UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

IN THE MATTER OF	)	
K-AIR CORPORATION, Respondent	)	
	)	**CASE NO. 16-CA-091326**
and	)	
	)	
SHEET METAL WORKERS LOCAL #67	)	
A/W SHEET METAL WORKERS	)	
INTERNATIONAL ASSOCIATION	)	

K-AIR CORPORATION'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWER BRIEF TO EXCEPTIONS

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I. THE ALJ ERRED IN FINDING K-AIR VIOLATED SECTION 8(a)(3)

A. A PRIMA FACIE CASE WAS NOT ESTABLISHED

To prove a violation of Section 8(a)(3) of the National Labor Relations Act, General Counsel must demonstrate that the discriminatee's protected conduct was a motivating factor in the adverse employment decision. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf'd 662 F. 2d 899 (1982); cert. den., 455 U.S. 989 (1972). The motivational link is established by proof of antiunion animus. *Oaktree Capital Management*, 353 NLRB 1242, 1242 (2009). The Board has long held that evidence of union animus must be substantial. In *Raysel-Ide, Inc.,* 284 NLRB 879 (1987), the Board noted that proof of animus must be "strong enough to support a conclusion that the respondent was willing to violate the law by discriminating against employees, in order to keep the union out." *Id*. at 880; *see also*, *Obars Machine & Tool*, 322 NLRB 275 (1996) (Board affirmed dismissal of 8(a)(3) allegation where credible evidence of substantial union animus was not presented); *Fibrocan Corp*., 259 NLRB 161, 171-172 (1981). In *Caribe Ford*, 348 NLRB 1108 (2006), the Board found that although the timing of an alleged discriminatee's discharge, "soon after he contacted the Union... may raise suspicions... [M]ere suspicion arising from coincidental timing alone is insufficient to sustain [the General Counsel's prima facie] burden." *Id.* at 1109. Only after General Counsel establishes a *prima facie* case does the burden of proof "shift" to the employer to demonstrate that "the same action would have taken place in the absence of the employees' union activity." *Manno Electric,* 321 NLRB 278, 280 n. 12. Importantly, however, the Board's utilization of "shifting" burdens of proof "does not undermine the established concept that General Counsel must establish an unfair labor practice by a preponderance of the evidence." *Wright Line*, 251 NLRB at 1089.

As noted in Respondent's Brief in Support of its Exceptions, there is no credible evidence to even suggest that K-Air harbored animus. To the contrary, the record affirmatively establishes that K-Air did not harbor anti-union animus. Specifically, K-Air, by and through Villarreal, attempted to hire union members and retained union-affiliated workers. Moreover, aside from the subject charge, no other charges have ever been filed against K-Air. (TR 102:19-25; and TR 220:14-16). Accordingly, the ALJ erred in finding a violation of Section 8(a)(3).

B. RESPONDENT REBUTTED ANY SHOWING OF DISCRIMINATION

Assuming *arguendo* that the Board finds that a *prima facie* case was established, K-Air established it would have discharged Vega irrespective of his purported union activity. Thus, K-Air has satisfied its burden of proof under *Wright Line*, 251 NLRB 1083 (1980). General Counsel argues that Vega was not the person responsible for the original problem with the Unistrut area. Importantly, although the original condition of the Unistrut area Vega encountered was problematic and dangerous, there is no dispute that the way Vega left the subject area after he worked on it was dangerous and substandard as well. (TR 222:23 through TR 223:23; TR 225:21-25; TR 281:7 through TR 283:11and R Exs. 3 and 4). Villarreal made a legitimate, non-discriminatory decision to terminate Vega's employment. Simply put, there is no evidence that any <u>other</u> worker performed a substandard and dangerous work product to the degree that Vega did. Since there are no similarly situated employees against whom to compare Vega, it cannot be established Respondent discriminated against Vega. It is well established that "the Act does not provide employees with immunity from otherwise legitimate employment decisions simply because of their status as union supporters". *Framan Mechanical*, 343 NLRB 408, 411 (2004). The Board, as well as the Courts, has consistently held that it should not substitute its judgment for that of the employer regarding the necessity for a discharge where

legitimate business reasons exist. The ALJ did just that. Accordingly, the ALJ erred in finding a violation of Section 8(a)(3).

II. THE AJL ERRED IN FINDING THAT RESPONDENT INTERROGATED EMPLOYEES ABOUT UNION MEMBERSHIP

The test for interrogations or discussions of this nature is whether the supervisor's statements "… would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question was actually intimidated." *Multi-Ad Services, Inc.,* 331 NLRB 1226, 1228 (2000). The ALJ failed to apply this analysis finding simply that no cite was needed. Most importantly, the ALJ makes no finding of a background of discrimination by Respondent or that the circumstances of the inquiries would induce fear of reprisal. (ALJD 8:34-46). In fact, the ALJ found that there was **no evidence** to support the allegation that Respondent coerced or threatened employees with unspecified reprisals as is required. (ALJD 8:43-46). Asking an employee if he is a union member alone does not violate Section 8(a)(1) of the Act. *See NLRB v. O.A. Fuller Super Markets,* 374 F.2d at 203; *Rossmore House,* 259 NLRB 1176 (1984), *aff'd sub no;. Hotel Employees & Restaurant Employees Union,; Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985); *Pioneer Natural Gas Co. v. NLRB,* 662 F.2d 408, 415 (5th Cir. 1980). Specifically, these isolated inquiries do not represent the degree of interference, restraint or coercion of employee organizational rights necessary to find a violation of Section 8(a)(1) of the Act. Accordingly, the ALJ erred in concluding that Respondent violated Section 8(a)(1) of the Act.

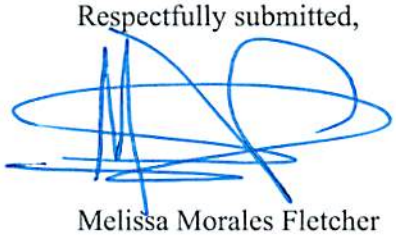
III. REINSTATEMENT IS NOT AN APPROPRIATE REMEDY

Contrary to General Counsel's assertion, the ALJ did hear evidence related to whether reinstatement was an appropriate remedy. Specifically, Villarreal testified that the Subject LA Fitness Job ended approximately the first week in December 2012. (TR 155:19 through TR 156:1). Moreover, Villarreal testified that Respondent has not had any other commercial jobs. (TR 240:1-15). Thus, the credible evidence demonstrates that Vega's former position no longer exists and there are no substantially equivalent sheet metal positions; therefore, reinstatement is not the appropriate remedy and any loss of earnings beyond the first week of December 2012 are not appropriate.

IV. CONCLUSION

Based on the foregoing, Respondent requests that the Board grant the exceptions asserted by Respondent. Respondent further requests any and all relief that the Board finds appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that in accordance with the NLRB's rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of the foregoing Reply Brief was timely filed via the NLRB E-filing system and was served on the following on the date below by undersigned counsel for K-Air Corporation via electronic mail:

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Dated July 19, 2013

Melissa Morales Fletcher