

**Gates & Sons Barbeque of Missouri, Inc. and Workers' Organizing Committee, Kansas City.** Case 14-CA-110229

September 16, 2014

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND JOHNSON

On June 17, 2014, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, to amend the remedy, and to adopt the recommended Order as modified.<sup>2</sup>

**AMENDED REMEDY**

We amend the judge's remedy to provide that the make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection Service*, supra at 683; see also *Pepsi-America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gates & Sons Barbeque of Missouri, Inc., Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

(b) Make employees at the Main Street location whole for any loss of benefits suffered as a result of the dis-

crimatory discontinuation of the free employee meal benefit, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

2. Substitute the attached notice for that of the administrative law judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT discontinue any of your benefits, or otherwise discriminate against you, because you engage in a protected strike or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL reinstate the free employee meal benefit.

WE WILL make you whole for any loss of benefits suffered as a result of the discriminatory discontinuation of the free employee meal benefit, plus interest.

GATES & SONS BARBEQUE OF MISSOURI, INC.

The Board's decision can be found at [www.nlr.gov/case/14-CA-110229](http://www.nlr.gov/case/14-CA-110229) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall modify the judge's recommended Order to conform to the amended remedy, and we shall substitute a new notice to conform to the Order as modified.

*Michael E. Werner, Esq.*, for the General Counsel.  
*Willis L. Toney, Esq. and Carroll W. Cunningham, Esq. (Toney Law Firm, LLC)*, of Kansas City, Missouri, for the Respondent.  
*Fred Wickham, Esq. (Wickham & Wood, LLC)*, of Independence, Missouri, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Overland Park, Kansas, on March 18, 2014. The Workers' Organizing Committee, Kansas City, filed the charge on July 31, 2013, and an amended charge on November 15, 2013, and the Regional Director for Region 14 of the National Labor Relations Board (the Board) issued the complaint on November 22, 2013. The complaint alleges that, on or about August 1, 2013, the Respondent violated Section 8(a)(1) by eliminating its practice of providing free daily lunches to employees at one of its locations because on July 30, 2013, nine employees at that location ceased work concertedly and engaged in a protected strike.<sup>1</sup> The Respondent filed a timely answer in which it denied that it violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

### FINDINGS OF FACT<sup>2</sup>

#### I. JURISDICTION

The Respondent, a corporation, operates a public restaurant selling food and beverages in Kansas City, Missouri, where it annually derives gross revenues in excess of \$500,000, and purchases and receives goods valued in excess of \$5000 from other enterprises located outside the State of Missouri. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> At the start of trial, I granted the General Counsel's unopposed motion to amend the complaint to withdraw multiple other allegations of wrongdoing.

<sup>2</sup> In its brief, the Respondent makes certain factual assertions that are not supported by the record before me. Instead the Respondent attempts to support these allegations by referring to a "Shipley Affidavit," which was not offered, or even mentioned, at trial and which the Respondent has not submitted since the trial closed. In other words, I simply do not have the purported affidavit. Even if the Respondent had attempted to reopen the record to submit such an affidavit, I would be disinclined to receive it since there is no readily apparent reason why an affidavit from its own manager would have been in existence, but unavailable to the Respondent, at the time of trial. See *Fite/Lucent Technologies, Inc.*, 326 NLRB 46, 46 fn. 1 (1998) (party seeking to reopen the record must show, inter alia, the existence of "newly discovered evidence" that existed at the time of trial but of which the moving party was "excusably ignorant"). On May 1, 2014, the General filed a motion to strike the assertions in the Respondent's brief that are based on the purported affidavit that is not part of the record. I grant that motion and give no weight to the purported Shipley affidavit or the representations based on it.

## II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates six restaurants in the Kansas City, Missouri area. The events involved in this case concern its location on Main Street in Kansas City (the Main Street location), where it employs approximately 30 individuals. During the relevant time period, Colin Shipley was the manager of that location, and Claudia Williams was a supervisor who reported to him. Shipley reported to Raymond Boyice, area operations manager, who in turn reported to George Gates, the Respondent's chief operating officer.

In addition to an hourly wage, the Respondent's employees at the Main Street store have received a number of benefits—among them an employee lunch provided at no charge. The employee lunch was only available during the shift when the individual was working and consisted of one meat sandwich and a side. This meal would cost approximately \$6 to \$10 if the employee was required to pay for it. The lunch benefit was continuously provided to employees at the Main Street location from at least 2011 until the end of July 2013. The decision about whether to grant this benefit was generally left up to the managers at the location. The Respondent also allowed employees to make purchases on a "tab" that would then be deducted from their paychecks.

Employees at the Main Street location were also able to collectively qualify for a monthly monetary bonus based on the location's performance. The relevant performance factors included the location's earnings, the number of customer complaints received, and the number of meals customers sent back. The Main Street location consistently performed well as judged by the bonus standards. For at least 8 consecutive months from December 2012 through July 2013, the Respondent awarded the monetary bonus to the work force at that location.

In July 2013, a number of employees at the Main Street location participated in a campaign by food workers across Kansas City to obtain higher wages. The charging party, the Workers' Organizing Committee of Kansas City (WOC), assisted employees engaged in this effort. The Respondent's employees received starting wages marginally above minimum wage, and the WOC campaign sought to approximately double that wage to \$15 per hour. As part of this effort, WOC helped organize a 1-day strike of food workers across Kansas City on July 30, 2013. A few days before the July 30 strike, Shipley met with a group of three employees who had spoken with a WOC organizer in the parking lot of the Main Street location the previous day. Shipley warned these employees that if he found out that they "had any part in the strike," they would "feel [his] wrath." He told them that if they participated in the strike they "might as well find another place of employment," and that they would be charged with a "no-call/no-show" and terminated. Shipley also met with another employee and asked him if he was "familiar" with the phrase "either you are with me or you are against me." Then Shipley asked the employee whether he was "with" the WOC, and warned, "If you are we can find ways to get rid of you right now."

On July 30, 2013, between 7 and 9 of the 30 employees of the Main Street location, engaged in the planned 1-day strike. On the morning of the strike, the Respondent was provided with notice, signed by seven of its employees at the Main Street

location, which stated that those employees were going on strike as of 7:30 a.m. on July 30, that the strike would end at 12 a.m. on July 31, and that the employees were unconditionally offering to return to work on the next scheduled shifts after the strike. The notice stated that the employees were engaging in this action “in support of better wages, benefits, and working conditions; and to protest this Company’s interference with protected workplace rights.”

On July 31, a number of employees who had engaged in the strike the previous day appeared at the Main Street location for their scheduled shifts. Boyice, who was present at the location, was handed a notice stating that the employees were unconditionally offering to return to work. The Respondent told these employees to go home because other employees had already been assigned to their shifts for that day.

During the following week, the Respondent permitted the returning strikers employees to resume their duties at the Main Street location, but announced that it was discontinuing certain employee benefits, including the free employee meals. The employees learned of this by way of notices posted by the Respondent at the location and also by word-of-mouth. One of the notices that the Respondent posted at the Main Street location stated: “There will be no employee meals, no loans, no tabs. Don’t ask.” Prior to the strike, the Respondent had not told employees that any of these benefits were in danger of being discontinued. In addition, within a day or two after the strike, Shipley added a handwritten notation to the employee schedule that was posted at the facility. This notation read: “4 DAY SCHEDULE WILL TURN INTO 3 DAY UNLESS PERFORMANCE OR ATTITUDE ABOUT JOB CHA[N]GES. GET BETTTER OR GET AWAY!”

One of the returning strikers asked his supervisor, Williams, why the Respondent was discontinuing benefits at the Main Street location given that “we were like the best store at the time as far as bonus . . . getting a lot of customers and stuff.” Williams responded that “whatever Gates tells her to do, . . . they have to do it, no questions asked.” The employee asked if he could talk to Mr. Gates, and Williams replied: “You don’t want to talk to him right now. He is feeling pretty sensitive.” The employee asked for Gate’s phone number and Williams replied, “9-1-1.” For approximately 2 months after the strike, the Respondent denied employees at the Main Street location the employee meal benefit. The benefit was reinstated, at least for a time, after the Respondent reassigned Shipley to a different location.

Shipley was not called as a witness by the Respondent. However, after the Respondent completed its case, the General Counsel called him as a witness. Shipley claimed that even though the decision to discontinue the employee meal and other benefits was not announced to employees before the poststrike notices mentioned above, the decision itself was actually made earlier in July, prior to the strike, during a meeting between Shipley and the managers who worked for him.<sup>3</sup> He stated that

the decision was based on “customer complaints and product complaints.” Shipley conceded, however, that he was not aware of any documentation of this managers’ meeting or of the decision being reached at that time. At first Shipley asserted that he believed some of the complaints were in writing, but when pressed he stated that he did not know if any were in writing. At trial, the Respondent did not introduce any notes or other writings corroborating Shipley’s claim that the decision to discontinue benefits was made at a managers’ meeting before the strike or that the decision was based on customer and product complaints. Indeed, the poststrike notices that the Respondent used to inform employees that the meal benefit was being discontinued made no mention of complaints or store performance. The Respondent did not call as witnesses any of the managers who worked for Shipley, and who purportedly participated in the managers meeting, to corroborate the claim that the decision to discontinue the meal benefit was made at such a meeting prior to the strike and for reasons other than the employees’ participation in the WOC campaign.

#### Analysis and Discussion

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by discontinuing the free employee meal benefit because employees ceased worked concertedly and engaged in a protected strike. The Respondent denies this, and asserts that the discontinuation of the benefit was motivated by “the lack of employee performance and customer satisfaction,” not any unlawful reason. The Board applies the *Wright Line* framework to alleged violations of Section 8(a)(1) that, like the one at-issue here, turn on employer motivation. *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006). Under the *Wright Line* analysis, the General Counsel bears the initial burden of showing that the Respondent’s decision to take adverse action against an employee was motivated, at least in part, by unlawful considerations. 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or other protected activity. *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed.Appx. 594 (8th Cir. 2010); *Internet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. See, *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to

based on, or when he arrived at it, or otherwise indicate that his testimony on the subject was more than hearsay. At any rate, his understanding was contradicted by the firsthand accounts of employees at the store who stated that they were receiving the benefit up until the strike, and also to an extent by Shipley’s, and Boyice’s own, testimony that employees were not told, until after the strike, that the benefit was being discontinued.

<sup>3</sup> Boyice testified that his “understanding” was that Main Street location’s management had discontinued the lunch benefit during the week of July 13—prior to the strike. I do not give this testimony any significant weight since Boyice did not state what this “understanding” was

demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

The General Counsel easily meets its initial burden. The evidence shows that employees engaged in protected concerted activity on July 30, 2013, by striking against the Respondent in an effort to secure improved wages. *California Gas Transport*, 347 NLRB 1314, 1319 (2006) (“In the absence of special circumstances, a strike to secure higher pay is protected concerted activity.”), enf. 507 F.3d 847 (5th Cir. 2007). There is no question that the Respondent was aware of this activity. The Respondent received written notice that the employees were striking for improved wages and at the time management announced the discontinuation of the employee meal benefit it was aware that employees had participated in a strike on July 30. The General Counsel has also met the third and final element of its initial burden by showing that the Respondent harbored animosity towards the protected strike activity. Shipley, the store manager with authority to continue or discontinue the meal benefit, told employees that if they participated in the strike they would “feel [his] wrath,” “might as well find another place of employment” and would be terminated. On a separate occasion shortly before the strike, Shipley told another employee that “you are with me or you are against me,” and if you are “with” the WOC “we can find ways to get rid of you right now.” These statements are more than sufficient to establish that the Respondent bore animosity towards the protected strike activity, but the timing of the action makes the case even stronger. The Respondent first notified employees that the meal benefit was being discontinued immediately upon their return to duties after the strike. There was no evidence that, during the days or weeks prior to this notice, the Respondent had told employees that a discontinuation of the meal benefit was planned or even contemplated. This timing is extremely suspicious on its own, and all the more so when viewed against the backdrop of Shipley’s explicit threats to punish employees who participated in the strike. *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2006) (fact that employer’s adverse action against employee immediately followed employer’s knowledge of that employee’s protected activity, supports an inference of animus), enf. 232 Fed. Appx. 270 (4th Cir. 2007); see also *Desert Toyota*, 346 NLRB 118, 120 (2005), pet. for review denied 265 Fed.Appx. 547 (9th Cir. 2008); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enf. sub nom. *Carolina Holdings, Inc. v. NLRB*, 5 Fed.Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994).

Since the General Counsel has met its initial burden, the burden shifts to the Respondent to show that it would have taken the same action even absent the employees’ protected strike activity. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. I find that the Respondent has failed to meet this burden. Shipley’s testimony was the only significant evidence supporting the Respondent’s claim that the employee meal benefit was discontinued on the basis of customer complaints. Based on my consideration of Shipley’s demeanor and testimony and the record as a whole, I find that this testimony was self-serving and not at all credible. As discussed above,

the evidence showed that prior to the strike the Respondent did not give employees any indication that the meal benefit was about to be discontinued, or even in danger of being discontinued. The notice that the Respondent posted after the strike to announce the discontinuation of the meal benefit made no mention of customer complaints or employee performance. The Respondent offers no explanation for why, if the decision to discontinue the meal benefit was made weeks before the strike on the basis of customer complaints, management did not announce the decision until immediately after the strike and did not mention performance problems when it made the announcement. The Respondent did not produce any documentary evidence corroborating either the claim that the decision to discontinue the free employee meal benefit was made at a management meeting weeks before the strike or that it was made because of customer complaints. Indeed there was no documentary evidence of customer complaints during the months leading up to the discontinuation, much less of an increase in customer complaints that would explain why this existing benefit was revoked immediately after the strike. I note, moreover, that although Shipley claimed that the decision to cancel the benefit was reached during a meeting with the managers who worked for him, not one of those other managers was called as a witness to corroborate his claim. Finally, Shipley’s assertion that the meal benefit was revoked based on performance problems rings hollow given the evidence of historically good performance at the Main Street location. The staff at that location had been awarded monthly, storewide, performance bonuses for at least 8 months straight, up to, and including, July 2013. For these reasons, the Respondent’s contention that it would have discontinued the employee meal benefit even absent the employee’s protected strike activity does not withstand scrutiny.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) by discontinuing the employee meal benefit on or about August 1, 2013.

#### CONCLUSIONS OF LAW

1. The Respondent has engaged in an unfair labor practice affecting commerce within the meaning Section 8(a)(1) and Section 2(6) and (7) of the Act, on or about August 1, 2013, when it discontinued the free employee meal benefit at its Main Street location because employees there engaged in protected activity by concertedly ceasing work and engaging in a strike.

2. The Respondent violated Section 8(a)(1) of the Act by discontinuing the free employee meal benefit at its Main Street location because employees there engaged in protected activity by concertedly ceasing work and engaging in a strike.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular the Respondent should be required to reinstate the free employee meal benefit at the Main Street location and make employees whole for the period during which they were unlawfully denied this benefit. The reimbursement amount for the back meal benefits shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289

(1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.<sup>4</sup>

#### ORDER

The Respondent, Gates & Sons Barbeque of Missouri, Inc., Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discontinuing any employee benefit or otherwise discriminating against employees at its Main Street location because those employees engage in a protected strike or other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the free employee meal benefit at the Main Street location.

(b) Make employees at the Main Street location whole for any loss of benefits suffered as a result of the discriminatory discontinuation of the free employee meal benefit in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board

or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back benefits due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility on Main Street, in Kansas City, Missouri, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."