

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34**

BOZZUTO'S, INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 919**

**Cases 01-CA-115298
01-CA-120801**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION AND
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE¹**

Counsel for the General Counsel, pursuant to Section 102.46(d) of the Board's Rules and Regulations, files this Answering Brief to address the exceptions filed by Respondent to the Decision of Administrative Law Judge Raymond Green in this matter. The ALJD issued on June 25, 2015, finding in favor of the General Counsel that Respondent: a) interrogated an employee on about September 27, 2013, in violation of 8(a)(1); b) announced and implemented a wage increase on about October 1, 2013; c) disciplined and then terminated Patrick Greichen on about October 1 and October 8, 2013, respectively, in violation of 8(a)(1) and (3); d) suspended and then terminated Todd McCarty on about January 14 and February 18, 2014, respectively, in violation of 8(a)(3); and e) maintained a policy conditioning continued employment for certain employees on their relinquishment of Section 7 rights. Respondent filed Exceptions and a Brief in

¹ In this "Answering Brief To Respondent's Exceptions to the Decision of the Administrative Law Judge", the Administrative Law Judge will be referred to as "the ALJ" or "the Judge"; Bozzuto's, Inc. will be referred to as "Respondent"; and the National Labor Relations Board will be referred to as "the Board." Citations to the ALJ's Decision will be referred to as "ALJ" followed by the page and line numbers specifically referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent's exhibits will be designated as "R" followed by the exhibit number.

Support thereof on July 23, 2015. On this date, August 6, 2015, Counsel for the General Counsel filed Limited Cross-Exceptions and a Brief in Support regarding the Judge's failure to require a public reading of the Notice.

Respondent excepted generally and specifically to various aspects of the ALJ's findings and conclusions that Respondent's actions of disciplining and then discharging both Greichen and McCarty violated the Act, and that Respondent violated 8(a)(1) by its interrogation of McCarty on about September 27, 2013. Notably, Respondent did *not* except to the finding that Respondent's October 1, 2013 announcement and implementation of a wage increase violated Section 8(a)(1) of the Act, nor to the judge's finding that since October 1, 2013, Respondent has maintained a policy under which employees have been prohibited from discussing disciplines they may have received or about their terms and conditions of employment. These findings are readily supported by the record evidence and applicable law. Counsel for the General Counsel hereby responds to Respondent's Exceptions.

I. The Interrogation Exceptions. The ALJ Properly Found that Respondent Interrogated Todd McCarty on September 27, 2013

Exception 1. Bozzuto's excepts to the ALJ's failure to consider whether Clark's single "offhand and somewhat innocuous comment" satisfied the General Counsel's burden to prove coercion or interference. (ALJ 8:18-23)

Conclusions of Law, Exception 1. Bozzuto's excepts to the ALJ's conclusion of law that it violated the Act by: Clark unlawfully interrogating Todd McCarty with a single "offhand and somewhat innocuous comment" (ALJ 8:21-24);

These exceptions by Respondent are quite misleading, and misstate the ALJ's findings. After finding that Senior VP Clark, on about September 27, 2013, asked McCarty "what's going on with this union stuff?", the ALJ explained that, while the comment "might be viewed as an offhand and somewhat innocuous comment, the fact is that this event

occurred at or near the same time of the unlawfully motivated pay increase and the unlawful discrimination against Greichen.” (ALJ 8:21-24). Considering those circumstances, the ALJ properly found that the interrogation violated 8(a)(1).

The applicable test for determining whether questioning of an employee constitutes unlawful interrogation is based on a “totality of the circumstances” test. Namely, whether under all the circumstances, the questioning at issue would reasonably tend to coerce the employee to whom it is directed to feel restrained from exercising rights protected by Section 7 of the Act. *Manor Care Health Services-Easton*, 356 NLRB No. 39, slip op. at 17 (2010), enfd. 661 F.3d 1130 (D.C. Cir. 2011). The Board in *Medcare Associates, Inc.* (also cited as *Westwood Health Care Center*), 330 NLRB 935, 939,940 (2000), noted that in analyzing an alleged interrogation it is appropriate to consider what has come to be known as “the Bourne factors,” so named because they were first set forth in *Bourne v. NLRB*, 332 F. 2d 47, 48 (2d Cir. 1964). These are: (1) the background, i.e., is there a history of employer hostility and discrimination?; (2) the nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?; (3) the identity of the questioner, i.e., how high was he in the company hierarchy?; (4) place and method of interrogation, e.g., was employee called from work to the boss's office?; and (5) truthfulness of the reply.

Applying the *Bourne* factors enumerated above leads to the conclusion that the ALJ properly found the interrogation of McCarty unlawful. Given the unfair labor practices concerning Greichen, the wage increase, and the unlawful agreements, the questioning was done in the context of other unlawful acts. Additionally, Clark’s testimony established that he had already learned from another employee about McCarty’s role in the organizing, and it is likely that his questioning was intended to intimidate McCarty -- and to confirm the

information the other employee had provided. Clark's rank in the organization further supports the finding of a violation. Moreover, McCarty's response was to advise Clark that he did not wish to speak of it. Thus, while protective of his self-interest, this response reflects that he did not feel he could answer it. These factors fully support the ALJ's finding that Clark's questioning of McCarty shortly after the organizing began was coercive under the circumstances, and thus violated the Act.

II. The Greichen Exceptions

A. Response to Greichen Exception 3

3. Bozzuto's excepts to the ALJ's failure to find or consider that other employees had received discipline for behavioral conduct similar to Greichen's prior to union organizing.

The ALJ did not discuss or consider that other employees had received discipline for acts of insubordination or other misconduct which might warrant termination on a first offense. Had the ALJ examined this evidence, discussed below, it would have revealed that Respondent's treatment of Greichen was disparate, further supporting a finding that his discharge violated 8(a)(1) and (3).

Respondent generally utilizes progressive discipline for violation of work rules, performance standards, and attendance standards. However, different categories of infractions -- attendance, productivity, and misconduct -- are each treated separately for purposes of progressive discipline. (Tr. 964). Respondent's standards of conduct include 33 identified work rules. Respondent's implemented disciplinary guidelines set forth the recommended disciplinary response based on the specific work rule violated. Under these guidelines, the violation of some work rules will trigger varying applications of the progressive disciplinary process, or a variation thereof, depending on the type of misconduct that is embodied by the rule at issue. (GCX 15). The full process is: written

warning, one day suspension, a three or five day suspension, and then “suspension pending investigation/termination” (“suspension pending” or “suspend pend”). For all intents and purposes, the employee who reaches “suspend pending” is an employee who is being terminated.² Notably, the guidelines direct that violation of certain rules will result in “suspension pending” for a first offense. These include: sleeping on the job (rule 22), falsifying company records (rule 24), possessing firearms (rule 25), the illegal use, sale/transfer, possession of narcotics, prescription drugs, over the counter drugs, alcohol or other substances while on Company time and/or Company property, (rule 29), and insubordination (rule 33) (GCX 15).

Despite the guidelines, record exhibits and associated testimony reflect that the Respondent at times exercises discretion concerning this class of offenses. (GCX 16, GCX 42, 43, RX 44). For example, on December 6, Respondent reversed a “suspension pending termination” action against Frank Leon, for failing to follow the directives of two transportation supervisors on two separate occasions. (GCX 16, p. 2). On September 30, Respondent reversed a “suspension pending termination” action against Kevin Pilgrim, an employee who had “repeated failure to start new pick orders in a timely fashion.” On January 24, 2014, Respondent reversed a “suspend pending” termination action against an employee for “sleeping on the clock.” (GCX 16, p. 3). On September 12, 2013, Respondent gave only a written warning to Francisco Arias for falsifying company records to reflect that he performed work that had never been done, and in January 2015, when Arias again falsified company records to reflect that he had performed work that had

² The term “suspension pending investigation” was used interchangeably with “suspend pend” and “suspension pending termination”, and appears to be Respondent’s way of referring to an employee that is being terminated. See, for example, RX 44, p. 1, and Tabs 2, 3, 6 and 7, where Respondent’s “index/cover sheet” identifies as “terminated” those employees for whom the corresponding personnel records reflect “suspension pending termination” as the final action.

never been done, he received only a one day suspension. (GCX 43). And on September 23, just two weeks before Greichen's refusal to attend the meeting on October 8, Respondent reversed a "suspend pending" for an employee who failed to report an equipment accident. (GCX 16, p. 4). On May 20, Respondent even reversed a termination decision for an employee who had exceeded the allowable attendance infractions. (GCX 16, p. 5).³ The record also reflects that in December 2007, Respondent gave employee Isidore Germaine a three-day suspension for insubordination for disobeying a supervisor's directive not to unload a truck. (GCX 38).⁴

Record evidence reflects other instances in which employees have been terminated for insubordination, all of which involve circumstances -- unlike the situation involving Greichen -- where employees refused directives critical to the ongoing operation of the facility. These include an incident in 2012 when an employee -- who was told by his supervisor not go on the floor without his badge ID which allowed him to punch in and be "on the clock" -- disregarded this directive and went on the floor anyway (RX 44, Tab 2); an incident in September 2013 in which an employee, in response to a directive to apply the proper labels to his assignment, responded with an outburst of foul language and a response that he would not do as directed and that he did not have to (RX 44 Tab 3); and an incident in which an employee who was directed to clean a refrigerator refused the directive, punched into downtime, and went and sat in the lunch room instead. (RX 44,

³ This is particularly significant, as Respondent's witnesses testified that the policies around attendance are strictly enforced. (Tr. 82:9-15, Clark; RX 12, p. 19:20-22)(This exhibit includes Vaughan's transcribed statements to Greichen, explaining that if he refuses to go to the meeting, 'it's like the other thing with the attendance thing, there's nothing I can do about it, that's it.')

⁴ In 2007, Respondent used to allow employees to unload third party trucks for pay by a third party, known as "lumping" (Tr. 929:4-15). The discipline notes that Germaine asked if he could "lump", and was told that he could not do it, that he "ignored this direction and did the lump anyway" (GCX 38).

Tab 6). In sum, this exception is entirely without merit, because there is no evidence that employees have been terminated for similar misconduct.

B. Greichen Exceptions 2, 4, and 5-18

Respondent's remaining Greichen Exceptions relate primarily to the sufficiency of the evidence or analysis to support the ALJ's findings and conclusion that Greichen's termination violated 8(a)(1) and (3). For the reasons set forth below, the General Counsel met its burden under both theories, Respondent failed to rebut them, and these exceptions should be dismissed.

1. The ALJ Properly Found that Respondent Violated Section 8(a)(1) by Disciplining Greichen on October 1, 2013, and then Suspending Pending Termination/Terminating Greichen on October 8, 2013

As the ALJ properly found, on October 1, 2013, Patrick Greichen was summoned to a meeting with Senior Vice President Rick Clark, Vice President of Human Resources Carl Koch, Employee Relations Manager Doug Vaughan, and, the head of Security Bill Glass. Clark began the meeting by claiming that employees had complained about Greichen's "erratic and scary behavior." In testimony, however, the only specific behavior identified by any of Respondent's witnesses was Greichen's tendency to openly complain in the presence of his co-workers about the long work hours and working conditions. (Tr. 160-164, GCX 18). By not later than September 26, 2103, Respondent had acquired knowledge of its employees' unionization campaign (GCX 14, p.1); and unsurprisingly Clark queried Greichen about the issues that were bothering him and others. During the meeting, Clark offered Greichen three choices:

- changing his behavior and communicating with his peers in the established format,
- choosing not to change his behavior and follow progressive discipline, or
- resigning from the company.

Clearing up any ambiguity as to exactly what conduct on Greichen's part Respondent found unacceptable was Clark's directive to Greichen that "he needed to stop disrupting the work environment by making negative comments in the aisles; such as being forced to work 20 hours per day or comments about needing three legs to do the work here, in the hallways and in front of his peers." (GCX 18, p.2). The meeting ended with Greichen being issued a notice of "verbal warning" for his "repeated negative attitude and disrespectful behavior which have become disruptive to the workforce and work environment." (GCX 18, p.1).

Despite the warning, a week later, on October 8, Greichen raised complaints with his supervisor about the selection "time standards" for a particular order, and expressed his belief that Respondent manipulated the standards to cheat the employees on high volume days. When he did not receive a satisfactory response from the front line supervisor, Greichen took the issue "upstairs" to Grocery Operations Manager Jason Winans, as he is permitted to do, without fear of retaliation, through Respondent's "Open Door" policy. (Tr. 292).

By written statement dated October 9, admitted into the record, Winans describes that Greichen " . . . told me that he tells anybody and everybody he can that he believes we are purposely changing the standards on a daily basis to screw the associates." Winans' statement continues:

I asked Patrick why he continued to work here if he thought we were purposely trying to make him miserable. He said that he would get back at the company, not physically but by using the law outside of here. He stated he had too much to loose [sic] to do anything physically.⁵

⁵ On September 24, Greichen had filed a complaint with the Connecticut Department of Labor alleging that the Employer was manipulating the standards for employees. It is unclear from the record whether the Employer had received a copy of Greichen's complaint by October 1.

I thought this conversation and the accusations made were serious enough that I should bring it to the attention of the upper management team. After I told Rick Clark and Dough Vaughan about what had happened Rick set up a meeting to include the three of us along with the industrial engineering team so they could help explain the standards to Patrick. (GCX 36).

After his initial meeting with Winans, Greichen returned to his work on the floor, only to be advised shortly thereafter by Winans that he was to attend a meeting with Senior Vice President Rick Clark and the industrial engineers. Greichen responded that he did not want to attend such a meeting, explaining that he viewed it as harassment. Winans ordered Greichen to “stay put”, and over half an hour later, Winans returned with Associate Relations Director Vaughan. Winans and Vaughan confirmed that Greichen was refusing to attend the meeting. Greichen was then told that his refusal to attend the meeting was a violation of the work rule prohibiting insubordination, *for which the first offense is termination*, and that if he continued to refuse, he would be suspended pending termination, while the paperwork was put together.

Greichen acknowledged his understanding, and reiterated that he did not want to attend the meeting, pointing out that he had just had a meeting with them the week prior, where they told him he had “behavior problems”, that he “did not know if that’s fully what it was about”, and that he did not want to go upstairs because “I feel that I am in some way shape or form being harassed to talk when I do not need to talk, when everything could be addressed, you know, without upper management, meaning top tiers of the company.” (RX 12, p. 21). Greichen expounded on why he was disinclined to attend such a meeting by further stating, “All I did was voice my concern and now everybody is coming and swooping in and getting involved after [inaudible]. Last Tuesday at 2:15 [inaudible] whenever and now I’m having another one [presumably, meeting]. What is wrong with

me saying that 57 minutes is no time for a 230-case order, but then it gets blown out of control and out of proportion. ”(RX 12, p. 18-23).⁶

Vaughan pointed out to Greichen that Rick Clark meets regularly with employees, and that the request was not out of the ordinary, pointing out that Clark “just had a meeting with a bunch of new guys.” Greichen responded, “I know that he’s taken several employees upstairs already for different meetings, and one of them was regarding that [sic] word of getting out of the union coming in here.” (RX 12, p. 22). Vaughan’s reply acknowledged that meetings had occurred (with other employees), but contested anything untoward, because Clark had merely said to those other employees “we’re going to talk about issues, there’s rumors that there’s a union out there, *if you want to leave right now you can leave, no repercussions, do whatever you want to do, I don’t care either way*, I’m asking you to give me how you feel about the issues in the company.” (RX 12, p. 22-23).⁷ Greichen reiterated that he would not attend the meeting with Clark. He was then suspended “pending termination”, and a few days later Respondent contacted him and formally advised him of his termination.

Thus, the evidence clearly supports the ALJs findings regarding Respondent’s actions toward Greichen on October 1 and October 8, 2013. Respondent’s October 8 directive that Greichen report to a meeting with Clark was in direct response to Greichen’s complaints to Winans earlier that day, which Winans documented – that “he tells anybody and everybody he can that he believes we are purposely changing the standards on a daily basis to screw the associates” (GCX 36), and the ALJ properly found that these

⁶ Greichen used his cell phone to record the exchanges he had with fellow employees while waiting, and the exchange he had with Winans and Vaughan in the final meeting prior to being escorted from the facility. The recording was played into the record, and a transcribed version was separately admitted as RX 12.

⁷ Respondent did not offer any explanation why the group of new hires had been given the option to refuse to remain at the meeting with Clark without repercussions, but Greichen had not.

complaints constituted protected, concerted activity. This is precisely what Greichen had been warned not to do, or be subject to further discipline, just the week prior. Importantly, in the October 1 meeting, Greichen was specifically instructed that *if he did not change his behavior in this regard, he would be subjected to further discipline*. By next *encouraging him to resign*, Respondent removed any doubt that separation from employment would be the end result should Greichen continue to openly complain to his coworkers about working conditions.

On October 8, Greichen reasonably anticipated Respondent would pursue the “options” that had previously been spelled out -- he would have been made to again choose between continued employment or relinquishment of his Section 7 rights. Given this understanding, Greichen understood that he was being faced with the “Hobson’s choice” -- attend the meeting, and be subjected to further discipline, consistent with the warnings from the week prior -- or refuse to attend the meeting and be terminated. His choice to refuse to attend the meeting was tantamount to a choice to resign rather than accept Respondent’s restriction of his Section 7 activity; precisely the scenario that is recognized as unlawful under the “Hobson’s Choice” line of cases. *See Intercom I (Zercom)*, 333 NLRB 223 (2001)(Treating an employee who voluntarily resigns rather than be subjected to continued employment wherein he is forced to relinquish his Section 7 rights as constructively discharged). In sum, Greichen reasonably believed that he would be subjected to further unlawful discriminatory conduct, as he had the week earlier, if he were to attend the meeting.

Moreover, both the scheduling of and Greichen’s act of declining to attend the October 8 meeting were a direct extension of the protected conduct in which Greichen was telling “anyone and everyone” about his complaints about manipulated performance

standards. As such, analysis of Greichen's having declined management's invitation to the meeting is properly considered under the four-factor test identified by the Board in *Atlantic Steel*, 245 NLRB 814, 816 (1979). The four factors are: the place of the discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst; and 4) whether the outburst was provoked by employer' unfair labor practices.

Applying these factors leads to a finding that Greichen's termination violated the Act because: (1) his refusal occurred in a meeting with management, removed from other employees or the public; (2) the subject matter was his willingness to attend, at that time, a meeting with Clark, the Senior Vice President, to once again address with him the open complaints he was raising about working conditions; (3) Greichen's refusal was unaccompanied by belligerence, discourtesy, vulgarity or rudeness of any kind; and (4) in explaining his refusal to attend, he specifically referenced the meeting he had of the week before in which Respondent violated the Act, his sense that he was being "harassed" precisely because he was continuing to raise complaints contrary to the earlier unlawful directive, as well as his observation that the Employer was aware of the effort to bring a union in. Thus, his refusal was largely provoked by the Employer's unfair labor practice of the week before. Under this analysis, Greichen's protected conduct did not lose the protection of the Act.

Moreover, contrary to Respondent's exception, the fact that Greichen's claim that Respondent was intentionally manipulating the standards in order to "screw" the employees may have been erroneous does not render it unprotected, as these statements were not so defamatory of opprobrious as to render them unprotected. See *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966) (finding that a statement which is alleged to be libelous or defamatory will not lose its protection unless it is made

“with knowledge of its falsity, or with reckless disregard of whether it was true or false.”); *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995)(erroneous accusations of being cheated of PTO, protected); *KBO, Inc.*, 315 NLRB 570 (1995)(accusations that the Employer was taking money out of employees’ profit sharing to pay lawyers to fight the union, protected).

Lastly, the evidence of disparate treatment contained in the record aptly shows that during this same time period other employees were permitted to leave meetings of their own accord without any adverse consequences, and, that Respondent routinely exercises its discretion in opting not to “suspend pend” (terminate) for first offenses of rules, particularly where there is no real disruption of work or operations. Why Greichen was not afforded the same treatment went unexplained by Respondent. Respondent’s “Open Door” policy is strictly voluntary, and specifies that employees who take advantage in it, as Greichen did when he approached Winans with his complaints, will not suffer retaliation. (Tr. 292). Respondent did not provide any rational explanation why it was so important that he meet with upper management that afternoon. The Director of Industrial Engineering testified that he was only “slightly inconvenienced” by Greichen’s refusal to attend the meeting, and that he did not view it as grounds for termination. (Tr. 583-584). These failings are persuasive evidence that Respondent’s asserted basis for Greichen’s discharge is nothing more than pretext. *Abbey’s Transportation Services, Inc.*, 837 F.2d 575 (1988). Clearly, Respondent seized on Greichen’s refusal to attend the meeting in order to rid themselves of an employee who was disposed to further the Union organizing.

2. The ALJ Properly Found that Respondent Violated Section 8(a)(3) by Suspending Pending Termination/Terminating Patrick Greichen on October 8, 2013

Section 8(a)(3) of the Act makes it unlawful for an employer to discharge or otherwise discriminate against an employee regarding any term or condition of employment because of the employee's union activity. To establish a prima facie case of discrimination, it must be shown that (i) the employee was engaged in protected or union activity; (ii) the employer had knowledge of this activity; and (iii) the employer's action was motivated by anti-union animus. The employer may rebut the prima facie case by showing that it would have taken the same action even in the absence of the employee's union activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)(Supreme Court approved this two-part test for determining unlawful motivation in *NLRB v. Transp. Management Corp.*, 462 U.S. 393, 402-403 (1983)). See also *Metro. Transp. Servs.*, 351 NLRB 657, 659 (2007)(where the General Counsel establishes that the employer's asserted reason for the adverse employment action is pretextual-that is either false or not in fact relied upon-"the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis."); *Ellicott Development Square*, 320 NLRB 762, 774-75 (1996) (timing and disparate treatment was evidence of pretext), *enfd sub nom.*, 104 F.3d 354 (2d Cir. 1996); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988)(timing and abruptly executed discharges persuasive evidence of pretext, resulting in the employer's failure to carry its burden that it would have

discharged employees in absence of union activity); *NLRB v. Matros Automated Electric Const. Corp.*, 366 Fed.Appx. 184 (2d Cir. 2010)(pretextual reasons for adverse employment actions warranted finding that the employer failed to carry its burden); *NLRB v. Relco Locomotives*, 734 F.3d 764, 786-787 (8th Cir. 2013)(timing supported evidence of animus where employer discharged employee two months after learning of his union and protected activities and 2 weeks after the union election), *enforcing* 358 NLRB No. 37, slip op. 20 (Apr. 30, 2012); *North Carolina License Plate Agency #18*, 346 NLRB 293, 294 (2003) (where discharges occurred immediately after employees threatened to file complaint with state agency, timing supported the inference that employer was motivated by animus), *enforced mem. sub. nom.*, *NLRB v. Griffin*, 243 Fed. Appx. 771 (4th Cir. 2007); *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 779 (6th Cir. 2002) (affirming Board's finding that employer's suspension and subsequent discharge of employee was unlawful because the severity of discipline given for purportedly violating the employer's confidentiality rule was disproportionate to the insignificance of his infraction); *Intermet Stevensville*, 350 NLRB 1270 (2007); *see also, Manno Electric*, 321 NLRB 278, 280 n.12 (1996), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997). To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enforced. mem.* 99 F.3d 1139 (6th Cir. 1996).

The record evidence clearly supports the ALJs findings and conclusion that Greichen's termination also violated 8(a)(3). The record is undisputed that Greichen

attended the initial organizing meeting on September 22, and outspokenly supported the organizing agenda from that day forward, even in the presence of supervisors. It is also undisputed that within days of that meeting, Respondent was aware that organizing was occurring, that Respondent utilized Doug Vaughan to identify and report employee complaints to Clark, that reports of union materials were to be brought to Clark's attention "immediately", and that cards and literature had been found in the restrooms, and Greichen was the one who placed them there. Additionally, in expressing the reasons that he did not wish to meet with Clark on October 8, Greichen specifically referenced his concern that Clark was holding meetings with employees because "word got out that a union is trying to get in"

The October 1 timing of the meeting and discipline of Greichen leads inescapably to the conclusion that Respondent was concerned that Greichen's outspoken complaints would provide fuel to the union fire that Respondent was desperately seeking to contain. There is likewise no dispute that the spark that started the Union campaign was the newly introduced labor standards which formed the basis of many of Greichen's protected concerted complaints. Animus is established by Respondent's selective and retroactive grant of wage increases in the week before Greichen was terminated, as well as by Respondent's actions of unlawfully conditioning further employment on employees' relinquishment of Section 7 rights (findings to which Respondent did not take exception). While academics might distinguish between "protected concerted" and "union activity", in this context Respondent's actions toward Greichen should not be so parsed. Greichen was undoubtedly both the early face of the Union campaign (as McCarty was intentionally keeping a low profile at that time) and the poster child for advocating for employees to

have a voice in the workplace concerning their terms and conditions. Accordingly, Respondent's animus towards Greichen's protected concerted activity is inextricably intertwined with its union animus, as Respondent clearly viewed dissent in the workplace as a catalyst for the ongoing union campaign that it would go to extraordinary lengths to quash -- as evidenced its manipulation of McCarty's production quotas (discussed below) and its insistence that employees forfeit the exercise of Section 7 activity as a condition precedent to continued employment eligibility. Moreover, the compelling instances of disparate treatment in the record is strong evidence that Respondent would not have discharged Greichen but for its desire to squelch the Union campaign. See *Abbey's Transportation Services, Inc.*, supra. In this regard, multiple instances of employees disobeying supervisor's directives that would have compromised production were placed in the record, as well as instances where the Employer opted not to terminate for alleged violation of a work rule recommending termination (suspension pending) on a first offense. Although there is absolutely no evidence that Greichen's refusal to attend the meeting would have had any similar adverse effect on production, unlike those other employees, Respondent chose to discharge Greichen. Based on the above, the ALJ appropriately found that Respondent's action in suspending pending termination and terminating Greichen violated Section 8(a)(3) of the Act.

II. Respondent McCarty Exceptions

A. The ALJ Properly Found that Respondent Violated 8(a)(3) by Suspending and Discharging McCarty, His Factual Findings are Supported by Record Evidence, and His Conclusions are Consistent with Applicable Precedent

1. The Record Establishes McCarty's Ongoing Union Activity, Respondent's Knowledge, and Evidence of Animus

After Greichen's termination, McCarty continued to spearhead his card-signing activity through November and December 2013. The undisputed record evidence reflects that in early January 2014, McCarty acknowledged to two supervisors, and to a consultant hired by Owner Mike Bozzuto, that he had been the lead organizer involved in the Union campaign, testimony that Respondent did not dispute. (Tr. 496-498).

Beginning in early January 2014, McCarty observed that his production numbers, which are observable to him via the computer, had been altered. More specifically, he observed that time which had been classified as "down time" had been reclassified as "productive time", thereby diluting his performance percentages from 99.4 to 91.2. After the onset of the campaign, McCarty had begun using the camera on his phone to document his statistics as they showed up on the computer screen, leaving him with "before and after" shots clearly demonstrating the January 2014 alteration. (Tr. 499-500). McCarty's credible testimony is that in the first week of January 2014, he complained to Operations Manager Jason Winans about the problems with his erased "down time." Winans responded that he would look into it. Shortly thereafter, McCarty followed up with Winans, who told him that "it is what it is" and that if he had wanted down time, he should have taken it – clearly dismissing McCarty's claim that the down time had been removed - - and that the numbers would stand. (Tr. 511-512).

On January 15, 2014, McCarty approached Supervisor Englehart and reiterated the claims he had previously made to Winans about his skewed numbers. Englehart assured him that he would bring the issue to Winans, his superior, explaining that he had to get Winans' approval, since the numbers could lead to suspension. Englehart also told McCarty "not to worry" because they weren't issuing disciplines at that time. (Tr. 516)⁸ Despite Englehart's assurances, later that same day McCarty was issued a five-day suspension -- the final step before termination.⁹ As McCarty had previously requested a three-week vacation during late January and February 2014, the dates of his suspension were bracketed around his trip. Winans signed off as department manager approving the suspension. (RX 45, Tab 13, p. 3).

On February 18, McCarty returned from his suspension and vacation. In the intervening period, his production numbers for the weeks ending January 11, 2014 and January 18, 2014 had posted. With the help of his coworkers, McCarty obtained "before" and "after" photos for these weeks as well. (Tr. 507). These shots again reflected that his "down time" had been altered to dilute his raw performance scores, bringing them below 95%.¹⁰ Shortly after he arrived at work the morning of February 18, 2014, McCarty was called into a meeting with his supervisor and presented with a write-up reflecting that his performance percentage for the week of January 11, 2014 was 94%, which was relied upon as a basis for his termination. (RX 45, Tab 13, p.4).

⁸ As Englehart did not testify, this is undisputed in the record.

⁹ The initial charge in Case 01-CA-120801, alleging that McCarty's suspension was retaliation in violation of 8(a)(3), was filed on January 16, 2014.

¹⁰ For the week ending January 11, 2014, his actual performance had been 98.1%; the adjustments brought it down to 92%; for the week ending January 18, 2014, his actual performance was 99.4%. McCarty testified that because he had no "mispicks" he would have received bonus points pushing his performance above 100% in both weeks.

2. Additional Record Evidence Reflects that even McCarty's Altered Performance Data was the Highest of Any Selector Terminated, and Would not Normally be a Basis for Discipline.

Record evidence demonstrates that while the "stated" performance standards triggering discipline was 95%, the actual practice was to allow employees to fall much lower -- to about 88% before issuing discipline, particularly where the discipline would result in suspension or termination. As noted above, Clark convenes both supervisor and employee "focus groups", (Tr. 7, 232-233), at which any number of issues related to the operation of the facilities are raised and discussed. At the supervisor focus group meeting held on about September 4, attended by both Rick Clark and Carl Koch, the notes reflect that "we are inconsistent with our implementation of productivity rules, especially with the 6th day production percentages. Some supervisors allow some associates to go as low as 88% without any discipline." The notes further state "Supervisors have been instructed to give discipline for associates who drop below 95% for any particular day, while other Supervisors do not give any discipline to lose selectors to suspensions." (RX 2, p. 7). Notably, nothing in the notes indicated any strategy to address these inconsistencies. Moreover, neither Carl Koch, nor Jason Winans, who oversee operations for the grocery division of the warehouse, testified that they took steps to correct these reported deviations from the stated standards. (Tr. 313-316, Winans).¹¹

At hearing, Respondent entered 52 disciplinary actions for 13 employees terminated for failing to meet performance standards between February 2012 and

¹¹ Winans testified that he made a list of all who fell below the 95% mark "a few times" but that "most times I relied on the supervisors to take care of it" (Tr. 316) He also admitted that "I can't say that every single [who falls below 95%] does" get disciplined. (Tr. 313).

February 2013. (RX 45).¹² The records corroborate that Respondent's supervisors did not tend to issue discipline, particularly if it meant suspension or termination, for production above 90%. At 94%, McCarty's manipulated performance percentages were *the single highest performance percentage* to result in an employee's termination from the records submitted. McCarty was the *only employee* whose final two write-ups leading to termination were for percentages over 90%. Taking the average of the four deficient performance percentages for each of the 13 terminated employees in the record, McCarty has the single highest average, at 91.1%. Only one other employee was terminated based on a final weekly percentage over 90%, however, that employee had selected at only 65.5% percent of requirement at the prior discipline, with an average of 82.2% for the four deficient performances. The remaining 12 were terminated based on final performance percentages between 45% and 89.5%.

Despite these realities, both Koch and Clark admitted at hearing that they had reviewed McCarty's performance history and agreed that he should be terminated. (Tr. 938-939, Koch). Clark testified that in every instance where an employee is being considered for termination, one of the main factors that he will weigh in deciding whether they should deviate from the suggested disciplinary guidelines (GCX 15) regarding production rules is "length of service" (Tr. 128-130). As a fifteen year employee, McCarty was one of the most senior employees on the floor, as well as one of the most productive. Koch's testimony likewise reflected that Respondent can exercise discretion with respect to production related infractions. However, neither provided any testimony that would tend to explain why they would agree to the enforcement of disparately high performance

¹² The data from this multi tabbed exhibit (RX 45) is summarized in the attached spreadsheet, included as Addendum A.

standards against McCarty, one of their most senior, and highest producing selectors.

3. The Record Supports the ALJ's Finding that Respondent Falsified Respondent's Production Records (ALJ 7-8, 46-2).

As evidence in support of his initial and amended charges, McCarty provided the Subregion with the "before and after" photos to substantiate his theory that his down time had been altered to reduce his scores. On April 9, 2014, the Subregion provided copies of these photos to Respondent. Confronted with the evidence, Respondent initiated an investigation, led by Jason Winans, to determine if the performance data had been altered. Respondent's investigation confirmed McCarty's allegations, including that time initially characterized as "down time" was reclassified as active time, diluting his performance percentages to below 95%. (GC 20).

Senior Vice President Clark admitted that production employees would not have had the training, capabilities or access to the data system to manipulate the data in the manner that was done, and that the changes could not have been done inadvertently. (Tr. 202-204). He also acknowledged that a "small group" of supervisors, operations managers, and industrial engineers would have. (Tr. 193-194). Accordingly, the ALJ properly concluded that Respondent had been responsible for the alterations.

Additionally, Clark testified that reports from his consultant brought to his attention some deficiencies in the attitude and demeanor of Jason Winans in relating to the production employees. Clark explained that "in this sort of position you have to be able to listen to people and give them the time of day" (Tr. 207), and the reports were that Winans was "short" with employees, and showed signs of "stress." In about late January 2014, in response to these deficiencies, Clark transferred Winans to a different position

within the organization (Tr. 287).¹³

By letter dated May 15, 2014, Respondent offered McCarty unconditional reinstatement to his former position. McCarty did not accept the offer. (Tr. 522, RX 24). McCarty credibly testified that on May 21, 2014, he received a phone call from a “blocked” caller, in which the caller threatened that if he did not drop his “f—ing law suits” and this union stuff, all of his family members working at Bozzuto’s would be fired. The caller also told him that he’d better watch his son when he drops him off at the skate park. McCarty’s 16-year-old son was in the car and heard the call as well. McCarty did not recognize the voice. McCarty reported the call to the police, and a police report was generated. (Tr. 524-525, GCX 51 p.1). However, without a phone number, no action could be taken.

On June 1, 2014, McCarty received another call, this time to his home phone, in which the caller ID identified the call as coming from “Jason Winans.” McCarty answered the call. The anonymous caller said simply: “you’re through.” Again, McCarty did not recognize the voice. Given that the caller ID indicated the call had come from the phone of Jason Winans, McCarty went back to the police and showed them evidence from his phone records tying the call to the home phone of Winans. (Tr. 530-531). The police contacted Mr. Winans, who denied making the calls, and a supplemental police report was generated. (GCX 51 p.2). Given the nature of the information conveyed in the calls, the manner in which he had been treated by Respondent, including Winans’ refusal to consider his claims about the skewed numbers, and the evidence tending to suggest

¹³ Winans co-wrote the report (GCX 20) with the Senior Industrial Engineer. All changes to McCarty’s time records were inputted under the name of one Supervisor, who reported to Winans. The Supervisor was put on paid administrative leave, until it was determined that they could not, with certainty, show that he had made the changes. As his superior, Winans’ computer clearance allowed greater access to the system than the supervisors. Winans could also access the system remotely. Incredibly, Respondent never questioned the wisdom of having Jason Winans lead the investigation.

some of the calls were coming from Jason Winans, McCarty was unwilling to accept Respondent's offer of reinstatement.¹⁴

Accordingly, McCarty sent an emailed response to an address that he believed to be Carl Koch's, expressing that, in light of the threatening phone calls, he viewed the offer as disingenuous.¹⁵ Additionally, on June 20, 2014, McCarty's private attorney, on his behalf, amended his State Court lawsuit to add Jason Winans as a party and specifically alleged the evidence pertaining to the threatening phone calls in support of this amendment. (GCX 49).¹⁶

4. The ALJ Properly Found that Respondent's Termination of McCarty Violated 8(a)(3), as Respondent Failed to Meet its *Wright Line* Burden

Under the applicable analysis described above in Section II (B)(2), the elements of the prima facie case are readily established, and Respondent has failed to meet its burden under *Wright Line* to show that it would have suspended or terminated McCarty in the absence of his union activity. Respondent's knowledge of McCarty's union activity is not in dispute. In addition to Clark's testimony admitting knowledge of McCarty's critical role early on, McCarty's testimony that he personally told Respondent's consultant and Supervisor of his continuing role in mid January 2014 was uncontested. (Tr. 496-497). Union animus is readily revealed through Respondent's unlawful grant of significant wage increases, its unlawful termination of Greichen, and the clearly manufactured basis for

¹⁴ Subpoenaed phone records for McCarty's and Winans' phone numbers yielded contradictory evidence. In the absence of unequivocal evidence tying the calls to Respondent, the General Counsel concedes that the evidence is insufficient to that the prior offer of reinstatement was not unconditionally made, and therefore does not except to the ALJ's finding on this issue.

¹⁵ McCarty mistakenly used the wrong email address, and this email did not reach Koch.

¹⁶ McCarty had filed a private cause of action in Connecticut Superior Court challenging the lawfulness of his discharge and particularly Respondent's falsification of his time records. See MCCARTY, TODD v. BOZZUTO'S, INC., HHD-CV14-6050657-S.

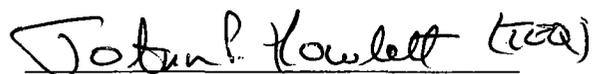
McCarty's suspension and discharge. Moreover, even absent Respondent's acknowledgement that the production data relied on to suspend and terminate had been altered, the evidence that Respondent subjected McCarty to disparately high production standards, and opted not to investigate his claims regarding altered down time, or otherwise exercise any discretion for a highly productive employee with significant length of service, raises the strong inference that there existed a coordinated strategy amongst Respondent's top-tier managers to devise a basis for ridding themselves of a lead union organizer. Otherwise, it makes no sense why Respondent did not commence an investigation before deciding to discharge McCarty when faced with complaints by a consistently top-producing employee that the production data relied upon was incorrect. Thus, the overwhelming record evidence amply supports the judge's finding that Respondent's suspension and termination of McCarty violated Section 8(a)(1) and (3) of the Act. (ALJ 7-8).

III. CONCLUSION

Based on the entire record, Counsel for General Counsel respectfully submits that Respondent's Exceptions are entirely without merit, and urges the Board to affirm Judge Green's Decision and Recommended Order, as modified in the manner set forth by Counsel for the General Counsel in her Limited Cross-Exceptions.

Dated at Hartford, Connecticut this 6th day of August 2015.

Respectfully submitted,



Jo Anne P. Howlett
Counsel for the General Counsel
National Labor Relations Board
Region One, Subregion 34

Employee Name	EE #	1st (Written)	2nd (1-Day Suspension)	3rd (5-Day Suspension)	4th Suspension Pending (Termination)	Average of Disciplinary Percentages Leading to Termination
P. Torres	11340	41	38.7	60	45.5	46.3
J. Griscti	11112	84.6	83.6	86	89	85.8
J. Vargas	11762	61	74	75	62	68
L. Guzman	10260	93.5	91.2	75.3	83.3	85.825
K. Pabon	11681	64	73.8	91	89.5	79.575
S. Brazdionis	9442	80.3	85.8	91.6	87.5	86.3
T. Swenor	11787	63.8	65.5	71.1	74.7	68.775
V. Sanchez	6802	90	87	85.4	80.3	85.675
A. Leahy	11659	83.5	93.4	92.9	61.7	82.875
S. Jones	6907	79.2	84.6	87.1	87.6	84.625
K. Lucas	7312	93.3	84.1	88.3	86.9	88.15
E. Reyes	11252	90	77.4	65.5	91.5	81.1
T. McCarty	5698	91.9	87.3	91.2	94	91.1

D

TABLE OF CONTENTS

	<u>Page(s)</u>
I. The Interrogation Exceptions. The ALJ Properly Found that Respondent Interrogated Todd McCarty on September 27, 2013	2
II. The Greichen Exceptions	4
A. Response to Greichen Exception 3	4
B. Greichen Exceptions 2, 4, and 5-18	7
1. The ALJ Properly Found that Respondent Violated Section 8(a)(1) by Disciplining Greichen on October 1, 2013, and then Suspending Pending Termination/Terminating Greichen on October 8, 2013	7
2. The ALJ Properly Found that Respondent Violated Section 8(a)(3) by Suspending Pending Termination/Terminating Patrick Greichen on October 8, 2013	14
III. Respondent McCarty Exceptions	18
A. The ALJ Properly Found that Respondent Violated 8(a)(3) by Suspending and Discharging McCarty, His Factual Findings are Supported by Record Evidence, and His Conclusions are Consistent with Applicable Precedent	18
1. The Record Establishes McCarty's Ongoing Union Activity, Respondent's Knowledge, and Evidence of Animus	18
2. Additional Record Evidence Reflects that even McCarty's Altered Performance Data was the Highest of Any Selector Terminated, and Would not Normally be a Basis for Discipline	20
3. The Record Supports the ALJ's Finding that Respondent Falsified Respondent's Production Records	22
4. The ALJ Properly Found that Respondent's Termination of McCarty Violated 8(a)(3), as Respondent Filed to Meet its <i>Wright Line</i> Burden	24
IV. Conclusion	25
TABLE OF CONTENTS	i
TABLE OF CASES	ii, iii

TABLE OF CASES

	<u>Page(s)</u>
<i>Abbey's Transportation Services, Inc.</i> , 837 F.2d 575 (1988)	13, 17
<i>Atlantic Steel</i> , 245 NLRB 814, 816 (1979)	12
<i>Bourne v. NLRB</i> , 332 F. 2d 47, 48 (2d Cir. 1964)	3
<i>Ellicott Development Square</i> , 320 NLRB 762, 774-75 (1996)	14
<i>FiveCAP, Inc. v. NLRB</i> , 294 F.3d 768, 779 (6th Cir. 2002)	15
<i>Intercom I (Zercom)</i> , 333 NLRB 223 (2001)	11
<i>Intermet Stevensville</i> , 350 NLRB 1270 (2007)	15
<i>KBO, Inc.</i> , 315 NLRB 570 (1995)	13
<i>Linn v. United Plant Guard Workers</i> , 383 U.S. 53, 61 (1966)	12
<i>Manno Electric</i> , 321 NLRB 278, 280 n.12 (1996), <i>enforced mem.</i> , 127 F.3d 34 (5th Cir. 1997)	15
<i>Manor Care Health Services-Easton</i> , 356 NLRB No. 39, slip op. at 17 (2010), enfd. 661 F.3d 1130 (D.C. Cir. 2011)	3
<i>Medcare Associates, Inc.</i> (also cited as <i>Westwood Health Care Center</i>), 330 NLRB 935, 939, 940 (2000)	3
<i>Mediplex of Wethersfield</i> , 320 NLRB 510, 513 (1995)	13
<i>Metro. Transp. Servs.</i> , 351 NLRB 657, 659 (2007)	14
<i>NLRB v. Griffin</i> , 243 Fed. Appx. 771 (4th Cir. 2007)	15
<i>NLRB v. Matros Automated Electric Const. Corp.</i> , 366 Fed.Appx. 184 (2d Cir. 2010)	15
<i>NLRB v. Relco Locomotives</i> , 734 F.3d 764, 786-787 (8 th Cir. 2013)	15
<i>NLRB v. S.E. Nichols, Inc.</i> , 862 F.2d 952 (2d Cir. 1988)	14
<i>NLRB v. Transp. Management Corp.</i> , 462 U.S. 393, 402-403 (1983)	14

<i>North Carolina License Plate Agency #18</i> , 346 NLRB 293, 294 (2003)	15
<i>W. F. Bolin Co.</i> , 311 NLRB 1118, 1119 (1993), <i>enforced. mem.</i> 99 F.3d 1139 (6th Cir. 1996)	15
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enfd.</i> , 662 F.2d 899 (1st Cir. 1981); <i>cert. denied</i> , 455 U.S. 989 (1982)	14, 24

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

BOZZUTO'S, INC.

and

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 919

Cases 01-CA-115298
01-CA-120801

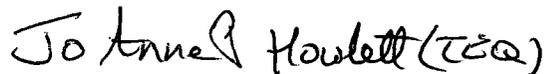
**COUNSEL FOR THE GENERAL COUNSEL'S
LIMITED CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel files the following limited cross-exceptions to the Decision and Order of Administrative Law Judge Raymond Green in the above-captioned matter, as follows:

1. The judge's failure to require that the Notice be read aloud to Respondent's employees on work time. (ALJD p. 10, 42:43).

Dated at Hartford, Connecticut, this 6th day of August, 2015.

Respectfully submitted,

 (TCA)

Jo Anne P. Howlett
Counsel for the General Counsel
National Labor Relations Board
Region One, Subregion 34

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION ONE, SUB REGION 34**

BOZZUTO'S, INC.

and

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 919**

**Cases 01-CA-115298
01-CA-120801**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN
SUPPORT OF LIMITED CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE¹**

In his decision that issued on June 25, 2015, Administrative Law Judge Raymond Green correctly found that Respondent unlawfully: a) interrogated Todd McCarty employee on about September 27, 2013; b) announced and implemented a wage increase on about October 1, 2013; c) disciplined and then terminated Patrick Greichen on about October 1 and October 8, 2013; d) suspended and then terminated Todd McCarty on about January 14 and February 18, 2014; and e) maintained a policy conditioning continued employment for certain employees on their relinquishment of Section 7 rights. Respondent filed Exceptions and a Brief in Support on July 23, 2015.

¹ In this Brief in Support of Limited Cross-Exceptions, the Administrative Law Judge will be referred to as "the ALJ" or "the Judge"; Bozzuto's Inc. will be referred to as "Respondent"; and the National Labor Relations Board will be referred to as "the Board". Citations to the ALJ's Decision will be referred to as "ALJD" followed by the page and line numbers specifically referenced.

With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent's exhibits will be designated as "R" followed by the exhibit number.

Counsel for the General Counsel files this Brief in Support of Limited Cross Exceptions, solely regarding the Judge's failure to require a public reading of the Notice.

I. Board Precedent Allows for a Notice Reading Remedy Where Warranted

The Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices, it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6-7 (2014)(ordering a notice reading); *Excel Case Ready*, 334 NLRB 4, 4-5 (2001)(ordering the provision of current names and addresses of employees, access to the facility, and a public notice reading). In this regard, the Board has held that a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) citing *J.P. Stevens & Co. v NLRB*, 417 F. 2d 533, 539-540 (5th Cir. 1969).

In *Marquez Brothers Enterprises*, 361 NLRB No. 150 (2014)², the Board summarized the circumstances where a public reading is required, as follows:

The Board has required that a notice be read aloud to employees where an employer's misconduct has been "sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion." *Jason Lopez' Planet Earth Landscape, Inc.* 358 NLRB No. 46, slip op. at 1 (2012); accord: *HTH Corp.*, 356 NLRB No. 182, slip op. at 8 (2011). This remedial action is intended to ensure that "employees will fully perceive that the [r]espondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F. 3d 920 (D.C. Cir. 2005).

² The Board's decision incorporates by reference *Marquez Bros.* 358 NLRB No. 61 (2012), which was vacated by the Supreme Court decision in *NLRB v Noel Canning*, 132 S. Ct. 2550 (2014). The Board considered the case *de novo* and adopted the judge's decision and the record in light of the exceptions and briefs, agreeing with the rationale.

In *Marquez*, the Board noted that the Employer's coercive conduct "extended temporally throughout the life of the employees' organizing efforts" and "began when the Respondent fired the first leader of a union campaign (Mares) as soon as it became aware of his protected activity." (*Marquez*, supra, at p. 2).

In numerous cases, the Board has required a public reading where serious unfair labor practices have been committed by a high ranking member of management, or have had a widespread impact on the unit employees. See, e.g., *Auto Nation*, 360 NLRB No. 141, slip op. at 11, fn. 2 (2014)(single discharge in a potential unit of about 80 employees and various 8(a)(1) statements to all by high-ranking managers); *Allied Medical Transport*, 360 NLRB No. 142, slip op. at 9, fn. 9 (2014)(two discharges and multiple 8(a)(1) statements over the course of more than six months, committed by high-ranking management official); *Carey Salt Company*, 360 NLRB No. 138, slip op. at 1 (2014)(coercive threat and discriminatory withholding of a scheduled wage increase to all employees, also violating 8(a)(5), with no discharges); *Jason Lopez Planet Earth Landscape, Inc.* 358 NLRB No. 46, slip op. at 1 (2012)(discharge of two union leaders in 15 person unit, and numerous coercive statements by owner); *Casino San Pablo*, supra (notice reading ordered to remedy numerous unilateral changes, barring of access to union representatives, and overbroad rules, but no discharges).

II. A Notice Reading is Warranted Here as an Aid in Remediating the Severe Breach of Integrity and Trust that Follows from Respondent's Action of Falsifying McCarty's Production Records to Bring about his Demise

Consistent with the applicable precedent cited above, the totality of the circumstances warrants this special remedy. Notably, the request here is limited to the special remedy of a notice reading -- not access, or current names and addresses, or a

broad cease and desist order. The totality of circumstances include Respondent's action, within days of its awareness of organizing, of announcing and implementing the wage increase (a finding to which no exceptions were filed), its swift targeting of Patrick Greichen, an employee known for his outspoken opposition to practices considered unfair, and its ongoing unlawful practice of requiring employees not to be involved in any conversations deemed "hearsay" or "non-factual" (a finding to which no exceptions were filed), all of which were undertaken at the direction and with the full participation of senior management, including Senior Vice President Rick Clark and Vice President of Human Relations Carl Koch.

Perhaps most outrageous is Respondent's conduct of falsifying the production data of lead organizer Todd McCarty to bring about his suspension and termination. It is undisputed that McCarty led the effort, on behalf of the Union, to collect over 160 signed authorization cards between late September 2013 and early January 2014. (Tr. 481, 793-794). And although the pace of new signers had dropped off, a meeting for employees held on January 11, 2014 was attended by approximately 30 employees. Another meeting was held in February 2014, the day after McCarty was terminated. But this time (other than McCarty) only one employee showed up. (Tr. 798-799). Clearly, McCarty's termination was the death knell for the Union's organizing campaign, as it had a profound and chilling impact on the willingness of remaining employees to exercise their Section 7 rights.

It can readily be presumed that the circumstances that led to McCarty's termination were widely disseminated amongst the employees. This presumption follows from several key and undisputed facts. First, it was well known that McCarty was routinely among the top five or ten producers in a unit of about 400 employees, and that although Respondent struggles with high turnover, McCarty was a long-term employee who had been maintaining that level of productivity for almost 15 years. (Tr. 149, 312). Employees closely monitored each others' records from week to week so that they could claim "bragging rights" over production percentage rates (Tr. 499-500). The proof McCarty used to show that his production data had been falsified was obtained *with the cooperation of other workers*, at least one of whom took the screen shot confirming the alterations to his production percentages and sent it to him while he was suspended. (Tr. 507). Thus, just as employees would have been aware that McCarty was spearheading the union organizing, there was surely widespread awareness that Respondent had intentionally falsified McCarty's production data to bring about his termination. McCarty's removal sent a powerful message throughout the facilities that even an outstanding record and lengthy seniority will not protect you if the company knows you are organizing a union, and reveals the outrageous lengths to which Respondent would go to achieve one's removal.

Judge Green declared that in his opinion, the violations found here were not "numerous, pervasive, or outrageous" so as to warrant the public reading of the notice. In making this declaration, however, the Judge overlooked or disregarded the compelling facts described above. Clearly, intentionally falsifying the computerized production data relied on to properly assess and pay employees for their work is

outrageous conduct. It is an affirmative act of fraud that most employees would be powerless to counteract.

McCarty's credible testimony is that he brought the concerns that his "down time" had been removed (thereby skewing his production percentages) to both Operations Manager Winans and to Supervisor Englehart -- complaints which either fell on deaf ears or were simply disregarded. (Tr. 499-500, 511-512, 516). Additionally, as argued in the General Counsel's Answering Brief to Respondent's Exceptions, the evidence of disparate enforcement with respect to a decision to terminate based even on McCarty's altered production records provides compelling evidence that, regardless which supervisor was responsible for falsifying the production records, the Vice President of Human Resources, Carl Koch, was complicit in the actions against McCarty.

It is likely that the *only* reason that McCarty effectively proved his case is because he had to foresight to take pictures of performance data before the changes were made. Absent this proof, it is likely that the fraudulent data would have been credited. It is impossible to overstate the sense of powerlessness than an employee would feel upon learning the fundamental breach of trust and integrity that occurred here. Under these circumstances, something more than a traditional notice posting is needed. A public notice reading provides a means to inject a level of human accountability to the restoration of trust that is necessary to reassure employees that Respondent truly is accountable for violating the Act.

After being confronted with the undeniable photographic evidence of the manipulation of data records, Respondent offered McCarty reinstatement, which he declined. As the evidence was insufficient to find that the offer was other than genuine,

a Board Order will not require reinstatement for McCarty. There is no chance that his return to employment can provide the powerful symbolic reassurance that employees deserve to counter the coercive impact of Respondent's unlawful and fraudulent conduct. He will not be to explain to employees what really happened, or to reassure employees that their rights truly do matter, and can and will be defended. Under these circumstances, it is incumbent upon the Board to fashion a remedy that truly attempts to bring some reassurance to remaining employees that their rights are real, and not just words on a paper. Something more is required, and in this case, under these circumstances, a public notice reading is called for.

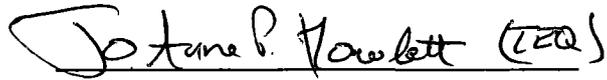
III. CONCLUSION

Taking the above into account leads to the conclusion that a traditional remedy would be patently insufficient to reassure the remaining employees that their rights under Section 7 of the Act are real. In an atmosphere where the foundation of trust has been so critically impacted, some additional measure is necessary to reassure remaining employees that a change has occurred; that the level of disregard for honesty and integrity and respect for their rights that was allowed to exist has shifted. The requirement that the Notice be read aloud to them, either by or in front of senior management, offers a small but meaningful possibility for this shift to occur. Of the limited remedies available, a public reading by Respondent, in front of its employees and "on the clock", is surely an appropriate means to provide employees a modicum of faith that their Employer acknowledges their rights, owns the transgressions that were made, and will in fact, not repeat them in the future. For all of the above reasons, it is

respectfully requested that General Counsel's limited Cross-Exception to the Decision of the Administrative Law Judge be granted.

Dated at Hartford, Connecticut this 6th day of August, 2015.

Respectfully submitted,

A handwritten signature in black ink that reads "Jo Anne P. Howlett (LEQ)". The signature is written in a cursive style and is underlined.

Jo Anne P. Howlett
Counsel for the General Counsel
National Labor Relations Board
Region One, Subregion 34

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

BOZZUTO'S, INC.

and

Cases 01-CA-115298
01-CA-120801

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 919

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW
JUDGE and COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE and COUNSEL FOR THE GENERAL COUNSEL'S LIMITED
CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on August 6, 2015, I served the above-entitled document(s) by email or regular mail upon the following persons, addressed to them at the following addresses:

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Bozzuto's Inc.
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Cheshire, CT 06410
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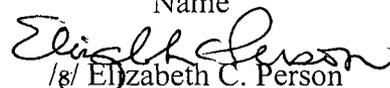
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August 6, 2015

Date

Elizabeth C. Person, Designated Agent of NLRB

Name


/s/ Elizabeth C. Person

Signature