

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

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<b>FRESH &amp; GREEN'S OF WASHINGTON DC, LLC</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>and</b>	)	<b>Case 5-CA-065595</b>
	)	
<b>UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 400</b>	)	
	)	
<b>Charging Party.</b>	)	

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**RESPONDENT FRESH & GREEN'S BRIEF IN SUPPORT OF ITS  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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## **I. INTRODUCTION AND STATEMENT OF THE CASE**

This case involves the discharge of two employees – Esam Amireh and Maria Yliquin – as part of a chain-wide reduction in force that impacted a total of 47 employees. The Acting General Counsel alleged that both employees were discharged because they engaged in union activities in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (the “Act”). The Administrative Law Judge (“ALJ”) correctly dismissed the Complaint allegation as to Amireh, but incorrectly concluded that Yliquin was discharged in violation of the Act. The Board should decline to adopt the ALJ’s decision with respect to Yliquin because the ALJ’s factual findings are clearly erroneous and contradicted by the record evidence. In addition, the ALJ restricted Respondent from presenting relevant evidence at the hearing.

Most of the material facts in this case are not disputed. In May 2011, Respondent Fresh & Green’s of Washington DC, LLC (“Fresh & Green’s” or “the Company”) successfully bid to purchase eight SuperFresh grocery stores from A&P (The Great Atlantic & Pacific Tea Company) – one store in Washington, D.C. and seven stores in Maryland – that were being sold as part of A&P’s bankruptcy proceedings. The employees of all eight SuperFresh stores were represented by the United Food and Commercial Workers (“UFCW”). The Charging Party, UFCW Local 400, represented the SuperFresh employees at the Washington, D.C. store. Most of the Maryland store employees were represented by UFCW Local 27 (“Local 27”).

Instead of hiring a new workforce, the Company decided to attempt to operate all eight stores with substantially all of the former SuperFresh employees, a total of 513 employees. The store managers had discretion as to which employees would be offered employment. Mary Huffman, the Store Manager at the Washington, D.C. store, decided to offer employment to all of the former SuperFresh employees, including Yliquin. Other store managers exercised their discretion by not hiring all of the former SuperFresh employees at their respective stores.

The Company also agreed to bargain with Local 400 as the collective bargaining representative of the Washington, D.C. store employees, and to bargain with Local 27 as the representative of the seven Maryland store employees. Fresh & Green's eventually reached agreement with Local 400 and Local 27 for new collective bargaining agreements covering the store employees in Washington, D.C. and Maryland, respectively.

The initial sales at the Company's new grocery stores were significantly below expectations. Sales were down approximately 70% from SuperFresh's sales levels from the prior year during the first week, and they were down in excess of approximately 50% from the prior year for the first month. These unexpected low sales forced the Company to reduce its workforce across all eight stores.

Local 400 filed an unfair labor practice charge alleging that all six employees who were selected for the reduction in force at the Washington, D.C. store were discharged for engaging in union activities. However, after the Region fully investigated the charge, the Region found no merit to Local 400's claims with respect to four of the discharged employees and dismissed those allegations.

On December 30, 2011, the Regional Director for Region 5 issued a Complaint alleging that the Company violated Sections 8(a)(1) and (3) of the Act by discharging Amireh and Yliquin because of their union activities. A hearing was held on February 27 and 28, 2012 in Washington, D.C., and on May 8, 2012, the ALJ issued his decision.

The ALJ's decision should be reversed for several reasons. First, the ALJ's decision that Fresh & Green's acted with a discriminatory motive in discharging Yliquin is based on clearly erroneous factual findings that are contrary to the record evidence.

Second, the ALJ committed serious error by restricting the Company's ability to introduce relevant evidence at the hearing and, thus, put on a full defense to the Complaint's allegations. Notably, the ALJ refused to permit the Company to introduce relevant evidence regarding the activities of Sally Crabbe, the other shop steward at the store. Yet, in rejecting the Company's defense that Yliquin was not chosen because of her shop steward status as evidenced by the fact that Crabbe was retained, the ALJ speculated that Yliquin was the more aggressive of the two shop stewards.

Third, the ALJ erred by ignoring undisputed evidence that Yliquin was one of six employees selected for termination based on legitimate reasons wholly unrelated to her conduct as a shop steward.

For the reasons described herein, the Company respectfully requests that the Board reverse the ALJ's decision with respect to Yliquin and dismiss the Complaint in its entirety.

## **II. STATEMENT OF FACTS<sup>1</sup>**

### **A. Fresh & Green's**

Fresh & Green's is engaged in the retail grocery business and currently operates six grocery stores – five in Maryland and one in Washington, D.C.<sup>2</sup> Fresh & Green's of Washington DC, LLC is owned by Mrs. Green's Natural Markets, which is owned by Natural Market Restaurants Corp. Catalyst Group, a private equity fund in Toronto, Canada, owns Natural Market Restaurants Corp. Tr. 169-170.

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<sup>1</sup> References to the ALJ's decision will appear as "ALJD" and references to the hearing transcript will appear as "Tr. \_\_\_". References to exhibits introduced at the hearing will appear as "GC Ex. \_\_\_" for General Counsel Exhibits or "R. Ex. \_\_\_" for Respondent Exhibits.

<sup>2</sup> As discussed herein, the Company originally acquired eight stores. However, it recently sold two of its Maryland stores. Tr. 170-171.

## **B. The Company's Acquisition Of The SuperFresh Stores**

In May 2011, the Company put in a bid to purchase several grocery stores from A&P as part of A&P's bankruptcy proceedings. An auction was held in which 23 A&P stores operating under the "SuperFresh" banner were put up for bid. The Company successfully bid on eight of the stores – one in Washington, D.C. and seven in Maryland. Tr. 171-172. The Company took control of the Washington, D.C. store on July 8, 2011. Tr. 174. The Company also took control of the seven Maryland stores in early July 2011. Tr. 176.

At the time the Company purchased the SuperFresh stores, the stores employed 513 employees who were represented by the UFCW. Tr. 175-176. The Washington, D.C. store employed between 59 and 63 employees who were represented by Local 400. Tr. 220. The Maryland stores employed approximately 450 employees. Tr. 176. Six of the Maryland stores' employees were represented by Local 27, and the seventh store was represented by another UFCW local union. Tr. 172-173.

Instead of hiring a new workforce, the Company decided that it wanted to staff all eight stores with the former SuperFresh employees. The Company hired nearly all of the SuperFresh employees. Tr. 173-174. The Company also agreed to recognize Local 400 as the collective bargaining representative of the Washington, D.C. store employees and to bargain with Local 400 for a new collective bargaining agreement to cover the employees. Tr. 175. In addition, the Company agreed to recognize Local 27 as the collective bargaining representative of the employees employed at the seven Maryland stores and to bargain with Local 27 for a new collective bargaining agreement. Tr. 175-178.

**C. July 8, 2011 Union “Rally”**

On July 8, 2011, almost all of the former SuperFresh employees – approximately 50 – gathered in the parking lot in front of the Washington, D.C. store. The employees apparently were gathering there in support of ongoing collective bargaining negotiations between the Company and Local 400. Tr. 255-256. Among the employees present were Amireh, Yliquin, Jenny Yliquin (Yliquin’s sister), shop steward Sally Crabbe, Carol Holiday, and Bill Fitzpatrick. Tr. 47, 104, 258-259. The store was closed to the public on that day as it was transitioning to Fresh & Green’s control and preparing to reopen under the Fresh & Green’s banner. However, Store Manager Mary Huffman and Front End Manager Alex Aguirre-Noguera, a bargaining unit employee, worked that day inside the store. Because it was a hot and humid day in the Nation’s Capitol, Huffman brought water out to the group of employees and Local 400 representatives. Tr. 81-82, 145-146, 255-258. Huffman also invited the employees and Local 400 representatives into the store to use the facilities or to cool down. Tr. 255-258. Around the same time, the parties reached a tentative agreement to cover the Local 400-represented employees working at the store.

On or about July 9, 2011, the former SuperFresh employees who had been hired by Fresh & Green’s, including Yliquin, began working at the store. Tr. 79. Huffman had personally called Yliquin’s sister, Jenny Yliquin, and told her that she (Jenny) and Yliquin should report to work on July 9. *Id.*

On July 13, 2011, Local 400 conducted a vote to ratify the CBA reached with the Company. Tr. 259. The ratification vote took place in the basement of the store at the suggestion of Huffman. Because the store was a centralized location for the employees and a place that all of them knew how to get to, Huffman recommended to Local 400 Representative Richard Wildt that the vote take place at the store. *Id.*

**D. All Employees At The New Fresh & Green's Stores Were Probationary Employees**

The CBA between Fresh & Green's and Local 400 is effective from July 1, 2011 to June 30, 2014. R. Ex. 1. Article 9 of the CBA contains the following "Trial Period and Appeal" provision:

9.1 The first ninety (90) days employment service of any employee with the Employer shall be considered a probationary period. *Employer may discipline or terminate any employee for any reason whatsoever [within] the first ninety (90) days of his or her employment* and there shall be no right of appeal therefore [sic].

9.2 The probationary period for employees hired for a new store opening shall be ninety (90) days after store opening. This period shall remain in effect for the first six (6) months after the store opening.

R. Ex. 1 (emphasis added).

The Company requested that this probationary period be put in the CBA. As President & CEO Matt Williams testified, the Company intended to hire substantially all of the former SuperFresh employees and wanted 90 days to "get to know them." Tr. 179. The Company's CBA with Local 27 contains a similar probationary period. Tr. 188.

**E. September 2011 Reduction In Force**

The Washington, D.C. store officially opened to the public as Fresh & Green's on July 15, 2011. Tr. 219. Unfortunately, when the store first opened, inventory was very low and it remained that way for approximately six weeks. Tr. 219-221. The Company was negotiating with various significant vendors, many of whom were not on board yet, and the store had not yet received supplies for some of the perishable food departments. Tr. 219. The Company's first week's sales across the stores were down 70% from SuperFresh's sales the prior year, and the

first month's sales were down in excess of 50%. Tr. 179-180. The Washington, D.C. store's sales were down approximately 42% for the first month. Tr. 221.

Because initial sales at the stores were falling far below expectations, in September 2011, the Company reduced its workforce at all eight Fresh & Green's stores. There was no set number of employees designated to be reduced at each store. Tr. 157-158, 184. The store manager of each store, with the assistance of Regional Director Alan Thompson and Regional Manager Bill Snyder, made the selections for the reduction in force based on overall job performance.<sup>3</sup> Tr. 184, 187, 209. In implementing the reduction in force at each store, the Company relied on the 90-day probationary period in the CBA. Tr. 187.

Approximately 47 of 429, or approximately 11%, of the Company's employees across the eight stores were impacted by the reduction in force. Tr. 181-183; R. Ex. 3. Six of 56, or roughly 11%, of the employees at the Washington, D.C. store were discharged as part of the reduction in force. Two of the Maryland stores discharged more than six employees. The Chesterton store discharged ten employees (out of 48) – the most of any store – and the Arnold store discharged eight employees (out of 67). The Cambridge store discharged six employees (out of 56), and the other four Maryland stores each discharged five employees or less. Tr. 181-183; R. Ex. 3. Two Local 27 shop stewards at the Cambridge store were among the employees adversely affected by the reduction in force. Tr. 187-188. The shop stewards at each of the other Maryland stores were retained. *Id.*

The six employees selected for the reduction in force at the Washington, D.C. store were: Amireh, part-time Cashier; Yliquin, part-time Cashier; Sonia Spurlock, part-time Cashier;

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<sup>3</sup> Thompson is the Regional Director of Planet Organic Market, a separate chain of grocery stores owned by Natural Markets Restaurant Corp. Thompson's office is located in Canada. Tr. 184. Snyder is employed by Fresh & Green's and was formerly employed by SuperFresh. His office is located in Baltimore, Maryland. Tr. 185.

Jonathan Bennett, part-time Cashier; Pernell Inman, full-time Seafood Manager; and Charles Mantiplay, full-time Night Grocery Stocker. Tr. 224-225; GC Ex. 1-A.

Huffman testified that Amireh was selected for the reduction in force because he had scheduling conflicts. Tr. 19, 226. Yliquin was selected for the reduction in force because of issues with her workplace behavior. Tr. 18.

All of the employees selected for the reduction in force were informed of the decision on September 6, 2011, except Mantiplay, who was informed on September 7 because he worked the night shift. Tr. 225-226, 253. Each employee was brought into Huffman's private office individually. Present with Huffman was the Store Co-Manager Antonio Brox. Tr. 253. Huffman told the employees that their services were no longer needed pursuant to the 90-day probationary period in the CBA. Tr. 21-22, 24-26. The employees were not told of the reasons why they were selected for the reduction in force. *Id.*

#### **F. Local 400's Unfair Labor Practice Charge**

Following the reduction in force, Local 400 filed an unfair labor practice charge against the Company alleging, among other things, that the discharges of the six employees at the Washington, D.C. store violated Sections 8(a)(1) and (3) of the Act. GC Ex. 1-A. After investigating Local 400's charge, the Regional Director of Region 5 (Baltimore) concluded that Local 400's charge with respect to Sonia Spurlock, Charles Mantiplay, Pernell Inman and Jonathan Bennett was without merit and dismissed those allegations. Tr. 158; R. Ex. 2 (Rejected R. Ex. 1).<sup>4</sup>

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<sup>4</sup> At the hearing, the Administrative Law Judge rejected Respondent Exhibit 2, which is the Baltimore Regional Director's dismissal of Local 400's charge with respect to the four aforementioned employees. Tr. 166-168. The employees dismissed from Local 400's charge were employed at the same store and were part of the same reduction in force as the alleged discriminatees. The charge alleges that all six employees were discharged in violation of Sections 8(a)(1) and (3) of the Act. The Regional Director's decision finding no merit to the allegations involving four of the six discharges is clearly relevant to this proceeding, where the Acting General Counsel's Complaint is based on the same theory as Local 400's charge.

**G. The ALJ Found That Yliquin Was Unlawfully Discharged For Being An “Aggressive” Shop Steward, Yet Prohibited The Admission Of Evidence Regarding The Activities Of The Store’s Other Shop Steward**

The hearing in this case was held on February 27 and 28, 2012. During the hearing, Huffman testified that the Washington, D.C. store employed another shop steward, Sally Crabbe, and that Crabbe had not been selected for the reduction in force in September 2011. Tr. 243-244. Huffman further testified that Crabbe approached her with employee grievances and complaints. Tr. 244. In his decision, the ALJ relied heavily on evidence regarding Yliquin’s alleged shop steward activities, but the ALJ rejected evidence regarding Crabbe’s engagement in similar activities as part of her responsibilities as a shop steward:

[Respondent’s Counsel] Q. Now, did Ms. Crabb [sic] ever approach you while you were store manager with employee grievances or issues?

[Huffman] A. Yes, sir.

Q. She did so at Superfresh?

A. Yes, sir.

Q. She did so at Fresh & Green's?

A. Yes, sir.

Q. Can you give us a couple of examples of the types of issues that she raised?

MR. BEATTY: Objection, Your Honor.

JUDGE BIBLOWITZ: Sustained.

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Section 10(b) of the Act provides that Board hearings shall, “so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.” Fed. R. Evid. 403 provides that “[t]he court may exclude relevant evidence if its probative value is *substantially outweighed* by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” (emphasis added). The admission of Respondent Exhibit 2 would not have implicated any of the dangers Rule 403 references. As such, the ALJ erred by failing to admit Respondent Exhibit 2 into evidence and to consider such evidence in his decision.

THE WITNESS: Uhm –

JUDGE BIBLOWITZ: No, don't answer.

THE WITNESS: Okay.

Tr. 244.

Moreover, despite prohibiting testimony regarding Crabbe's shop steward activities, the ALJ speculated that Crabbe was not terminated because she "may not have been as aggressive in that position as Yliquin." ALJD at 7, lines 6-9.

### III. ARGUMENT

#### A. **The ALJ Erred In Finding That The Acting General Counsel Met His Burden Of Establishing That Yliquin Was Selected For The Reduction In Force Because Of Her Protected Conduct (Exceptions 3-15, 18-20, 22, 23)**

##### 1. The ALJ Erred In Crediting The Testimony Of Yliquin And Amireh Over That Of Huffman

As an initial matter, the ALJ erred by failing to credit Huffman's testimony where her testimony conflicted with the testimony of Amireh and Yliquin. ALJD at 6, lines 35-36. The Board will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950). However, as the Board stated in *Jewel Bakery, Inc.* 268 NLRB 1326, 1327 (1984):

The Board will not cede its statutory "power and responsibility of determining the facts as revealed by the preponderance of the evidence." Rather, as the Board explicitly stated, in all cases coming before it for review on exceptions, it would base its "findings as to the facts upon a *de novo* review of the entire record, and...not deem [itself] bound by the [administrative law judge's] findings." Since the enunciation of the policy, the Board has repeatedly stated that the "ultimate choice between conflicting testimony rests not only on the witnesses' demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.

*Id.* at 1327.

Here, the ALJ found that Huffman’s testimony was “confusing, at times, contradictory, and incredible,” ALJD at 6, lines 22-23, without pointing to any record evidence to support this conclusion. To cast such a strong judgment without any explanation or proof is not only wrong, but also effectively prevents the Board from reviewing the ALJ’s credibility resolutions. *See Camelot Terrace, Inc.*, 353 NLRB 151, 152 (2008) (remanding the complaint to ask that the ALJ explain his findings and credibility resolutions in sufficient detail for review because the ALJ “failed to articulate a basis for many of his credibility determinations and did not address evidence that arguably contradicted a number of his factual findings”). Further, as discussed herein, the ALJ mistakenly characterized witness testimony, ignored relevant evidence, and made conclusions unsupported or contradicted by the record. *See Jewel Bakery, Inc.*, 236 NLRB at 1327 (“In cases in which the excepted-to credibility resolutions are in decisions which have omitted reference to relevant testimony on critical matters and have mistakenly characterized the state of the record, the Board has accorded less weight to the factor of demeanor. Thus, the invocation of the demeanor factor is not a substitute for a complete review and analysis of all the record evidence.”).

It should be noted that there are but a few material instances in the record where Huffman’s testimony conflicts with the testimony of Amireh or Yliquin. Where such disputes occur, however, the record as a whole establishes that Huffman was the more candid and sincere witness. As such, the ALJ’s credibility resolutions should be rejected, and, for the reasons stated herein, his decision should be reversed.

2. The ALJ's Findings That Yliquin Engaged In Certain Protected Concerted And Union Activities Are Not Supported By The Record Evidence

In order to meet his burden of establishing that Yliquin's discharge was discriminatorily motivated, the Acting General Counsel must first establish that Yliquin engaged in protected conduct. *See Wright Line, Inc.*, 251 NLRB 1083 (1980), *enfd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). *See also NLRB v. Transportation Management. Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). The ALJ committed serious error by concluding that Yliquin engaged in certain concerted and union activities protected by the Act when the record evidence clearly contradicts such conclusions.

According to the ALJ, Yliquin engaged in protected conduct when she allegedly tried to resolve three issues that arose after the store was acquired by Fresh & Green's: (1) a brief lapse in health insurance coverage for employees; (2) a payroll error that resulted in certain employees not receiving pay for a thirty-minute lunch period; and (3) the failure to post a work schedule by seniority. However, as discussed below, the record does not establish that Yliquin, in her capacity as a shop steward, attempted to correct the problems related to health insurance or pay. While Yliquin approached Huffman regarding the work schedule, several other employees did as well, and there is no evidence that Yliquin was treated any differently for raising this issue.

a. Yliquin did not engage in any protected conduct related to the lapse in health insurance coverage at the store

After Fresh & Green's began operating the Washington, D.C. store, there was a brief time period during which employees were without health insurance. Tr. 53-54, 244-245. In his decision, the ALJ found that Yliquin engaged in protected conduct by attempting to correct this problem. ALJD at 6, lines 31-35, 48-52; at 7, line 1. However, there is no record evidence that Yliquin ever raised the lapse in health insurance with Huffman or any other manager at the Company. Yliquin testified that she discovered that she had no insurance when she

unsuccessfully tried to get a prescription filled, and that she then informed Wildt, her Local 400 business representative, and a nameless customer of *her* problem. Tr. 53-55. Yliquin also testified that co-workers had asked her about the problem, but there is no testimony that Yliquin raised this issue with management on the behalf of any employees, and the problem was quickly corrected. *Id.* Thus, the ALJ erred by finding that Yliquin engaged in protected conduct by attempting to correct the lapse in health insurance coverage for employees. ALJD at 6, lines 28-31, 31-35, 48-52; at 7, line 1. Accordingly, the ALJ also erred by relying on such conduct in concluding that it was a motivating factor in Huffman's decision to select Yliquin for termination. ALJD at 7, lines 9-11.

- b. Yliquin questioned the shortage in her individual paycheck, not the paychecks of other employees, and therefore she was not engaged in any protected conduct

Another issue that arose after Fresh & Green's acquired the store was that approximately 17 employees, including Yliquin, had errors in their initial paychecks. Tr. 55-56, 236-237. Apparently, the issue was that the employees were not paid for a thirty minute lunch period. Tr. 55. There is no dispute that Yliquin raised this issue with Huffman and that their conversation was not pleasant. However, according to Huffman, Yliquin came into her office very upset and asked questions only pertaining to *her* paycheck. Tr. 235. Huffman credibly testified that Yliquin discussed only her paycheck and not other employees' paychecks. *Id.* Because Yliquin questioned only her paycheck with Huffman, the ALJ erred by finding that Yliquin engaged in protected conduct by attempting to correct a pay issue, ALJD at 6, lines 28-31, 31-35, 48-52; at 7, line 1, and by concluding that such conduct was a motivating factor in Huffman's decision to select Yliquin for termination. ALJD at 7, lines 9-11.

3. The ALJ Erred In Concluding That Yliquin Was An “Aggressive” Shop Steward

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The ALJ’s ultimate conclusion that the Respondent violated the Act by discharging Yliquin hinges on his factual finding that Yliquin was an “aggressive” shop steward. *See* ALJD at 6, lines 47-48 (“It is clear that Yliquin was an aggressive shop steward, complaining to Huffman whenever her rights or benefits, or those of the other employees, were affected.”); ALJD at 7, lines 1-3 (“It is also clear that Huffman did not like Yliquin’s aggressive attitude as a shop steward . . .”); ALJD at 7, lines 14-15 (“Her only fault was, apparently, being too aggressive as a shop steward for Huffman.”). However, the record evidence clearly does not support the ALJ’s factual finding that Yliquin was an “aggressive” shop steward.

First, there is no dispute that Yliquin was involved in only a *single* written grievance as a shop steward, and that was when the store was operated by SuperFresh. Tr. 75-76. There is also no dispute that Yliquin was not involved in prosecuting any grievances at Fresh & Green’s. Tr. 77. Certainly, Yliquin’s lack of involvement with any grievances contradicts the “aggressive” label given to Yliquin by the ALJ.

Second, as discussed above, the only issue that Yliquin raised with Huffman in her capacity as a shop steward related to the work schedule not being listed by seniority. Tr. 249-250. Once the work schedule issue was brought to Huffman’s attention, she corrected it immediately, and the record is devoid of any evidence that Huffman was upset with Yliquin for raising this issue. *Id.* As such, this lone activity clearly does not support the ALJ’s characterization of Yliquin as an “aggressive” shop steward.

Third, the ALJ’s error becomes more apparent when considering that it is undisputed that several employees, including the other shop steward, Crabbe, questioned Huffman about the problems related to health insurance, a pay discrepancy and a work schedule. Tr. 243-244, 248,

250-251. Indeed, unlike Yliquin, it is incontrovertible that Crabbe questioned Huffman about the lapse in health insurance coverage. Tr. 248, 250-251. Huffman also testified, without contradiction, that several other employees, including the meat manager, front end manager, produce lead and several cashiers, raised concerns about the health insurance issue.<sup>5</sup> Tr. 244-245, 248.

In short, the record evidence simply does not support the ALJ's conclusion that Yliquin was an "aggressive" shop steward. Moreover, as discussed below, there is no evidence that Yliquin was any more aggressive than the other shop steward at the store, Crabbe. Because the ALJ's decision hinges on this erroneous factual finding, the Board should reverse the Judge's decision.

4. The ALJ Erred By Excluding Relevant Evidence Regarding The Union Activities Of The Other Shop Steward

The ALJ also erred by excluding relevant evidence at the hearing regarding the union activities of the other shop steward at the store, Crabbe. As the ALJ acknowledged in his decision, one of the Respondent's primary defenses to the Complaint allegation that Yliquin was discharged because she was a shop steward is the indisputable fact that Crabbe was retained during the reduction in force despite her shop steward status. As described above, in response to the Acting General Counsel's attempts to distinguish Yliquin from Crabbe, the Respondent attempted to elicit detailed testimony at the hearing regarding Crabbe's shop steward activities. Tr. 243-244. But, the ALJ inexplicably shut the examination down. Tr. 244.

To make matters worse, in addressing the Respondent's defense in his decision, the ALJ speculated that Crabbe "*may* not have been as aggressive" as Yliquin as a shop steward. ALJD

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<sup>5</sup> Except for Huffman and the Assistant Store Manager, Antonio Brox, all other store employees are in the bargaining unit. Tr. 175.

at 7, lines 6-9 (emphasis added). The ALJ cannot be permitted to restrict the Respondent from putting on evidence in support of its defense, and then reject that same defense based on insufficient evidence. The ALJ committed serious error by denying the Respondent's due process rights to put on a complete defense to the Complaint allegations. This error clearly prejudiced the Respondent, and for this reason alone, the ALJ's decision should be reversed.

Notwithstanding the Judge's crucial error in violating the Respondent's due process rights, the record evidence establishes that the ALJ was wrong in speculating that Yliquin may have been more aggressive than Crabbe. In this regard, the record reveals that there was no material difference between the shop steward activities of Yliquin and those of Crabbe. The undisputed fact is that Crabbe served as a shop steward longer than Yliquin. Tr. 71, 156, 243. Moreover, it is undisputed that Crabbe raised employee grievances and issues with Huffman, including the issues regarding health insurance and work schedules, Tr. 248, 250-251. As such, the record evidence does not establish that Yliquin was any more of an aggressive shop steward than Crabbe.

The ALJ also attempted to distinguish Yliquin from Crabbe by noting that Huffman did not complain to Wildt, the Charging Party's representative, about Crabbe's attitude. ALJD at 7, lines 6-9. There is no evidence, however, that Crabbe was disrespectful to Huffman or others. If anything, the fact that Huffman never went to Wildt regarding Crabbe shows that Huffman, who had been dealing with UFCW shop stewards for her entire career in management, had no problem with shop stewards carrying out their duties in a professional and respectful manner. Even assuming, *arguendo*, that Hoffman may not have liked Yliquin or had a strained relationship with her, these issues clearly were unrelated to Yliquin's shop steward status. Huffman has spent her entire career in the retail grocery business, virtually all of it for unionized

employers, and as both a member of the bargaining unit and in a supervisor position. Tr. 218. Huffman was well aware of her inability to terminate a shop steward for engaging in activities in support of her union, and candidly testified that Yliquin's status as a shop steward played no role in Huffman's decision to select her for the reduction in force. Tr. 243. Even if Huffman did not "like" Yliquin, it was clearly a personality conflict, and it is apparent that Yliquin's at times abrasive behavior resulted in her being selected for the reduction in force, and not her status as a shop steward. As a result, the decision did not violate Sections 8(a)(1) and (3) of the Act. *See, e.g., Hyatt on Union Square*, 265 NLRB 612, 616-617 (1982) (Board upheld ALJ decision finding discharge of union steward did not violate the Act, where employee was one of 22 stewards, and record established that respondent had good working relationship with labor unions); *Emerson Electric Co.*, 196 NLRB 959, 961 (1972) (ALJ, with Board approval, upheld discharge of union supporter based on the fact that there were no independent violations of Section 8(a)(1), no record of union animus, and no evidence of disparate treatment due to the employee's union activity).

5. The Overwhelming Record Evidence Establishes That Huffman Harbored No Animus Towards Yliquin For Engaging In Any Protected Or Union Activities

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In order to establish a *prima facie* case of unlawful discrimination under the National Labor Relations Act, the Acting General Counsel must present, at a minimum, proof of employer animus or hostility toward the alleged discriminatee for engaging in activities protected under the Act, and prove that such animus was a motivating factor in the employer's challenged conduct. *See Tasty Baking Co.*, 330 NLRB 560, 561 n.2 (2000) (holding "to establish a violation under Section 8(a)(3), the General Counsel must show that animus against the union activity was a motivating factor in the respondent's conduct ...."); *Wright Line, Inc.*, 251 NLRB at 1089. The

entire record is void of any credible evidence of union animus on the part of Huffman or the Respondent.

The following **undisputed** facts contradict the ALJ's conclusion that Yliquin's alleged protected conduct was a motivating factor in the decision to terminate her:

- The Company offered employment to substantially all of the former employees at all eight of the SuperFresh stores acquired by the Company, and voluntarily recognized the UFCW locals at those stores. Tr. 173-174, 175-178.
- After Fresh & Green's acquisition of the Washington, D.C. store, Huffman had the discretion not to hire Yliquin (and Amireh), but chose to hire Yliquin. Tr. 214-215, 220.
- There was no limit to the number of employees that could be selected as part of the reduction in force, yet Huffman, in consultation with Regional Director Alan Thompson and Regional Manager Bill Snyder, selected only six employees – less than the number of employees selected for discharge at two of the Company's other stores and the same number of employees selected at another store. Tr. 184, 222; R. Ex. 3.
- Huffman chose not to select the other shop steward, Crabbe, for the reduction in force although Crabbe raised employee issues with Huffman before and after the acquisition. Tr. 233-234.
- Huffman could have, but chose not to terminate Carol Holiday, an employee who filed a grievance against Huffman after the store became Fresh & Green's; nor did she terminate Bill Fitzpatrick, an employee who had filed a grievance against her while the store was owned by SuperFresh. Tr. 231-234.
- Despite selecting Yliquin for the reduction in force, she recommended that Yliquin (and Amireh) be considered for rehire. Tr. 254; R. Ex. 14-15.
- Huffman, a former longtime member of the Charging Party, brought water out to the employees who were participating in the Union's so-called "rally" outside the store in July 2011, and she also invited employees into the store to use the facilities and to avoid the heat. Tr. 81-82, 255-248.
- Huffman suggested that the Charging Party use the store basement for its contract ratification vote for the convenience of the employees. Tr. 259.
- Following Fresh & Green's acquisition of the store, certain employees were due vacation pay from SuperFresh, and Huffman assisted the Charging Party so that the employees could get paid. Tr. 252-253.

- Significantly, the Complaint contains no allegation that the Company or Huffman committed any independent Section 8(a)(1) violations. *See, e.g., Emerson Electric*, 196 NLRB at 961 (finding that General Counsel failed to meet burden of proof that employee was discharged for his union activity, where, among other things, there were no independent violations of Section 8(a)(1) involved, nor any record of union animus or sentiment upon which to build a “pretext” case).

Despite the extreme hole in the record of any evidence establishing that Huffman harbored animus against union activity, the ALJ found that Huffman selected Yliquin because of her alleged protected conduct. In his decision, the ALJ found that it was “clear that Huffman did not like Yliquin’s aggressive attitude as a shop steward, and she sometimes responded to Yliquin’s complaints in a dismissive way.” ALJD at 7, lines 1-3. Once again, the ALJ failed to adequately explain or point to any record support for his finding.

The record contains evidence of only one confrontation between Huffman and Yliquin, and that occurred when Yliquin approached Huffman about her missing wages. Tr. 235-237. Huffman testified that Yliquin was loud and disrespectful. Tr. 235. Yliquin claims Huffman was “nasty” and loud with her. Tr. 58. The record evidence weighs in favor of crediting Huffman’s version of this meeting. It was Yliquin who, understandably, was upset about her paycheck being short. On the other hand, Huffman, as the store manager, was empathetic to those who had not been correctly paid. Huffman testified, without contradiction, that approximately 16 other employees were impacted by the payroll error and that she spoke with each of them to assure them that the issue was being corrected. Tr. 236-237. The record evidence does not support the inference that Huffman singled out Yliquin for raising this issue.

Moreover, while Yliquin did approach Huffman about the issue with a work schedule not being posted by seniority, there is absolutely no evidence that suggests Huffman bore animus towards Yliquin for raising this issue. Tr. 249-250. There is no evidence of any confrontation or conflict when Yliquin raised this issue with Huffman. The record establishes that Huffman

simply explained the cause of the problem to Yliquin and then promptly corrected it. *Id.*

Moreover, approximately ten other employees approached Huffman about the work schedule issue, including Crabbe. Tr. 250-251.

In addition, in an attempt to find even the remotest possible evidence of discrimination, the ALJ found that Huffman responded “brusquely” to Yliquin’s questioning on September 6 as to why she was being terminated. This finding is not supported by the record evidence. ALJD at 7, lines 3-4. The record shows that Huffman simply told Yliquin in that meeting that her services were no longer needed pursuant to the 90-day probationary period in the CBA, and to talk to her Union representative if she had any questions. Tr. 21-22, 24-26. Huffman essentially followed the same script when she met with the other employees that day regarding their terminations. *Id.* In any event, the ALJ’s finding is irrelevant, since at the time of their meeting on September 6, the decision to terminate Yliquin as part of the reduction in force had already been made. Nothing that occurred at that meeting establishes that Huffman harbored any animus towards Yliquin for her union activities.

The ALJ also cited to testimony from Union representative Richard Wildt that Huffman allegedly told him that Yliquin was a troublemaker and was getting employees “riled up”. ALJD at 7, lines 4-6. Huffman candidly testified that she spoke with Wildt “a long time ago,” not while the store was Fresh & Green’s, and asked Wildt to talk to Yliquin about how she spoke to her and others. Tr. 240. Wildt said he would talk to Yliquin about her method of relating to other individuals. *Id.* The ALJ’s failure to describe Wildt’s demeanor, and to explain why he apparently relied on Wildt’s testimony instead of Huffman’s, taints his reliance on this clearly self-serving evidence offered up by the Charging Party’s representative.

Given the Judge’s numerous factual and procedural errors – crediting Yliquin for engaging in protected conduct that she clearly did not engage in; labeling Yliquin as an “aggressive” shop steward without any record support; prohibiting the Respondent from putting on a full defense; ignoring indisputable evidence that Huffman and the Respondent harbored no union animus – the ALJ’s finding that Yliquin was discharged for engaging in protected conduct cannot stand. For the foregoing reasons, the ALJ erred by concluding that the Acting General Counsel met his burden of establishing that Yliquin was discharged for engaging in protected conduct. As such, the ALJ’s decision should be overturned and the Complaint dismissed.

**B. The ALJ Erred By Failing to Find That The Respondent Would Have Selected Yliquin For The Reduction In Force Even Absent Her Alleged Protected Conduct (Exceptions 1,2 4-8, 16, 17, 19-23)**

Even if the Acting General Counsel can meet his burden to show, by a preponderance of the evidence, that the employer’s adverse employment action was motivated by the employee’s protected conduct, the employer may defeat the charge of unlawful discrimination by demonstrating, by the same preponderance of the evidence standard, that it would have taken the same adverse action, regardless of the protected conduct. *See Wright Line*, 251 NLRB at 1089; *Sysco Food Services of Cleveland, Inc.*, 347 NLRB 1024, 1034 (2006). The ALJ erred by failing to find that the Respondent would have selected Yliquin for the reduction in force even absent her alleged protected conduct as a shop steward. ALJD at 7, lines 11-13.

1. Yliquin Was Selected For The Reduction In Force For Legitimate, Non-Discriminatory Reasons

Contrary to the ALJ’s findings, the record evidence establishes that Yliquin was selected for the reduction in force for legitimate, non-discriminatory reasons. The ALJ erred when he stated the issue as being “whether Yliquin and Amireh were selected ‘at random’ based upon their overall job performance, or were they, or either one of them, selected because of their

Union or other concerted activities.” ALJD at 6, lines 16-19. There was nothing “random” about the selection of the employees to be terminated as part of the chain-wide reduction in force. The criteria, at all eight stores, for selecting employees for the reduction in force was overall job performance. Tr. 184, 187, 209. All who were selected were terminated pursuant to the 90-day probationary period in the collective bargaining agreements, which was placed in the CBA to afford Fresh & Green’s (as a successor employer) the opportunity to evaluate (1) its staffing needs, and (2) which employees could best fulfill them. Tr. 187; R. Ex. 1. As previously noted, two other UFCW shop stewards were selected as part of the reduction, while several other shop stewards were retained. Tr. 187-188.

Huffman testified that Yliquin was selected for the reduction in force because of issues with her workplace behavior. According to Huffman, Yliquin was disrespectful toward management, vendors and co-employees. Tr. 234-235, 237, 272. Notably, most of Huffman’s testimony regarding Yliquin’s behavioral issues was undisputed.

As discussed above, Yliquin was disrespectful toward Huffman and spoke to her with a loud voice concerning the issue that Yliquin had with *her* paycheck. Tr. 235. The ALJ concluded that Yliquin’s disrespectful behavior was protected conduct. ALJD at 6, lines 28-35. However, as established herein, the credible record evidence does not support the ALJ’s finding that Yliquin was engaged in protected conduct, and, more importantly, that Yliquin was selected for termination due to any protected conduct.

Huffman presented uncontroverted testimony that Yliquin also had run-ins with vendors on the occasions when she worked as a receiver. Tr. 237-238. The ALJ stated that Huffman “seemed to side with Yliquin” in regard to her issues with vendors, but this characterization does not accurately reflect the record. ALJD at 6, lines 26-28. While there is evidence in the record

that Huffman backed Yliquin on one occasion, and told a vendor that he had to do what Yliquin asked, Huffman believed that Yliquin could have controlled the situation better so that it did not get to the point that Huffman had to intervene. Tr. 238, 273-274. In addition, the ALJ ignored the fact that the dispute between Yliquin and the vendor continued and became aggravated. Tr. 238. The ALJ also ignored undisputed testimony that a driver informed Huffman that he would not deliver to the store in the future if he had to deal with Yliquin. *Id.* This posed a significant concern, as the store only had one full-time receiver – Crabbe, the other shop steward. Tr. 238-239. Notably, the record reflects that there were no issues between any vendors and Crabbe. *Id.*

Also, contrary to the ALJ’s finding that there is no evidence of Yliquin having issues with co-employees, ALJD at 6, lines 23-28, Huffman testified that other employees told her that they felt threatened by Yliquin. However, they were too afraid to give specifics, as that would likely lead to a meeting with Yliquin. Tr. 19, 239. Some employees told Huffman that they “were actually scared” of Yliquin. Tr. 19. Moreover, Yliquin admitted that she had been admonished by Ms. Huffman for “threatening employees in the store.” Tr. 66.

2. The ALJ Erred By Relying On Irrelevant And Improper Testimony Concerning Yliquin’s Work Performance

In determining that the Respondent did not meet its burden, the ALJ opined that Yliquin was an excellent employee as shown by the awards that she received at her previous employer, SuperFresh, and testimony from two customers of the store. The ALJ should not have afforded any significant weight to the performance awards, as two of them were issued long ago and before Huffman became manager of the store. Tr. 69-70; GC Ex. 2, 3. There is also no evidence that the store considered prior performance awards with another employer when selecting employees for the reduction in force. Indeed, there is no dispute that the Company did not have the personnel files maintained by SuperFresh prior to or after the acquisition. Tr. 173-174.

The ALJ also should not have given any weight to the testimony of the two customers who testified at the hearing, as most of their testimony, over the objection of the Respondent, consisted of hearsay, improper conjecture or opinion, or was simply irrelevant. For example, the ALJ cited to Janet Lim’s testimony that the Respondent “should be honored to employ” Yliquin, that “there [was] no employee more dedicated than” Yliquin, and that “many customers purposely waited in Yliquin’s line.” ALJD at 5, lines 7-12. Lim’s baseless lay opinion and hearsay testimony should never have been admitted by the ALJ, and certainly should not have been afforded any weight in his decision.

Moreover, the ALJ ignored undisputed evidence of Yliquin’s work performance problems, including the discipline that she received at SuperFresh, Tr. 73-74. The ALJ also made no mention of the undisputed customer complaint levied against Yliquin for treating the customer poorly and being “very rude.” Tr. 241-242; R. Ex. 4. While this customer complaint was not considered by Huffman in selecting Yliquin for a reduction in force, it confirms Yliquin’s behavioral issues and validates Huffman’s decision to select her for the reduction in force.

3. The Record Evidence Does Not Support The ALJ’s Conclusion That The Respondent’s Stated Reasons For Selecting Yliquin For The Reduction In Force Were False

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Contrary to the ALJ’s decision, there is no evidence of pretext by the Respondent in this case. As described above, Huffman’s reasons for selecting Yliquin are backed up by the record evidence, most of which is uncontroverted. The Respondent’s reasons for terminating Yliquin should be upheld, as there is no credible evidence that the decision was motivated by Yliquin’s union activities. *See Posadas de Puerto Rico Associates*, 247 NLRB 1421, 1422 (1980) (“It is [] fundamental that an employer may discharge an employee for any reason or no reason except where motivated by that employee’s union or other protected activity.”). As demonstrated

herein, Yliquin would have been selected for the reduction in force even absent any alleged protected conduct.<sup>6</sup>

The ALJ seemed to question the hirings Huffman made after the September 2011 reduction in force, where Amireh and Yliquin were not considered. ALJD at 4, line 8; at 7, lines 34-37. However, Huffman credibly explained that those new employees were hired to fill *new* vacancies due to employees leaving the store or being on long term leave. Tr. 281-283. In addition, there is no evidence that Amireh or Yliquin applied for any job openings after they were terminated.

Further, in reaching his erroneous decision, the ALJ seems to overlook the fact that Yliquin was, unfortunately, one of six employees at the Company's D.C. store, and one of 47 employees chain-wide (including two other shop stewards), who were let go as part of a reduction in force. This was no "random" selection of employees as the ALJ stated in his decision. As Huffman sincerely testified, the termination decisions she had to make were "very difficult" and "not easy for [her] to make." Tr. 224. And the record demonstrates that they were all made for legitimate, non-discriminatory reasons.

As noted above, the ALJ ignored relevant evidence concerning the Regional Director's dismissal of the Union's challenge to four of the employees terminated. In its charge, the Union alleged that all six of the employees selected for the reduction in force, including Amireh and Yliquin, were discharged for their protected activities. GC Ex. 1-A; R. Ex. 2 (Rejected R. Ex.1). The ALJ correctly found that Amireh was not discharged for unlawful reasons. All five of the

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<sup>6</sup> The ALJ also ignored evidence that the Washington, D.C. store has terminated other bargaining unit employees for job performance issues. Montaz James, a Night Stocker, was terminated at the end of July 2011 following back-to-back absences. Tr. 260-261; R. Ex. 6. Derron Falls, a part-time Cashier, was terminated in November 2011 for being a no show at work. Tr. 260-261; R. Ex. 5. Huffman testified that Sharad Brox, who is the half-brother of the Store Co-Manager, Antonio Brox, was let go because he was not suited for the job he was hired for. Tr. 282-284.

employees the Regional Director and ALJ collectively decided were let go lawfully were selected by Huffman, in consultation with regional management, for overall job performance issues when compared to the remaining employees. Yet, the ALJ concluded that Huffman singled out Yliquin because of her alleged protected conduct. As discussed herein, the ALJ's belief is grounded on numerous erroneous factual findings and significant procedural errors. The record as a whole simply does not support the ALJ's conclusion that the Respondent violated the Act when it selected Yliquin for the reduction in force. As such, the ALJ's decision should be reversed.

#### **IV. CONCLUSION**

For the foregoing reasons, the Company respectfully urges the Board to reverse the Administrative Law Judge's decision in accordance with its Exceptions, and to dismiss the Complaint in its entirety.

Respectfully submitted,

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Dated: June 22, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 22, 2012, a copy of the foregoing Respondent Fresh & Green's Exceptions and Brief In Support Of Its Exceptions To Administrative Law Judge's Decision, which were filed today via the Board's E-Filing System, were served on the following by electronic mail:

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