).

About one week prior to her September Bensenville trip, Christian spoke with Jim Hyland about staffing levels at Bensenville. (Tr. 302, Christian). They discussed that the Bensenville facility was overstaffed because the Company had been moving work to Juarez, which would require a reduction in Bensenville headcount in the relatively near future. (*Id.*). The Company had previously laid off about 30 employees in 2009, due both to the declining economy and the continuous transfer of work from Bensenville to Juarez. (Tr. 302-03, Christian; Tr. 355, Hyland).

Christian arrived in Chicago on Sunday, September 18, and was at the Bensenville facility on Monday, September 19. (Tr. 303, 305, Christian). During her visits with employees on September 19, Christian had a conversation with Bensenville employee Anna Faron. Faron

⁴ Unless otherwise noted, hereafter all dates in this brief are 2011.

told Christian that employees were asking for higher wages. (Tr. 305, Christian). Christian said she was aware of the requests for wage increases, and had spoke to Jim Hyland about potential increases. However, as Hyland had told her, she told Faron that the wages were frozen and there was “nothing we can do about [it] right now,” but that hopefully things would improve to the point where the Company could grant wage increases. (*Id.*).

D. The Bensenville Employees Engage in a Sit-Down Strike For Six Hours on September 20.

At approximately 8:40 on Tuesday, September 20, all of the Amglo production and maintenance employees – about 85 employees – stopped working and engaged in a sit-down strike in the assembly area of the plant. (Tr. 82, Dzeikan; Tr. 124, Ossak; CX-15; Kulikowski).⁵ The only purpose of the strike was to ask for wage increases. (Tr. 32, Kopec; 126, Ossak). After 8:40 a.m. on September 20, only two employees did any work during the remainder of the day. (Tr. 133, 139-40, Ossak).

Czajkowska and Christian were driving to the Bensenville facility at about 8:40 when Czajkowska received a phone call from Chlipala. (Tr. 175, 193, Czajkowska; Tr. 306, Christian). Chlipala told Czajkowska that employees were gathered in the middle of the assembly area and not working. (*Id.*).

E. Czajkowska and Christian Address the Striking Employees and Repeatedly Reject Demands for a Wage Increase.

Czajkowska and Christian arrived at the plant about 10-15 minutes after the call from Chlipala and proceeded almost immediately to the assembly area to address the employees. (Tr. 306, Christian). At no time between when Czajkowska received the call from Chlipala and Czajkowska and Christian first addressed the employees did either Czajkowska or Christian

⁵ The parties stipulated at the hearing that if Ewa Kulikowski had testified at the hearing, she would have testified to the contents of the affidavit she gave to Region 13 on October 6, 2011. (Tr. 348). The affidavit was entered into evidence as CX-15.

discuss terminating any employees or receive direction from anyone to terminate any employee. (Tr. 209, Czajkowska; Tr. 306, Christian). When they arrived at the assembly area, they found all of the production and maintenance employees in the assembly area, and none of them working. (Tr. 176, 196, Czajkowska).⁶

1. Czajkowska Rejects the Strikers' Demands for a Wage Increase, and Tells the Strikers to Either Go Back to Work or Leave the Facility.

Czajkowska spoke first, greeting the assembled crowd and asking why they were not working. (Tr. 199, Czajkowska; Tr. 306, Christian). Someone said that the employees were unhappy because of the lack of wage increases. Czajkowska responded that “as I told you before, the wage increases are frozen and nothing has changed.” (Tr. 176, 199, Czajkowska; Tr. 306, Christian). As every witness who was present testified, over the course of the next 45 to 90 minutes, Czajkowski repeated “many times” that wages were frozen, and that there would be no wage increases. (Tr. 158-59, Ossak); (*see also* CX-15 at 1, Kulikowski (“Ania said that wages were frozen”)); Tr. 369, Skomoroska (in response to the request for a wage increase, “Anna [sic] answered there is no chance [at] this time for that”); Tr. 381, Uchanska (“Anna [sic] and Iza answered that all the increases are frozen”); Tr. 34-35, 59, Kopec (“Anna [sic] spoke something that there is no possibility. There is no possibility to increase wages . . . After Anna spoke, Ms. Izabela who confirmed that there were no possibility to increase the wages.”); Tr. 84, 87, 88 Dzeikan (“Anna answered there would be no, any increases of the wages. . . . Anna said that all increases are frozen now and there will be no, any increases of the wages . . . She said nothing can be done now”); Tr. 127, Ossak (“There’s going to be no discussion about the wages. We

⁶ Czajkowska testified that neither she nor Christian had ever been in a situation previously where all of the employees stopped working, and had never prepared for such a situation. (Tr. 196, Czajkowska).

already had the discussion. I told you nothing's going to change. Nothing, we cannot do anything. The pay raises are frozen").⁷

Czajkowska also told the gathered strikers to either go back to work or leave the facility. (Tr. 59, 62-63, Kopec; Tr. 105-06, Dzeikan, CX-3 ("Anna said to go back to work and if anyone does not like it, they should punch out and go home."); Tr. 157-58, Ossak ("[Czajkowska said to] go back to work or punch out."). She repeatedly asked the gathered employees to return to work. (Tr. 199, Czajkowska; Tr. 306, Christian; *see also* CX-15 at 1, 2, Kulikowski ("Ania asked us to return to work . . . Ania said that if we wanted to work, we could work . . . She left it up to us."); Tr. 369, Skomoroska "[Ania] repeatedly asked [the strikers] to return to work"); GCX-9, Skomorowska ([Czajkowska and Christian] told employees "that they should return to work"); Tr. 381, Uchanska ("[Ania and Iza] asked the, the workers to return to work"); Tr. 84, Dzeikan ("What are you not working? Go back to work").

2. In Response to Striker Intimidation of an Employee Attempting to Return to Work, Czajkowska Tells The Employee Doing the Intimidating That "If [She] Doesn't Like it, [She] Can Resign."

Several witnesses testified that Czajkowska had some papers in her hand when she spoke to the assembled group. (Tr. 36, Kopec, Tr. 85-86, Dzeikan). Czajkowska confirmed that she had about 10 copies of what was introduced as General Counsel Exhibit 5. (Tr. 176, 198, Czajkowska). The document stated "Effective I have tendered my resignation and consider this as my last day of employment at Amglo," then included a signature line and a date." (GXC-5). Czajkowska testified that General Counsel Exhibit 5 was created several years before the strike, and was used for employees' files to show that they had resigned. (Tr. 196-97, Czajkowska). She testified that she took some of those forms before addressing the strikers

⁷ Dziekan also testified that she had asked Czajkowska about a potential raise a few months prior to September 20, and that Czajkowska had told her then as well that the wages were frozen. (Tr. 80, Dziekan).

because “I didn’t know what to expect. I knew that people are not working, so I don’t know if they want to quit or, I don’t know what was going on. So I took those forms in my hand.” (Tr. 198, Czajkowska).

Czajkowska testified after she told employees that there would be no wage increases and that they should go back to work or leave the facility, employee Stanislaw Pietras attempted to return to work. (Tr. 206-08, Czajkowska). However, another employee, Zofia Bialon “shouted down” Pietras, who then remained with the striking group. (*Id.*). After seeing this occur, Czajkowska put the form in front of Bialon and said “if you don’t like it, you can resign. Just sign the paper and you can go.” (Tr. 207, Czajkowska). Bialon did not take the form, but rather threw it away, and told Czajkowska to “sign it yourself.” (Tr. 36, Kopec, 128, Ossak). Czajkowska did not use the form at any other time during the strike. (Tr. 208, Czajkowska).

3. Christian Also Asks the Strikers to Return to Work, and Reaffirms That There Will Not Be a Wage Increase.

After Czajkowska finished speaking, Christian spoke to the strikers. She “assured them once again that what [Czajkowska] said was correct, that the owner was informed of the concern from people, but unfortunately we couldn’t do anything about [the wages] and there are no changes right now.” (Tr. 307-08, Christian; Tr., 176, 201, Czajkowska). Some employees asked to speak to the owner, Jim Hyland. Christian or Czajkowska responded that she was there to answer any questions on behalf of Hyland. (Tr. 85, Dzeikan; Tr. 128, Ossak).⁸

Czajkowska and Christian stayed with the group for somewhere between 60 and 90 minutes. (Tr. 308, Christian). During this time, both Czajkowska and Christian each asked employees to return to work at least three or four times, and each told the employees three or

⁸ Prior to September 20, 2011, Czajkowska had reported to Christian that some production employees at Bensenville had approached her about wage increases. (Tr. 302, Christian). On “a couple of occasions,” when Christian approached Jim Hyland about potential wage increases, Hyland told her that wages were still frozen. (*Id.*).

four times that there would not be any wage increases at this time. (Tr. 308, Christian). At no point during this conversation did either Czajkowska or Christian tell any employee that they were fired. (Tr. 200, Czajkowska).

4. Christian and Czajkowski Learn That the Strikers Will Not Leave, and Plan to “Occupy” the Plant Again the Following Day.

After they left the strikers, Czajkowska and Christian went back to the front offices. (Tr. 178, Czajkowska; Tr. 308, Christian). Around 1:00, they went to speak to Krystyna Skomorowska, a supervisor at the Bensenville facility. (Tr. 308, Christian). At no time between the time they left the striking employees and 1:00 did Christian discuss terminating any employees. (Tr. 309, Christian). Czajkowska and Christian asked Skomorowska to bring all of the managers and supervisors to the QC room. (Tr. 308-09, Christian; Tr. 369, Skomorowska).

At that point, Skomorowska went back to the assembled group of strikers and said loudly that Christian had asked all the supervisors to go to the QC room. (Tr. 370, Skomorowska). Skomorowska testified that “[i]n the beginning, there was a movement and a few persons, several persons wanted to go. And then people began to shout why do you go, where do you go, don’t go anywhere, and people withdrew from the movement.” (*Id.*).

Also around this time, despite having been told on multiple occasions that the Company would not raise their wages, the assembled strikers drew up a list of written demands. (Tr. 38, Kopec; 133, Ossak). One of the Amglo office workers typed up the list and gave it to Czajkowska while she was in the QC room. (Tr. 133, Kopec; Tr. 178, Czajkowska; *see also* GCX-3).⁹

⁹ The written demands consisted of a two-page document that was entered into evidence as General Counsel Exhibit 3. The first page of the document was in Polish. It was translated on the record as stating, “Strike. With regards of the conditions of ending the strike. We request hourly request even up actual hourly wages for every year from the last wage increase in a rate of every year of the inflation rate according to the attachment. We request written warranty (or guarantee) of every year to receive annual wage increase according to the annual

Skomorowska eventually returned to the QC room a short time later saying she had asked the supervisors to come, but that they had refused. (Tr. 309, Christian; Tr. 370, Skomorowska). Skomorowska told Czajkowska that she wanted to work, but that the strikers had warned her against it, and that employees were afraid to work. (*Id.* at 202-03). Skomorowska also told Czajkowska and Christian that the strikers were planning to stay until 2:45 p.m. on that day, and occupy the plant and engage in a sit-down strike again on the following day (Wednesday September 21). (*Id.*)¹⁰ She said that the employees had agreed to come at 5:00 a.m. on Wednesday (even those whose shifts started at 6:30 a.m.), and again sit in the middle of the plant, not working. (*Id.*; Tr. 212-13, Czajkowska; *see also* Tr. 107-08, Dzeikan; Tr. 160, Ossak).

5. At Approximately 2:45 p.m., Most of the Employees End the Sit-Down Strike and Leave the Plant.

At approximately 2:45 p.m., the strikers ended the sit-down portion of the strike, and left the facility. (Tr. 213, Czajkowska; Tr. 310, Christian; *see also* CX-15, Kulikowski (“[T]he group of workers, me included, remained there until approximately 2:45 p.m.)). Dziekan testified that her regular shift ran from 5:00 a.m. until 1:15 p.m., but that on Tuesday September 20 she stayed until 2:45 p.m, and that everyone except for “a few persons” also stayed until 2:45. (Tr. 77, 89, 106-07 Dziekan). Ossak and Stanislaw Wilusz testified similarly. (Tr. 122, 140, 159, Ossak; Tr. 390, Wilusz).

inflation, federal annual inflation. Signed, Amlgo employees.” (Tr. 137-39, Ossak). The second page of the document was a chart in English of “Current Inflation.” (GCX-3).

¹⁰ Czajkowska also spoke in private with Marius Cwik. (Tr. 202, Czajkowska). Cwik told Czajkowska that he wanted to work, but that other people were telling him not to work, and that employees were “afraid” to turn on their machines.” (*Id.*). Another employee (Pietras) attempted to work, but was prevented from doing so as well. (Tr. 205-07, Czajkowska).

6. Czajkowski and Christian Address Kopec and Wilusz, Who Remained in the Facility Past 2:45 p.m.

At about 3:00 p.m., Kerchenfaut told Czajkowska and Christian that there were still some employees in the building. (Tr. 310, Christian). Czajkowska and Christian approached those employees – Kopec, Wilusz, and one other employee, and told them to go home and come back tomorrow. (Tr. 215-16, Czajkowska; Tr. 310, Christian; Tr. 390, Wilusz).

7. Concerned With Potential Sabotage and Wanting to Avoid Another In-Plant Strike, the Company Changes the Locks to the Facility.

After most or all of the strikers had left the building, Kerchenfaut, Czajkowska and Christian called Jim Hyland to inform him of the strike, and of the strikers' plan to again "occupy" the plant the following day. (Tr. 181, Czajkowska). Because some of the strikers had keys to the Bensenville facility, and because the Company feared potential damage to equipment or product, the Company decided to change the locks of the facility on the evening of September 20. (Tr. 182, 216, Czajkowska; Tr. 338, Kerchenfaut).

That evening, Kerchenfaut stopped at the Bensenville Police Department and told the police that there had been a sit-down strike at the facility that day. (Tr. 338, Kerchenfaut). He asked the night shift to "make a few extra turns" around the plant because it was not well-lit during the night. (*Id.*).

F. Anglo Management, Along With a Bensenville Police Officer, Address the Strikers on the Morning of Wednesday, September 21, and Request that They Return to Work.

As Skomorowska predicted, the vast majority of employees arrived at the facility on the morning of Wednesday, September 21 at 5:00 a.m. (Tr. 42, Kopec; Tr. 90, Dzeikan; Tr. 140-41, Ossak). Because the locks had been changed, they were unable to enter the facility.

At 7:10 a.m., Kerchenfaut called the Bensenville police, spoke with Dispatcher Brandon Hurd, and asked for an officer to come to the plant to assist in dealing with the strikers. (Tr. 338,

Kerchenfaut; CX-14). Specifically, Kerchenfaut asked the police for assistance with asking the strikers – again – to return to work. (Tr. 338, Kerchenfaut; CX-14). Kerchenfaut told Hurd that the Company wanted “to ask employees *one more time* if they want to work or not,” and if not, he wanted police assistance in removing them from Amglo property. (Tr. 340, Kerchenfaut; CX-14, emphasis added).

Czajkowska and Christian arrived at the plant around 7:00 a.m. (Tr. 311, Christian). The employees were outside the plant, gathered at the back (employee) entrance, on Company property. (Tr. 312, Christian). Bensenville Police Officer Joseph Melone arrived at the Amglo facility at 7:32 a.m. (CX-14). Shortly thereafter, Czajkowska, Christian, Kerchenfaut, and Officer Melone addressed the crowd. (*Id.*; Tr. 312, Christian; Tr. 182-83, Czajkowska; Tr. 325, Kerchenfaut).

Czajkowska spoke first, in Polish. She had the employees’ time cards in her hand, and raised her hand and said “please come to work.” (Tr. 312, Christian; Tr. 216-17 Czajkowska). No one responded. Christian followed, also in Polish, by saying that the “door is open, please come in.” (Tr. 312, Christian, Tr. 220-21, Czajkowska). Kulikowski testified that “Ania or Iza said that they were inviting us to work, that anyone who wanted to work could come in.” (CX-15, Kulikowski).

The strikers again asked about wages increases, and if anything had changed since the day before, and Czajkowska again told them that there would be no changes to wages. (Tr. 183, 217, Czajkowska). One of the strikers said that they would not come back to work until there was a change in wages. (*Id.*). At that point, Elizabeta Tarosa, one of the strikers said “fire us” in Polish. (Tr. 185, 218, Czajkowska). Czajkowska responded to Tarosa, “no, you are trying to fire

yourselves. You're resigning because you don't want to return to work." (Tr. 185, 220, Czajkowska.

Kerchenfaut and Office Melone spoke to the strikers as well. Kerchenfaut also invited employees back into the plant, and said that because the employees were striking, they would be ineligible for unemployment benefits. (Tr. 221, Czajkowska; Tr. 326, Kerchenfaut; CX-15 at 2, Kulikowski). Officer Melone also told the strikers that they could come to work if they wanted to, but that if they did not return to work, they needed to leave Anglo property.¹¹ In his report, Melone reported – and the parties agree that he would have testified that:

Approximately 60 employees stopped work on 9-20-11. When they returned on 9-21-11 they were advised to either work or leave the property. The crowd was peaceful and given a copy of the village strike regulations.

(Tr. 312, Christian; CX-14; stipulated testimony of Officer Joseph Melone).¹² Despite the requests to return to work, no employees in fact returned at that time. Receiving no response, Czajkowska, Christian, and Kerchenfaut went back into the facility. (Tr. 313).

G. After Verbally Asking Employees to Return to Work, Czajkowska and Christian Begin Calling Employees to Appeal for Them to Return to Work, and Ten Employees Returned to Work on Wednesday, September 21.

After going back into the plant, Czajkowska and Christian began calling supervisors to ask them to come back to work, and to ask them to contact their direct reports and request that

¹¹ Kulikowski's testimony corroborates this statement. She testified that "[t]he policeman said that those who wanted to work should come in, and those who did not want to work had to leave because this was private property and we did not have a right to be here." (CX-15, Kulikowski).

¹² At the hearing, the parties stipulated that if Bensenville Police Officer Joseph Melone had testified, he would have testified to the narrative at the bottom of Company Exhibit 14. (Tr. 348; *see also* CX-14). The police report is definitive evidence regarding what Kerchenfaut said to the dispatcher on the morning of September 21, and regarding what Officer Melone said to the strikers on that same morning. That Melone does not speak Polish is irrelevant, as he and Kerchenfaut were speaking English, and he knew in advance that the Company was going to ask the strikers to return to work.

they return to work as well. (Tr. 314, 319, Christian; CX-4).¹³ Kulikowski testified that Czajkowska called her on September 21 and asked her to return to work. (CX-15 at 3, Kulikowski). Skomorowska testified that Czajkowska called her as well on Wednesday September 21, and asked her to call the employees in her department and asked them to return to work. (Tr. 371-72, Skomorowska). Skomorowska did in fact call those employees. (*Id.*). Wilusz testified that Czajkowska called him as well on Wednesday September 21 and asked him to return to work, which he did the following day. (Tr. 391, Wilusz).

Uchanska testified that Czajkowska called her as well, and asked her “to persuade my coworkers to return to work and promise them that they will not have any consequences from the strike.” (Tr. 381-82, Uchanska). Uchanska called one employee and told her that she would meet with her employees at 5:00 a.m. the next morning, face to face. (Tr. 382, Uchanska). She did not call any other employees because Jesse Kopec had told a group of employees “not to accept any phone call because they would probably persuade us to come back to work.” (*Id.*; Tr. 387-88, Uchanska). Uchanska did, however, meet with all 14 of her assembly employees at 5:00 a.m. on Thursday morning (September 22) and told them that Czajkowska and Christian wanted them to return to work, and that there would be “no consequences because of the strike.” (Tr. 383, 385 Uchanska).

Ultimately, ten employees returned to work on Wednesday, September 21, the second day of the strike, and all were accepted without conditions or consequences. (Tr. 314, Christian; CX-5). Dzeikan and Ossak testified that they were aware that these strikers had returned to work, and Ossak testified that she saw the strikers enter the plant. (Tr. 109-10, Dzeikan; Tr. 163, Ossak).

¹³ Company Exhibit 4 is Czajkowska’s cellular telephone bill from late September 2011, and shows a number of calls on September 21, 22, and 23 to Amglo supervisors. (Tr. 226, CX-4). Czajkowska also testified that she used the Company telephone to call other supervisors as well. (Tr. 277, Czajkowska).

H. Eighteen More Employees Return to Work on Thursday and Friday, September 22 and 23.

On Thursday September 22, Czajkowska and Christian arrived at the plant at 5:00 a.m. When they arrived, strikers were already gathered outside of the building on the street. (Tr. 314, Christian). Czajkowska and Christian, from a distance, went to the end of the driveway at the facility and “were gesturing to people to come [into work].” (*Id.*; Tr. 230-31, Czajkowska). Before the end of the day on Thursday September 22, 17 more employees requested to return to work, and all were accepted without conditions or consequences. (Tr. 314-15, Christian; CX-5). Kopec, Ossak, and Dzeikan testified that they were aware that these strikers had turned to work. (Tr. 69-70, Kopec; 110, Dzeikan, Tr. 164, Ossak).

On Friday September 23, Czajkowska and Christian again arrived at the plant at 5:00 a.m., and again, strikers were already gathered outside of the building on the street. (Tr. 315 Christian). Again, Czajkowska and Christian went to the end of the driveway to gesture for employees to return to work. (*Id.*). One additional employee requested to return to work on September 23, and was accepted without condition or consequence, making a total of 28 returning strikers. (*Id.*; CX-5).¹⁴

On the afternoon of Friday September 23, four employees came to Amglo’s front door and asked if the Company needed them for work. (Tr. 96-97, Dzeikan). Eventually, Czajkowska told the group of employees that they would need to “[f]ill in the application.” (Tr. 97, Dzeikan). The employees left, and later attempted to return, purportedly to fill out such “applications,” but by that time the front door was locked. (Tr. 98-99, Dzeikan). Czajkowska testified without contradiction that the “application” she was referring to was General Counsel Exhibit 2, the

¹⁴ The individual who returned on Friday, September 23 was a hearing-impaired employee. Czajkowska called his mother on the night of Thursday September 22 and explained that the Company would like him to return to work, and he did so the next day. (Tr. 231-32, Czajkowska; Tr. 315, Christian).

return to work paperwork that strikers signed as they returned to work, indicating that they were returning to work under the same conditions as existed prior to the strike. (Tr. 234-35, Czajkowska).

I. Not Knowing Whether The Strikers Would Return, the Company Interviews and Hires Four Permanent Replacement Workers.

Because the Company was unsure if the strikers would return, the Company interviewed a number of potential employees on Thursday and Friday, September 22 and 23. (Tr. 233, Czajkowska; Tr. 327-29, Kerchenfaut).¹⁵ Ultimately, four were hired as permanent replacement workers. (Tr. 186, 232 Czajkowska; Tr. 342, Kerchenfaut; GCX-4). These individuals were hired on Friday September 23, prior to the end of the strike on September 27, and went directly onto the Amglo payroll (as opposed to being paid by the temporary agency). (Tr. 342, Kerchenfaut). At the time of their hire, the replacements were told by Christian that they were being hired as permanent employees. (Tr. 393, Christian). Two of those individuals quit after one day; two remain Amglo employees. (Tr. 342-43, Kerchenfaut; Tr. 393, Christian).

J. The Company Determines, Based on Projections of Future Business, That it Does Not Need – And Cannot Justify – the Full Complement of Pre-Strike Employees.

Also on Thursday September 22, Grant Hyland returned to the Amglo facility from a business trip. (Tr. 353, Hyland). On that day, Hyland met with Czajkowska and Christian to discuss efficiencies and “what we thought our business was moving forward.” (*Id.*). At this meeting, Hyland told Czajkowska and Christian that he was “very confident that [Amglo was] moving into a soft patch.” (Tr. 354, Hyland). Accordingly, at this point the Company determined, based on prior production transfers and this assessment of projected business, that it

¹⁵ The applicants were provided by Clear Staff, an employment agency. (Tr. 327, Kerchenfaut).

did not need and could not justify the full complement of production and maintenance employees that had been employed prior to the strike. (Tr. 185, 234, Czajkowska).

Hyland's belief that the Company was moving into a soft patch stemmed from two main factors. First, since the economic crisis in 2008, customers had stopped making "blanket" orders. As Hyland testified:

Prior to the financial crisis, we pretty much could book our business based upon blanket orders that were in the system. Since that time, most of our customers buy product as they needed. They don't do a great amount of order placement that would be, you know, giving you great visibility moving forward.

(Tr. 354, Hyland).

Second, Hyland testified that the economic situation in Europe also factored into his belief that the Company was approaching a "soft patch." He testified that customers in China had expressed concern about the financial crisis in Europe. (Tr. 354-55, Hyland). He also testified that he feared that the situation in Europe was similar to what caused the American financial crisis in 2008 and 2009, and that the Company revenues had dropped 30 percent at that time. (Tr. 355, Hyland).

Hyland's prediction was true – both Company revenues and the quantity of lamps shipped dropped dramatically beginning in September 2011. (Tr. 235-40, Czajkowska; CX-6, CX-7). Amglo's fiscal year runs from September 1 to August 31. For fiscal year 2011, the Company had the following average revenues:

- FY 2011 1st quarter (Sept. – Nov, 2010): \$834,000/month
- FY 2011 2nd quarter (Dec. 2010 – Feb. 2011): \$802,000/month
- FY 2011 3rd quarter: (Mar. – May 2011): \$894,000/month
- FY 2011 4th quarter: (Jun. – Aug. 2011): \$813,000/month

But in September 2011 and following the strike, revenues were down sharply:

- FY 2012 1st quarter (Sept. – Nov, 2011): \$751,000/month

- FY 2012 2nd quarter (Dec. 2011 – Feb. 2012): \$678,000/month¹⁶

In other words, compared with the first quarter of fiscal year 2011, revenue in the first quarter of fiscal year 2012 (which included the month of the strike and the two subsequent months) was down 10%. (CX-7). Revenue fell even more in the second quarter, with revenue in December 2011 down almost 16% compared to average revenue in the second quarter of fiscal year 2011. (CX-7).

The number of lamps shipped by Amglo dropped dramatically as well during the same time period. (CX-6). From January to August 2011, the Company averaged 21,291 lamps shipped per month. (CX-6). From September 2011 to January 2012, however, the Company averaged just 16,534 lamps shipped per month, a decrease of more than 22% per month. (*Id.*).

Since the strike, Amglo has been able to complete all of its work without the 22 employees on the preferential recall list. For example, the assembly department had 14 employees prior to the strike, and 9 following the strike. But Assembly supervisor Teresa Uchanska testified that Assembly has enough employees to manage the production she has had since the strike. (Tr. 379-80, Uchanska). Wilusz similarly testified that since the strike, he has not had any problem getting all of the maintenance work done himself. (Tr. 391, Wilusz). No witness testified that the Company was having any problems completing production since the strike.

Hyland testified that he expects business to “continue to be very weak” in 2012, because “we have a lot of customers and a lot of partners that are still very concerned.

¹⁶ The FY 2012 number is an estimate based on December 2011 actual revenue of \$675,246.92, and estimated January revenue of \$680,000.00 (estimated as of January 27, 2012). *See* CX-7.

And so, the first thing that happens is everybody starts to cut inventory. And so that slows down the orders.” (Tr. 356, Hyland).

K. The Strike Continues on Monday and Tuesday September 26 and 27, and on the Afternoon of September 27, the Remaining Strikers Offer to Return to Work.

Christian remained in Bensenville on Monday and Tuesday September 26 and 27. (Tr. 315-16, Christian). Ossak testified in her affidavit – given September 27– that she heard from Dzeikan on Monday September 26 and that the Company was “waiting for us to come back,” but that she did not return to work that day (Tr. 165-66, Ossak). Kopec similarly stated that “I later got a call from one of the employees who told me that we would meet at the company instead because they want us back to work, that we were not fired.” (*Id.*).

Two additional strikers returned on Monday September 26, for a total 30, and seven more returned on the morning of Tuesday September 27, without condition or consequence, for a total of 37 returned strikers prior to the remainder of the strikers offering to return *en masse*. (CX-5).

L. The Remaining Strikers Offer to Return to Work.

On the afternoon of Tuesday September 27, the remaining strikers – about 50 individuals – offered to return to work. (Tr. 50, Kopec). The strikers were asked to and did sign a document stating that they were returning to work “under the same wages and working conditions I had when went [sic] on strike.” (GCX-2). Over the course of the next several days, the Company recalled all but 22 of these employees, and placed the 22 on a preferential recall list. (CX-5; Tr. 270, Czajkowska). On October 21, the Company sent letters to each of the 22 employees who are on the preferential recall list. (Tr. 188-89; GCX-6). The letter was to give employees “an update concerning your employment status with Amglo Kemlite.” (*Id.*). The letter reiterated to employees that their “employment has not been terminated and [they] have the right to be

recalled if and when we have job opening[s] in the future. We will recall employees from our preferential hiring list before hiring new employees.” (*Id.*).

M. The Company Transferred A Small Amount of Bensenville Work to Juarez on a Temporary Basis During the Strike, and Continued Its Long Standing Process of Assessing What Other Work Could Be Transferred to Juarez.

At the hearing, the Company introduced Company Exhibits 8-13, all of which dealt with the transfer of work from the Company’s Bensenville facility to the Company’s Juarez facility. Company Exhibits 8-12 were created and maintained by Amlgo’s Work Transfer Coordinator Margaret Chlipala in the course of her job duties, and list products that either have been or are scheduled to be transferred from Bensenville to Juarez. (Tr. 238-41, Czajkowska). The charts describe the Amglo part, the yearly quantity of product (which in some cases is an estimate), and other product information. (Tr. 243, 257 Czajkowska). Products are transferred according to different schedules, for the most part dependent on the time it takes to train the employees in Juarez to perform the work. (Tr. 243-44, Czajkowska).¹⁷

Company Exhibit 13 was created for the hearing in this case, and summarizes Company Exhibits 8-12. (Tr. 263, Czajkowska). It shows that the vast majority of items on the work transfer list were already on the work transfer list **prior** to the strike. (CX-13). Further, it shows that other than the temporary transfer of 50 pieces of product during the strike, the *only* work that was done in Bensenville *prior* to the strike and was being done in Juarez *after* the strike consisted of 200 units of product AHQ-5755. (CX-13). As Czajkowska testified, transfer of the production of AHQ-5755 was planned well before the strike as well. (Tr. 266-67, Czajkowska). Indeed, that product was an example of the Company using Bensenville as an “incubator” plant,

¹⁷ Company Exhibit 8 is the work transfer list as it existed on November 8, 2010. (Tr. 242, CX-8). Company Exhibit 9 is the work transfer list as it existed on August 23, 2011. (Tr. 249, CX-9). Company Exhibit 10 is the work transfer list as it existed on August 24, 2011. (Tr. 250, CX-10). Company Exhibit 11 is the work transfer list as it existed as of the time of the strike in September 2011. (Tr. 257-58, CX-11). Finally, Company Exhibit 12 is identical to Exhibit 11, except that it contains part numbers. (Tr. 258, CX-12).

in that the project was originally bid in early 2011 using Mexico labor rates, and samples made in Bensenville were provided to the customer in March 2011. (*Id.*).

N. The Complaint in this Case Alleged Only That the Employees Were Engaged in Protected Activity and Then Were Terminated Because of Such Activity.

The Complaint in this case was issued on December 30, 2011, and contained four main allegations. First, the Complaint alleged that from September 20 to September 27, the Amglo employees “ceased work concertedly and engaged in a protected strike.” (GCX-1(e) at IV.A). Second, it alleged that Czajkowska threatened employees that things would not end well for them if they continued the strike. (*Id.* at IV.B). Third, the Complaint alleged that on the first day of the strike, Amglo “terminated” the striking employees in retaliation for the strike. (*Id.* at IV.D). Finally, the Complaint alleged that Amglo transferred production work to Mexico in retaliation for the strike. (*Id.* at IV.E).¹⁸

The Complaint contained no allegation that the Company laid off any employees, no allegations that the Company did not have legitimate and substantial business reasons for not recalling the 22 strikers and instead placing them on a preferential recall list, and no allegations related to the manner in which strikers were recalled.

O. The ALJ Finds That The Strikers Were Not Terminated, But Creates An Entirely New Theory of the Case That Was Neither Alleged Nor Litigated.

The hearing in this case was held on January 30 and 31 and February 1, 2012. Post-hearing briefs were submitted on March 14. In briefing, the Company argued that (1) the strike, while initially protected, became unprotected due to the actions of the strikers; (2) no reasonable employee could have believed that his or her employment had been terminated; and (3) no work was moved from the Bensenville facility to the Juarez facility in retaliation for the strike. (Post

¹⁸ The initial complaint also alleged that the strike was prolonged by Amglo’s alleged unfair labor practices. (GCX-1(e) at IV.C). That allegation was later dropped. (GCX-1(l)).

Hearing Brief of Respondent). The Company also briefly addressed its legitimate and substantial business reasons for not recalling 22 of the strikers. At no point in this case – not prior to the hearing, not at the hearing, nor in its post-hearing brief did the Company argue that it laid off any employees.

On March 22, the ALJ issued his decision. He found that the strikers were engaged in protected activity, reasoning that although the length of the strike (6 hours) weighed in favor of a finding that the strike was unprotected, several other factors weighed in favor of a finding that the strike was protected. (*See* Decision of the Administrative Law Judge (“ALJD”) at 6-8.

The ALJ then found that none of the striking employees were terminated, stating “I credit the testimony of the Respondent’s witnesses that it did not fire any employees.” (ALJD at 9, lines 17-18). This finding should have resulted in dismissal of the Complaint in its entirety. However, rather than dismissing the Complaint, the ALJ created a new theory of the case that was not alleged in the Complaint. In his decision, the ALJ states that “Respondent contends that it did not discharge any of the employees. It argues that it laid-off 22 of the production employees for non-discriminatory economic reasons.” (ALJD at 8, lines 12-13). This assertion by the ALJ – which is made up out of whole cloth and has no basis at all in the record – formed the basis for the rest of his decision.

The ALJ went on to hold that Amglo’s “layoff” was discriminatory, finding (incorrectly) that the Company did not have any plans to lay off employees prior to the strike, and that even if it did, that “the acceleration of the lay-off” due to the strike violated the Act. (ALJD at 8, lines 29-37). The ALJ conceded that no charge had been filed alleging an unlawful layoff or an unlawful acceleration of a layoff, but stated that a close connection existed between the complaint allegation of termination and his finding of an unlawful layoff. The ALJ also claimed

– without any explanation or basis in the record – that Amglo “fully litigated its reasons for having a layoff,” despite the fact that the Complaint did not allege a layoff and Amglo never claimed there was a layoff. (ALJD at 9, lines 1-12).

Next, and again despite the fact that Amglo never argued that it laid off any employees, the ALJ found that Amglo had not met its “affirmative defense” of showing that “the lay-off of the employees who were not recalled was not discriminatorily motivated.” Here, the ALJ conceded that Amglo’s revenues and lamp shipments were down substantially following the strike, but found anyway that “there are statistics that belie Respondent’s claim that it laid off 22 employees for nondiscriminatory reasons.” (ALJD at 9, lines 39-40).

Ignoring the undisputed record, the ALJ went on to also hold that Amglo “has not established that it did not transfer a significant amount of production work to Juarez and/or other facilities in retaliation for the strike.” (ALJD at 10, lines 11-13). Finally, again although it was neither alleged in the Complaint nor discussed at the hearing at all, the ALJ found that Amglo’s “decision not to recall certain employees also strongly suggests discriminatory motive.” (ALJD at 10, lines 29-30).

Ultimately, the ALJ found that Amglo “discriminatorily laid-off twenty-two employees,” and ordered reinstatement and back pay, with backpay to be “tolled for any period after September 20, 2011 for which the Respondent proves at compliance that it would have laid off these individuals for legitimate nondiscriminatory economic reasons.” (ALJD at 11-12).

ARGUMENT

A. The ALJ Erred in Finding the Six-Hour In Plant Sit-Down Strike Protected (*Cross-Exceptions 1-15, 17-26, 28*).

The ALJ erred by finding the six-hour in plant strike to be protected. From the earliest days of the Act, “sit-down” strikes, in which strikers remain on the employer’s premises and

interfere with production, have regularly been deemed unprotected strikes. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *Overhead Door Corp., Advance Indus. Div.*, 540 F.2d 878 (7th Cir. 1976). The Board has repeatedly found that such in-facility work stoppages lose the protection of the Act, and has developed a multi-factor test to determine whether such a work stoppage is protected. The factors include:

1. the reason the employees stopped work;
2. whether the work stoppage was peaceful;
3. whether the work stoppage interfered with production, or deprived the employer of access to its property;
4. whether employees had adequate opportunity to present grievances to management;
5. whether employees were given any warning that they must leave the premises or face discharge;
6. the duration of the work stoppage;
7. whether employees were represented or had an established grievance procedure;
8. whether employees remained on the premises beyond their shift; and whether the employees attempted to seize the employer's property.

See *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056-57 (2005).

These factors must be analyzed against the backdrop of an employer's right to manage and run its facility in an efficient manner, as it is clear that "on-site work stoppages trench upon employers' private property rights." *Fortuna Enter., LP v. NLRB*, No. 10-1272 at *6 (D.C. Cir. Dec. 9, 2011). Work stoppages that begin as protected may "reach[] a point at which it was no longer a protected means of protest." *Cambro Mfg. Co.*, 312 NLRB 634, 635 (1993).

Here, the vast majority of the *Quietflex* factors strongly weigh in favor of a finding that the Tuesday September 20 in-plant strike at some point became unprotected. The ALJ correctly found that the length of the in-plant strike – six hours – weighed in favor of a finding that the strike was unprotected. However, the ALJ erred by finding that the other *Quietflex* factors did not weigh in favor of a finding that the strike was unprotected.

The strikers very clearly had an opportunity – within the first hour of the strike – to present their wage grievance to management. Despite those grievances being clearly, unequivocally, and repeatedly rejected, and despite being unambiguously told to return to work or leave the premises, the strikers remained in the plant, not working, for more than five additional hours, with about half of the employees staying 90 minutes past the end of their scheduled shift. In addition, the strike interfered with production, as essentially no work was done at the Bensenville facility on September 20.

While there is no question that the strikers were initially engaged in protected activity by striking in favor of higher wages, the NLRA is not a license to “take over” or “occupy” private property for an entire day, presumably in a manner that would continue until the Company acceded to the wage increase demand. Here, the strikers went too far, and their conduct lost the protection of the Act.

1. The Length of the in-Plant Strike Alone Warranted a Finding that The Strike Was Unprotected.

The Board has never found a six-hour in-plant strike to be protected. The ALJ erred by not finding the strike unprotected on this basis alone. The Board has uniformly held that work stoppages longer than two to three hours lose the Act’s protection. *See Waco, Inc.*, 273 NLRB 746 (3.5 hour strike unprotected) and *Cambro Mfg. Co.*, 312 NLRB 634 (same). Protected work stoppages generally are far shorter, including cases where the stoppages lasted less than 2 hours, and in some cases a matter of minutes. *See Quietflex*, 344 NLRB at 1058, n.15 (citing relevant cases).

In finding the strikes in *Quietflex*, *Cambro*, and *Waco* unprotected, the Board relied heavily on the length of the strike, *even where other factors weighed in favor of a finding that the strike was protected*. In *Cambro*, the Board found a 3 or 3.5 hour in-plant work stoppage was

unprotected, even though the work stoppage was “peaceful, focused on several job-related complaints, and caused little disruption of production,” because the employees were permitted to persist in an in-plant protest for “a reasonable period of time,” and the 3 to 3.5 hour strike crossed the line into unreasonable. 312 NLRB at 636.

In *Waco*, the Board found that despite the fact that the protest was peaceful and focused on job-related complaints, the 3.5 hour length of the strike meant that the employees “had overstepped the boundary of a protected, spontaneous work stoppage, and were occupying the facility in a manner which was unprotected.” 273 NLRB at 746. In *Quietflex*, the Board held a 12-hour work stoppage unprotected, despite the fact that the work stoppage was peaceful “at all times,” there was no disruption in operations, the employees were unrepresented, had no established grievance procedure, and were protesting work-related complaints. 344 NLRB at 1058.

Here, it is undisputed that the work stoppage inside the plant went on for approximately *six hours*. The strike began around 8:40 a.m., and the vast majority of strikers did not leave the facility until 2:45 p.m. (See Tr. 213, Czajkowska; Tr. 310, Christian; CX-15, Kulikowski; Tr. 77, 89, 106-07 Dziekan; Tr. 122, 140, 159, Ossak; Tr. 39, Kopec; Tr. 390, Wilusz). During that period, most of the facility employees, except for a few, remained in the assembly room area and did not work. (Tr. 37, Kopec; Tr. 133, 139-40 Ossak). The length of the strike alone places it outside of the protection of the Act, and the ALJ erred by not so finding.

2. The ALJ Erred By Finding the Strike Protected Because Within the First Hour of the Strike, the Strikers Presented their Grievances to the Company President and the Plant Manager, and Received an Unequivocal Response, Yet Continued to Occupy the Facility for Almost Five Hours Thereafter.

An in-plant strike is more likely to be unprotected if employees remain in the facility *after* having had their grievances heard. The Board has repeatedly held that strikers who receive

a response to their grievance demands, and yet continue to persist with an in-plant work stoppage beyond that time without justification, forfeit the Act's protection *See Waco*, 273 NLRB at 746; *Cambro*, 312 NLRB at 636; *Quietflex* 344 NLRB at 1058. Here, the ALJ erred by finding that although the employees had the opportunity to present their grievances, "it was not until they presented their petition to management that they were able to specify their demands," (ALJD at 7, lines 16-17), and that "the fact that employees remained in the plant so long was due in part to the ambiguity of Respondent's responses to the employee demands." (ALJD at 7, lines 32-33). The record flatly contradicts this finding. To the contrary, the record shows that within the **first hour** of the strike, the strikers presented – multiple times – their request for a wage increase to the Plant Manager and the Company President, and that the strikers received – multiple times – a definitive and unequivocal answers to their requests. That the strikers later reiterated their same demand in writing – well after it had been unequivocally rejected – is simply irrelevant.

Within the first hour of the strike, Christian (Amglo's President and COO) and Czajkowska (the Bensenville Plant Manager) met with employees for 60-90 minutes. There was substantial and undisputed testimony – from Czajkowska, Christian, Kopec, Dzeikan, Kulikowski, Ossak, Uchanska, and Skomoroska – that during that time, the strikers repeatedly requested a wage increase, and that both Christian and Czajkowska repeatedly told the strikers in no uncertain terms that their demands for a wage increase would not be met. Strikers were told repeatedly that there was "no possibility" of raises, (Tr. 34-35, Kopec), that "we cannot do anything . . . [t]he pay raises are frozen." (Tr. 127, Ossak), that there is "no chance this time for [a wage increase]" (Tr. 369, Skomoroska), and that "nothing can be done now." (Tr. 88 Dzeikan). The ALJ's finding that these responses somehow reflected "ambiguity" is obviously wrong. Indeed, is difficult to imagine a more definitive or less ambiguous response.

Strikers may not insist that an employer agree to their demands before they leave the property; the Board looks to whether the employees *had an opportunity* to make known their demands. *Quietflex*, 344 NLRB at 1059. Once those demands are flatly rejected, there is no logical or lawful basis to continue occupying the plant in the interest of having their grievance “heard.” *See Waco*, 273 NLRB at 747 (finding strike unprotected where strikers received response to their demand but continued their protest on employer property for nearly three additional hours).

In this case, the strikers had an answer to their demand within the first hour of the strike – in fact were told the answer multiple times. Yet like the employees in *Waco*, they stayed on the property without working for hours after receiving their answer. At the hearing, when asked why the group continued to strike in the plant despite having their demands rejected, Dzeikan testified that “[w]e thought that Anna and Izabela went away to discuss the matter between them and they would come to tell us.” (Tr. 88, Dzeikan). Ossak testified similarly. (Tr. 160-61, Ossak). These employees’ subjective belief the Company could possibly change its mind in the future is not a license for an unending work stoppage inside the plant, particularly given that both Czajkowska and Christian had just told the assembled group of strikers multiple times and in no uncertain terms that there would not be any wage increase. In other words, there was nothing at all to suggest that the strikers were left in limbo as to the Company’s response to their single demand – that the Company increase wages – or that employees reasonably remained onsite to await a response to their written petition.¹⁹ *See Waco*, 273 NLRB at 751 (finding continued occupation

¹⁹ The employees’ written demand did not merely reiterate their demand, but actually escalated their earlier wage increase requests to add the annual cost of living increments. No rational basis could exist for an expectation that management would be more likely to entertain, much less accede to, this increased demand and consequently, no inference is reasonably drawn that the employees were rightfully prolonging their job action awaiting a response.

of facility unlawful where employees remained after having demands rejected because they “thought [the employer] would change [its] mind and come listen to what we had to say”).²⁰

3. The ALJ Erred in Finding the Strike Protected Because the Strikers Ignored the Company’s Demand to Return to Work or Leave the Facility.

An in-plant strike is far more likely to be unprotected if the strikers refuse an employer’s demand to return to work or leave the facility. *See Cambro*, 312 NLRB. at 637 (finding strike unprotected and stating that “[f]urther in-plant refusals to work served no immediate protected employee interests and unduly interfered with the employer’s right to control the use of its premises”); *Waco*, 273 NLRB at 746 (upholding discharge of employees who refused to either begin work as scheduled or leave the employer’s premises); *Quietflex*, 344 NLRB at 1059 (upholding discharge of employees who refused to leave employer property after being asked to work their shift or leave the property). Here, the ALJ erred in finding the strike protected because there was undisputed evidence that the Amglo strikers remained in the plant for **five hours** after both their wage demand was rejected *and* they were told to return to work or leave the premises.

It was **undisputed** at the hearing that between 9:00 a.m. and 10:00 a.m., Czajkowska told the gathered strikers to either go back to work or leave the facility. (Tr. 59, 62-63, Kopec; Tr. 105-06, Dzeikan, CX-3 (“Anna said to go back to work and if anyone does not like it, they

²⁰ The ALJ found that “[u]pon receiving the petition Czajkowska and Christian went first to talk to Respondent’s CFO Larry Kerchenfaut and then called Respondent’s owner Jim Hyland in Florida to discuss the petition,” (ALJD at 4, lines 13-15), and that Czajkowska and Christian “were aware that most employees were still waiting in the plant assembly area for a response to the petition at 1:15 p.m. and even later.” (ALJD at 4, lines 11-12). This is pure fiction. There is no record evidence at all to suggest that Czajkowska and Christian initiated contact with Hyland to discuss the petition; rather, they called Hyland to inform him of the strike, and the fact that the employees were planning to strike again the following day. In addition, there is no basis at all to suggest that Czajkowska and Christian believed that the employees were waiting for a response to their petition; to the contrary, the Company gave no indication that it was considering the employees’ written petition and/or that employees could remain inside the facility to await a response. *See* Tr. 89 (Dzeikan) (“Did Anna or Iza approach the group at all later in the day? No.”). To the contrary, the overwhelming weight of the evidence shows that the response to the strikers’ single demand – that the Company increase wages – was unequivocally “no.” *See* Tr. 37, Kopec (“Around 11:00 we realized that nobody else would come to us from the offices . . .”).

should punch out and go home.”); Tr. 157-58, Ossak (“[Czajkowska said to] go back to work or punch out.”).²¹ Moreover, not only did the strikers simply ignore this demand, they planned to do the same thing the following day.²² When asked why employees did not punch out or go back to work, Dzeikan testified that “we hoped that Anna and Izabela need some time to talk about this case and maybe they would talk to the owner and they would come and give us their answers.” (Tr. 108-09, Dzeikan). Not only is this explanation unreasonable given Czajkowska and Christian’s unequivocal rejection of the strikers’ demands, this is precisely the conduct the Board has found repeatedly to be unlawful. As a result, like the employees in *Cambro*, *Waco*, and *Quietflex*, the strikers here forfeited the Act’s protection by continuing the occupation on their own terms.²³

4. The ALJ Erred in Finding the Strike Protected Because Many of the Strikers Remained Inside the Plant Well After their Shift Ended (Cross-Exceptions 17, 26).

The Board has held that a striker’s decision to remain inside his or her employer’s facility, without working and beyond their shift, is further grounds for holding a work stoppage unprotected. *Quietflex*, 344 NLRB at 1057, n.11 (citing *Peck, Inc.*, 226 NLRB 1174 (1976)).

²¹ These witnesses were all called by Counsel for the Acting General Counsel. The ALJ found that Czajkowska “may” have told employees to leave the plant if they were not going to return to work, and that the record was “somewhat unclear on this point.” (ALJD at 3, lines 11-12). The ALJ states that Czajkowska and Christian “deny that either of them ever ordered employees to get out of the plant,” citing pages 199-201 of the transcript. But nothing in these pages (which are Czajkowska’s testimony) reflects a denial that they ordered employees out of the plant. While Czajkowska says she did not use the pejorative Polish term “wynocha,” meaning “get out,” it certainly does not follow that she did not tell employees to either return to work or leave the facility, and multiple witnesses confirm she did make that statement.

²² Compare *Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477 (1977), enf’d 449 F.2d 824 (5th Cir. 1979), where the court found employees did not forfeit the protection of the Act, relying on the fact that the employees did not threaten to carry the work stoppage over into the next shift, and left when asked to do so.

²³ Compare *City Center Dodge, Inc.*, 289 NLRB 194 (1988), enf’d *sub nom.*, *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989), in which the strikers remained on employer property for two to three hours to present their grievances, but *left* after the company president told them to return to work or leave the premises. 289 NLRB at 194.

There is little dispute in this case that dozens of strikers remained on Company premises well after their shift had ended. The shifts of about half of the strikers (between 40 and 50 individuals) ended at 1:15 p.m. At the hearing, six witnesses testified that the vast majority of strikers – including those whose shift ended at 1:15 p.m. – did not leave at 1:15, but rather stayed in the plant striking until 2:45 p.m. Two of those witnesses – Ossak and Dzeikan – testified that their shift ended at 1:15, but that they stayed until 2:45. A seventh witness testified that when she left at 2:15 p.m., the vast majority of the strikers were still in the plant.²⁴

The ALJ concedes that “at least some” of the employees remained in the assembly area for 90 minutes after their shift. (ALJD at 8, lines 1-2). However, he disregards this fact because he found that “they did not interfere with production to any extent beyond withholding their labor.” (*Id.* at lines 2-3). But the *Quietflex* test is not whether the employees remained past their shift **and** interfered with production. Rather, the *Quietflex* test looks *only* to whether the employees remained past their shift. 344 NLRB at 1057. Whether the employees interfered with production is a completely separate factor in the *Quietflex* test. The ALJ erred by conflating these two factors, and thus the fact that at least 40-50 employees stayed 90 minutes beyond their shift further weighs in favor of a finding that the in-plant strike was unprotected.²⁵

5. The Work Stoppage Was Not “Completely Peaceful,” as Multiple Witnesses Testified that Employees Were “Afraid” to Work Based on the Protestors’ Decision to Interfere With Production.

²⁴ Czajkowska, Christian, Kulikowski, Dzeikan, Ossak, and Wilusz all testified that the vast majority of strikers stayed until 2:45. (*See* Tr. 213, Czajkowska; Tr. 310, Christian; CX-15, Kulikowski; Tr. 77, 89, 106-07 Dzeikan; Tr. 122, 140, 159, Ossak; Tr. 390, Wilusz). Skomorowska also testified that when she left the facility at 2:15, all of the employees were still striking. (Tr. 371, Skomorowska). Only Jesse Kopec claimed that all the workers on the 5:00 a.m. to 1:15 p.m. shift left the plant on September 20 at 1:15 p.m., not at 2:45. (Tr. 39, Kopec).

²⁵ The ALJ also found, again with no basis in the record, that “the fact that employees remained in the assembly area until 2:45pm had no greater impact on Respondent’s business than if the employees had walked out of the plant.” (ALJD at 7, lines 10-14). This statement both lacks any basis in the record (and the ALJ cites to none), and is irrelevant, as it conflates whether strikers stayed past their shift with the arguable effect of the strikers staying past their shift.

The ALJ also erred by finding that the work stoppage was “completely peaceful.” Although the six-hour occupation did not trigger physical violence, multiple witnesses testified that they were “afraid” to go back to work and/or feared for their safety, causing a massive interference with Amglo’s work.²⁶ Skomoroska testified that she “was afraid” to return to work, and the ALJ appears to have credited this testimony. (ALJD at 6, line 40-42). Another employee (Marius Cwik) reported that he too wanted to work, but “we’re afraid to turn machine [on].” (Tr. 202, Czajkowska). And when Stanislaw Pietras attempted to return to work, Zofia Bialon “shouted down” Pietras, who then remained with the striking group. (Tr. 206-08, Czajkowska).²⁷

Based on this environment of fear, many employees were prevented from going back to work, thus interfering with Amglo’s production and control over the operation, weighing further in favor of a finding that the strike was unprotected. (Tr. 205-07, Czajkowska).

6. The Weight of the Evidence Shows That the ALJ Erred in Finding the Six-Hour In-Plant Strike Protected.

The weight of the evidence is clear that while the Tuesday September 20 strike was initially protected, the strikers’ actions ultimately removed any protection under the Act. Very few of the *Quietflex* factors – only the reason the employees stopped work, the lack of a formal grievance procedure, and that there was no violence or damage to machinery or product – weigh

²⁶ The ALJ found that “[a] small group of employees who were on a late afternoon or evening shift worked on September 20. Their work was unaffected by the strike.” (ALJD at 4, lines 26-28). There was no testimony to support this claim (and the ALJ cites to none). Moreover, the ALJ’s findings that “[t]he work stoppage did not interfere with Respondent’s production to any greater extent than a strike outside the plant,” that “the entire workforce took part in the strike,” and that the “strikers did not prevent other employees from working by gathering in the assembly area” all lack any basis in the record. To the contrary, it was undisputed that **not** the entire workforce participated in the strike (Tr. 229, Czajkowska). Moreover, the undisputed testimony shows that the strikers did prevent other employees from working.

²⁷ The ALJ should have, but did not, credit the statements of Cwik and Pietras. First, the ALJ generally credited Czajkowska, who reported the statements. Second, contrary to the ALJ’s statement (*see* ALJD at 6, lines 42-44), these statements were not hearsay, as they fall within the “statements against interest” exception to the hearsay rule, in that they were statements made by striking employees that tended to show that the strike was unprotected.

in favor of a finding that the in-plant strike was protected. And although the strikers lacked a formal grievance procedure, they clearly had an effective opportunity to present their grievances; indeed, going so far as to have had the opportunity to engage the President of the Company directly and in person. Czajkowska and Christian both testified that they spoke with employees about wage increases prior to the strike.²⁸

On the other hand, the majority of the *Quietflex* factors weigh heavily in favor of a finding that the strike became unprotected. The strike clearly interfered with production, in that essentially no production work was done that day, and several witnesses testified that they were afraid to work. The strike lasted six hours, longer than any in-plant strike found to be protected by the Board. Within the first hour of the strike, the strikers presented their single demand – that the Company increase their wages – to management, and management unequivocally and repeatedly rejected the demand. Despite management asking employees to either return to work to leave the premises, the strikers remained in the assembly area – many for 90 minutes past the end of their shift – preventing any significant work from being done, for approximately five more hours. Finally, the strikers planned to engage in the same activity the following day.

For all of these reasons, the in-plant strike was unprotected. Because the remainder of the Acting General Counsel’s complaint relies on a finding of protected, concerted activity, the Complaint should be dismissed in its entirety on this basis.

B. The ALJ Erred and Violated Amlgo’s Due Process Rights By Mischaracterizing Amlgo’s Legal Arguments, Applying the Wrong Legal Standards, and Creating an Entirely New Theory of the Case That Was Not Alleged in the Complaint. (*Cross-Exceptions 16, 27, 29-46, 50-53, 55-57*)

²⁸ Thus, the ALJ’s finding that “the in-plant work stoppage was one of the few, if only, ways of communicating their grievance to Respondent” (ALJD at 7, lines 38-39) again clearly contradicts the record evidence. Moreover, his finding that somehow the fact that Amlgo did not fire any of the employees weighs in favor of a finding that the conduct is protected (ALJD at 8, lines 13-14) has no basis in the case law.

The fundamental elements of procedural due process are notice and an opportunity to be heard. *Lamar Advertising of Hartford*, 343 NLRB 261 (2004), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In addition:

Congress incorporated these notions of due process in the Administrative Procedure Act. Under the Act, ‘persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted.’ 5 U.S.C. Section 554(b). To satisfy the requirements of due process, *an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change theories in midstream without giving respondents reasonable notice of the change.*

Lamar Advertising, 343 NLRB at 265-66, quoting *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (emphasis added).

The Board has held on numerous occasions that it will not hold an employer or union in violation of the Act based on allegations that were not set forth in the complaint or litigated by the parties. See *Sumo Airlines*, 317 NLRB 383, 384 (1995) (dismissing violations that General Counsel failed to allege “with particularity” because “there was no paragraph of the complaint which could be construed as reasonably comprehending them”); *Albert Einstein Med. Ctr.*, 316 NLRB 1040, 1040 (1995) (dismissing violation not alleged in complaint nor litigated by the parties).

The Complaint in this case alleged that “[a]round September 20, 2011, Respondent terminated the employees identified in paragraph IV(a) and in retaliation for engaging in the protected concerted strike describe in paragraph IV(a) and IV(c).” See Complaint, paragraph IV(d). Counsel for the Acting General Counsel never sought – either before, during, or after the hearing – to amend the Complaint to add new legal theories relating to a layoff, or to claim that Amglo discriminated in selecting employees for recall. Consequently, Amglo prepared its defense to counter the charge that it had terminated the employees for engaging in a work

stoppage, and Amglo dedicated seven pages of its post-hearing brief to addressing this specific allegation.

The ALJ, however, found that although the Company did not terminate any employee,²⁹ it discriminatorily laid off the employees – or discriminatorily accelerated a planned layoff, and that it discriminatorily recalled striking employees. While the Board may find and remedy a violation in the absence of a specific allegation in the complaint, it may only do so if there is a close connection between the complaint allegation *and* the alleged violation has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enf'd.*, 920 F.2d 130 (2d Cir. 1990).

Here, for multiple reasons more fully explained below, the ALJ's finding of a discriminatory layoff was hardly "fully litigated," and therefore the Board should reverse the ALJ and dismiss the Complaint. The ALJ's decision is a textbook example of the due process concerns triggered by new, post-hearing allegations against an employer or union that were not found in the Complaint. Moreover, not only did the ALJ invent a new theory of the case for Counsel for the Acting General Counsel, he also invented a new theory of the case for Amglo – one which Amglo never made at any point before, during, or after the hearing, and his entire decision is predicated on the incorrect statement of Amglo's position. Moreover, Amglo was never placed on notice, at any time, that the ALJ was essentially converting the instant case from (i) a Section 8(a)(1) *Laidlaw* rights post-strike failure to recall case, to (ii) a Section 8(a)(3) *Wright Line* mixed-motive discriminatory layoff case, which deprived Amglo of any opportunity at any time to present evidence, argument or legal authorities regarding the latter issues, much

²⁹ Although the ALJ concluded that the Company did not terminate any striking employee, the ALJ erred in his admission of documentation relating to unemployment insurance benefits (Gen. Counsel Exh. 8), ostensibly offered to contradict the Company's position regarding this issue. The admission of this exhibit was improper because there was an inadequate foundation, it was not properly authenticated, and it was irrelevant to the issues in dispute in the instant case.

less to prepare for the litigation of such issues. Finally, the ALJ erred in applying these new theories in multiple ways. For all of these reasons, the ALJ's decision should be reversed, and the Complaint dismissed.

1. The ALJ Erred By Completely Mischaracterizing Amglo's Contentions.

As noted above, the ALJ found that Amglo did not terminate any of the striking employees. (ALJD at 9, lines 17-18). This finding should have resulted in dismissal of the Complaint. However, rather than dismissing the Complaint, the ALJ created a new theory of the case that was not alleged in the Complaint – the “layoff” or “accelerated layoff” theory. But the ALJ's “layoff” findings are based on an argument never advanced by Amglo at any time.

In his decision, the ALJ states that “Respondent contends that it did not discharge any of the employees. *It argues that it laid-off 22 of the production employees for non-discriminatory economic reasons.*” (ALJD at 8, lines 12-13, emphasis added). This is simply not the case. Amglo never argued – not in its answer, not at the hearing, and not in its post-hearing brief – that it laid off the 22 employees who were not recalled from the strike. For this reason alone, the ALJ's entire discussion of the alleged discriminatory “layoff” is in error, and should be reversed.

At the hearing, the Company introduced some (but certainly not all of the) evidence that discussed the reasons why the Company did not recall 22 of the employees.³⁰ And in its post-hearing brief, the Company stated:

The Complaint alleges only that the strikers were terminated in retaliation for engaging in protected activity. (GCX-1(1)). It does not make any further allegations with respect to the 22 strikers who were not recalled, and does not allege that the Company unlawfully discriminated against any striker during the recall process. Thus, if the Administrative Law Judge finds either that the strikers were not engaged in protected activity or that the strikers could not have

³⁰ Because there was no allegation in the Complaint relating to the recall of the 22 employees, Amglo could have simply ignored any evidence relating to the recall at the hearing. However, to give some color to the decision not to recall the 22 employees, Amglo presented evidence showing *some* (but certainly not all) of the reasons it decided not to recall all of the striking employees.

reasonably believed their employment had been terminated, the Complaint must be dismissed. Moreover, because it is not alleged in the Complaint, Counsel for the Acting General Counsel has waived any argument that absent termination, the Company did not have legitimate and substantial business reasons for not recalling 22 of the striking employees.

(Co. Post-Hearing Brief, at 41-42).

In short, the ALJ's finding of a violation is wholly based on a complete mischaracterization of the Company's position. The Company never at any time argued that it had laid off any employees. It argued only that the employees could not have reasonably believed that their employment was terminated, and in passing that the Company had legitimate and substantial business reasons for not recalling 22 of the employees. For this reason alone, the ALJ's decision should be reversed, and the Complaint should be dismissed.

2. The ALJ Erred By Applying the Wrong Legal Standard.

There is no dispute here that the Amglo employees engaged in a strike. There is also no dispute that by the end of the first week of the strike, all of the Amglo employees had offered to return to work, and that all but 22 were recalled. *Id.* In addition, there is no dispute that Amglo told the 22 employees who were not recalled that they were being placed on a preferential recall list, that they would be recalled if work became available, and before Amglo hired any new employees. Finally, it is well-established that an employer may refuse to recall striking employees if they have been permanently replaced or if there are legitimate and substantial business reasons for not recalling such strikers. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd.*, 414 F.2d 99 (7th Cir. 1968).

Here, the ALJ did not apply the *Laidlaw* test – indeed, he did not even cite *Laidlaw*. Rather, he applied what purported to be a *Wright Line* analysis, finding that “[t]he General Counsel’s initial showing of discriminatory motivation is established by the fact that Respondent

did not have any plans to lay-off or terminate employees from the Bensenville plant prior to the September strike.” (ALJD at 8, lines 29-31). After finding discriminatory motive in the “layoff,” the ALJ stated that “the burden of proof has shifted to Respondent to prove that the lay-off of the employees who were not recalled was not discriminatorily motivated,” (*Id.* at 9, lines 16-17), and finding that Amglo had not met its burden because “Respondent has admitted that the timing of the lay-off is related to the strike.” (*Id.* at lines 20-21).

There are many problems with this analysis. First, obviously the ALJ applied the wrong legal standard – he should have applied the *Laidlaw* standard, and not the *Wright Line* standard. Second, the ALJ misstated the second portion of the *Wright Line* standard. An employer need not, as the ALJ wrote, “prove that the lay-off of the employees who were not recalled was not discriminatorily motivated.” Rather, the employer must prove that it would have taken the same action in spite of any discriminatory motive. *Wright Line*, 251 NLRB 1083 (1980), *enf’d.*, 662 F.2d 889 (1st Cir. 1981). Third, the entire analysis rests on the ALJ’s assertion that Amglo laid off employees, which as explained above, it did not. These fundamental mistakes by the ALJ also warrant reversal of his decision and dismissal of the Complaint.

3. The ALJ Erred By Finding a Discriminatory Layoff and Ordering Reinstatement and Backpay.

Apart from the procedural problems with his decision (inventing a theory that Amglo never advanced and applying the wrong legal standard), the ALJ also erred in finding that Amglo discriminatorily laid off employees. Again, in multiple ways, the ALJ got both the facts and the law wrong. For these reasons, more fully explained below, the ALJ’s decision should be reversed and the Complaint should be dismissed.

a. The ALJ Erred by Finding That Amglo Had a Discriminatory Motive.

The ALJ's finding of a discriminatory motive is based on four of his findings: (a) that Amglo allegedly "locked out" its employees in September 21; (b) "the statements made by Czajkowska to striking employees"; (c) that Amglo allegedly "did not have any plans to lay-off or terminate employees" prior to the strike, and (d) Christian's statement in an investigatory affidavit that "at the time of the work stoppage, management reviewed our production needs to see how many employees we really needed." (ALJ at 8, lines 23-33). None of these warrants a finding of discriminatory motive.

First, there is no factual basis in the instant case for characterizing the Company's actions as a "lockout," when the record establishes that the Company took reasonable action, while a strike was in process, to prevent sabotage and unauthorized entry by persons who had no intention to perform work. But even if there were a "lockout," the employer would have a protected right to engage in a defensive lockout of economic strikers, and there is nothing about such actions that would support a reasonable inference of unlawful motivation. Christian, Czajkowska, and Skomorowska all testified that Skomorowska – who was participating in the strike on September 20 – told Czajkowska and Christian that the strikers were planning to continue to engage in a sit-down strike again on September 21. (Tr. 212-13, Czajkowska; *see also* Tr. 107-08, Dzeikan; Tr. 160, Ossak). When Kerchenfaut, Czajkowska and Christian called Jim Hyland to inform him of the strike and of the strikers' plan to again "occupy" the plant the following day, they made the decision to change the locks because some of the strikers (including General Counsel witness Jesse Kopec) had keys to the Bensenville facility, and because the Company feared potential damage to equipment or product. (Tr. 181-82, 216, Czajkowska; Tr. 338, Kerchenfaut). Thus, Amglo had a perfectly reasonable and non-discriminatory motive for changing the locks. Moreover, to the extent there was a "lockout," it

lasted only about two hours, at which point Kerchenfaut, Christian, Czajkowska, and a Bensenville police officer all invited the strikers to return to work. These actions are certainly inconsistent with any discriminatory motive.

Second, while the ALJ found that “statements” made by Czajkowska to strikers showed an unlawful motive, he does not specify the statements to which he is referring. Moreover, it is undisputed that Czajkowska continually asked the strikers to return to work – at the start of the strike, the following morning at the entrance to the plant, and via phone on the first days of the strike. And it is undisputed that Czajkowska welcomed every striker who returned in the first six days of the strike without condition or consequence. These actions are hardly evidence of discriminatory motive.

Third, the ALJ also erred by finding that the Company did not have plans to layoff employees prior to the strike. Christian testified that the Company was discussing layoffs prior to the strike. (Tr. 305, Christian). Although he generally credited Christian’s testimony, the ALJ did not credit Christian’s statement because “[t]here is no documentary corroboration for such a plan and Christian did not share this plan with anyone at Bensenville, including Czajkowska.” (ALJD at 8, n. 12, citing Tr. 305-06). But there is no support at all for the ALJ’s statement that Christian did not share her discussion of layoffs with anyone at Bensenville – the pages cited by the ALJ do not support this assertion. She simply was not asked at the hearing whether she shared these discussions. And the lack of documentary evidence, particularly for a company as small as Amglo, is not surprising, and certainly does not support a finding of discriminatory motive.³¹

³¹ There was testimonial evidence that the Company had been considering layoffs but held off in order to see if business would pick up. Ossak’s affidavit discussed a conversation with Czajkowska prior to the strike in which Czajkowska told her wages were not being increased in part because the Company was “trying to keep us

Finally, Christian's statement that "at the time of the work stoppage, management reviewed our production needs to see how many employees we really needed" does not show a discriminatory motive either. It shows nothing more than the fact that Amglo believed its work load could not support the level of pre-strike employees, and that the Company exercised its lawful right to determine its post-strike *recall* procedures based on objective economic rationale.

In short, none of the ALJ's findings regarding discriminatory motive hold up to scrutiny. For this additional reason, the ALJ's decision should be reversed, and the Complaint should be dismissed.

b. The Company Did Not Have an Adequate Opportunity to Fully Litigate the Layoff Issue

Because the "layoff" theory was never part of the Complaint, serious due process concerns are raised by not affording Amglo the opportunity to present a specific defense. As noted, above, extra-Complaint allegations may only be added when the Respondent is given timely notice of the new allegations and an effective opportunity to present evidence so that a determination can then be made as to whether "the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989). If no timely notice has been given or if one or both of these Pergament elements are missing, the case must be dismissed, or at least remanded. *See Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191, slip op. 2 (Jan. 3, 2012) (dismissing information request violation where Complaint lacked allegation); *Enloe Med. Ctr.*, 346 NLRB 854, 855-56 (2006) (remanding new complaint allegation "to remedy any prejudice suffered by the Respondent"); *United Mine Workers of America, Dist. 29*, 308 NLRB 1155, 1157-58 (1992) (dismissing finding

there. They had laid off some employees about two years ago, and after that I got the sense that they wanted to keep employees working." (Tr. 155-56, Ossak).

of unlawful Section 8(b)(1)(A) threats in September 1989 when Complaint only mentioned alleged threats in October 1989).

The test for whether a claim has been “fully litigated” is “whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence *or* whether the respondent would have altered the conduct of its case at the hearing had a specific allegation been made.” *Pergament*, 296 NLRB at 335 (emphasis added); *see also Piggly Wiggly*, 357 NLRB No. 191, slip op. 2 (“Whether or not new evidence would have changed the result, “[i]t is the opportunity to present argument under the new theory of violation, which must be supplied.”); *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 548 (7th Cir. 1987) (vacating Board decision where employer “had no notice and thus never had a chance to prepare its defense to the [new] claim, much less to present it”).

Here, there is no question that at the very least, Amglo would have altered the conduct of its case at the hearing had a specific allegation of an unlawful layoff been made in the Complaint. Amglo would have presented – at the very least – detailed and substantial evidence regarding past layoffs, procedures for implementing layoffs, further discussions regarding pre-strike staffing and potential layoffs, further evidence regarding the Company’s pre- and post-strike performance at its Bensenville and Juarez facilities, and further details regarding discussions had during the strike related to staffing, both before, during, and after the strike. In other words, had Amglo known that the ALJ was planning to create an entirely new theory of the case, it would have presented substantially more evidence relating to that theory, instead of the very limited evidence it presented regarding the reasons for not recalling the 22 strikers.

In addition, that Amglo presented some evidence related to the reasons it did not recall the 22 employees *does not* support a claim that the issue was fully litigated. “[T]he presence of

evidence in the record to support a charge unstated in a complaint or any amendment thereto does not mean the party against whom the charge is made had notice that the issue was being litigated.” *Enloe*, 346 NLRB at 855 (citing *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983)). Simply put, at the hearing Amglo had no need to present all of the evidence related to any potential post-hoc allegation; had it been aware of such claims, it certainly would have introduced additional evidence related to those claims. The ALJ’s finding of a violation based on an entirely new theory not alleged in the Complaint and based on a position never advocated by the Company is fundamentally unfair and violates Amglo’s due process rights.

c. The Evidence Presented Proves that Amglo Had Legitimate and Substantial Business Reasons for Not Recalling the 22 Strikers.

“The Board has recognized that one legitimate and substantial justification for not immediately reinstating former strikers is a bona fide absence of available work for the strikers in their prestrike or substantially equivalent positions.” *Zimmerman Plumbing and Heating Co., Inc.*, 334 NLRB 586, 588 (2001). Here, the Company presented uncontradicted evidence that (a) the Company knew that the Bensenville facility was overstaffed before the strike, and that it was likely layoffs would have to occur in the relative near future (Tr. 302, Christian); (b) on day three of the strike, when Grant Hyland returned to the Bensenville facility, he met with Czajkowska and Christian regarding “what we thought our business was moving forward,” and that Hyland told Czajkowska and Christian that he was “very confident that [Amglo was] moving into a soft patch” (Tr. 353-54, Hyland), and (c) since the strike, Company revenue has plunged, as has the number of lamps shipped. (CX-6, 7)

The ALJ disregarded this uncontradicted evidence, instead finding that “there are statistics that belie [Amglo’s] claim,” then proceeding to cherry pick certain revenue and overtime numbers that allegedly are “inconsistent with the bleak picture painted by Hyland.”

(ALJD at 10, line 5). The ALJ ignored, however, the incontrovertible facts that (a) Amglo's revenues since the strike were down substantially, (b) the number of lamps shipped were down substantially, and (c) there was uncontradicted testimony from multiple witnesses (including the Acting General Counsel's witnesses) that the Company has been able to complete all of its orders since the strike without the 22 employees on the preferential recall list. (Tr. 379-80, Uchanska; Tr. 391, Wilusz).

Moreover, to accept the ALJ's view of Amglo's pre- and post-strike business performance and decisions is simply illogical. By the ALJ's reasoning, Amglo understaffed its facility and downplayed its business performance in order to artificially reduce staffing. (ALJD at 9-10). But the Board does not easily conclude that an employer embarks on a "self-defeating course of depressing [its] sales for a period of [time] . . . in order to avoid reinstatement of strikers." *Bushnell's Kitchens, Inc.*, 222 NLRB 110, 117-18 (1976) (accepting employer's grounds for not reinstating all economic strikers where strike negatively impacted customer demand and production projections going forward); *see also Randall, Burkart/Randall*, 257 NLRB 1, 7-8 (1981) (rejecting General Counsel's allegation that employer "deliberately refused to fill job vacancies through the recall of strikers" where employer presented evidence that inventory levels were high enough to justify limited staffing).

Here, there is simply no reason to think – and no basis in the record to support the claim that – Amglo was intentionally downplaying its business performance in order to justify not recalling some strikers. Indeed, all of the objective evidence (lower revenue, fewer lamps shipped, and testimony from recalled strikers) demonstrates that was not the case.

d. The ALJ Improperly Found that Amglo Discriminated in Recalling Strikers.

The ALJ also stated that he had a “strong suspicion” that Amglo engaged in discrimination when it selected some employees, but not others, following the employees’ unconditional offer to return to work after September 27, 2011. The ALJ again admitted that “[t]he General Counsel has not alleged that Respondent discriminated in selecting employees for lay-off.” (ALJD at 10). Yet the ALJ apparently expected Amglo to put into evidence its procedures and rationale for post-strike recall, as he nonetheless stated that “Respondent has offered no explanation as to how it chose the employees it recalled and those it did not.” (*Id.*). Obviously, Amglo had no opportunity to fully litigate this issue.

Moreover, again the ALJ is wrong on the facts. For example, the ALJ states that “[o]f the two maintenance men, Respondent recalled the most junior, Stanislaw Wilusz . . . [and] Respondent knew that the senior maintenance man, ‘Jesse’ Kopec had been encouraging employees to continue the strike.” (ALJD at 10-11).³² But Wilusz was not recalled. As he testified at the hearing, Wilusz returned to work voluntarily on Thursday September 22, and at that time the Company was accepting all returning strikers. (Tr. 393-94, Wilusz; CX-3). Kopec, on the other hand, did not offer to return until the last day of the strike, September 27, with 50+ other employees and thus became subject to being placed on the preferential recall list. (*Id.*). In addition, the ALJ fails to note that Ossak and Dzeikan, both of whom were charging parties in this case – were recalled. Finally, since this allegation was not part of the Complaint, the Company obviously had no opportunity at all to present a case as to why specific employees were recalled and others were not.

C. The ALJ Erred in Finding That the Company “Has Not Established That it Did Not Transfer a Significant Amount of Production Work to Juarez and/or Other Facilities in Retaliation for the Strike.” (*Cross-Exceptions 47-49, 54*)

³² The ALJ erroneously held that Kopec was not a supervisor, when un rebutted evidence establishes that he had supervisory authority, his compensation was consistent with supervisory status, and he otherwise constituted a supervisor consistent with applicable standards under the Act.

The Complaint alleged that Amglo retaliated against strikers by transferring work previously done at the Company's Bensenville facility to the Company's Juarez facility. At the hearing, the Company presented undisputed evidence that:

- The Company's Bensenville and Juarez sites are "sister" sites that make essentially the same products (Tr. 350-51, Hyland);
- The Juarez site opened in 2001, and the Company has a long history of transferring production work from Bensenville to Juarez, mainly for labor cost reasons (Tr. 185, Czajkowska; Tr. 363, 365, Hyland);
- Since 2004 or 2005, the Company has used Bensenville as an "incubator" site, where it designs and tests products, with Juarez acting as the main production site for many products after they pass the design and testing stage (Tr. 365, Hyland);
- The Company often bids work based on using labor rates from the Juarez facility (Tr. 194, 266-67, Czajkowska);
- In 2010 (well before the strike), the Company created the position of Work Transfer Coordinator, a position created solely to help facilitate the transfer of work from Bensenville to Juarez (Tr. 195, Czajkowska; Tr. 304, Christian);
- The purpose of Christian's trip to Bensenville in September 2011 was to speed up the transfer of work from Bensenville to Juarez (Tr. 302-03, Christian);
- The Company has maintained detailed work transfer spreadsheets since 2010 that were periodically updated throughout 2011 (Tr. 238-39, Czajkowska, CX 8-13);
- The work transfer spreadsheets show that since the strike, the Company has moved only a miniscule amount of work from Bensenville to Juarez (CX-8-13); and
- The two products moved since the strike consisted of (a) product number AQM-7950, which was a temporary transfer made during the strike and has been transferred back to Bensenville, and (b) product number AQH-5755, of which only 200 units have been made since the strike, and of which large-scale production was always planned for Juarez (CX-13).

All of these facts were all undisputed at the hearing. Ignoring this undisputed evidence, the ALJ found that:

Respondent concedes that its exhibits regarding *the number of employees and the number of overtime hours* for production employees at its Juarez, Mexico

facility may not be accurate. Thus, I find that Respondent has not established that it did not transfer a significant amount of production work to Juarez and/or other facilities in retaliation for the strike at Bensenville.”

(ALJD at 10, lines 9-13, emphasis added).

Like much of the rest of his decision, this finding by the ALJ makes no sense. The Company presented substantial and undisputed evidence showing that only a miniscule amount of work product was transferred to Juarez from Bensenville after the strike. The ALJ ignored this evidence, in favor of Juarez staffing information that admittedly does not show whether or not work was transferred at all. On this basis, the ALJ erred as well.³³

CONCLUSION

For the foregoing reasons, the Company respectfully urges the Board to find merit to its Cross-Exceptions to the Administrative Law Judge’s decision, and to dismiss the Complaint in its entirety.

Respectfully submitted,

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Dated: May 16, 2012

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³³ Although he found that Amglo had not proved that it had not transferred work in retaliation for the strike, the ALJ did not actually find that Amglo did transfer work in retaliation for the strike, and also did not include a remedy on this point. Nor could he have, given the absence of an 8(a)(3) allegation here and the Supreme Court’s decision in *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) holding that “some employer decisions are so peculiarly matters of management prerogatives that they would never constitute violations of section 8(a)(1), whether or not they involved sound business judgment, unless they also violated section 8(a)(3).”

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT AMGLO KEMLITE LABORATORIES, INC.'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION was served this 16th day of May 2012, upon the following:

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