UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

VOITH INDUSTRIAL SERVICES, INC.

and Case 9-CA-097589

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL UNION NO. 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

**RESPONDENT, VOITH INDUSTRIAL SERVICES, INC.'S,
ANSWERING BRIEF TO BRIEFS IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S DECISION OF COUNSEL TO ACTING GENERAL COUNSEL AND CHARGING PARTY TEAMSTERS LOCAL 89**

Respondent Voith, by its counsel, presents the following Brief in Answer to Charging Party Teamsters 89 and General Counsel's Brief in Support of Judge Bogas' Decision, in accordance with Section 102.46 of the Board's Rules and Regulations.

> **The ALJ erred in concluding that Respondent Voith violated 8(a)(1), (3) and (4) of the Act when it suspended and subsequently terminated Stein and Murphy under its attendance policy for their excessive absenteeism and for the reason that General Counsel failed to meet its *prima facie* evidentiary burden under a *Wright Line* analysis in this regard. (Resp. Ex. 9).**

General Counsel contends that Judge Bogas was "on solid ground" in finding that Respondent Voith harbored a hostility towards the Teamsters and that this hostility supported his ultimate conclusion that the alleged suspensions on December 21, 2012, and subsequent terminations on January 4, 2013, of Murphy and Stein were discriminatorily motivated in violation of Sections 8(a)(1), (3) and (4) of the Act. In support of his finding of animus and

discriminatory motive, Judge Bogas relied, in the main, on the testimony of Jason Miller, a former Voith supervisor, who was terminated for his aberrant conduct[1]

The ALJ attributed his finding of unlawful motive under an 8(a)(3) analysis to the statements made by Voith representatives which were directed at the Teamsters but did not

[1] The ALJ's findings, in the main, are supported by the testimony of Jason Miller, a former Voith supervisor who was terminated for his extraordinary misconduct. The ALJ credited his testimony based solely upon his demeanor. His credibility findings, given the significance afforded to Miller's testimony by the ALJ, is a critical issue in this litigation. Respondent is well aware of the principles distilled from the Board's decision in *Standard Drywall Products*, 91 NLRB 544 (1950). The reluctance to overrule an administrative law judge's credibility resolution is not without its limits. If, as in the subject case, the clear preponderance of the relevant record evidence convinces the Board that the ALJ's findings on credibility were incorrect, the Board has the obligation to overturn them. Thus, it is Respondent's judgment that the Board must analyze the totality of the record to determine if, in fact, Miller's testimony is worthy of credit or is to be rejected to the extent that such testimony is unfavorable to Respondent. Miller was not a credible witness, without regard to his demeanor at trial. In the first instance, he demonstrated a high level of hostility and bias against Respondent Voith. He had been terminated for egregious misconduct with which he disagreed and was obviously resentful and vengeful. The inconsistencies in his testimony demonstrate this hostility, without more. Initially, Miller testified that he was instructed by Wilson to "be more lenient to the Teamsters, that way it wouldn't give them any more ammunition." (Tr. 512:3-5). He then testified that Wilson told him "to get rid of them [Teamsters]" sometime after the initial NLRB proceeding ended. (Tr. 512:9-14). He subsequently recanted this testimony in its entirety. Miller stated that he was told by Wilson "we need to get rid of our problems . . ." was not a reference to Teamsters but, rather, to any employee without regard to union affiliation who did not report to work on a regular basis. (Tr. 512:18-19). He then testified, unequivocally, that Wilson had never made reference to Teamsters, contrary to his initial testimony, but that he (Miller) inferred that Wilson's remarks were directed to Teamster 89 supporters. Miller then admitted that "attendance was a gigantic problem at the LAP." (Tr. 514:11-15). He then conceded that Wilson's reference to "get rid of the problems" related to all employees who were not coming to work on a regular basis. General Counsel then attempted to rehabilitate his witness but without any success, as demonstrated by the following questions and answers:

> Q: Okay. When you brought that up, what did Jason Wilson say?
> A: He didn't really comment on them winning or losing like it wasn't, I guess, something that he wanted the management to be privy to knowing and when we got back to talking about the attendance and he said we need to get rid of the problems. Anybody that's causing us grief.

In an effort to conceal his vengeance, he testified, gratuitously, that after his discharge, he filed another application with Respondent Voith for a janitorial supervisory position at the LAP. This constituted a boldfaced misrepresentation in violation of his sworn oath, made intentionally to obscure the truth; his bias and hostility towards Respondent's interests. The record evidence reflects that he never filed an application. This speaks volumes of his lack of honesty and integrity. If there remains an iota of doubt about his lack of credibility, his inconsistent testimony, and the recanting of testimony contained in his investigative affidavit given to the Region at the investigative stage demonstrate that his testimony is not worthy of any weight and is to be rejected in its entirety, to the extent that it is unfavorable to Respondent's interests in this litigation. The only glimpse of truth was his testimony that Respondent administered and enforced the attendance policy in a non-discriminatory manner without regard to an employee's union and/or protected activities.

relate, in any way, to the protected activities or affiliation of either Murphy or Stein.[2] Specifically, the ALJ concluded that the term "war against the Teamsters," coupled with Respondent's failure to recognize Teamsters 89 and statements made during the staffing for vehicle processing positions attributed to Voith representatives "to keep the majority of the employees UAW," (Tr. 415-416, 427) as well as a statement attributed to Wilson by Jason Miller that he (Miller) "could now get rid of the problems" supported General Counsel's *prima facie* case. Judge Bogas also relied upon documentary evidence wherein Respondent's supervisors referred to Teamster-affiliated employees as "special employees." Judge Bogas also found significant an email which attributed to Voith a statement referring to "Teamster nonsense."

Respondent Voith, as previously noted, contends that these statements, if they constitute animus at all, constitute no more than a general animus toward the Teamsters union as an institution, not to the specific affiliations or activities of those who support the union and, as such, do not support a finding that the discipline administered by Respondent to Stein and Murphy, including both their suspensions and their ultimate terminations, were, in any way, illegally motivated.

Under a *Wright Line* analysis, the General Counsel must prove a discriminatory motive. In this context, the motive of the employer is the controlling factor and, absent a showing of anti-union motivation, an employer may discharge an employee for a "good reason," a "bad reason," or for "no reason" at all. *American Gardens Mgmt. Co.*, 338 NLRB 644, 645 (2002) (employer's

[2] The *Wright Line* analysis also applies to terminations under Section 8(a)(1) of the Act, 8(a)(4) claims of retaliatory discharge, as well as Section 8(a)(3). *See American Gardens Mgmt. Co.*, 388 NLRB 644 (2002) ("The Board also applies the *Wright Line* analysis to 8(a)(4) claims"); *Center Prop. Mgmt.*, 274 NLRB No. 190 (1985); *Elko Gen. Hosp.*, 347 NLRB 1425 (2006) (applying the *Wright Line* analysis, Board found employer did not violate Section 8(a)(1) of the Act); *Tortillas Don Chavez*, 196 LRRM 1148 (NLRB, 2013) ("As with 8(a)(3) discrimination cases, the Board applies the *Wright Line* analysis to 8(a)(1) concerted activity cases that involve an employer's motivation for taking adverse employment action against employees engaged in a protected activity.") *NLRB v. Camco, Inc.*, 5 Cir. 1965, 340 F.2d 803, cert. denied 382 U.S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339; *NLRB v. Atlanta Coca-Cola Bottling Co.*, 5 Cir. 1961, 293 F.2d 300

motivation must be established as a precondition to a finding of an 8(a)(3) and 8(a)(4) violation. Thus, if an employee fails to meet the requirements of his or her employment on one hand, and is engaged in union/protected activities or cooperates with the Board, such a coincidence does not, without more, prohibit the employer from administering statutorily protected "just cause" discipline or discharge. The General Counsel only sustains this burden under *Wright Line* by producing evidence which establishes a causal connection between the employer's anti-union motivation and the adverse personnel action administered to the employee. In this regard, the General Counsel must show that there is a nexus or casual relationship between the employee's protected activity and the adverse employment action. This nexus must rest on something more than speculation and conjecture. *Tracker Mabine, LLC*, 337 NLRB 644, 64 (2002); *Amcast Auto. of Indiana*, 348 NLRB 836, 839 (2006).

Under this scheme, General Counsel's proof of an employer's general hostility towards unions, without more, does not supply the requisite unlawful motive for the reason that it lacks nexus which cannot be inferred. *NLRB v. Monroe Auto Equip. Co.*, 368 F.2d 1975 (8th Cir. 1966); *NLRB v. Little Rock Downtowner, Inc.*, 341 F.2d 1020 (8th Cir. 1965). Thus, even if the company is shown by substantial evidence to harbor an anti-union animus, any discipline administered thereafter does not necessarily violate Section 8(a)(1), (3) and (4) of the Act, absent proof of the causal connection. A business's enforcement of its rules and policies cannot be condemned because it is insensitive to a union.[3] In *Ozburn-Hessey Logistics, LLC*, (NLRB ALJ 2013), the ALJ offered this analysis of proof of a general union animus in the context of an 8(a)(3) discipline case which has unique application to the subject case. Factually, the case

[3] This argument is vividly supported by the myriad of enforcement cases before various Circuit Courts of Appeals wherein the Courts have enforced Board orders concerning 8(a)(1) violations but, in the same matter, denied enforcement of alleged 8(a)(3) violations.

evolved from a hotly contested union organizing case. The initial litigation resulted in an ALJ's finding of 8(a)(1) statements and 8(a)(3) unlawful terminations and discipline. The subsequent case involved six alleged discriminatees who were union supporters who were disciplined. As to some, the ALJ found discrimination and 8(a)(3) violations. As to others, the ALJ found no violation. In regard to proof of an unlawful motive based upon the employer's general resistance towards the union's organized efforts, the ALJ remarked:

> One needs only to read through the history of prior litigation detailed above to see that Respondent has not viewed the union's presence favorably . . . In analyzing the Respondent's discipline of these six employees I am also mindful of the fact that an employer's resistance to its employees' organizing efforts does not of itself establish the illegality of its actions toward these employees.

There is no evidence in this record that Murphy and Stein engaged in union/protected activities or cooperated with the Board in any manner that demonstrates a difference from the participation of other readily identifiable Teamster supporters who have not been disciplined or terminated. In this regard, there is no indication that Murphy and Stein assumed any substantial role in furthering Teamster activities at the LAP, which distinguished them from the others. Likewise, their Board cooperation in the prior case before Judge Rosenstein was no different than the seven other Teamster supporters who provided testimony in the prior proceeding, arguably supportive of the General Counsel. Finally, Murphy and Stein's protected activity in filing a complaint with OSHA protesting the loading of rail during non-daylight hours was no different than that of Sandra Rhodes, a known Teamster supporter, who has maintained exemplary attendance and has not received any discipline under Respondent's attendance policy.

On the other hand, there is abundant evidence to establish that Murphy and Stein were excessively absent and, thus, were less than satisfactory employees. It was their excessive

absences which separated them from the other Teamster supporters and resulted in their suspensions and ultimate terminations, not their protected activities.

Additionally, the weight of the record evidence does not support the ALJ's finding of a discriminatory motive, contrary to the claims of both General Counsel and the Charging Party. In the first instance, Respondent's enforcement of its attendance policy has resulted in the termination of 11 employees. Of this number, nine of the employees were affiliated with the UAW, not the Teamsters. (Tr. 732:7-14). These employees were terminated, as were Murphy and Stein, because of excessive absenteeism. These employees, without regard to union affiliation, had a simple choice: report to work regularly or be terminated. These statistics, standing alone, constitute compelling evidence that the policy has been administered in a non-discriminatory manner. *Kroger Co.*, 339 NLRB 740 (2003). *Engineered Comfort Sys., Inc.*, 346 NLRB 661 (2006). *AT&T Mgmt. Co.*, 276 NLRB 1183 (1985).

Further proof of Respondent Voith's lack of discriminatory motive is found in a review and comparison of the attendance matrixes proffered by Respondent Voith. Respondent's Exhibits 4a-4k consist in the attendance record of known Teamster 89 supporters, other than the alleged discriminatees. Respondent's Exhibit 13 is the attendance matrix of Kelly Stein and Respondent's Exhibit 15 is the attendance matrix of Patti Murphy. Respondent Voith also introduced the attendance matrixes for UAW employees who were terminated under Respondent's attendance policy. (Resp. Exhibits 9a-9i). A review, analysis and comparison of these exhibits demonstrate that Voith administered its attendance policy uniformly, without regard to an employee's union affiliation, protected activity or prior Board cooperation. The policy contains various components which, if utilized correctly, allow employees to escape the assessment of points for days that they are absent from work. These components, among others,

included the utilization of vacation days, emergency vacation days (EVAC Days), banked holidays, prearranged absences and appeals. UAW and Teamster supporters alike were provided the benefits of these aspects of the policy without regard to their union affiliation or participation in protected activities.

A complete review of Stein and Murphy's matrixes demonstrates that they utilized "preapproved absences," "banked holidays" and "appeals," and were otherwise treated in all respects in the same manner as UAW supporters and other Teamster supporters. In fact, Counsel for the General Counsel did not proffer a scintilla of evidence to support disparate treatment and, as such, General Counsel has failed to establish its *prima facie* case under a *Wright Line* analysis.

The record demonstrates further that both before and after Murphy and Stein filed a complaint with OSHA and provided testimony in the prior proceeding, the Respondent continued to accommodate their fear or loading during periods of darkness. For a period of four and one-half months, commencing on August 1, 2012, the Company accommodated the unsupported fears of Murphy, Stein and Rhodes, another identified Teamster supporter. (Tr. 243:20-245:15; 904:1-9). The Company, during hours of darkness, assigned Rhodes and Stein to non-productive work. They were assigned, in the main, to light janitorial work, which included matching and folding of gloves, picking up trash, sweeping and other related janitorial duties. (Tr. 244:15-25; 903:8-11). Stein was assigned to drive the Company van and when not performing this function she was reassigned to janitorial tasks in the same manner as Murphy and Rhodes. (Tr. 245:13-25; 246:2-4). Although engaged in non-productive and lighter work, these individuals continued to receive pay as rail loaders. (Tr. 246:25-247:7).

The favorable treatment received by Murphy and Stein through the accommodations which excused them from performing rail loading during periods of darkness, as well as the

accommodations, and practices applied to them under the attendance program which were the same or similar to other similarly situated Teamsters and UAW supporters, conclusively demonstrates that the ALJ has erred in finding that the requisite discriminatory motive exists with respect to the 8(a)(1), (3) and (4) aspects of this litigation. For this reason, the allegations of the Complaint directed at 8(a)(1), (3) and (4) discipline and termination should be dismissed..

Dated this 9th day of April, 2014.

Respectfully submitted,

By: s/Gary A. Marsack

Gary A. Marsack
Lindner & Marsack, S.C.
411 E. Wisconsin Avenue, Suite 1800
Milwaukee, WI 53202-4498
(414) 273-3910
(414) 273-0522 (FAX)
gmarsack@lindner-marsack.com

Stephen Richey
Thompson Hine LLP
312 Walnut Street, Suite 1400
Cincinnati, OH 45202
(513) 352-6768
(513) 241-4771
Stephen.richey@thompsonhine.com

Attorneys for Respondent Voith Industrial Services, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent, Voith Industrial Services, Inc.'s, Answering Brief to Briefs in Support of the Administrative Law Judge's Recommended Decision of Counsel to Acting General Counsel and Charging Party Teamsters Local 89 was served upon the National Labor Relations Board by electronic filing in PDF format using the Agency's E-filing system on this 9th day of April, 2014.

I further certify that a copy of the foregoing was served upon the following by email in accordance with CFR 102.11(4) on this 9th day of April, 2014:

STEPHEN RICHEY, ATTORNEY
THOMPSON & HINE, LLP
312 WALNUT ST, STE 1400
CINCINNATI, OH 45202-4029
stephen.richey@thompsonhine.com

JAMES F. WALLINGTON
BAPTISTE & WILDER
1150 CONNECTICUT AVE NW, STE 315
WASHINGTON, DC 20036-4104
jwallington@bapwild.com

ROBERT M. COLONE
GENERAL COUNSEL
3813 TAYLOR BLVD.
LOUISVILLE, KY 40215
rmcolone@teamsters89.com

JONATHAN D. DUFFEY
COUNSEL FOR THE ACTING GENERAL COUNSEL
REGION 9, NATIONAL LABOR RELATIONS BOARD
3003 JOHN WELD PECK FEDERAL BUILDING
550 MAIN STREET
CINCINNATI, OH 45202-327
jonathan.duffey@nlrb.gov

s/Gary A. Marsack
Gary A. Marsack
Attorney for Respondent Voith Industrial Services, Inc.