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History of the Labor Management Relations Act, 1947, at 543 (1948)**

I. **STATEMENT OF THE CASE AND SUMMARY OF FACTS**

A. **Statement of the Case**

This case arises from events during the efforts of Local 919, United Food and Commercial Workers Union (“the Union”) to organize warehouse workers at Bozzuto’s, Inc. (“Bozzuto’s”). Bozzuto’s engaged in speech protected by Section 8(c) of the Act and implemented discipline conforming to its work rules and long-standing practices. One employee was discharged for cause, insubordination, because he refused to attend a required meeting on the clock during work hours, despite Bozzuto’s efforts to convince the employee to attend the meeting and keep his job. Section 10(c) of the Act precludes an order of reinstatement or back pay for an employee discharged for cause. Another employee was discharged for failing to meet production requirements four times in one year. However, upon being presented with evidence of two altered computerized production records two months after the discharge, Bozzuto’s promptly reversed this employee’s discharge with an unconditional offer to return to work and make whole relief, which the employee declined. There were no coercive interrogations. The collection of union cards had virtually ceased for several months prior to the February 2014 McCarty discharge; the union never approached a majority of employees in its favor, and therefore never filed a petition for recognition.

On October 16, 2014 the Regional Director for Region 1 - Subregion 34 of the National Labor Relations Board (“the Board”) issued a Consolidated Complaint and Notice of Hearing alleging violations of the National Labor Relations Act (“the Act”).

The case was tried in Hartford, Connecticut on January 29-30, 2015 and March 18-20, 2015 before Administrative Law Judge Raymond P. Green.

On June 25, 2015, Judge Green issued a decision finding that Bozzuto's violated Sections 8(a)(1) and (5) of the Act as follows: by instituting wage increases on October 1, 2013; by disciplining and discharging employee Patrick Greichen; by disciplining and discharging employee Todd McCarty; by including within corrective reviews giving employees a second chance language limiting discussion about the terms and conditions of employment; by interrogating an employee by a single offhand and innocuous comment.

Judge Green did not find a violation of the Act insofar as employer surveillance and found that Bozzuto's unconditional offer of reinstatement and make whole relief to Todd McCarty was valid, eliminating reinstatement as a remedy. Judge Green required usual Board remedial orders but rejected extraordinary remedies like the public reading of a notice.

## **B. SUMMARY OF THE FACTS**

### **1. The Parties**

Bozzuto's is a regional northeastern wholesale grocery distributor with two warehouses in Connecticut (Cheshire and North Haven) and a yard in Allentown, Pennsylvania. (Clark Testimony, Tr. 57; GC- 7, p. 2) There were approximately 500 warehouse workers at those facilities in October 2013. (Clark Testimony, Tr. 58)

United Food and Commercial Workers, Local 919 (hereafter "the Union") sought to represent Bozzuto's warehouse employees. Jason Dokla (hereafter "Dokla") was the Union's organizing director and representative.

Todd McCarty (hereafter “McCarty”) and Patrick Greichen (hereafter “Greichen”) were Bozzuto’s employees working as selectors in the Cheshire warehouse.

**2. The Union Organizing Campaign**

**a. The Union’s Efforts to Organize**

The Union’s efforts to organize Bozzuto’s warehouse workers commenced on Sunday, September 22, 2013 when Union organizer and representative Dokla met with four Bozzuto’s employees, including McCarty and Greichen. (Dokla Testimony, Tr. 790) McCarty “wanted to be” and became the “point person” for the campaign. (Dokla Testimony, Tr. 793) The meeting attendees were given union authorization cards with the mission to get their fellow employees to sign them. (Dokla Testimony, Tr. 793)

The Union held a second small group meeting with five (5) Bozzuto’s employees on December 14, 2013. (Dokla Testimony, Tr. 795) On January 11, 2014, the Union held a meeting announced to Bozzuto’s workers by a mailing to about one hundred (100) people and an announcement on the Union web site. Thirty (30) people attended. (Dokla Testimony, Tr. 796-797) The final Union sponsored meeting was a twelve hour long open house on February 19, 2014, again announced by a mailing and a posting on the Union’s web site; two employees, one of whom was McCarty, attended the open house. (Dokla Testimony, Tr. 797-798)

The Union received signed cards as follows:

September 2013:	84
October 2013:	54
November 2013	21
December 2013:	6

January, 2014	3
February 2014:	2
June 2014:	1

(Dokla Testimony, Tr. 794, 804) The Union never filed a petition for an election.<sup>1</sup> (Dokla Testimony, Tr. 803)

By January, 2014, McCarty acknowledged that it was getting “tougher” to get union cards signed and that he was concerned that the organizing campaign was falling short. (McCarty Testimony, Tr. 662, 678) He agreed that the campaign needed to be invigorated. (Id.)

McCarty was terminated on February 18, 2014, well after the Union’s organizing campaign had stalled far short of the numbers necessary to warrant an election. McCarty’s discharge played no role in the Union’s failure to garner enough signature cards to obtain an election as the organizing drive was essentially dead after December 2013, months before McCarty was disciplined or discharged.

Dokla also discussed with McCarty whether he should identify himself as a union organizer to Bozzuto’s. Dokla thought self-identification by McCarty was a good idea because it would show people he was not afraid and also because it might protect him from discipline. (Dokla Testimony, Tr. 802-803) McCarty falsely denied that he discussed this issue with the Union. (McCarty Testimony, Tr. 692) Dokla also corresponded with McCarty by email advising him to identify himself as the lead organizer. (R-21; R-22)

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<sup>1</sup> On January 7, 2014, Dokla wrote McCarty that the Union needed at least 40 more cards to file a petition. (R-21)

**b. McCarty's Involvement with Organizing**

**(1) McCarty's Announcements to Bozzuto's That He Was the Lead Organizer**

McCarty testified that he started handing out union authorization cards on either September 23, 2013 or September 29, 2013. (McCarty Testimony, Tr. 481, 643) There was "no secret" about his role in organizing after the first week of the campaign.

(McCarty Testimony, Tr. 693) He specifically told Bozzuto's personnel that he was the lead organizer at least three (3) times from October 2013 - January 2014:

October 2013 (GC-49, p. 3)

December 2013-January 2014 (McCarty Testimony, Tr. 497; GC-49, p. 3)

January 18, 2014 (McCarty Testimony, Tr. 492)

By January, 2014, McCarty acknowledged that it was getting "tougher" to get union cards signed and that he was concerned that the organizing campaign was falling short. (McCarty Testimony, Tr. 662, 678) The campaign needed to be invigorated.

(Id.) McCarty was on vacation from January 20, 2014 through February 7, 2014. (R-59) The Union sent at least seven (7) letters to Bozzuto's employees. (R-23) McCarty saw the March 17, 2014 letter to employees that the Union prepared about his termination prior to its being sent. (McCarty Testimony, Tr. 687) The Union's letter encouraged unionization on account of McCarty's termination. (R-23, Union letter dated 3/17/14)

**(2) McCarty's Interactions With Management**

McCarty testified that management personnel were on the warehouse floor more than usual and talking with employees more than usual once the union organizing commenced. (McCarty Testimony, Tr. 484) He reported one verbal exchange

mentioning a union with Senior Vice President Rick Clark (“Clark”) after September 22, 2013 as follows:

When he was coming out of a restroom in the warehouse on either September 27 or October 4, 2013, Clark said to him; “Hey Todd, what’s going on with this union stuff?” McCarty’s reply was “I’m not going to talk about it with you Mr. Clark.” Clark put up his hands and said “ok.”

Nothing else was said in this conversation. (McCarty Testimony, Tr. 485)  
McCarty had no further conversations with Clark about union activity. (McCarty Testimony, Tr. 486)

In early January 2014, McCarty went to his supervisor’s office to discuss his vacation time with his supervisor Bill Engelhard (“Engelhard”). Dave Gardner (“Gardner”), another supervisor who shared that office, commented that McCarty was “really lucky” to have all this vacation time and that if there were a union at Bozzuto’s, he might not be so lucky. McCarty replied, “I don’t know what you are talking about with this union stuff, Dave.” Gardner responded “Todd we all know you’re involved.” McCarty’s reply was “Dave, I’m not just involved...I’m not just organizing...I am the organizer.” (McCarty Testimony, Tr. 497)

Finally, McCarty claims that he was warned about leaving his work area to make a telephone call. (McCarty Testimony, Tr. 489-490) He said that Clark and Doug Vaughan (“Vaughan”) were present. Vaughan denied he was involved in this conversation. (Vaughan Testimony, Tr. 420)

**c. Bozzuto's Interactions With Employees**

Bozzuto's had security cameras in place prior to the union activity. The purposes of the cameras were to ensure security, including security of food supplies, avoidance of theft, and investigation and prevention of accidents and injuries. (Koch Testimony, Tr. 896) Employees at Bozzuto's are advised in the employee orientation materials and through multiple postings that there is video surveillance in the workplace. (R-41; GC-8, p. 66; Koch Testimony, Tr. 896-898, 901) Tapes could be reviewed for 14 days. There were no changes or increases in electronic monitoring after September, 2013, and there was no specific monitoring of Greichen or McCarty. (Koch Testimony, Tr. 896-904)

Clark routinely has many interactions with employees: warehouse walk-throughs, warehouse focus groups to discuss company issues, supervisor focus groups, posts to the Grapevine, and through an open door policy. (Clark Testimony, Tr. 56, 67, 73-78)

During the union campaign, Bozzuto's posted or mailed four (4) announcements or letters about its view that unionization was unnecessary at Bozzuto's. (GC-11, GC-12, GC-13, GC-22) There also was discussion about unionization between employees and management in the Grapevine, an intranet communication vehicle. (GC 14)

**3. Bozzuto's Discipline System**

Bozzuto's has had the same associate work rules in place for many years. (GC-8, R-42) All employees receive a copy of the work rules in employee orientation materials when they are hired. (R-34; R-42, p. 25; GC-8)

The discipline process depends on the type of infraction. (Clark Testimony, Tr. 81) Attendance infractions involve a five (5) step process; there is an automatically

generated corrective action when a certain number of attendance “points” are reached. (Clark Testimony, Tr. 825; Koch Testimony, Tr. 919) Production infractions are subject to a four step process. In order for an associate to avoid discipline, his production has to be at least 95% of standard. (Koch Testimony, Tr. 920) Probationary employees have twelve (12) weeks to achieve the required production level. (Clark Testimony, Tr. 83) Four (4) production infractions within a twelve (12) month period results in a suspension pending termination. (Koch Testimony, Tr. 937) Employees are advised that an insubordination violation can result in termination on the first offense. (R-34) There are general discipline guidelines in place. (GC-15; Clark Testimony, Tr. 127-128) When administering discipline, the employee’s entire work history is considered, including length of service and past discipline. Discipline stays on an employee’s record for twelve months, after which time it is not counted toward future discipline. (Koch Testimony, Tr. 919-920)

Vaughan, Manager of Associate Relations and Development, as one of his job duties, takes notes at one-on-one meetings between management personnel and employees. (Vaughan Testimony, Tr. 427-430) At the discipline stage of suspension pending, Vaughan outlines the employee’s file as to past infractions. (Vaughan Testimony, Tr. 430, R-17) He views attendance and production infractions as “black and white.” (Vaughan Testimony, Tr. 433) Vaughan writes down everything said at meetings, and Clark does not change the content of his notes. (Vaughan Testimony, Tr. 426-427, 445)

When justified, an employee can be retained with a “back to work” or “last chance” agreement. At the time period relevant to this case, provisions in such an

agreement included following work rules and not being involved in conversations that are “hearsay, rumors or nonfactual comments that cause disruption in the business environment.” (Clark Testimony, Tr. 133-135; GC-16) Such provisions preceded union organizing. (R-4)

#### **4. Bozzuto’s Use of Labor Standards**

Jamie Wright (“Wright”), Bozzuto’s Director of Industrial Engineering, is responsible for operational efficiency, including maintaining and developing labor standards. (Wright Testimony, Tr. 547) During the course of his work duties, Wright has routinely met with Clark and employees to review labor standards or answer questions about the incentive system.<sup>2</sup> Wright also develops labor standards using time studies, a process that takes months. (Wright Testimony, Tr. 551) Before any change to labor standards is made, there would be meetings with associates, supervisors, an announcement at shift meetings, and a posting on bulletin boards. (Wright Testimony, Tr. 552, 555; GC-9) An announced change that is a “+” means that the employee will be given more time to do a particular task.<sup>3</sup> Access for changes to the labor standards is limited to the industrial engineering and IT staffs; supervisors do not have access to make a change in a labor standard. (Wright Testimony, Tr. 552-553)

#### **5. Patrick Greichen’s Discipline and Discharge**

##### **a. Greichen’s Work History**

Patrick Greichen was hired by Bozzuto’s on September 27, 2010 as a selector in the warehouse. (Greichen Testimony, Tr. 834) He received copies of the work rules

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<sup>2</sup> Wright described such meetings with employees Brian Dube and Paul Gotlibowski, both of whom are still employed. (Wright Testimony, Tr. 548-550)

<sup>3</sup> The addition of 3.35% more time for Big Y jobs was especially significant since Big Y is Bozzuto’s largest customer, accounting for 40-50% of its business. (Wright Testimony, Tr. 556)

and the orientation materials and understood that he could be terminated for insubordination. (Greichen Testimony, Tr. 833-835) He also understood that he was required to follow the reasonable work instructions of his superiors. (Greichen Testimony, Tr. 832)

During the course of his work history prior to October 1, 2013, Greichen received seventeen (17) corrective actions for, inter alia, attendance and failure to perform required work functions. (R-43)

Greichen also attended the following meetings with Bozzuto's management personnel prior to October 1, 2013:

- 10/1/12 Meeting with Winans and Vaughan to explain incentive pay;
  - 8/2/13 Meeting with Chetcuti and Vaughan to explain mispicks;
  - 8/13/13 Meeting with Clark and Vaughan to discuss time off rules and complaints against Winans;
  - 8/22/13 Meeting with Clark, Vaughan and Winans to resolve interpersonal issues
- (R-43; Vaughan Testimony, Tr. 435-439) All of the foregoing meetings pre-dated any union organizing activities. None resulted in termination, although they involved management explanations to Greichen of Bozzuto's work and production rules.

In addition, Greichen himself scheduled two meetings with Clark when he first became an employee to talk about non-work subjects. (Clark Testimony, Tr. 236-237) Greichen also sent Clark a t-shirt as a gift, which Clark was not allowed to keep. (Greichen Testimony, Tr. 857) Greichen testified that he had no hesitation in meeting with Clark. (Greichen Testimony, Tr. 857) Nothing in Greichen's behavior evidenced that he was intimidated by Clark. (Clark Testimony, Tr. 236-238)

**b. Greichen's October 1, 2013 Verbal Warning for Erratic Behavior**

Following the four (4) meetings between Greichen and management from late 2012 - end of August 2013 and seven (7) corrective reviews<sup>4</sup> between late 2012 - end of September 2013, Clark, Koch, Vaughan and Glass met with Greichen on October 1, 2013 to discuss his negative attitude and disrespectful behavior, which had become disruptive to the work force and work environment. (GC-18)

Greichen had a reputation for always talking, could get agitated, and could display behavior out of the ordinary. (Vaughan Testimony, Tr. 435, 438, 460). For example, on August 8, 2013, he was denied a request for additional time off because he had exhausted his allowed time. Greichen responded with a confrontational interaction with his manager, Winans, in which he told Winans that he did not like him or the way he did business. (R-13) Clark's assistant told him that Greichen's behavior had become scary, and Clark received comments that Greichen's behavior was erratic. (Clark Testimony, Tr. 160, 163-164) Greichen's work colleague McCarty described Greichen as a hot head who sometimes rants at work. (McCarty Testimony, Tr. 711) Dokla, the Union representative, stated that he would have his "hands full" in controlling Greichen at a meeting. (R-21) Greichen himself admitted that he would "rant" about some things, get excited and speak loudly. (Greichen Testimony, Tr. 877-878)

Vaughan's notes summarize the October 1, 2013 meeting as follows:

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<sup>4</sup> From 12/3/12 - 9/24/13, prior to union organizing, Greichen received a warning, two one day suspensions and a three day suspension for attendance violations, two warnings for failing to do job functions, and a warning for deficient production. (R-43)

1. Management needed to address Greichen's conduct because of comments from hourly and salaried workers that Greichen's behavior was more erratic and scary.

2. Clark stated that Bozzuto's has an obligation to provide a safe work environment and that he wanted Greichen to succeed with the company.

3. Clark outlined Greichen's choices, which included appropriate communication with peers and management, no behavior change, and working elsewhere.

4. Greichen commented that when told he was doing something wrong, he felt like he is being poked and forced to the ground. He said he felt like he was being told he was bad and does not like it. He reacts by wanting to get up and do the same things back to the person doing it to him.

(GC-18)

Greichen received a verbal warning. Clark never said anything about unions to Greichen at this meeting or otherwise in 2013. (Greichen Testimony, Tr. 858)

Other employees have received similar treatment prior to union organizing.

(R-4)

c. **Greichen's October 8, 2013 Suspension and Discharge For Insubordination**

The facts surrounding Greichen's discharge are undisputed. Greichen agreed that as an employee, union activity notwithstanding, he was required to follow reasonable work instructions from his supervisors and could be terminated for insubordination. (Greichen Testimony, Tr. 832-833, 836-837)

On October 8, 2013, Greichen made accusations to his supervisors and then to Jason Winans ("Winans"), Distribution Manager for Grocery, that management was purposely changing the time standards on a daily basis to "screw" employees and that he tells that to anybody and everybody that he can. (R-43, Tab 31; Winans Testimony, Tr. 379; Greichen Testimony, Tr. 843-845) Winans thought these accusations about system integrity were important and relayed them to Clark. (Winans Testimony, Tr. 380-381) Clark set up a meeting for Greichen with the industrial engineers to explain to Greichen how the standards work so he could see they could not be manipulated. (Clark Testimony, Tr. 166) He directed Winans to tell Greichen to attend the meeting and the purpose of the meeting. (Winans Testimony, Tr. 381) Greichen acknowledged that he was told that the engineers would be involved and that nothing was said about unions. (Greichen Testimony, Tr. 841-843) Greichen stated that he was not going to attend the meeting. (Winans Testimony, Tr. 382) Clark then directed Winans and Vaughan to explain to Greichen that he was being directed to attend the meeting and that if he refused it would be regarded as insubordination. (Clark Testimony, Tr. 167; Winans Testimony, Tr. 383) Both Winans and Vaughan explained several times to Greichen that he would experience no adverse consequences if he attended the meeting but would be considered insubordinate if he refused. (R-12, pp. 18-25) Greichen indicated that he understood - he would be fired if he did not go and not fired if he did go. (Greichen Testimony, Tr. 837-840, 847; R-12, p. 21) Greichen secretly tape recorded this meeting so there is no dispute about what was said.<sup>5</sup> (R-12, pp. 18-25)

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<sup>5</sup> In the preliminary part of the tape recording, while waiting, Greichen discussed with others the stock market, chocolate, and commented "what's life without a little trouble or controversy." (R-12, pp. 8-16)

At the hearing, Greichen acknowledged that he did not want to attend the meeting because he did not want to hear what management had to say and also did not want to attend the meeting because he believed it might conflict with a wage complaint he made with the Department of Labor.<sup>6</sup> (Greichen Testimony, Tr. 848, 885)

Greichen also testified that, as to the purpose of the meeting at Bozzuto's on October 8, 2013, nothing was said about unions or union organizing. (Greichen Testimony, Tr. 842-843) He further testified that in all of 2013 Clark had never said anything to him about unions. (Greichen Testimony, Tr. 858)

Rather, Greichen admitted that he was instructed to attend a meeting with Rick Clark and the industrial engineer to discuss work standards. (Greichen Testimony, Tr. 838). Greichen further admitted that the meeting was to discuss issues he had raised earlier in the day regarding the work standards. (Greichen Testimony, Tr. 841, 846)

Greichen's surreptitious tape recording of his interactions on October 8, 2013 with Vaughan and Winans provides irrefutable evidence of the attempts by Vaughan and Winans to convince Greichen to attend the meeting on work standards and keep his job. (R-12, p. 18-25) As proved by the recording, Bozzuto's made repeated assurances to Greichen that he would not be terminated if he attended the meeting on work standards. (Id.) Greichen acknowledged his understanding as follows:

Mr. Greichen: Right. Okay. I guess so it's termination if I  
don't go to the meeting; correct? And its non-termination if I  
do go to the meeting; right?

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<sup>6</sup> Greichen filed a complaint with the U.S. Department of Labor about his wage calculation and termination. (R-39; Greichen Testimony, Tr. 880-881) In November 2013 his complaint was dismissed. (R-40)

Mr. Vaughan: Yeah. You're not going to get terminated upstairs.

(R-12, p. 21) Bozzuto's also provided assurances to Greichen that he would suffer no adverse consequence from attending the meeting on work standards:

Mr. Vaughan: . . . But I'm telling you now, and I don't want to delay it anymore, but if you absolutely refuse to go upstairs, there is nothing here that's unsafe or discriminatory or harassment in this meeting because we're paying you, you're not going to lose -- you're not going to lose incentive. You're going to get down time away, good stuff, we're not doing anything negative to you. If you don't do it, that is considered insubordination.

(R-12, p. 23-24)

Finally, Mr. Greichen confirmed his refusal to attend the meeting:

Mr. Vaughan: So it's your choice now.

Mr. Greichen: Yeah. My choice is not to go to the meeting.

(R-12, p. 24-25)

Industrial Engineer Wright was prepared to meet with Greichen on October 8, 2013 about Greichen's views about labor standards. Wright had no prior experience with Greichen and was not told anything about him prior to that date. (Wright Testimony, Tr. 556) He was not told whether or not Greichen was a union supporter or directed to ask any questions about union activities. (Wright Testimony, Tr. 560-561)

The meeting was to occur in a conference room next to Clark's office, a place where Wright had met with employees before. (Wright Testimony, Tr. 559-560) The meeting did not occur because Greichen chose not to attend.

Greichen was suspended pending termination and ultimately discharged for insubordination. From June 2012 - March 2014, four (4) other employees have been terminated for insubordination.<sup>7</sup> (R-44)

6. **Todd McCarty's Discipline, Discharge and Unconditional Return to Work Offer.**

a. **McCarty's Employment History**

McCarty began employment at Bozzuto's in 1999 as a first shift selector. (McCarty Testimony, Tr. 472) His discipline history shows more than seventy (70) infractions for, inter alia, attendance, failure to perform work functions, leaving work without permission, and deficient production. (R-17) Over the course of his employment, his productivity record was generally good. (Clark Testimony, Tr. 191)

In the summer of 2013, prior to any union activity, McCarty received the following corrective reviews:

7/19/13      Failure to meet production standards (91.9%). McCarty wrote in the "comments" section: "Did my best working through injury incurred at Bozzuto's Inc." (R-6)

8/7/13      Failure to meet production standards (87.3%). McCarty wrote in the "comments" section: "due to mispicks, not actual performance." (R-7)

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<sup>7</sup> Two other employees were given suspensions for insubordination. Frank Leon, a driver, initially refused but ultimately did the runs he was assigned. (R-44, Tab 5) Isidore Germain was a selector who was denied permission he requested to unload a truck ("lumping") but proceeded nonetheless to unload the truck. He received a three-day suspension. (Koch Testimony, Tr. 929-930; R-44, Tab 1)

**b. McCarty's Discipline and Discharge in 2014**

To avoid discipline, selectors must achieve 95% of the production standards. (Koch Testimony, Tr. 920) McCarty was aware of this requirement; in fact other employees would come to him for help in figuring out their incentive pay. (McCarty Testimony, Tr. 473-474; 644) Prior to 2014, if McCarty brought compensation discrepancies to Bozzuto's attention with his evidence, Bozzuto's would correct the discrepancy. (McCarty Testimony, Tr. 645) Four production infractions within a twelve month period would result in a suspension pending review and potentially termination. (Koch Testimony, Tr. 937) During the suspension pending review, the employee's entire work record would be considered, including length of service and past discipline. (Clark Testimony, Tr. 130)

As previously described, McCarty incurred two production infractions in July and August 2013, which was prior to any union activity, and he made comments on both corrective reviews. (R-6; R-7) McCarty also received discipline for deficient production on January 4, 2014 and January 11, 2014. (R-8, R-9) He chose not to make any comments on the corrective reviews for those dates. (McCarty Testimony, Tr. 647-649)

Because he believed the computer generated data about his production in January 2014 was wrong, McCarty began taking cell phone photographs of the computer screens showing his production. (McCarty Testimony, Tr. 499-500; GC-45, GC-46a) He testified that he made comments that his percentage was wrong to Winans and to his supervisor Engelhard (McCarty Testimony, Tr. 512, 514-515, 520) but did not state that his numbers had been altered or provide the photographs. Winans denied

that McCarty had complained to him about his production numbers. (Winans Testimony, Tr. 307-308)

In January 2014, McCarty advised union rep Dokla that he had “hard proof” that his production records had been altered. (Dokla Testimony, Tr. 799) On January 22, 2014, Dokla advised McCarty that he should submit his proof when he met with the Board Officer at the NLRB.<sup>8</sup> (R-22) Dokla saw McCarty’s screen shots of his production records for the first time at the February 19, 2014 meeting. (Dokla Testimony, Tr. 799) McCarty falsely denied that he had discussed this issue with the Union. (McCarty Testimony, Tr. 658) By January, 2014, McCarty acknowledged his concern that the organizing campaign was falling short and needed to be invigorated. (McCarty Testimony, Tr. 662, 678) He was on vacation from January 20, 2014 through February 7, 2014. (R-59)

McCarty never furnished the photographs of the computer screens documenting the changed numbers to anyone at Bozzuto’s or made a claim to anyone at Bozzuto’s that the integrity of the production data had been violated. (McCarty Testimony, Tr. 649; Koch Testimony, Tr. 939)

McCarty received progressive discipline for the four production deficiencies within a twelve month period and was discharged on February 18, 2014. Twelve other employees were discharged for repeated production deficiencies in 2013-2014. (R-45)

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<sup>8</sup> Although McCarty testified that he gave affidavits to the Board attorney in mid-January and the end of January, 2014 (McCarty Testimony, Tr. 654-656), the first affidavit was dated February 12, 2014. (McCarty Testimony, Tr. 1127), which is consistent with Dokla’s advice about what McCarty should do with his “proof.” (R-22)

c. **Bozzuto's Unconditional Offer of Reinstatement and Make Whole Relief**

Two months after McCarty gave the photographs to the Board agent, on April 9, 2014, the NLRB sent to Bozzuto's counsel the allegation that McCarty's data had been tampered with and the "before and after" photographs of computer screens that McCarty had provided. (R-19) This was the first time that Bozzuto's had been notified of this allegation and presented with this evidence.<sup>9</sup> (Clark Testimony, Tr. 200; Koch Testimony, Tr. 939)

Bozzuto's immediately began an investigation, putting Jamie Wright, Director of Industrial Engineering, in charge. On April 14, 2014, less than a week after receiving the NLRB letter and after reviewing hundreds of pages of selector transaction logs, Wright concluded that McCarty's production numbers had been changed adversely to him. (Wright Testimony, Tr. 562, 566, 572-573; R-20; GC-20) Bozzuto's was unable to conclusively establish who made the changes to McCarty's records because security at that time was lax - the supervisor codes were short and never expired, and once a log in occurred, the system would remain open and active indefinitely. The investigation also revealed that some supervisors shared their codes with employees. (Wright Testimony, Tr. 569; Winans Testimony, Tr. 368) Once a screen had been altered, only the altered screen remained viewable on the system. Thus, if someone looked up prior production data, he would only find the altered screen. Only the review of hundreds of pages of detailed individual transaction logs revealed the changes. (Wright Testimony, Tr. 571-

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<sup>9</sup> Bozzuto's surveillance cameras preserve its recordings for 14 days so that by the time the NLRB communicated the evidence it had in its possession for 2 ½ months, Bozzuto's could no longer review security recordings to determine who made the modifications. (Koch Testimony, Tr. 896)

573) Jason Winans did not have access to other supervisors' passwords when the changes to McCarty's records were made. (Wright Testimony, Tr. 600, 623-624; Winans Testimony, Tr. 355, 370-371)

On May 14, 2014, Bozzuto's unconditionally offered McCarty reinstatement to his position and make whole relief. McCarty's attorney was copied on the reinstatement letter. (R-24) Bozzuto's unconditional offer of reinstatement provided for immediate reinstatement to the same job category with the same seniority, benefits and pay rate that he would have held had there been no interruption in employment and make whole relief for any losses, earnings, and other benefits suffered as a result of his discharge. The offer did not require McCarty to sign any settlement, release any claims or withdraw any pending complaints. McCarty had 10 days to respond, i.e., to May 24, 2014. If he accepted the offer, Bozzuto's would contact him to arrange his return to work. (R-24) At McCarty's counsel's request to Bozzuto's counsel, Bozzuto's extended the time period for McCarty to respond to the reinstatement offer to May 28, 2014. McCarty did not accept Bozzuto's unconditional offer of reinstatement. (R-28)

## **II. SPECIFICATION OF THE QUESTIONS INVOLVED**

A. Did Bozzuto's unlawfully interrogate an employee with a single "offhand and somewhat innocuous" comment? (Exception I, Interrogation)

B. Did Bozzuto's unlawfully discipline P. Greichen on October 1, 2013 for his disruptive conduct? (Exception II, Discipline and Discharge of Greichen 1-3)

C. Were Bozzuto's Sec. 8(c) communications considered as anti-union animus? (Exception II, Greichen Discipline 4)

D. Was Greichen's undisputed insubordinate conduct cause for termination?  
(Exception II, Greichen Discipline 5-13)

E. Given the ALJ's acceptance that Greichen was insubordinate, did the ALJ's order of reinstatement and back pay violate Section 10(c) of the Act? (Exception II, Greichen Discipline 14)

F. Was Greichen unlawfully discharged? (Except II, Greichen Discipline 15-18)

G. Was T. McCarty's discipline and discharge unlawful given the evidence Bozzuto's had at the time of his production deficiencies and McCarty's choice to withhold photographic evidence to the contrary? (Exception III, McCarty Discipline 1-8)

### III. **ARGUMENT**

#### A. **Bozzuto's Did Not Coercively Interrogate Employees About Their Union Activities**

Directing questions to employees during a union organizing campaign is not illegal per se. Section 8(c) of the Act explicitly permits the expression of views, arguments or opinion or the dissemination thereof if such expression contains no threat of reprisal or promise of benefit. 29 U.S.C. Sec. 158. Lawful expression cannot be the basis of an inference of animus, and Judge Green and the General Counsel acknowledged that.

To constitute an unfair labor practice within the parameters of Section 8(a)(1), "either the words themselves or the context in which they are used must suggest an element of coercion or interference." Rossmore House and Hotel Employees and Restaurant Employees Union, 269 NLRB 1176, 1177 (1984). Some factors that are considered in analyzing alleged interrogations include: the background, the nature of the information sought, the identity of the questioner, the place and method of the

interrogation, and the truth of the reply. Rossmore House, *supra* at 1178 n. 20, citing Bourne v. NLRB, 332 F.2d 47 (2d Cir. 1964). These factors contribute to an assessment of the totality of the circumstances. Toma Metals, Inc., 342 NLRB 787, 789 (2004)

The Complaint in this case alleged that on or about September 27, 2013, Rick Clark interrogated employees about their union activities. McCarty testified about one exchange he had with Senior Vice President Clark after September 22, 2013 where union activity was mentioned as follows:

When he was coming out of a restroom in the warehouse on either September 27 or October 4, 2013, Clark said to him; “Hey Todd, what’s going on with this union stuff?” McCarty’s reply was “I’m not going to talk about it with you Mr. Clark.” Clark put up his hands and said “ok.” Nothing else was said in this conversation and McCarty had no further conversations with Clark about union activity. (McCarty Testimony, Tr. 485-486)

The ALJ found that Clark’s single statement was an “offhand and somewhat innocuous comment.” (ALJ 8:21-22) However, because the comment occurred at or near the time of the pay increase, as evidenced by a posting (GC-13), and the Greichen discipline on October 1, 2013, he concluded that it constituted an unlawful interrogation.

A fair application of the Bourne factors and the totality of the circumstances do not support a finding of unlawful interrogation. McCarty was described by the Union representative as eager to be the point person in the campaign. (Dokla Testimony, Tr. 793) He was an open union supporter and so identified himself early on in the union campaign to management personnel. While Clark is a senior management official, he

was a “hands on” manager who regularly took walks through the warehouse and participated in focus meetings with employees. (Clark Testimony, Tr.56, 67, 73-78) The exchange occurred on the warehouse floor; it was brief, casual and not directed at discovering information about any particular individual, although McCarty had volunteered his leadership role. McCarty’s response was direct (“I’m not going to talk about it with you” ) and its tone certainly suggests no intimidation. There were no follow up questions after McCarty dismissed Clark’s remarks.

There is no allegation and no evidence that Bozzuto’s expressed its view that a union was not needed in a coercive way. In short, the totality of the circumstances does not support the ALJ’s conclusion that Clark’s single remark was unlawful interrogation.

**B. Greichen’s Verbal Warning On October 1, 2013 About His Behavior Was Warranted and Unconnected To His Union Activities.**

Greichen’s October 1, 2013 discipline – a verbal warning – occurred after four (4) other meetings over the last year with management personnel to discuss pay issues, time off rules, and an interpersonal issue between Greichen and Winans, after Greichen had telephoned Winans, Manager of Grocery Operations, to tell him that he did not like him.<sup>10</sup> (R-13; R-43; Vaughan Testimony, Tr. 435-439) Clark, who did not know that Greichen was involved in union activity, which had just commenced, had also received complaints from his assistant that Greichen’s behavior was scary. (Clark testimony, Tr. 160, 163-164) Vaughan described Greichen’s conduct as sometimes unusual, that he could get agitated, and that he would “rock back and forth.” (Vaughan Testimony, Tr. 435, 438, 460) Greichen himself stated that he would “rant” about things. (Greichen Testimony, Tr. 877-878) His colleague McCarty described him as a “hot head” and

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<sup>10</sup> There was no discipline given for Greichen’s disrespectful behavior to a manager.

even the union rep stated that he would have a hard time “controlling “ Greichen at a meeting. (R-21)

At the October 1, 2013 meeting, Clark stated that Bozzuto’s needed to address Greichen’s behavior to assure a safe and comfortable work environment for employees. Greichen’s comment about his own conduct was notable: he did not like being told he was doing something wrong and reacts “by wanting to get up and do the same things back to the person doing it to him.” (GC-18)

Bozzuto’s was justified in alerting Greichen that his way of communicating was unacceptable and disrespectful. Clark told Greichen that Bozzuto’s wanted him to succeed as an employee. There was no mention of unions. Bozzuto’s issued a form of corrective review with boilerplate language that had existed prior to any union activity.<sup>11</sup>

**C. Because Bozzuto’s Discharged Greichen For Cause On October 8, 2013, He Is Ineligible For Reinstatement and Back Pay.**

**1. The ALJ’s Analysis of The Insubordination Incident Should Be Rejected.**

The ALJ decided that Greichen’s insubordinate conduct on October 8, 2013 was inseparable from his verbal warning for disruptive behavior on October 1, 2013. The ALJ’s conclusion ignores the statutory restraints imposed by Section 10(c) of the Act which provides that when an employee engages in conduct that results in termination for cause, reinstatement and back pay are prohibited even when the conduct relates to union activity. 29 U.S.C. Sec. 160(c) Further, the ALJ ignores the difference in Greichen’s complaints on October 1 about having to work too hard and his accusation on October 8 first to his supervisor and then to operations manager Winans that he

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<sup>11</sup> Bozzuto’s does not contest the finding that the provision stating that employees should not be involved in conversations that are “hearsay, rumors or nonfactual comments that cause disruption in the business environment” was improper and should be removed and no longer used.

would tell “anybody and everybody” that Bozzuto’s was “screwing” the associates by changing the time standards on a daily basis to cheat them out of pay. (R-43, Tab 31; Winans Testimony, Tr. 379; Greichen Testimony, Tr. 843-845) This was an entirely separate, distinct and inflammatory issue that Greichen raised, and the ALJ erred in coalescing it with the subject of the October 1 meeting. To Clark, the solution to this accusation that Bozzuto’s was purposely cheating employees was simple – educating Greichen about how time standards were done and the impossibility of manipulating them on a daily basis.

The ALJ also states that “management more than likely believed that [Greichen] was among the employees who most likely would support a union.” This inference is contrary to the record evidence. Rick Clark’s uncontradicted testimony was that he was the decision maker insofar as Greichen’s discipline and that he knew about only two employees who were involved in union activity, neither of whom was Greichen. (Clark Testimony, Tr. 71-72, 106, 178) Greichen himself testified that Clark never discussed or raised the issue of unions with him. (Greichen Testimony, Tr. 858) Moreover, cases have held that the Board must show actual knowledge on the part of the company official who made the employment decision, not suspicion or conjecture as expressed by the ALJ. Firestone Tire & Rubber v. NLRB, 539 F. 2d 1335, 1338 (4<sup>th</sup> Cir. 1976)

The ALJ apparently concedes that Greichen’s refusal to attend a required meeting was insubordination. (ALJ 6:28-30) The record evidence supports this conclusion. Bozzuto’s long established work rules establish insubordination as an offense dischargeable on its first occurrence, (GC-8; R-34; R-42), and Bozzuto’s has discharged employees for this offense in the past. (R-44) Greichen himself

acknowledged his obligation to follow reasonable work orders and his awareness of the insubordination rule. (Greichen Testimony, Tr. 832-833, 836-839)

Finally, the ALJ appears to conclude that only threatening behavior could convert concerted activity into unprotected conduct. (ALJ 6:39-40) Many cases have held that employers have lawfully disciplined workers for misconduct short of that which is flagrant, violent or extreme. See Aroostock County Regional Ophthalmology Center v. NLRB, 81 F. 2d 209, 215 n.5 (D.C. Cir. 1996) and cases cited therein.

There is no discussion whatsoever about Section 10(c) of the Act or the General Counsel's burden to show unlawful motivation as the cause of Greichen's discharge. Nor is there any discussion of the contents of Greichen's surreptitious tape recording of the events causing his discharge.

**2. Sections 8(c) and 10(c) of the Act and Related Case Law Are Relevant and Were Ignored By the ALJ.**

The NLRA affords employers two protections in addressing conduct during union organizing. Section 8(c) of the Act allows the employer to express views, arguments or opinion and the dissemination thereof if such expression contains no threat of reprisal or the promise of benefit. 29 U.S.C. Sec. 158 There was no allegation or testimony in this case that the employer by its general postings or employee mailings overstepped the parameters of Section 8(c). Judge Green correctly noted that this permissible conduct, protected by Section 8(c), is not evidence of anti-union animus, especially not animus against any particular employee, and the General Counsel agreed. (Tr. 270, 941-42)

Section 10(c) of the Act provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of back pay, if such individual was suspended or

discharged for cause.” 29 U.S.C. Sec. 160(c) This provision was “sparked” by a concern over the Board’s perceived practice of inferring from the fact that someone was active in the union that he was fired because of anti-union animus even though the worker had been guilty of gross misconduct. NLRB v. Transportation Management Corp., 462 U.S. 393, 401 n. 6 (1983) The legislative history of Section 10(c) supports this view:

Undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in Section 10(c) of the amended act,...it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of back pay if such individual was discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.

House Conference Rep. No. 510, 80<sup>th</sup> Cong. 1<sup>st</sup> Sess., 39 (1947), U.S. Code Cong. Serv. 1947, pp. 1135, 1146, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 543 (1948).

Thus, the fact that an employee was engaging in concerted activity in that it concerned a working condition does not necessarily mean the employee can engage in the activity with impunity. Atroostock County Regional Opthamalogy Center v. NLRB, supra, 81 F. 3d at 214-215 n.5 Were the rule otherwise, any employee who is guilty of conduct warranting discharge could protect himself by openly engaging in union activity.<sup>12</sup> See Waterbury Community Antenna, Inc. v. NLRB, 587 F. 2d 90, 97 (2d Cir. 1978); Firestone Tire & Rubber Co., supra, 539 F. 3d at 1337 n. 7

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<sup>12</sup> In fact union representative Dokla advised McCarty that identifying himself as a union organizer would protect him from adverse action. (Dokla Testimony, Tr. 802-803)

Even assuming Greichen's conduct in refusing to attend the required meeting was insubordinate, the ALJ still "thought" his discharge was unlawful. However, even when concerted activity was initially involved, courts and the Board "have refused to reinstate employees discharged for "cause" consisting of insubordination, disobedience or disloyalty." NLRB v. Local Union 1229, IBEW, 346 U.S. 464, 474(1953) See also Champlin Co., 2003 NLRB LEXIS 324 (2003) (employee's action unprotected if, during course of his protest, actions became insubordinate); Carolina Freight, 295 NLRB 1080 (1989) (employer lawfully discharged employee in asserting a contract right when employee persisted in challenging a supervisor's direct order to clock out); Interlink Cable System, 285 NLRB 304, 306-307 (1987) (unprotected insubordination where employees refused to obey supervisor's order to sign warning slip)

The evidence in this case conclusively shows Greichen's insubordination and Bozzuto's attempts to retain him as an employee.

**3. Greichen's Surreptitious Tape Recording Conclusively Establishes His Insubordination and Bozzuto's Attempts to Save Him From Discharge.**

Oddly the ALJ's decision omits any reference whatsoever to the contents of Greichen's surreptitious tape recording of his interactions with management on October 8, 2013 which show the repeated efforts of management personnel Vaughan and Winans to convince Greichen to keep his job by merely attending a meeting about the issues he had raised that very day – whether supervisors were changing the labor standards on a daily basis to cheat employees. (R-12) Vaughan expressly assured Greichen that he would suffer no adverse consequences by attending the meeting. (R-12) Greichen acknowledged his choices to attend the meeting and remain employed or refuse to go and be found insubordinate. (R-12, p. 21)

Because of Greichen's tape recording, the situation could not be clearer that Greichen knowingly refused to attend a required meeting on the clock during work hours despite Bozzuto's efforts to convince him to attend. To uphold the ALJ's reinstatement and back pay order under these circumstances is contrary to the language and intent of Section 10(c).

**4. The Board Failed to Prove That Greichen Was Discharged Because of His Union Activities.**

The ALJ did not engage in any analysis of the Greichen discharge as a "dual motive" case, i.e. where the employer had both a good motive and a bad motive for its actions.

Under that analysis, merely showing that management dislikes union activity does not constitute proof of an unfair labor practice. NLRB v. Elion Concrete, Inc., 1989 U.S. App. LEXIS 22625 \*13-15 (4<sup>th</sup> Cir. 1989) The Board has the burden of proving that the employee's protected conduct was a substantial motivating factor in the discharge. Transportation Management, supra, 462 U.S. at 401. This requires proving that the employee was engaged in protected activity, that the employer was aware of the activity, and that the activity was a motivating reason for the employer's decision. Gestamp South Carolina v. NLRB, 769 F. 3d 254, 261 (4<sup>th</sup> Cir. 2014)

Argument has already been made that Greichen's insubordination lost him the protection of concerted protected activity; see discussion supra at pp 26-28. Second, the union campaign had barely commenced when Greichen's insubordination occurred, and Clark, the decision-maker, had no knowledge of Greichen's union activity. (Clark Testimony, Tr. 160, 163-164) "A discharge cannot be held to be discriminatory without proof that the employer had knowledge of the employee's union activity." Independent

Gravel Co. v. NLRB, 566 F. 2d 1091, 1094 (8<sup>th</sup> Cir. 1977). There is no such proof in this case. Indeed, the ALJ's remark on this issue reveals only speculation instead of proof.<sup>13</sup>

The reasons Greichen gave at the hearing for refusing to attend were that he did not want to hear what management had to say and that he did not want to jeopardize a Department of Labor wage complaint he had filed.<sup>14</sup> (Greichen Testimony, Tr. 848, 885) His refusal was despite his many prior similar meetings with management with no adverse consequences and his testimony that he had no hesitation about meeting with Clark. (R-43; Vaughan Testimony, Tr. 435-439; Greichen Testimony, Tr. 857) When Greichen refused to attend the meeting, he was not acting on behalf of other employees. He was acting for personal reasons. The ALJ's finding that Greichen was terminated for engaging in protected concerted activity is unfounded.

Finally, Bozzuto's presented evidence that prior to union activity other employees had been terminated for insubordination. (R- 44)

Bozzuto's cannot be found to have discharged Greichen because of his union activity under this analytical framework.

**D. Based On the Evidence Available At The Time, Bozzuto's Followed Its Usual Procedures and Did Not Violate The Act By Disciplining and Terminating McCarty For Poor Production.**

There is no evidence in the record that supports the ALJ's assertion that McCarty was the sole active union supporter after Greichen left on October 8, 2013. Rather, the record evidence shows that the initial meeting with the union representative had four

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<sup>13</sup> The ALJ's decision states the Company "more than likely" believed that he was among the employees who "most likely" would support a union. (ALJ 6:22-23)

<sup>14</sup> The Department of Labor complaint was ultimately dismissed. (R-40)

Bozzuto's employee participants, which included two others besides Greichen and McCarty. (Dokla Testimony, Tr. 790) and Clark's testimony that he knew of two active union supporters, Rich and McCarty. (Clark Testimony, Tr. 160, 163-164)

The ALJ also ignores the fact that McCarty incurred two corrective reviews for production deficiencies a few months prior to any union activity and that McCarty made comments on each of these disciplines. (R-7) There would have been no suspension and termination in January-February 2014 without these prior disciplines.

The ALJ does not acknowledge that McCarty had within his possession photographic evidence demonstrating that his production numbers had been altered (McCarty Testimony, Tr. 499-500; GC-45; GC-46a), discussed with the union representative what to do with this evidence (Dokla Testimony, Tr. 562, 566; R-22), made no comments on his corrective reviews as he had done in the past (compare R-7 with R-8 and R-9), and elected to withhold this evidence from Bozzuto's so that he was terminated in accordance with Bozzuto's policy on production deficiency discipline. The ALJ also fails to note that at the same time in January-February 2014, the union organizing campaign was dying (Dokla Testimony, Tr. 794, 804) and, as McCarty testified, needed to be "invigorated." (McCarty Testimony, Tr. 662, 668) Although the ALJ freely speculates about employer "beliefs" (ALJ 6:22-23), he does not address the coincidence of a failing union campaign with McCarty's choice to withhold evidence that would have prevented his discipline and discharge. Indeed, once given the evidence by the Board agent in April 2014 (R-19), two months after McCarty's discharge, Bozzuto's promptly reviewed hundreds of individual transactions to conclude that McCarty's

production records had been tampered with.<sup>15</sup> Unfortunately, because of McCarty's forbearance and the Board agent's delay, Bozzuto's could not determine who had made the changes.<sup>16</sup> (Clark Testimony, Tr. 200; Koch Testimony, Tr. 896, 939) Contrary to the ALJ's finding, Bozzuto's could not determine to "a level of certainty" that someone from management had altered McCarty's production numbers because security measures at the time were lax. (ALJ 7:47-8-2; see Testimony of Wright and Winans, Tr. 368, 569) Given Bozzuto's prompt investigation and reinstatement offer to McCarty once the relevant evidence had been supplied, the only reasonable conclusion is that McCarty would not have been disciplined or discharged if Bozzuto's had been given McCarty's photographic evidence and that his union activity made no difference. This is particularly so in view of McCarty's testimony that during his employment when he brought pay discrepancies to the attention of Bozzuto's management, Bozzuto's corrected the issue.<sup>17</sup> (McCarty Testimony, Tr. 645)

Finally, the ALJ takes no note of the fact that Bozzuto's followed its usual disciplinary procedures for deficient production in McCarty's case. (R-6 through R-9) (Koch Testimony, Tr. 962-1003 reviewing GC-22 - GC-33)

The ALJ's determination that Bozzuto's violated Sections 8(a)(1) and (3) of the Act by disciplining and discharging McCarty because of his union activity should be reversed.

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<sup>15</sup> Merely looking at the computer screen would only have revealed the altered data. (Wright Testimony, Tr. 562, 566, 572-573)

<sup>16</sup> Winans could not have made the changes because he lacked access to supervisor passwords when the alterations were made. (Wright Testimony, Tr. 600, 623-624; Winans Testimony, Tr. 355, 370-371)

<sup>17</sup> The same result occurred when Greichen brought pay discrepancies to Bozzuto's attention. (Greichen Testimony, Tr. 858-859)



