

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

**833 CENTRAL OWNERS CORP.**

**and**

**29-CA-70910**

**LOCAL 621 UNITED WORKERS  
OF AMERICA**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS  
AND SUPPORTING BRIEF**

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## 1. Procedural History

This case was litigated before Administrative Law Judge William N. Cates (“ALJ”) on May 7, and May 8, 2012. On September 14, 2012, Judge Cates issued his thorough decision in which he found that 833 Central Owners Corp. (“Respondent”) committed numerous violations of the National Labor Relations Act (“Act”), as alleged in the Amended Complaint. The ALJ found, *inter alia*, that Respondent issued four warnings to, suspended, and discharged building superintendent Ezra Shikarchy because of his support for and activities on behalf of Local 621, United Workers of America (“Union”) and because of other protected activities, in violation of Section 8(a)(3) and (1) of the Act. The ALJ also found that on several occasions, various agents of Respondent threatened Shikarchy with discharge and unspecified reprisals, because of his support for and activities on behalf of the Union, and promised him benefits to discourage him from supporting and engaging in activities on behalf of the Union, in violation of Section 8(a)(1) of the Act.

On October 12, 2012, Respondent filed 34 exceptions to the ALJ’s findings, along with a brief in support of its exceptions. No other party has filed exceptions. Pursuant to Section 102.46 of the Board’s Rules and Regulations, Counsel for the Acting General Counsel (“General Counsel”) hereby submits its Answering Brief in Opposition to Respondent’s Exceptions and Supporting Brief.

## 2. Statement of the Facts

All relevant and material facts have been completely and accurately set forth in the ALJ’s Decision (ALJD p. 2-13)<sup>1</sup>, except as otherwise noted herein.

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<sup>1</sup> References are abbreviated as follows: “ALJD” denotes the Decision; “Resp. Exc.” denotes Respondent’s exceptions; “Resp. Ex.” denotes Respondent’s exhibits. “GC Ex.” denotes General Counsel’s exhibits. “Tr.” denotes the official transcript of the Hearing. “Resp. Br.” denotes Respondent’s Brief in Support of its Exceptions.

### 3. Argument

An analysis of the record evidence and relevant, well-established Board law fully supports each of the ALJ's findings and conclusions to which Respondent has excepted. The repeated threats of discharge and unspecified reprisals, and other violations of Section 8(a)(1) of the Act were not refuted. Those clear violations of Section 8(a)(1), in addition to other credible evidence of Union animus in the record, established that Shikarchy's Union support and protected activity was a motivating factor in Respondent's decision to: 1) issue him four warnings on September 7, 2011; 2) suspend him on October 27, 2011; and 3) terminate him on December 13, 2011. Respondent's exaggerated and piled on accusations of Shikarchy's alleged wrongdoing were correctly exposed by the ALJ as pretexts for Respondent's unlawful conduct.

The General Counsel submits that Respondent's exceptions are wholly without merit and should be rejected. Some of Respondent's exceptions are so baseless that they are clearly proffered only to delay Respondent's compliance with the ALJ's recommended Order. For the following reasons, the Board should affirm the ALJ's Decision and Order in its entirety.

**a. RESPONDENT'S ARGUMENT THAT WALTER BERGER IS NOT AN AGENT OF  
RESPONDENT IS PREPOSTEROUS AND IN BAD FAITH BECAUSE  
RESPONDENT STIPULATED THAT BERGER WAS AN AGENT OF  
RESPONDENT  
(Exceptions 1-7)**

Respondent, in Exceptions 1 through 7, excepts to the ALJ's findings relating to Walter Berger's agency status. Respondent's Exception 1, arguing that the ALJ erred by finding that Walter Berger was an agent of Respondent, is preposterous and wholly without merit. On May 25, 2012, Respondent stipulated, *inter alia*, that "at all material times, Walter Berger was an

agent of Respondent within the meaning of Section 2(13) of the Act,<sup>2</sup> and Respondent's treasurer." GC Ex. 27, p. 1.<sup>3</sup> In spite of that stipulation in which Respondent admitted that Berger was an agent of Respondent, Respondent now claims that Berger "was not an agent of Respondent." Resp. Br. 8. Respondent bases its disingenuous argument on the fact that it did not stipulate that Berger was an agent of Respondent *as defined under Section 2(2)* of the Act.<sup>4</sup> Resp. Br. 8. Respondent's argument is misplaced in that Section 2(2) does not define the term "agent." Although Section 2(2) references "agent," it only does so in an attempt to define the term "employer." Not surprisingly, Respondent cites no legal authority in support of its argument that the stipulation here is insufficient to establish Berger's agency status, because none exists. The absence of a stipulation that Walter Berger is not an agent of Respondent as defined in Section 2(2) of the Act is clearly immaterial and has absolutely no bearing on whether Berger is an agent of Respondent, especially where Respondent has stipulated that Berger was an agent of Respondent within the meaning of Section 2(13) of the Act.

Similarly, Respondent's Exception 2, that the ALJ erred each time he referred to Berger as "Board Treasurer Berger and/or Board Member Berger," and its related argument that the General Counsel did not prove that Berger was a Board Member, are equally devoid of merit. First, Berger's name appears on numerous minutes from Board of Directors meetings. See Tr. 34, 88, 89. Second, and most tellingly, Berger's name appears on a list of Respondent's Board of

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<sup>2</sup> Section 2(13) of the Act states that: [i]n determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

<sup>3</sup> As the ALJ noted at footnote 2, on May 8, 2012, the ALJ adjourned the hearing to allow the General Counsel to review certain documents pursuant to subpoena, and established a resumption date, if necessary, of June 5, 2012. The stipulation regarding Walter Berger's agency status obviated the need to resume the hearing on June 5, 2012. Had the issue not been resolved, the General Counsel would have requested to resume the hearing on June 5, 2012.

<sup>4</sup> Section 2(2), in relevant part, states that the term "employer" includes any person acting as an agent of an employer, directly or indirectly . . . .

Directors that Respondent's agent, Jeffrey Herskovitz, emailed to James Goldstick of Mark Greenberg Real Estate Co., LLC on December 16, 2011. GC Ex. 26, 27. While Respondent in the May 25, 2011 stipulation "denies that Walter Berger was a Member of Respondent's Co-Op Board at any time," the denial is exposed as baseless by Respondent's agent's email that lists Berger as a member of the Board of Directors. GC Ex. 27.

Respondent's Exceptions 3, 5, 6 and 7, that the ALJ erred in imputing to Respondent various threats made by Berger, must also be rejected. Because the ALJ properly found that Berger was an agent of Respondent and its treasurer (because Respondent stipulated to these facts), the ALJ properly imputed to Respondent his numerous threats and promise of benefits (some of which were recorded by Shikarchy) and concluded that Respondent violated Section 8(a)(1) of the Act. *See Kidd Elec. Co.*, 313 NLRB 1178, 1180 (1994).

Finally, Respondent, in Exception 4, argues that the ALJ erred in crediting and finding that "Shikarchy testified, without contradiction [Berger testified but did not address these matters], that between mid-August and early December, Berger spoke with him several times about his employment with the Company." Resp. Exc. p. 2 (citing ALJD p. 14, ln. 24-26). Exception 4 further states that "Shikarchy's testimony was in fact contradicted by Mr. Berger's testimony that he did not speak to Mr. Shikarchy in December or at any other time while he was in Florida." Resp. Exc. p. 2. Respondent's credibility based argument must be rejected because the ALJ stated that "[t]o the extent, if any, there are conflicts, real or perceived, between Shikarchy's testimony and that of Berger or Herskovitz, I credit Shikarchy." ALJD p. 13, ln. 11-12. He found that Berger testified "with a self-imposed and deliberate failure to recall certain facts and dates." ALJD p. 13, ln. 8-10. The ALJ explicitly stated that he carefully observed the demeanor of the witnesses as they testified and relied on those observations in making his credibility determinations. ALJD p. 2, ln. 5-7. It is well-settled that the Board's

policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951); *See also Bralco Metals, Inc.*, 227 NLRB 973, 973 (1977) (the "Board is reluctant to overturn the credibility findings of an Administrative Law Judge"); *E.S. Sutton Realty Co.*, 336 NLRB 405, 405 fn. 2 (2001) ("only in rare cases" will it do so). Here, Respondent has failed to meet its heavy burden of demonstrating that the clear preponderance of all relevant evidence shows that the ALJ erred in crediting Shikarchy over Berger and Herskovitz.

In sum, each of Respondents Exceptions 1 through 7 should be rejected. The ALJ correctly found that Berger was both an agent of Respondent and its treasurer, and properly imputed to Respondent his numerous threats and promise of benefits toward Shikarchy.

**b. THE ALJ CORRECTLY FOUND THAT RESPONDENT WAS AWARE OF SHIKARCHY'S UNION ACTIVITIES AS OF JUNE 20, 2011 AND THAT BOARD MEMBERS FRIEDMAN AND HERTZBERG THREATENED HIM BECAUSE OF HIS SUPPORT FOR THE UNION (Exceptions 8-13)**

Respondent, in Exceptions 8 through 18, excepts to the ALJ's findings relating to Respondent's knowledge of Shikarchy's Union activities. In Exceptions 8, 9 and 10, Respondent argues that the ALJ erred when he found it was aware that Shikarchy supported the Union at the June 20, 2011 arbitration when he failed to prepare for it. Respondent's Exceptions should be rejected because the ALJ's findings regarding Respondent's knowledge of Shikarchy's change in loyalty at the June 20, 2011 arbitration are well-supported by the record evidence. ALJD p. 16, ln. 4-6.

Respondent's knowledge of Shikarchy's change in loyalty and Union support as of the arbitration, or shortly thereafter, is established by several key facts. First, as the ALJ correctly

found, Shikarchy chose not to testify on behalf of Respondent at the arbitration, and openly displayed his support for the Union's position by giving a "thumbs up" to the Union. ALJD p. 15, ln. 36-40. Second, even assuming that Shikarchy's failure to testify was somehow unrelated to his support for the Union, or that Respondent was unaware of the "thumbs up" gesture, Shikarchy's unrefuted testimony that Walter Berger, in the last week of June 2011, told Shikarchy that Respondent had a Board meeting and they—Steven Friedman and Mark Hertzberg—wanted Shikarchy out because he "switched to the Union," leaves no doubt that Respondent was aware of Shikarchy's Union support at that time. ALJD p. 4, ln. 46; Tr. 129-130, 192. Third, Shikarchy testified that at the arbitration, Friedman was very angry with his lack of preparation and suggested that Friedman blamed him for the outcome. ALJD p. 16; ln. 6-7; Tr. 131. Respondent failed to call Friedman as a witness, and therefore, the testimony is unrefuted. These facts, which were correctly found by the ALJ based on credible unrefuted record evidence, establish that Respondent knew of Shikarchy's Union support as early as June 20, 2011, or at the latest, sometime during the last week of June 2011.

Respondent, in Exceptions 11 to 13, addresses the ALJ's findings regarding the timing of discipline issued to Shikarchy as it relates to his Union activities. Specifically, Respondent, in Exception 11, states that the ALJ erred when he concluded "[f]urther evidence demonstrates the pretextual nature of the Company's defense. Shikarchy's record was that of an attentive employee without discipline until he engaged in protected activities and shifted his support for the Union." Resp. Exc. 11 (citing ALJD p. 17, ln. 19-21). Respondent, in Exception 12, states that the ALJ erred when he concluded that "[a]ll of the email evidence proffered by the Company to support its defense involved incidents that occurred after Shikarchy's support for the Union was known to the Company." Resp. Exc. 12 (citing ALJD p. 17, ln. 21-23). Respondent, in Exception 13, states that the ALJ erred when he concluded that "[t]he Company

advanced no justifiable explanation for issuing four written warnings to Shikarchy on one day, September 7, for events dating back to June 21, one day after Shikarchy made his support for the Union known. Resp. Exc. 13 (citing ALJD p. 17, ln. 23-25). According to Respondent, the record evidence shows that Shikarchy was disciplined for his failure to perform his job duties prior to it being placed on notice that Shikarchy had begun to support the Union. Resp. Exc. p. 5.

Respondent's claim is demonstrably false and Exceptions 11 through 13 should be rejected. Respondent does not dispute that it first disciplined Shikarchy on September 7, 2011 when it issued him four warnings for conduct dating as far back as June 21, 2011, one day after the arbitration. Tr. 152-153. Respondent offered no explanation for why all four warnings were issued on the same day, and why they were not issued closer in time to the alleged wrongdoing. As explained above, the ALJ correctly found that Respondent was aware of Shikarchy's change in loyalty as of June 20, 2011, and after the arbitration in June 2011 when Berger told Shikarchy that Respondent knew he switched to the Union. ALJD p. 4, ln. 46. Even assuming Respondent did not know of Shikarchy's Union support on June 20, 2011, or even late June 2011, Respondent was clearly aware that on August 15, 2011, Shikarchy filed a grievance, through the Union, regarding Steven Friedman's harassment of him, because Union President Sombrotto emailed it to Herskovitz on that date. Tr. 144, 186; GC Ex. 18. The Board and the Courts have long held that the filing of a grievance is protected concerted activity as defined in Section 7 of the Act. *United Parcel Service of Ohio*, 321 NLRB 300, 322 (1996) (citing *Ladies Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975)). Thus, Respondent's Exceptions 11 through 13 must be rejected because the record evidence unequivocally establishes that Respondent had knowledge of Shikarchy's Union and protected activities prior to disciplining him on September 7, 2011.

**c. THE ALJ CORRECTLY DID NOT FIND OR DISCUSS EVIDENCE SHOWING THAT SHIKARCHY AND FRIEDMAN WERE INVOLVED IN A PERSONAL DISPUTE BECAUSE NO RELEVANT, CREDIBLE EVIDENCE EXISTS IN THE RECORD (Exceptions 14-18)**

Respondent, in Exceptions 14 through 18, excepts to the ALJ's failure to find or discuss evidence showing that Shikarchy and Steven Friedman were involved in a personal dispute. Respondent raises this frivolous exception, even though, most glaringly, Respondent failed to call Friedman to the stand to substantiate the existence of a personal dispute between him and Shikarchy. In the absence of testimony from Friedman, the record evidence did not establish that such a dispute existed prior to the June 20, 2011 arbitration. Shikarchy testified that he did not have problems with Friedman prior to the arbitration. Tr. 148. As explained below, even assuming that Shikarchy and Friedman were involved in a personal dispute, it became inextricably linked to Shikarchy's Union and protected activities, and the evidence is clear that this animus was a motivating factor in Respondent's discipline of Shikarchy.

Respondent, in Exception 14, argues that the ALJ erred when he made the following finding of fact: "Shikarchy testified Board Member Friedman had not harassed him before the June 20 arbitration but afterward began to do so." Resp. Exc. 14 (citing ALJD p. 4, ln. 34-35). According to Respondent, Shikarchy's testimony and even a written grievance filed by Shikarchy contradict such testimony. Resp. Exc. 14. Contrary to Respondent's argument, Shikarchy testimony established that he did *not* have problems with Friedman prior to the arbitration. Tr. 148.<sup>5</sup> While Shikarchy acknowledged on cross-examination that prior to the arbitration, Friedman directed him about what to do and how to treat employees, this does not

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<sup>5</sup> While Shikarchy did initially answer "yes" to the question "Did you have problems with Steve Friedman harassing you prior to the arbitration?" after being asked the question again, Shikarchy clarified that he did not have problems with Friedman prior to the arbitration. Tr. 148. He also earlier testified on several occasions that he did not have problems with Friedman prior to the arbitration. Tr. 144-145.

establish a personal dispute. Tr. 183. At most, it merely establishes that Friedman often gave Shikarchy orders. What is clear is that it was Friedman's harassment of Shikarchy on August 14, 2011 in the lobby that led Shikarchy to file a grievance the next day. Tr. 144-145.

In another flawed attempt to establish that the harassment began well before the June 20, 2011 arbitration, Respondent notes that the grievance states that Shikarchy has been harassed "in or about the six months." Resp. Br. 18-19. Respondent's argument is specious. The fact that the August 15, 2011 grievance contains a time frame of "in or about the last 6 months" clearly does not establish that the harassment actually occurred since February 15, 2011. Instead, the Union likely included such a time frame to track the language often found in unfair labor practice charges filed with the National Labor Relations Board in light of Section 10(b) of the Act's 6-month statute of limitations. Based on the credible record evidence, the ALJ correctly found that the harassment began after June 20, 2011, and Respondent's Exception 14 should be rejected.

Respondent, in Exceptions 15 and 16, argues that the ALJ erred by concluding that unrefuted threats of discharge and unspecified reprisals made by Mark Hertzberg and Steven Friedman to Shikarchy were unlawful. Remarkably, Respondent suggests that because the grievance related to a personal dispute, the threats made to Shikarchy if he did not withdraw it are not unlawful. Resp. Exc. 15, 16; Resp. Br. 19-23. Respondent's argument is both factually and legally incorrect under well-established Board law. It is factually incorrect because as explained above, the August 15, 2011 grievance was not based on a personal dispute; rather, it stemmed from Friedman's hostility to Shikarchy after he began supporting the Union at the June 20, 2011 arbitration. It is legally incorrect because the Board and the Courts have long held that the filing of a grievance is protected concerted activity as defined in Section 7 of the Act, and therefore, it follows that a threat of discharge or unspecified reprisals to withdraw the

grievance violates Section 8(a)(1) of the Act. *United Parcel Service of Ohio, supra*. It is the *filing* of the grievance itself (rather than the facts underlying the grievance) that is Shikarchy's protected activity. Given that Respondent does not deny that Hertzberg and Friedman threatened Shikarchy as alleged in the Amended Complaint, Respondent's Exceptions 15 and 16 clearly lack merit and should be rejected.

Respondent, in Exception 17, contends that the ALJ erred when he found "[o]n August 14, Shikarchy claimed harassment by Board Member Friedman because he supported the Union." Respondent argues that the record evidence shows that Shikarchy never alleged on August 14 that he was being harassed because of his Union participation. Resp. Exc. 16. Respondent's argument is without merit. The ALJ clearly did not mean that Shikarchy *explicitly* alleged in the grievance that the harassment was because Shikarchy supported the Union--the grievance itself does not contain such language. See GC Ex. 18. Rather, Shikarchy's credited testimony established that the harassment underlying the grievance was triggered by Shikarchy's Union activities. Thus, the ALJ's finding is sound, and Respondent's Exception 17 should be rejected.

Respondent, in Exception 18, argues that the ALJ erred when he concluded "I find it unnecessary to address, in detail, each of the asserted defenses raised by the Company." As discussed more fully below, under well-established Board law, because the ALJ correctly determined that Respondent's proffered reasons for warning, suspending, and discharging Shikarchy were pretextual (ALJD p. 17, ln 11-15), he was not required to address, in detail, each of Respondent's defenses. *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004). As explained below, even if he had addressed each of them, Respondent failed to meet its burden under *Wright Line* of showing that it would have disciplined and terminated Shikarchy absent his Union and protected activities. Thus, Respondent's Exception 18 should be rejected.

**d. THE ALJ CORRECTLY FOUND THAT THE GENERAL COUNSEL ESTABLISHED THAT RESPONDENT HARBORED UNION ANIMUS THAT MOTIVATED SHIKARCHY'S TERMINATION (Exceptions 19-25)**

Contrary to Respondent's argument in Exceptions 19 through 25, the ALJ correctly concluded that Respondent harbored general union animus, and animus specifically against Shikarchy's protected activities, and that such animus motivated Shikarchy's termination. ALJD p. 16, ln. 19-20. The ALJ's conclusion is well-supported by the record, which is replete with evidence of Respondent's virulent animus against the Union and against Shikarchy for supporting the Union.

Between mid-March 2010 and December 5, 2011, Respondent demonstrated its Union animus through many statements, including threats, to Shikarchy. The crux of Respondent's argument is that the statements of animus, including many threats, made between mid-March 2010 and September 7, 2011, are too remote in time from the December 13, 2011 termination to prove that Shikarchy was terminated for his Union activities and support. Resp. Br. 23.

The cases relied on by Respondent to support its contention that its anti-Union comments are too remote in time to establish a nexus or temporal proximity between those anti-Union comments and Shikarchy's termination are easily distinguishable from the instant case. *Permaneer Corp.*, 214 NLRB 367 (1974), *New Otani Hotel & Garden*, 325 NLRB 928 (1988) and *Magic Pan*, 242 NLRB 840 (1979) are all distinguishable because in those cases and unlike in our case, the statements found to be too remote in time to support a finding of animus were relatively modest and did not rise to the level of a violation of Section 8(a)(1). In addition, the comments in those cases (in *Permaneer*: management remarked that the union would "fall flat on its face if [a particular employee] were not around"; in *New Otani*: "be careful"; and, in *Magic Pan*: "[i]f you weren't part of the union or involved with the union, then I could treat you as an

individual, but since you are involved with the Union, I can't do that") were somewhat ambiguous and open to interpretation. Here, on the other hand, the ALJ properly found that Respondent's statements constituted at least six independent violations of the Act, as alleged in the Amended Complaint. See ALJD p. 16-17. In addition, unlike in those cases, here, Respondent's statements left no doubt as to Respondent's general Union animus (e.g., in mid-March 2010 when Respondent told Shikarchy that the Union people were very bad, Respondent was going to fire everyone and no longer needed the Union (ALJD p. 16, ln. 21-23)), and specific Union animus towards Shikarchy (e.g., drop your grievance or you'll be fired (ALJD p. 4, ln. 5-7; p. 13, ln. 27-31)).

*Champion and Home Builders*, 350 NLRB 788 (2007) and *Quazite Corp.*, 323 NLRB 511 (1997), involved a completely different issue and set of facts. In those cases, the issue was whether the timing of unfair labor practices was too remote to have caused the employees' labor disaffection with the union so as to taint a decertification petition under *Master Slack Corp.*, 271 NLRB 78 (1984). Those cases had nothing to do with the timing of statements of animus in relation to an employee's termination. Thus, Respondent's reliance on them is clearly inapposite. Similarly, in *Amcast Automotive of Indiana, Inc.*, 348 NLRB 836 (2006) and *Personnel Hygiene Services, Inc.*, 2001 WL 1589671 (Div. of Judges, 2001), the question was not the timing of *statements of animus*, it was whether the timing of *union activity* was too remote to support a finding that the union activity motivated the employer's withholding a wage increase. *Amcast Automotive of Indiana* and *Personnel Hygiene Services* are clearly inapplicable here, where we have direct statements of animus that are clearly relevant to Shikarchy's termination.

Most importantly, however, Respondent ignores the fact that Respondent made *additional* threats to Shikarchy just *one week* prior to his termination. In that regard,

Shikarchy's recording of the December 5, 2011 telephone call with Walter Berger conclusively establishes that Berger threatened Shikarchy with discharge because of Shikarchy's support for the Union. First, Berger said if Shikarchy was against Respondent, they would "let chance do what they want" and "let the chips fall where they may." GC Ex. 9(a), p. 4, 6. Second, Berger said that if Shikarchy did not want to accept Respondent's offer to renounce the Union, Respondent would fire him. GC Ex. 9(a), p. 27, 29. During the same telephone call, Berger impliedly promised Shikarchy benefits, i.e., continued employment, if Shikarchy renounced the Union. Berger stated that if Shikarchy came over to Respondent's side, they would have a meeting and a chance to work something out . . . the way the job should be, and Shikarchy would not be harassed anymore. GC Ex. 9(a), pp. 2-4, 6, 11-12. Berger told Shikarchy that he would have a job and they would work it out. GC Ex. 9(a), pp. 17-18. The recording—the most reliable source of what happened—leaves no doubt that Berger, on December 5, 2011, just one week before Respondent terminated Shikarchy, made the unlawful statements. Respondent did not, in any way, refute the statements made in the recording.

Therefore, Respondent's Exceptions 19 through 25 and argument that the general and specific Union animus found by the ALJ between mid-March 2010 and September 7, 2011 was too remote in time to establish that such animus motivated Shikarchy's termination, must be rejected because of the prevalence of clear statements of animus, and Berger's December 5, 2011 threat just one week before Shikarchy's discharge. Berger's threat was consistent with prior general and specific animus and leaves no doubt that Shikarchy's termination was motivated by Union animus.

**e. THE ALJ CORRECTLY DETERMINED THAT RESPONDENT'S DISCIPLINE, SUSPENSION AND TERMINATION OF SHIKARCHY WAS PRETEXTUAL, AND PROPERLY REJECTED RESPONDENT'S DEFENSE (Exceptions 26-34)**

The remainder of Respondent's exceptions, Exceptions 26 through 34, allege that the ALJ erred in concluding that Respondent failed to meet its burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The ALJ's conclusion is well-supported by the record evidence and each of Respondent's remaining exceptions should be rejected.

Under *Wright Line*, once the General Counsel demonstrates by a preponderance of the evidence that an employee's protected conduct was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. *See Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). If, however, the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Rood Trucking Co., supra.* *See also Austal USA, LLC*, 356 NLRB No. 65, slip op. at 2 (2010) (if proffered reason for discharge is pretextual, employer necessarily fails to establish *Wright Line* defense).

The ALJ correctly determined that Respondent's proffered reasons for warning, suspending, and discharging Shikarchy were pretextual—that is, they were not in fact relied upon. ALJD p. 17, ln 11-15. Accordingly, the ALJ was not required to perform the second part of the *Wright Line* analysis, and he did not err in failing to consider each and every one of Respondent's piled on accusations of alleged wrongdoing. Nonetheless, the ALJ provided additional reasons why Respondent failed to meet its *Wright Line* burden. *See* ALJD p. 17, ln.

19-35. For those reasons, and for the reasons discussed below, the ALJ's decision to reject Respondent's defense is well-grounded in the record and should be affirmed by the Board.

i. Respondent Admitted That Shikarchy Was Discharged Because of His Union Activities

As set forth in more detail below, on December 5, 2011, just one week prior to Shikarchy's discharge, Walter Berger indisputably told Shikarchy that if he renounced his Union support by withdrawing the charges and not attending the mediation meeting scheduled on December 7, 2011, Respondent would not terminate Shikarchy. On the recording, Berger states: "These things will help us tremendously. And in this case you'll have a job . . . and we'll work it out . . . ." GC Exhibit 9(a), 15, 17-18. Berger warned, however: "If you're not interested . . . then they'll fire you." GC Exhibit 9(a), p. 27. Shikarchy chose to continue supporting the Union, and, consistent with Berger's warning, was discharged just one week later. As the ALJ recognized, Berger's recorded statements not only establish that Shikarchy was discharged because of his Union support, but also that the reasons for all of the prior discipline (the written warnings and the suspension) were pretextual in an effort to set Shikarchy up for discharge.

ii. Respondent's Only Witness Failed to Establish That Shikarchy Engaged in Misconduct

Respondent presented only one witness, Jeffrey Herskovitz. His conclusory testimony, which consisted largely of his explanations of over 30 emails, did not establish that Shikarchy engaged in any wrongdoing. When pressed for details on Shikarchy's alleged wrongdoing, Herskovitz either could not recall them (e.g., he could not recall any names of people who complained about Shikarchy), gave exaggerated testimony (e.g., Shikarchy's story was the "complete opposite" of what actually happened), or provided hearsay statements (e.g., he

admitted providing third hand accounts of some of the incidents). Accordingly, the ALJ properly decided to credit Shikarchy over Herskovitz to the extent that there were conflicts in their testimonies. ALJD p. 13, ln. 11-12. Given the absence of any credible probative evidence that Shikarchy engaged in any wrongdoing, Respondent failed to establish that Shikarchy engaged in any misconduct.

iii. The Suspicious and Unexplained Timing of Respondent's Harassment and Discipline of Shikarchy Establishes that it was a Pretext

1. *Respondent Praised Shikarchy's Work When He Opposed the Union*

The timing of the harassment and discipline establishes that the discipline was a pretext to mask Respondent's unlawful motivation. After Shikarchy was hired—when he supported the Union—Herskovitz praised his work, called him a “wonderful and attentive employee” and one of the best superintendents they had, gave him a bonus, and as recently as April 2011, referred him to other jobs. ALJD p. 17, ln. 20-21; Tr. 148, 152, 174-175. The evidence establishes that Respondent never harassed or disciplined Shikarchy as long as he opposed the Union.

2. *Respondent Harassed Shikarchy and Accused Him of Misconduct Only After He Supported the Union*

Every single one of the more than 30 emails produced by Herskovitz purporting to show problems with Shikarchy's performance or behavior is dated *after* he began supporting the Union. ALJD p. 17, ln. 21-24. The record is devoid of any problems with Shikarchy's work prior to July 26, 2011. Only days after the settlement at the June 20, 2011 arbitration, which Friedman blamed on Shikarchy, Friedman began harassing Shikarchy, and on September 7, 2011, just three weeks after Shikarchy filed a grievance over the harassment, Respondent

issued him four written warnings on the same date for conduct dating as far back as June 21, 2011, one day after the arbitration. As Shikarchy became more involved with the Union by attending negotiations and distributing flyers beginning in October 2011, Respondent issued him a suspension on October 27, 2011 and finally, discharged him on December 13, 2011, a week after he attended a mediation meeting that Berger threatened him to stay away from if he wanted to keep his job.

3. *Respondent Failed to Explain the Suspicious Timing of the Written Warnings, Suspension, and Discharge*

Respondent failed to explain the suspicious timing of any of the discipline, including how Shikarchy could become a horrible superintendent so quickly after Respondent continuously praised his work. ALJD p. 17, ln. 23-25. For example, why did Respondent issue four written warnings on one day (September 7, 2011)? Why was one of those warnings for an incident on June 21, 2011, eleven (11) weeks before the warning was issued? Similarly, Respondent did not establish why the suspension issued on October 27, 2011 and why the discharge issued on December 13, 2011, other than making conclusory statements about Shikarchy's performance and behavior. Herskovitz's suggestion that its decision to terminate Shikarchy was somehow related to the building "falling apart" is directly contradicted by Berger's email to him in which Berger states that the building has never been as clean as it was. Tr. 291; GC Ex. 12. Without any justification for the suspicious timing of the discipline and discharge, the ALJ correctly found that it was imposed as a pretext for Respondent's real reason for disciplining Shikarchy, i.e., his Union activity and support.

**f. IN SPITE OF RESPONDENT'S PILING ON OF ACCUSATIONS, RESPONDENT'S DEFENSE NECESSARILY FAILS BECAUSE IT OFFERED SHIKARCHY CONTINUED EMPLOYMENT JUST ONE WEEK PRIOR TO HIS TERMINATION, ON ONE CONDITION: THAT HE RENOUNCE HIS SUPPORT FOR THE UNION**

Even if the Board concludes that Respondent's defense is not pretextual, Respondent has failed to meet its burden under *Wright Line* to demonstrate that it would have disciplined Shikarchy absent his Union activities. Instead, as the ALJD found, the evidence conclusively establishes that Respondent told Shikarchy that it would *not* discharge him if he abandoned his support for the Union. ALJD p. 17, ln. 15-17.

It could not be any clearer that Respondent would not have terminated Shikarchy, absent his support for the Union. In that regard, Walter Berger's recorded statements to Shikarchy on December 5, 2011 in which he offers Shikarchy continued employment only if Shikarchy renounced his Union support, conclusively establishes that Respondent would not have discharged him absent his Union support. ALJD p. 17, ln. 15-17. It is undisputed that Berger, an admitted agent of Respondent, told Shikarchy that Respondent is willing to work things out and that Shikarchy will have a job, but only if he renounces his Union support by dropping the charges and staying away from the mediation meeting. Berger stated that if those things are accomplished then "in two days the whole thing will be settled." GC Ex. 9(a), pp. 24-25. Shikarchy, of course, did not drop the charges and did not stay away from the mediation meeting, and was terminated one week later. Respondent presented no evidence of any incident between the December 5, 2011 conversation and the termination that would have warranted Shikarchy's termination.

Furthermore, Herskovitz's email to Berger on December 6, 2011, stating: "Also, he is showing to the mediation, he made it clear to me in an e-mail. Sorry" and Berger's response telling Herskovitz to "do what he has to do," namely, to fire Shikarchy, further compels the inescapable conclusion that the *only* reason why Shikarchy was warned, suspended, and

discharged was because he supported the Union and engaged in Union activities. ALJD p. 7, ln. 11-13; ALJD p. 17.

#### **4. Conclusion**

In his Decision, the ALJ's findings of fact are based on a well-reasoned analysis of probative record evidence. Moreover, the ALJ accurately applied Board law to the facts of this case. In doing so, he correctly found that Respondent issued four warnings to, suspended, and discharged Shikarchy because of his support for and activities on behalf of the Union, and because of other protected activities, in violation of Section 8(a)(3) and (1) of the Act. The ALJ also correctly found that on the occasions alleged in the Amended Complaint, various agents of Respondent threatened Shikarchy with discharge and unspecified reprisals because of his support for and activities on behalf of the Union, and promised him benefits to discourage him from supporting and engaging in activities on behalf of the Union, in violation of Section 8(a)(1) of the Act. For the reasons set forth above, the Board should overrule Respondent's 34 exceptions and affirm the ALJ's rulings, findings of fact, conclusions and proposed remedy.

Dated at Brooklyn, New York, October 26, 2012.

Respectfully submitted,



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

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**833 CENTRAL OWNERS CORP.**

**and**

**Case No. 29-CA-70910**

**LOCAL 621, UNITED WORKERS  
OF AMERICA**

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**Date: October 26, 2012**

**STATEMENT OF SERVICE OF:**

***COUNSEL FOR THE ACTING GENERAL COUNSEL'S***

***ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS AND SUPPORTING BRIEF***

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in accordance with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated above:

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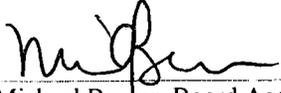
NATIONAL LABOR RELATIONS BOARD, DIVISION OF JUDGES

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