

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

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FRESH & GREEN'S OF WASHINGTON DC, LLC)	
)	
Respondent,)	
)	
and)	Case 5-CA-065595
)	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 400)	
)	
Charging Party.)	
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**RESPONDENT FRESH & GREEN'S ANSWERING BRIEF
TO THE ACTING GENERAL COUNSEL'S EXCEPTIONS AND THE CHARGING
PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION AND STATEMENT OF THE CASE

On May 8, 2012, Administrative Law Judge (“ALJ”) Joel P. Biblowitz issued his decision in this case, dismissing the Complaint allegation that Respondent discharged Esam Amireh because he engaged in union activities. The ALJ, however, incorrectly concluded that Maria Yliquin was discharged for engaging in union activities in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (the “Act”). On June 22, 2012, the Acting General Counsel and the Charging Party each filed exceptions to the ALJ’s dismissal of the Complaint allegation regarding Amireh. On the same date, Respondent filed exceptions to the ALJ’s decision with respect to Yliquin.

Amireh and Yliquin were selected for termination in September 2011 as part of a chain-wide reduction in force that was necessary due to unexpected low sales after the reopening of Respondent’s eight newly-acquired stores that were purchased as part of the A&P bankruptcy proceeding. The reduction in force involved all eight stores and impacted a total of 47 employees. Amireh and Yliquin were two of six employees at Respondent’s Washington, D.C. store who were selected for the reduction in force.

The Charging Party 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 the Charging Party’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.

Contrary to the Acting General Counsel's and the Charging Party's exceptions, the ALJ's dismissal of the Complaint with respect to Amireh should be affirmed. The record evidence clearly supports the ALJ's conclusion that the Acting General Counsel failed to carry his burden that Amireh's alleged protected conduct was a motivating factor in his selection for the reduction in force. Amireh clearly was not an active or open Union supporter. Amireh participated in a so-called Union "rally" in July 2011, along with approximately 50 other former SuperFresh employees, which occurred outside of the Washington, D.C. store before Respondent took over the SuperFresh stores from the A&P subsidiary. However, there is no evidence that Amireh stood out among the 50 other former SuperFresh employees who also attended the rally.

The Acting General Counsel and the Charging Party contend that Amireh engaged in protected activity after Respondent took over the Washington, D.C. store when he expressed certain preferences to Huffman regarding *his* work schedule. This contention is completely meritless. As the ALJ correctly concluded, Amireh's concerns with *his* work schedule were purely personal and therefore not concerted.

Amireh was not involved in the filing of any grievances while employed by Respondent. And, he was involved in only a single grievance in November 2009 while employed by his previous employer, SuperFresh. That grievance was ultimately withdrawn by the Union.

The record evidence simply does not support an inference that Amireh was chosen for the reduction in force due to any protected or union activities. Therefore, Respondent respectfully requests that the Board affirm the ALJ's decision with respect to Amireh. Further, for the reasons set forth in its Exceptions and Brief in Support of its Exceptions to the ALJ's Decision, the Complaint should be dismissed in its entirety.

II. SUMMARY OF FACTS¹

A. Fresh & Green's Acquires The SuperFresh Stores, Offers Employment To Substantially All Of The Former Store Employees, Voluntarily Recognizes The Union, And Negotiates A Collective Bargaining Agreement

Many of the material facts in this case are not in dispute, especially with respect to events related to Amireh. In May-July 2011, Respondent, Fresh & Green's of Washington DC, LLC ("Fresh & Green's" and "the Company") acquired, via an asset purchase, eight grocery stores from A&P (The Great Atlantic & Pacific Tea Company) as part of A&P's bankruptcy proceedings. Tr. 171-172, 174, 176.² The A&P stores had operated under the "SuperFresh" banner. One store was located in Washington, D.C. and the other seven stores were located in Maryland. Tr. 171-172.

Instead of hiring a new workforce, the Company decided that it wanted to staff all eight stores with the former SuperFresh employees. Tr. 173-174. 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 Amireh and Yliquin. Tr. 214-215, 220. Other store managers exercised their discretion by not hiring all of the former SuperFresh employees at their respective stores. Tr. 214. The Company hired nearly all of the 513 former SuperFresh employees across the eight stores. Tr. 173-174.

The Company also agreed to voluntarily recognize the Charging Party, United Food and Commercial Workers ("UFCW"), Local 400 ("Local 400"), as the collective bargaining

¹ Respondent incorporates by reference its Statement of Facts contained in its Brief in Support of Exceptions to the ALJ's Decision. A summary of facts pertinent to answering the Acting General Counsel's and the Charging Party's exceptions to the ALJ's decision is set forth herein.

² 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.

representative of the Washington, D.C. store employees and to bargain with Local 400 for a new collective bargaining agreement (“CBA”) to cover the employees. Tr. 175. In addition, the Company agreed to recognize UFCW Local 27 (“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 CBA. Tr. 175-178.

B. Amireh Was One Of Many Former SuperFresh Employees At The Union’s July 2011 “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 transitioned to Fresh & Green’s control. However, Store Manager Mary Huffman and Front End Manager Alex Aguirre-Noguera, a bargaining unit employee, worked that day inside the store.³ Because it was a hot and humid day, 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 on a CBA.

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

³ Except for the two managers in the Washington, D.C. store, Huffman and Co-Store Manager Antonio Brox, all other store employees are members of the bargaining unit. Tr. 175.

called Yliquin's sister, Jenny, and told her that she (Jenny) and Yliquin should report to work on July 9. *Id.* Amireh also returned to work on July 9 or 10. Tr. 105-106.

C. Amireh Had Limited Availability During The Majority Of The Year, And He Did Not Want To Work Fridays And Saturdays

Amireh was a part-time cashier during his employment at SuperFresh and Fresh & Green's. Tr. 120, 224-225. Part-time means an employee who works under 35 hours per week. Tr. 224. For the last eight to nine years, Amireh also worked as a school bus driver for Fairfax County, Virginia during the school year (September to June). Tr. 120-121, 227-228. During the school year, Amireh's work hours at the store were limited to working 6:00 p.m. to 10:00 p.m. during the week because of his job as a school bus driver. *Id.* The Washington, D.C. store closes at 10:00 p.m. during the week. Tr. 227-228. During the summer, Amireh worked approximately 26 hours per week. Tr. 100.

While employed by SuperFresh, Amireh always had Fridays and Saturdays off. Tr. 107, 122-123, 136, 227. After the Washington, D.C. store was acquired by Fresh & Green's, Amireh had discussions with Huffman about his work schedule. Specifically, Amireh told Huffman that he wanted to continue having Fridays and Saturdays off. Tr. 107, 135-136, 227. Huffman explained to Amireh that Fridays and Saturdays were busy days, and that under the new Fresh Green's banner, he could no longer be guaranteed both days off, but that she would attempt to alternate working him Friday or Saturday. Amireh said that he would try to work with that arrangement. Tr. 226-227.⁴

⁴ Amireh also testified that he had a discussion with Front End Manager Alex Aguirre-Noguera, a bargaining unit employee, about his schedule. Tr. 108. Amireh claimed that Aguirre-Noguera asked him what days he wanted to have off the following week, and then Aguirre-Noguera allegedly got angry and said that Amireh could not have Fridays and Saturdays off. Tr. 109-110. The record is silent as to Amireh's response to Aguirre-Noguera's initial question, and Amireh did not explain why Aguirre-Noguera allegedly became upset. In any event, there is no dispute that Aguirre-Noguera is a bargaining unit employee and that she played no part in Amireh's selection for the reduction in force.

Amireh testified that he also told Local 400 Representative Richard Wildt of his desire not to work Fridays and Saturdays. Tr. 108, 113, 149. Amireh said that he also mentioned to Wildt that less senior employees than Amireh were working early mornings and eight-hour shifts, while he was working five-hour shifts. Tr. 108, 113. Amireh never requested that Wildt file any grievance over Amireh's scheduling preferences and no grievance was ever filed.

Wildt testified that Amireh talked to him about his continued desire not to work Fridays and Saturdays, and that Amireh was concerned only about his schedule. Tr. 150, 156. However, Wildt never testified that Amireh mentioned anything to him about less senior employees working more hours than Amireh. *Id.* Wildt testified that he spoke with Huffman about Amireh's scheduling issue. Specifically, Wildt asked Huffman, "what's going on?", and Huffman told him that the Company would no longer be honoring the same schedule as SuperFresh. Tr. 150. Huffman pointed out that she needed all employees to be available on weekends, but that she would make an effort to work with them whenever possible. *Id.*

D. Amireh and Yliquin Were Probationary Employees At The Time They Were Selected For The Reduction In Force In September 2011

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.⁵ 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. The CBA between Fresh & Green's and Local 400 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).

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. 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

⁵ 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.

cashier; 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.*

E. 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).⁶

⁶ 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. For the reasons set forth in Respondent's Post-Hearing Brief and Brief in Support of its Exceptions, Respondent believes that the ALJ erred by failing to admit Respondent Exhibit 2 into evidence and to consider such evidence in his decision.

F. Amireh Was Not An Active Union Member, Nor Was He Involved In Any Grievances At Fresh & Green's

The ALJ concluded in his decision that Amireh was not an active Union member. ALJD at 7, lines 22-24. Amireh never served as a Union shop steward at SuperFresh or Fresh & Green's. Tr. 128. He did not wear any union buttons or t-shirts to work. Amireh also did not attend any Union meetings. Tr. 128, 130-132.

It is undisputed that while employed by Fresh & Green's, Amireh was not involved in either the filing or processing of any grievances, and that he was involved in only one grievance while employed by SuperFresh. Tr. 128, 229. In November 2009, Amireh was involved in a grievance at SuperFresh regarding a "spot check" or "bag check" that was performed on him. Tr. 101-104, 229-230; GC Ex. 6. The grievance alleged that his then manager, Huffman, harassed him by searching his belongings in front of employees and customers. Tr. 101-104; GC Ex. 6. At the time of this incident, SuperFresh had a policy that permitted it to randomly search employees' bags. Tr. 229-230. Employees selected for the so-called "bag checks" would have their bags checked once they passed the store's point of checkout.⁷ Tr. 230. Other SuperFresh employees in addition to Amireh also had their bags checked under this policy. Tr. 230. Ultimately, the Union decided not to pursue Amireh's grievance. Tr. 104, 229-230.

III. ARGUMENT

A. The ALJ Correctly Concluded That The Acting General Counsel Failed To Carry His Burden That Amireh's Alleged Protected Conduct Was A Motivating Factor In His Selection For The Reduction In Force

There is no dispute that to prove the allegations in his Complaint, the Acting General Counsel has the initial burden of establishing that Amireh's selection for the reduction in force

⁷ As Huffman testified, the Washington, D.C. store is small compared to average grocery stores, and there is very little space after the checkout counters and before the exit. Tr. 219.

was motivated by the Company's animus or hostility toward his protected conduct. *See Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd* 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). In the case of Amireh, the ALJ correctly concluded that the Acting General Counsel failed to meet his burden under *Wright Line*.

1. The Record Evidence Supports The ALJ's Conclusion That Amireh Was Not Selected For The Reduction In Force Due to Any Protected or Union Activities

a. There is no evidence linking Amireh's participation in the July 2011 Union "rally" with his selection for the reduction in force

There is no credible evidence that Amireh engaged in *any* protected or union activities after he became an employee of Fresh & Green's in July 2011. As the ALJ correctly found, Amireh's only protected activity was his participation in a so-called Union "rally" on July 8, 2011 outside of the Washington, D.C. store. ALJD at 7, lines 24-25; Tr. 104-105. This "rally" occurred prior to Amireh and other former SuperFresh employees starting work for Fresh & Green's. Tr. 79, 105-106. There is no evidence, nor any contention, that Amireh stood out from any of the other 50 former SuperFresh employees who were present that day. Amireh testified that he only stayed for a couple of hours, and while he was there, he simply spoke to Union leaders and other employees. He also tried on a Union t-shirt for a few minutes and took it off. Tr. 133-134. Huffman testified that she did not even remember seeing Amireh there. Tr. 258. There is absolutely no evidence linking Amireh's non-distinct participation in this well-attended event to his selection for the reduction in force.⁸

⁸ The Acting General Counsel asserts in his exceptions that the ALJ erred by concluding that Amireh and Yliquin were terminated as part of a reduction in force. However, as noted above, there is no dispute that Amireh and Yliquin were two of 47 employees chain-wide selected for a reduction in force in September 2011 due to unexpected low sales across the eight stores. The Acting General Counsel's assertion clearly has no merit.

- b. There is no evidence that Amireh's involvement in a single grievance in 2009 while employed at SuperFresh is linked to his selection for the reduction in force
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There also is no dispute that Amireh was not involved in the filing or processing of any grievances while employed by Fresh & Green's. Tr. 128, 229. In fact, as noted above, the only grievance that Amireh was involved in was while he was employed by SuperFresh, two years before the reduction in force. Tr. 101-104, 229-230; GC Ex. 6. The Union ultimately decided not to pursue Amireh's grievance. Tr. 104, 229-230.

The Charging Party argues, and the Acting General Counsel seems to suggest, that the ALJ erred by failing to find that Amireh's involvement in this 2009 grievance was protected conduct. Even if such conduct was protected, there is no evidence linking this remote grievance to Amireh's selection for the reduction in force. The ALJ correctly found that there is no evidence that Huffman resented or retaliated against Amireh for this old grievance. ALJD at 7, lines 29-30. In fact, Huffman credibly testified that she did not even remember the grievance until it was brought up at the hearing. Tr. 230. A single grievance filed almost **two years** prior to Amireh's discharge – with a different employer and that was ultimately dropped by the Union – clearly is too remote in time to have been a factor in the Company's September 2011 reduction in force. *See, e.g., Posadas de Puerto Rico Associates*, 247 NLRB 1421, 1422 (1980) (finding no violation where an employee's "minimal union activity last occur[r]ed some 3 months prior to his discharge, which tend[ed] to render unlikely a causal connection between these events."); *Rockland-Bamberg Print Works, Inc.*, 231 NLRB 305, 306 (1977) (finding that discharge of employee who was not an active union supporter was too remote in time from union campaign and election – held five months before the discharge – to violate Section 8(a)(3)). It is not surprising that Huffman did not even remember that Amireh filed this grievance, and there was no reason for the ALJ to question her testimony on this issue.

Further undermining the contention that Amireh's remote grievance had something to do with his discharge is the fact that another employee, Holiday, had recently filed a grievance after the store became Fresh & Green's over her being removed as deli manager, a bargaining unit position, and made a part-time cashier. Tr. 231. Yet, Holiday was not selected for the reduction in force.⁹ *Id.* In addition, when the store operated as SuperFresh, Bill Fitzpatrick had filed a grievance. However, Fitzpatrick also was not selected for the reduction in force. Tr. 232-234. The filing of Amireh's November 2009 grievance was not relied on by Huffman in making her decision to select him for the reduction in force in September 2011, and the ALJ correctly refused to find that that it played any role in Huffman's decision.

- c. Amireh's scheduling issues were personal, and had nothing to do with his selection for the reduction in force in any event

The Acting General Counsel and the Charging Party also except to the ALJ's conclusion that Amireh's work schedule issues were "purely personal." ALJD at 7, lines 30-31. However, the record clearly supports the ALJ's finding. In this regard, the facts surrounding this issue are not in controversy. Every witness who testified on this subject, including Amireh himself, said that Amireh was concerned only about *his* schedule. Tr. 135-136, 150, 156, 227, 229. Amireh told Huffman about *his* continued desire not to work on Fridays and Saturdays. Tr. 107, 135-136, 227. Amireh told Wildt about Amireh's preference, Tr. 113, 149, and Wildt asked Huffman about the issue. Tr. 150, 156. Huffman's response to Amireh and Wildt was essentially the same: the Company would no longer be honoring the same schedule as SuperFresh, that she now needed all employees to be available on weekends, but that she would make an effort to work with them whenever possible. Tr. 150, 156, 226-227. There is no evidence, nor any

⁹ Notably, at the time of the hearing, aside from Local 400's grievance regarding the discharges of the six employees selected for the reduction in force, Holiday's grievance was the only grievance that had been filed since the store was acquired by Fresh & Green's. Tr. 231.

contention, that either Amireh or Wildt mentioned the parties' CBA when discussing this issue with Huffman or with each other. No grievance was filed over this issue.

Amireh testified that he also told Huffman he was available to work early mornings and eight-hour days after Fresh & Green's acquired the store. Tr. 106-107. However, Amireh never asked Huffman to change his schedule; nor did he complain to Huffman that he thought he deserved to work early mornings or eight-hour shifts instead of less senior employees. Amireh never mentioned the CBA or his seniority when discussing his scheduling preferences with Huffman. Moreover, as noted above, Wildt did not mention anything to Huffman about Amireh wanting to work early mornings or eight-hour shifts. Wildt testified that he only spoke to Huffman about the issue of Amireh not having Fridays and Saturdays off. Tr. 150, 156.

Notwithstanding the undisputed fact that Amireh's issues concerning his work schedule were purely personal, the Acting General Counsel and the Charging Party contend that Amireh somehow invoked a right under the CBA by raising *his* scheduling issues, and therefore his conduct was protected under the principles set forth in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966). As discussed below, this argument is without merit.

First, there is no dispute that this case is governed by *Wright Line*. Ultimately, to prove his Complaint allegations, the Acting General Counsel must show that Respondent's adverse actions vis-à-vis Amireh (and Yliquin) were motivated by anti-union animus. *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"); *Columbian Distribution Servs., Inc.*, 320 NLRB 1068, 1071 (1996) (characterizing "the evidence of animus" as an "essential element" to proving a Section 8(a)(3) violation). The cases cited by the Acting General Counsel, *N.L.R.B. v. City Disposal Sys., Inc.*,

465 U.S. 822 (1984), and the Charging Party, *Interboro Contractors*, 157 NLRB at 1295, involve only Section 8(a)(1) of the Act. Here, even assuming that Amireh's individual actions rise to the level of protected concerted activity (and they do not), that would not be enough for the Acting General Counsel to meet his burden. As demonstrated below, the essential element of anti-union animus is clearly lacking in this case.

Second, Amireh's personal scheduling requests are not covered by the *Interboro* doctrine in any event. While an employee need not explicitly reference a collective bargaining agreement for his or her actions to be covered by the *Interboro* doctrine, "the nature of the employee's complaint [must] be reasonably clear to the person to whom it is communicated, and the complaint [must], in fact, refer to a reasonably perceived violation of the collective-bargaining agreement," for it to be found that the complaining employee is engaged in the process of enforcing that agreement. *See City Disposal*, 465 U.S. at 840. None of those factors are present here.

At most, the record reflects that after Fresh & Green's began operating the store, Amireh merely expressed to Huffman a continued desire to have *his* Fridays and Saturdays off, and he informed her that he could come in earlier in the mornings and work eight-hour shifts, presumably until the school year began a few weeks later. Tr. 107, 135-136, 227. There is no evidence that when Amireh spoke with Huffman that he believed his rights or the rights of other employees under the CBA were being violated. Clearly, Amireh was not raising his scheduling issues on behalf of any other employee, and there is no evidence that Amireh even attempted to communicate with or involve any other employees in his scheduling issues. Not surprisingly, the Acting General Counsel and the Charging Party do not cite to any evidence establishing that had Amireh been successful at getting his Fridays and Saturdays off, other employees would have

benefited. The Acting General Counsel in his exceptions brief generally points to provisions in the CBA regarding seniority and scheduling. But, there is no evidence or contention that Amireh's scheduling issues allegedly violate the CBA. *See National Wax Co.*, 251 NLRB 1064, 1065 (1980) (Board held that employee's acts in attempting to secure a merit increase for himself did not constitute protected concerted activity, as the evidence failed to show that the employee's individual actions directly involved the furtherance of any right which would inure to the benefit of any other employee); *The Tampa Tribune*, 346 NLRB 369, 371-372 (2006) (Board held that employee, who served as a shop steward, disciplined for outburst during a coaching session with his supervisor was not engaged in union or other concerted activity, where employee spoke only for himself when accusing the supervisor of favoritism, and there was no evidence that employee was asserting a grievance under the parties' collective bargaining agreement).

The Acting General Counsel also contends that Amireh's conduct was protected because he told Wildt about his scheduling issues, and Wildt spoke to Huffman on Amireh's behalf. The record reflects, however, that Wildt simply asked Huffman "what's going on?" Tr. 150, 156. That Wildt asked Huffman about Amireh's scheduling issue does not transform Amireh's personal issue into a concerted one. *See The Tampa Tribune*, 346 NLRB at 371 ("[T]he fact that [the employee] was represented by a steward does not transform his individual protest into a concerted one," there being no contention or evidence that respondent warned the employee because he sought and secured the assistance of a steward). Wildt made no complaint or demand on behalf of Amireh. Again, as noted above, Wildt did not discuss Amireh's desire to work early mornings and eight-hour shifts with Huffman. Tr. 150, 156. Moreover, in asking Huffman about Amireh's desire to continue to have Fridays and Saturdays off, Wildt did not suggest that Amireh's or any other employee's rights under the CBA were being violated. Nor is there any

contention or evidence that Huffman resented or retaliated against Amireh for speaking to Wildt about his scheduling issues.¹⁰ The ALJ's conclusion that Amireh's scheduling issues were purely personal is amply supported by the record and Board law, and therefore should be adopted.

In sum, there is absolutely no credible evidence of any causal connection between Amireh's non-distinct and remote protected or union activities and his selection for the reduction in force in September 2011. As such, the ALJ was correct in concluding that the Acting General Counsel failed to establish a *prima facie* case of unlawful discrimination with respect to Amireh. *See, e.g., L.A.R. Electric, Inc.*, 274 NLRB 702, 704-705 (1985) (Board found no violation for the layoff of two employees during reduction in force, one whose protected activities – testimony at a union hearing – were found to be “extremely remote”); *Emerson Electric Co.*, 196 NLRB 959, 961 (1972) (ALJ, with Board approval, upheld discharge of employee whose only known union activity was wearing a union button). Therefore, the Board should affirm the ALJ's dismissal of the Complaint allegations regarding Amireh.

2. The Overwhelming Record Evidence Establishes That Huffman Harbored No Animus Towards Amireh (or Yliquin) For Engaging In Any Protected Or Union Activities

As noted above, in order to establish a *prima facie* case of unlawful discrimination under the 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*

¹⁰ The case cited by the Acting General Counsel, *Schrock Cabinet Co.*, 339 NLRB 182, 183 (2003), is clearly distinguishable. In that case, a union representative complained to a supervisor about an employee being sent home early, and the supervisor twice made unlawful threats to discipline the employee if the union filed a grievance, which the union eventually did. *Id.* at 183. As discussed above, here, Wildt made no complaint on behalf of Amireh, nor did he suggest that the Union would be filing a grievance, regarding Amireh's scheduling preferences; Huffman never made any threats of retaliation against Amireh; and the Union never filed a grievance.

Baking, 330 NLRB at 561 n.2; *Wright Line*, 251 NLRB at 1089. The entire record is void of any credible evidence of anti-union animus on the part of Huffman or the Respondent.

The following **undisputed** facts contradict any argument that Amireh's (or Yliquin's) alleged protected conduct was a motivating factor in the decision to select him for the reduction in force:

- 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 Amireh (and Yliquin), but chose to hire him (and 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, Sally 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 Amireh (and Yliquin) for the reduction in force, Huffman recommended that Amireh (and Yliquin) be considered for rehire.¹¹ 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.

¹¹ The ALJ incorrectly found that Huffman never explained why she hired four employees in October and November 2011, but did not consider rehiring Amireh. ALJD at 7, lines 34-37. Respondent has filed an exception to the ALJ's finding. As stated in the Company's exceptions brief, Huffman credibly testified that those new employees were hired to fill *new* vacancies due to employees separating from 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 the September 2011 reduction in force.

- 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).

Because the Acting General Counsel failed to establish that Huffman or Respondent harbored any anti-union animus when it selected Amireh (or Yliquin) for the reduction in force, the Complaint should be dismissed in its entirety. At a minimum, the ALJ’s decision that the Acting General Counsel’s failed to meet his burden under *Wright Line* with respect to Amireh should be affirmed.¹²

B. The ALJ Did Not Find That The Company’s Reasons For Selecting Amireh For The Reduction In Force Were Pretextual

The Acting General Counsel and the Charging Party further contend that the ALJ found Huffman’s reasons for selecting Amireh for the reduction in force to be pretextual, and therefore the ALJ erred by not concluding that Amireh’s selection for the reduction in force was discriminatorily motivated. However, the ALJ never found that Huffman’s reasons for selecting Amireh for the reduction in force were pretextual. ALJD at 7, lines 20-37. The ALJ never questioned the Company’s reasons for selecting Amireh for the reduction in force, as he

¹² In further attempting to create anti-union animus out of thin air, the Acting General Counsel wildly speculates that Amireh was one of “three pt staffers” who Huffman identified in an August 19, 2011 e-mail regarding the reduction in force. GC Ex. 13. The Acting General Counsel points to no credible evidence to support his speculation. And, in any event, Huffman credibly testified that the e-mail reflected a list of potential employees who she was considering at the time for the reduction in force. Some of the employees listed on the e-mail were ultimately included in the reduction in force, and some were not. Tr. 265-267, 277-279; GC. Ex. 13.

correctly concluded that the Acting General Counsel failed to meet his initial burden that Amireh's alleged protected or union conduct was a motivating factor in his selection for the reduction in force.¹³ Because the ALJ did not find that the Company's stated reasons for selecting Amireh for the reduction in force were false, the Acting General Counsel's reliance on *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), and its progeny is misplaced. Moreover, unlike in *Shattuck Denn*, the record evidence does not support any inference that the Company's motive for selecting Amireh for the reduction in force was unlawful. In *Shattuck Denn*, the court upheld the Board's finding that an employee's discharge was motivated by the employer's desire to discourage union activity based, in part, on the "surrounding facts:" the union had just been certified and was busy advancing grievances; the employee at issue was an officer of the union, a shop steward, and an active member of the grievance committee; and the employee presented a grievance against his supervisor. *Id.* at 470. Here, the Union was voluntarily recognized by the Company; at the time of the hearing, there had only been two grievances filed against the Company; and Amireh was not a shop steward or active Union member. Thus, even if the ALJ had found the Company's reasons for selecting Amireh for the reduction in force to be false (which he did not), there is no basis for inferring that the Company had an unlawful discriminatory motive.

While the ALJ did discredit Huffman's testimony, a finding that Respondent has filed exceptions to, he did so only to the extent that Huffman's testimony conflicted with Amireh's testimony. ALJD at 6, lines 35-36. As discussed herein, there are no material factual disputes between Huffman and Amireh. The ALJ's adverse view of Huffman's testimony therefore has

¹³ The ALJ did, however, find that the Acting General Counsel met his initial *Wright Line* burden with respect to Yliquin, and that the Company's reasons for selecting Yliquin for the reduction in force were pretextual. For the reasons set forth in Respondent's exceptions and supporting brief, the ALJ clearly erred in reaching these conclusions.

no bearing on his conclusion that the Acting General Counsel did not meet his legal burden in this case.

For example, there is a conflict in the record involving Amireh's claim that, at one point, Huffman said that he had to be available both Fridays and Saturdays or he had to go. Tr. 110. However, Amireh immediately contradicted himself when he testified that Huffman told him that "you have to be available Friday *or* Saturday or this job is not right for you." *Id.* (emphasis added). Amireh contradicted himself again on cross-examination when asked about his conversations with Huffman regarding his schedule. In this regard, Amireh testified that he spoke with Huffman in early July and August, and that both times Huffman asked Amireh if he would prefer working Fridays or Saturdays. Tr. 123-124. Also, significantly undermining Amireh's testimony is that he never told Wildt (or anyone else) about Huffman's alleged ultimatum that he had to work Fridays and Saturdays. In short, Amireh's testimony that Huffman allegedly told him that he had to work Fridays and Saturdays or go is not credible, nor is it supported by the record evidence as a whole.¹⁴ In any event, this dispute is not material to the ALJ's conclusion. As discussed below, the record is clear that Huffman did not testify that she chose Amireh for the reduction in force because he refused to work Fridays and Saturdays. Huffman made the difficult decision to select Amireh because of his limited availability during the majority of the year and his strong preference to continue to have Fridays and Saturdays off, which the store could no longer accommodate under Fresh & Green's. Tr. 19, 226-227. More

¹⁴ Overall, Amireh was not a trustworthy witness. As the record reflects, at times, Amireh was purposely evasive and provided contradictory testimony.

importantly, there is no evidence that Amireh was selected for the reduction in force due to any union activities.¹⁵

As for the Acting General Counsel's and the Charging Party's contention that Huffman lied about the reason she selected Amireh for the reduction in force, their contention is not supported by the record evidence. They contend that Huffman's purported reason for selecting Amireh for the reduction in force was that he refused to work Fridays and Saturdays. However, as noted above, Huffman never testified that Amireh refused to work Fridays and Saturdays. Tr. 19, 226-227. Huffman testified that when Amireh expressed his continued desire to have Fridays and Saturdays off, she explained to Amireh that she could no longer guarantee him both days off and that she would try to work with him. Huffman admitted that Amireh's response was that he would try to work with that arrangement. Tr. 226-227.

Huffman credibly testified that Amireh was selected for the reduction in force due to scheduling issues, not because he refused to work Fridays and Saturdays.¹⁶ Tr. 19, 226-227. As discussed above, those issues included Amireh's limited availability during the majority of the year when he drove a school bus in Virginia, and Amireh's strong preference to have Fridays and Saturdays off – busy days for the store, which Huffman told him she could no longer accommodate. *Id.* These were legitimate reasons for Huffman to include Amireh in the reduction in force, and, more importantly, they were clearly unrelated to any protected or union activities. *See Posadas de Puerto Rico Associates*, 247 NLRB at 1422 (“It is [] fundamental that

¹⁵ Another conflict in the record involves Amireh's claim that he told Huffman and Wildt about his desire to work early mornings and eight-hour shifts after the store re-opened in July 2011. However, neither Huffman nor Wildt testified that Amireh raised this subject with them, and so Amireh's testimony should not be credited. Even if Amireh's testimony is credited, however, there is no evidence that Amireh's personal scheduling issue was concerted, or that he was selected for the reduction in force for raising such issue.

¹⁶ As such, the cases relied on by the Acting General Counsel and the Charging Party for the premise that an unlawful motive can be inferred from an employer's pretextual assertion that an employee is unavailable are inapposite here. Again, Huffman never testified that Amireh was selected for the reduction in force because he refused to work Fridays and Saturdays. Tr. 19, 226-227.

an employer may discharge an employee for any reason or no reason except where motivated by that employee's union or other protected activity.”). Further, Huffman's business judgment in selecting Amireh (and Yliquin) and the other employees for the reduction in force should not be rejected, even if one were to question the rationale used. *See Columbian Distribution*, 320 NLRB at 1070-1071 (ALJ did not find employer's rationale to be so unreasonable to warrant a substitution of his business judgment for that of the employer).

Therefore, even if the evidence presented by the Acting General Counsel rose to the level which would warrant a shifting of the evidentiary burden under *Wright Line* (which the ALJ correctly found it did not), the Company has demonstrated that Amireh would have been selected for the reduction in force regardless of any protected or union activities he allegedly engaged in. *See, e.g., Ryder Distribution Resources, Inc.*, 311 NLRB 814, 817 (1993) (holding that respondent met its *Wright Line* burden of demonstrating that it would have taken the same action even in the absence of its employees' protected union activity, where respondent made business decision to discharge employees and subcontract work). As Huffman testified, the decision as to which employees should be selected for the reduction in force was not easy. Tr. 224. But it is clear that the record in this case is devoid of any evidence that Amireh's union activities played any role in the Company's decision, and that Huffman had a legitimate reason to include Amireh on the list of employees who the Company was forced to let go because of a severe drop off in sales.

IV. CONCLUSION

The record evidence simply does not support an inference that Amireh was selected for the reduction in force in September 2011 because of any protected or union conduct. As such, the Company respectfully urges the Board to affirm the Administrative Law Judge's decision to

dismiss the Complaint with respect to Amireh, and in accordance with its Exceptions to the ALJ's decision, to dismiss the Complaint in its entirety.

Respectfully submitted,

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Dated: July 18, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2012, a copy of the foregoing Respondent Fresh & Green's Answering Brief To The Acting General Counsel's Exceptions And The Charging Party's Exceptions To The Administrative Law Judge's Decision, which was filed today via the Board's E-Filing System, were served on the following by electronic mail:

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