

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**APOGEE RETAIL, NY, LLC d/b/a UNIQUE
THRIFT STORE**

and

**Case Nos. 02-CA-133989
 02-CA-134059
 02-CA-137166**

LOCAL 338, RWDSU/UFCW

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Dated at New York, New York
this 27th day of August, 2015

Moriah H. Berger
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

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I. PROCEDURAL HISTORY

On August 4, 2014,¹ Local 338, RWDSU/UFCW (“the Union”) filed a charge in Case No. 02-CA-133989, alleging that Apogee Retail, NY, LLC (“Respondent”), since at least July 9, had been failing to bargain in good faith with the Union, in violation of § 8(a)(5) and (1) of the Act. (GC Exh. 1A).²

On August 5, the Union filed a charge in Case No. 02-CA-134059, alleging, in relevant part, that Respondent made statements of futility concerning the Union’s representation, in violation of § 8(a)(1) of the Act.³ (GC Exh. 1C). The Union amended the charge in Case No. 02-CA-134059 on September 19 and on December 4. (GC Exhs. 1E and 1K). As amended, the charge alleges, in relevant part, that Respondent, in and around May, June, July and August 2014, promised employees a wage increase and improvements in employee benefits to induce them to abandon their support for the Union, and informed employees that Respondent was withholding wage increases because they are represented by the Union, in violation of § 8(a)(1) of the Act.⁴ (GC Exh. 1K).

On January 30, 2015, following an investigation of the above allegations, the General Counsel, by the Regional Director for Region 2 of the National Labor Relations Board (“Regional Director”), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Case Nos. 02-CA-133989, 02-CA-134059 and 02-CA-137166 (“Complaint”). (GC Exh. 1M). On March 5, 2015, the General Counsel, by the Regional Director, issued an Amendment to Consolidated Complaint (“Amendment”).⁵ (GC Exh. 1R). Respondent, by its Counsel, filed an Answer to the Complaint, on

¹All dates hereafter are in 2014, unless otherwise stated.

²Citations to the transcript will appear as “Tr.” followed by the corresponding page and line number(s). Citations to General Counsel and Respondent exhibits will appear as “GC Exh.” and “R. Exh.,” respectively, followed by the exhibit number. Citations to the Joint Exhibit will reference the specific document, and then “Joint Exh.” Citations to Judge Green’s decision will appear as “ALJD,” followed by the corresponding page and line number(s).

³The Union withdrew the following allegations from its original charge in Case No. 02-CA-134059: that Respondent unilaterally changed the terms and conditions of employment of bargaining unit employees, bypassed the Union and dealt directly with bargaining unit employees, maliciously and grossly misrepresented the positions held by Respondent and the Union during contract negotiations, created an impression of surveillance of employees’ union activities, and sponsored and circulated a decertification petition.

⁴On September 19 and November 19, the Union filed a charge and amended charge, respectively, in Case No. 02-CA-137166 (GC Exhs. 1G and 1I); however, the surveillance allegations raised in that charge are not a subject of these Exceptions.

⁵Also, during the hearing, Judge Green accepted an amendment to paragraph 5(a) of the Complaint, correcting the spelling of the name of Respondent’s Chief Executive Officer and owner from “Koehler” to “Kloeber.”

February 12, 2015⁶ (GC Exh. 1O), and an Answer to the Amendment, on March 9, 2015 (GC Exh. 1T), denying the allegations listed above.

A hearing was held before Administrative Law Judge Raymond P. Green, in New York, New York, on March 31, April 1, 2, and 6, 2015. On July 30, 2015, Judge Green issued a Decision and Recommended Order, dismissing the Complaint in its entirety.

II. BACKGROUND FACTS

A. *Respondent's business and management structure*

Respondent operates a national chain of twelve thrift stores. (Tr. 30:6; 653:22). Only one of Respondent's stores is involved here, the Unique Thrift Store located at 218 West 234th Street in Bronx, New York (the "Bronx store").⁷ (GC Exh. 1M). At its Bronx store, Respondent sells used merchandise it has purchased from non-profit organizations, including furniture, clothing, jewelry, and bric-a-brac, or what Respondent and its employees refers to as "brica." (Tr. 31:11-15; 653:19-22). Merchandise arrives at the Bronx store via truck. (Tr. 115:15-18). Upon arrival, it is sorted on a loading dock toward the back of the Bronx store by the truck driver. (Tr. 116:1-3). Thereafter, the merchandise is placed in carts and pushed inside the Bronx store, into the production department. (Tr. 117:6-7). In the production department, a more intricate sort is performed. Merchandise is separated by category, for example, clothing is divided from brica, and then by type, for example men's versus women's clothing. (Tr. 118:1-8). Sorted merchandise is then pushed to the appropriate department, where it is priced and a price ticket is attached to each item. (Tr. 118:19-119:6). Finally, the sorted, priced and ticketed merchandise is pushed to the sales floor. (Tr. 119:9-10).

Respondent employs approximately sixty-four employees at its Bronx store. (Tr. 32:25). The majority of these employees, about thirty-six to forty-two of them, work in the production department. (Tr. 39:11). Respondent also employs about nineteen to twenty-two cashiers. (Tr. 39:21).

Respondent's hierarchy does not include individual department heads, but does include

⁶ Respondent's Answer is dated February 12, 2014, but this appears to be a typographical error.

⁷ This area of the Bronx is also referred to as Riverdale.

supervisors of various functions. (Tr. 33:15). Lygia Martinez is the supervisor of pricing. (875:2-3). Shamsun Nahur is the front supervisor, and is responsible for ensuring a sufficient number of cashiers are servicing Respondent's customers. (856:14; 863:11-14). Going up the hierarchy, next is Respondent's Supervisor/Manager of Production, Naomi Santana.⁸ (GC Exh. 17, ¶1). Sameh Michill is the manager of the Bronx store. (Tr. 26:21; 808:24). Michill reports to David Morley, the general manager of five of Respondent's stores. (Tr. 27:17; 186:8, 11-12). Above David Morley in Respondent's hierarchy is David Kloeber, Respondent's Chief Executive Officer. (Tr. 187:5-9).

B. Election of RWDSU, delegation of Local 338, and decertification effort

On June 7, 2013, a representation election was conducted at the Bronx store, during which a majority of Respondent's employees in the following bargaining unit voted to be represented by the RWDSU:

All full-time and regular part-time line workers, including workers carrying out functions such as Pricer, Pusher, Hanger, Sorter, Maintenance, Pick-Up, Cleaner, Sales Associate, Cashier, Floater, and Bagger, employed by Respondent at the Bronx store.

(Tr. 375:4-6; GC Exh. 1R). On March 28, Respondent, by its Counsel, "agree[d] to a settlement" of a prior unfair labor practice charge, Case No. 02-CA-104237, by committing "to bargain with Local 338, UFCW/RWDSU, as the designee of the RWDSU, in connection with bargaining regarding an initial collective bargaining agreement." (GC Exh. 2A).

On June 27, Ramon Steffani filed a petition in Case No. 02-RD-131679, seeking to decertify the Union as the exclusive collective-bargaining representative of the above employees. (GC Exh. 3G). On July 11, the Regional Director approved a Stipulated Election Agreement in Case No. 02-RD-131679, thereby scheduling an election for August 8, from 11 a.m. to 2 p.m., in the break room at Respondent's Bronx store. (GC Exh. 4). The ballots from the August 8 election have been impounded. (Tr. 19:2-5).

III. FACTS AND ARGUMENT IN SUPPORT OF EXCEPTIONS

⁸ Ms. Santana also goes by Naomi Nazario, her maiden name. (Tr. 922:3-12). She was incorrectly identified in the transcript as Naomi Mazario. (*Compare* Tr. 922:4-8 with GC Exh. 7).

Exception 1: Judge Green erred in failing to consider evidence supporting the General Counsel's allegation that Naomi Santana, Respondent's Supervisor/Manager of Production, is a supervisor within the meaning of § 2(11) of the Act, and in failing to find that Santana is a supervisor within the meaning of § 2(11) of the Act.

The record is replete with evidence that Naomi Santana exercises at least three of the enumerated functions of a supervisor found in § 2(11) of the Act – the authority to hire, assign, and discipline employees.⁹ Judge Green ignored this evidence, refused to consider the issue of Santana's supervisory status, and authored a decision that ignored this allegation of the Complaint.¹⁰ Judge Green was apparently content, for the purpose of reaching a decision on the issue of whether Respondent, via Santana, violated § 8(a)(1) of the Act, with Respondent's belated admission that Santana is an agent of Respondent within the meaning of § 2(13) of the Act.¹¹ (ALJD: 1:46-2:2). This is a grave mistake, not only because it constitutes abdication of the role of the administrative law judge to evaluate the merits of each Complaint allegation, but more importantly because it removed from consideration a critical factor, the identity of the speaker, to be considered when evaluating the coerciveness of an alleged unlawful statement. *See e.g. Allied Medical Transp., Inc.*, 360 NLRB No. 142, slip op. at 20 (2014) (ordering a notice reading to remedy the particularly coercive impact of unfair labor practices “committed by a high-ranking management official”); *Consec Security*, 325 NLRB 453, 455 (1998) (“When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten.”); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984) (the identity of the questioner has long been considered by the Board when assessing whether an interrogation ran afoul of the Act).

⁹ Section 2(11) of the Act also includes the authority to transfer, suspend, lay off, recall, promote, discharge, reward, responsibly direct, and adjust grievances. It also includes the authority to recommend any of those enumerated actions – authority Santana clearly possesses.

¹⁰ During the hearing, Judge Green sustained Respondent's objections to questions regarding Santana's supervisory status, even when Counsel for the General Counsel and Counsel for the Union urged him to reconsider his ruling on Respondent's objections, explaining that Santana's supervisory status and placement within Respondent's hierarchy are factors to consider when evaluating the coercive nature of her statements to employees. (Tr. 890:12-22; 951:17-952:17). Despite this limitation, there is more than enough evidence in this record to find that Santana is a supervisor within the meaning of § 2(11) of the Act.

¹¹ After more than three days of hearing, Respondent Counsel stipulated that Santana is an agent of Respondent within the meaning of § 2(13) of the Act. (Tr. 889:13-24).

It is a well-established principle of Board law that context and surrounding circumstances must be considered when evaluating whether an alleged unlawful statement interfered with, restrained, or coerced employees in the exercise of their § 7 rights. *See e.g. NLRB v. J. Weingarten, Inc.*, 339 F.2d 498, 500 (5th Cir. 1964) (“To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.”) Here, relevant context includes Santana’s status as second-in-command at the Bronx store. Anti-union statements made by one of two top bosses carries significantly more weight than anti-union statements made by a coworker. It is axiomatic that an employee would feel coerced when hearing from the Supervisor/Manager of Production – an individual he knows has the authority to change his work assignment or issue him discipline – that he should vote out the Union in the upcoming election in order to get a pay raise. The same cannot be said of a similar statement coming from a coworker, even one authorized to communicate with employees about the collective-bargaining process. Authorization to serve as a conduit between employees and management is, to a unit employee, significantly less coercive than authorization to hire, assign, and discipline employees.

It follows that, because an evaluation of whether any comment or question alleged to violate § 8(a)(1) of the Act must be considered in the context of all surrounding circumstances, Judge Green erred in ignoring Santana’s status as second-in-command at the Bronx store. As demonstrated below, there is ample evidence to support the finding that Santana is a supervisor within the meaning of § 2(11) of the Act. General Counsel therefore respectfully requests that the Board correct Judge Green’s error by considering the evidence of Santana’s supervisory status; making factual findings regarding Santana’s authority to hire, assign and discipline employees; and making the legal finding that Santana is a supervisor under § 2(11) of the Act. Or, at the very least, General Counsel respectfully requests that the Board remand the record to Judge Green with the directive that he consider the issue of Santana’s supervisory status.

The record is not wanting for evidence of Santana’s status as a statutory supervisor. Regarding the hiring process, employee Abiel Ventura, who worked in the production department at the Bronx store

from September 2013 to January 2015, submitted his application for work in the Bronx store to Santana. (Tr. 140:4-7). He then met one-on-one with Santana, who told him work at the Bronx store can be rigorous and require heavy lifting, and gave him a date to return and begin working. (Tr. 140:10-141:1). Employee Jose Luis Tavira, who worked as a cashier and in the production department, from March 2013 to October 2014, met with Santana after submitting an application. (Tr. 255:7-10; 258:3-5). Santana explained to Tavira that work at the Bronx store is hard, and employees are assigned to work where help is needed, including at the cash registers, on the sales floor and in the back, where the production department is located.¹² (Tr. 258:5-8). Like Ventura, Tavira did not meet with any other representatives of Respondent before he started working at the Bronx store.¹³ (Tr. 258:1-2, 13-14). Santana thus has the “ability to evaluate an employee,” and her evaluation has an “impact on the employees’ job status,” factors sufficient for a finding of § 2(11) supervisory status. *See Harbor City Volunteer Ambulance Squad, Inc.*, 318 NLRB 764 (1995).

Regarding assignment of duties, Santana tells employees in the production department how much merchandise must be sorted, priced, ticketed and pushed to the sales floor in a single day. (Tr. 134:8-11; 135:20-22). She has access to the office at the Bronx store, where Respondent keeps digital records of sales and the processing of merchandise.¹⁴ (Tr. 102:3-6; 156:14-25). Throughout a typical workday,

¹² In his questioning of Ventura and Tavira, Respondent counsel attempted to suggest that Santana, after interviewing each of them, communicated with Michill, who made the ultimate hiring decision. Even if that were true, Santana at the very least recommended that Respondent hire Ventura and Tavira. In Ventura’s case, for example, Santana told him, during his interview, when to return and begin working. She thus was of the opinion that Ventura was fit for work at the Bronx store, and she communicated that opinion to Ventura without consulting anyone else. If Michill thereafter gave his stamp of approval, sometime between the date of Santana’s interview with Ventura and Ventura’s first day of work, he simply authorized Santana’s recommendation.

¹³ Respondent’s Store Manager, Sameh Michill, testified on direct examination by Respondent Counsel that he, not Santana, hired Ventura and Tavira (incorrectly identified by Counsel as Rivera). (Tr. 814:13-18; 815:3-20; 815:8-10). This self-serving testimony, contradicted by both Ventura and Tavira, is inherently unbelievable when considered in the context of Michill’s entire testimony. For example, while Michill could recall with specificity the hire of Ventura and Tavira, events that took place close to two years before the hearing opened, he could not recall personnel actions that occurred within months of the hearing. (Tr. 66:3-6: “Really, you know, Your Honor, since ’09 how many employees came to the store and left? I cannot memorize all this;” Tr. 66:19-23: “Honestly, Your Honor, I have to go and review because really I don’t, I don’t remember all these employees in my head right now;” Tr. 74:23-25: “[E]very day” Michill confronts “many, many issue[s],” and would need time to “sit and refresh my memory.”)

¹⁴ Michill, the manager at the Bronx store, testified that bargaining unit employees do not have access to the office. (Tr. 55:21-25).

employees can find Santana in the office, and request that she look up the processing data and inform them whether they are at, above, or below the daily target for number of items processed. (Tr. 156:6-7, 21-25; 158:1-2). Production employee Abiel Ventura testified that, on a typical workday, he regularly received instruction from Santana regarding the volume of work that needed to be completed. (Tr. 134:8-11; 135:20-22).

Santana is also responsible for tracking where in the sorting, pricing, ticketing and pushing process additional manpower may be needed. She assigns employees accordingly, moving them between functions, for example, from arranging merchandise to pricing it, and between areas, for example, from the cash registers to the sales floor. (Tr. 257:8-18; 288:21). Marlon Colon, a production employee from December 2013 to September 2014, testified that Santana would instruct him to move from collecting garbage to assisting in the production department. (Tr. 366:7-9). Current production employee Rosaura Tolentino testified that Santana tells all employees what work to do. (Tr. 332:7-9). Santana also tells employees they must work more quickly. (Tr. 289:4-7). As Ventura described, Santana can, and has, “r[u]n the show in production.” (Tr. 155:3-4).

Regarding job and shift assignment, in 2014, Santana moved cashier Jose Luis Tavira from his position as cashier on the 12:30 p.m. shift to a position in the production department, on the 8 a.m. shift. (Tr. 256:7-15). She told Tavira he was needed in the production department for about two months, to cover for an employee who had left for vacation. (Tr. 256:13-15).

The Board has defined the term “assign” to mean the “designating of an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Golden Crest Healthcare*, 348 NLRB 727, 728 (2006). However, the Board will not find supervisory status where assignments given are “routine” and not “based on anything other than the common knowledge, present in any small workplace, of which employees have certain skills and which employees work well together.” *Armstrong Machine Co., Inc.*, 343 NLRB 1149, 1150 (2004). It is well-established that “ad hoc instruction that [an] employee perform a discrete task” is insufficient to show supervisory status. *Oakwood Healthcare, Inc.*,

348 NLRB 686, 689 (2006). Here, Santana's assignment of employees goes beyond the merely routine or ad hoc. She moves employees between departments, and between significant overall functions within a department, based on her assessment of where help is needed in order to meet daily production goals. Santana thus has the authority to assign, and on this basis as well is a supervisor within the meaning of § 2(11) of the Act.

Regarding discipline, Santana has the authority to issue verbal warnings, written warnings, and suspensions. (GC Exh. 17, ¶12). On about three or four occasions, she issued a written warning to production employee Abiel Ventura, each time for arriving late to work. (177:17-20; 178:12-21; 183:12-13). These written warnings eventually led to a two-day suspension, issued by Michill, the manager of the Bronx store. (Tr. 181:10-16). In or around 2012, Santana issued a written warning to production employee Rosaura Tolentino, informing Tolentino she was being written up for being late, and must sign the warning. (Tr. 289:15-290:3). Tolentino was also warned by Santana in or around 2013, for drinking coffee in the front of the store. (Tr.290:6; 291:15). On this occasion, Santana told Tolentino that she was going to give her a written warning, and that if Tolentino refused to sign it, Santana would sign it for her. (Tr. 291:4-15; 329:2-5). On June 25, 2013, Santana verbally warned employee Luz Rincon, after Rincon arrived late to work. (GC Exh. 17, ¶13). When Rincon was late again two days later, Santana informed her she would be written up, then drafted a written warning which was subsequently approved by General Manager David Morley. (*Id.*). On June 17, 18, 22 and 24, 2013, Santana issued either a verbal or written warning to employee Stephanie Torres, all for arriving late to work. (*Id.* at ¶14). When Torres was late a fifth time on June 26, 2013, Santana drafted a written warning, which was subsequently approved by General Manager Morley.¹⁵ (*Id.*). On December 27, Santana issued a written warning to employee Antonio Trinidad, disciplining him for failing to properly push priced shoes to the sales floor.¹⁶

¹⁵ Morley admitted that Santana emails him proposed disciplinary reports, with information regarding the employee's misconduct and a recommendation regarding the action to be taken. (Tr. 199:11-22). He admitted further that he typically approves these reports. (Tr. 199:23-25; GC Exh. 9, ¶4).

¹⁶ GC Exhibit 7 is an Employee Disciplinary Report, Respondent's template for recording instances of employee discipline. (Tr. 57:15-19). At the top, it is dated "2/27/14," but at the bottom, in a one-paragraph description of

(GC Exh. 7). She stated in this written warning that, should Trinidad's performance fail to improve, he "will be subject to suspension or termination." (GC Exh. 7). Thus, authority to discipline is yet another basis upon which to conclude that Santana is a supervisor within the meaning of § 2(11) of the Act. *Compare Lucky Cab Co.*, 360 NLRB No. 43 (2014) (road supervisors found not to possess § 2(11) authority to discipline where they had never issued or recommended discipline; rather, they merely completed a daily report listing employee infractions); *DirectTV*, 357 NLRB No. 149, slip op. at 4 (2011) (employer failed to establish authority to discipline where it "did not introduce evidence establishing the existence of a progressive disciplinary system or otherwise explain how the verbal or written warnings in the record were linked to future disciplinary action").

The conclusion is inescapable: Santana holds at least three of the primary indicia of a supervisor listed in § 2(11) of the Act, namely the authority to hire, assign, and discipline employees. Further, not only is Santana a statutory supervisor, she is one of only two supervisors present at the Bronx store on a daily basis. Therefore, her remarks to employees, many of whom she has hired and/or disciplined, carry significantly more weight than the remarks of a coworker merely authorized to communicate about the status of collective bargaining. Moreover, in the context of a pending decertification petition and election, the remarks of a supervisor are significantly more influential than the remarks of a mere coworker. It is for this very reason that the General Counsel included in the Complaint not only an allegation of agency status, but also an allegation of supervisory status. The General Counsel respectfully requests that the Board give the supervisory status allegation the attention it is due.

Exceptions 2-4: In sum, Judge Green's credibility resolutions are in error, as they are based on blatant factual mistakes, and were reached only after disregarding critical record evidence.

In concluding that Respondent, via Naomi Santana, did not violate § 8(a)(1) of the Act on any of the many occasions alleged in the Complaint, Judge Green credited Santana's testimony in its entirety. His credibility resolutions were not based on witness demeanor. With regard to one alleged violation of § 8(a)(1), Judge Green's credibility determination was based on the presence of corroborating testimony.

Trinidad's performance, the date "12/27/2014" is listed. The individual who witnessed the issuance of this written warning, Lygia Martinez, testified that the warning issued in December 2014. (Tr. 889:1-3).

With regard to another alleged violation of § 8(a)(1), Judge Green’s credibility determination was based on inconsistencies among the testimony of General Counsel’s employee witnesses. But with regard to all other alleged violations of § 8(a)(1) attributed to Naomi Santana, on what Judge Green based his credibility resolution is not revealed in the Decision and Recommended Order.¹⁷

As demonstrated below, Judge Green failed to consider critical pieces of record evidence directly related to Santana’s credibility. Consequently, his overarching, generic finding that Santana was a forthright and credible witness with regard to all facts about which she testified is an unsound conclusion; one greatly weakened by the weight of evidence to the contrary.¹⁸ The General Counsel respectfully submits that the Board need not, and should not, accept credibility resolutions wholly unsupported, and even undermined, by record evidence. “[T]he demeanor of a witness cannot be dispositive when his testimony is inconsistent with ‘the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.’” *E.S. Sutton Realty Co.*, 336 NLRB 405, 407 fn. 9 (2001) (citing *Humes Electric, Inc.*, 263 NLRB 1238 (1982)).

Even a cursory review of the record reveals glaring contradictions between sworn testimony Santana provided during an unrelated Regional investigation (GC Exh. 17) and sworn testimony Santana provided on the witness stand. (Exception 2). Santana was repeatedly impeached on factors large (for example her job title and responsibilities) and small (for example other positions she has held at the Bronx store).

On September 23, 2013, in connection with a Regional investigation of unfair labor practice Case No. 02-CA-104237, Santana provided a Confidential Witness Affidavit in which she identified her position as “Supervisor/Manager of Production” of the Bronx store.¹⁹ (GC Exh. 17). Therein she testified

¹⁷ As discussed further below, General Counsel excepts here to Judge Green’s legal conclusion with regard to two of the alleged violations of § 8(a)(1) of the Act.

¹⁸ General Counsel recognizes that a judge may credit portions of a witness’ testimony, while discrediting other portions. The defect here is that Judge Green failed to consider critical pieces of the record directly relevant to Santana’s credibility.

¹⁹ Santana admitted that she reviewed her Confidential Witness Affidavit before signing it and swore to its veracity, and that the Confidential Witness Affidavit was accurate at the time it was given. (Tr. 943:1-8). Board affidavits may be accepted as substantive evidence and credited over hearing testimony. *Conley Trucking*, 349 NLRB 308, 310 (2007). Such acceptance is in line with Rule 801(d)(1)(A), and with the statutory guidance, found in § 10(b) of

further that employees submit vacation requests to her, that she verbally warns employees, and that she issues written discipline and suspensions. (*Id.*). Yet Santana insisted, when faced with the allegation that she is a supervisor and that she coerced employees into voting no for the Union, and in sharp contrast to her Confidential Witness Affidavit, that she merely works in the production department, has no job title, and apparently no specific function. (Tr. 923:6-11; 948:19-22).²⁰ Santana thus took to the witness stand, swore to testify truthfully, and outright lied about her job title and responsibilities – a significant component of the General Counsel’s case. Or, Santana lied in September 2013 when providing a Confidential Witness Affidavit, also sworn testimony. Either way, she is an untruthful witness.

Not only is Santana’s claim that she has no title inconsistent with her Confidential Witness Affidavit, it is inconsistent with the experience of all other employee witnesses. Lygia Martinez, for example, confidently identified herself as the “Floor Supervisor of Pricing.” (Tr. 875:2-3). The same is true for Shamsun Nahur, who testified that her position is “Front Supervisor.” (Tr. 856:14). Kirsy Gonzalez testified without hesitation that she is a “Pricer.” (Tr. 906:7). Jose Luis Tavera identified his various positions at the Bronx store with specificity – he was initially a cashier and was then assigned to be a pusher of women’s clothes. (Tr. 255:7-10, 16-256:2). The same is true for Marlon Colon, who also began as a cashier, and then transitioned to garbage. (Tr. 363:14-18). Abiel Ventura explained that he was assigned to the brica table, then reassigned to maintenance. (Tr. 133:8-15). Finally, Rosaura Tolentino testified that she is responsible for cleaning and hanging men’s clothing. (Tr. 286:3-6). Tellingly, only Santana failed to testify with specificity regarding the title she holds and the work she performs. Such stark inconsistencies lead to only one conclusion: Santana was less than forthcoming and truthful when responding to questions about her position and duties.

On even minor, innocuous details, such as the length of time she has held her current position and the prior positions she has held at the Bronx store, Santana was inconsistent. On the witness stand,

the Act, that the Board follow the rules of evidence “so far as practicable.” *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

²⁰When offered a chance to explain these contradictions, Santana offered the following: “No documents say that I’m a Supervisor or Manager.” (Tr. 949:15-16). Contrast this hollow explanation with, for example, General Counsel’s Exhibit 7, an Employee Disciplinary Report Santana signed under the heading “Manager.”

Santana insisted that, for the past seven years and continuing to date – her entire tenure at the Bronx store – she has occupied the same position. (Tr. 948:23-24). But in her Confidential Witness Affidavit, Santana explained that she was hired on July 15, 2008, was promoted to Supervisor/Manager of Production in 2010, and in between worked as a cashier, in the accessory department, in the men’s department, in the ladies’ department and in the shoe department. (GC Exh. 17). A witness willing to testify untruthfully about even harmless information should have her veracity questioned, yet Judge Green, without explanation and on no apparent basis, determined that Santana accurately described all facts about which she testified. Where, as here, an alleged unlawful statement was made during a one-on-one conversation between an employee and a supervisor, and there is no evidence in the record to suggest the employee, in stark contrast to the supervisor, has a penchant for lying under oath, a decision-maker must be much more deliberative before crediting the supervisor.

Additionally, Judge Green’s findings regarding employee wage rates are a complete distortion of the record evidence. (Exception 3). His subsequent reliance on blatantly incorrect facts, used to justify his decision to discredit employee witnesses, was therefore a serious error. (Exception 4). Contrary to Judge Green’s findings, made from whole cloth, it is undisputed that, prior to the election of the RWDSU, Respondent regularly awarded employees small raises, leading some employees to earn well above the minimum wage. In this regard, production employee Rosaura Tolentino, who works cleaning and hanging men’s clothes, testified that she progressed from a starting wage of \$7.50/hour in 2008 to a wage of \$9.80/hour today, all due to several raises. (Tr. 292:2-11; *see also* R. Exh. 1 ¶ 8). Front Supervisor Shamsun Nahur received a raise every three to four months in her six years of experience as a cashier and Front Supervisor at the Bronx store. (Tr. 856:10-12; 865:3-10). Lygia Martinez, the Floor Supervisor of Pricing, has received several raises in her eight years as a production employee at the Bronx store. (Tr. 880:24-881:9).²¹ Manager Michill testified that he would evaluate employee performance, determine “if

²¹ Not all of these raises can be attributed to increases in the minimum wage, as the New York State minimum wage, which has at all relevant times been higher than the federal minimum wage, has increased only three times since 2007, and is currently \$8.75/hour. Moreover, it has not been increased nearly as frequently as every three to four

they are in [the] green area, which is reach the performance for their department, they will get [a] raise automatic[ally].” (Tr. 824:15-16; 825:1-3). Michill testified further that he has not given any such raises since January or April of 2013 (Tr. 824:8-12), a statement consistent with employee testimony that they have not received a raise since the election of the RWDSU in June 2013. (Tr. 292:12-13; 865:25-866:6; 916:21-23). Only those employees hired close in time to, or after, June 2013 were earning the minimum wage. (Tr. 163:22-25; 260:1-12; 373:13-15).

Thus, Judge Green’s factual findings that, “the only time production employees got raises was when the minimum wage was increased either at the Federal or State level” (ALJD 10:6-7) and that, “almost all of the Company’s employees, except for leads or persons labeled as supervisors, (such as Santana), received the minimum wage” (ALJD 9:5-7) and that, “[t]o the extent that pay increases were given in the past, the evidence shows that such raises were given only when the minimum wage was increased” (ALJD 9:7-9), are unsupported, and even explicitly contradicted, by evidence presented by both the General Counsel and Respondent.

These factual errors were then compounded by Judge Green’s reliance on them in evaluating the veracity of employee testimony. (Exception 4). Multiple employee witnesses testified that Santana told them, when urging them to vote out the Union, that, prior to the Union’s election, Respondent gave regular raises based on the amount of work performed. (Tr. 143:16-21; 161:9-16; 150:1-7; 167:23-168:4; 274:11-17; 368:5-8). Inexplicably, however, and in stark contrast to the record evidence, Judge Green found that, “an alleged statement that the Company gave raises every three months, is inaccurate.” (ALJD 10:8-9). Problematically, this inaccurate finding led Judge Green to conclude that employees’ descriptions of their conversations with Santana regarding wages were not as credible as Santana’s descriptions of those conversations. But it was Judge Green, not employee witnesses, who was “inaccurate” about Respondent’s history of granting wage increases.

months. www.labor.ny.gov/stats/minimum_wage.asp; www.dol.gov/whd/minwage/chart.htm. Judge Green could certainly have taken judicial notice of these facts.

In conclusion, for myriad reasons, including drawing incorrect factual conclusions and ignoring relevant evidence, Judge Green's determination that Naomi Santana was in every instance a credible witness is inconsistent with the weight of the evidence, established facts, inherent probabilities and reasonable inferences drawn from the record. Only after misrepresenting and disregarding essential evidence did Judge Green credit Santana in full. The General Counsel therefore respectfully requests that the Board refuse to accept a credibility resolution that is belied by record evidence, and make factual findings consistent with the record evidence. *See Lord & Taylor*, 258 NLRB 597 fn. 1 (1981) (remarking that it is "poor practice for an administrative law judge to make only generalized credibility resolutions," and noting that, although such generalizations do "not warrant routine rejections of the findings," there must be careful examination of the entire record). In the alternative, the General Counsel asks that the Board at least remand this case to Judge Green with the directive that he base his credibility resolutions on all of the relevant evidence.

Exception 5: Judge Green erred in finding that employee witness Abiel Ventura "could not recall when [a conversation he had with Santana] occurred" and in apparently concluding that the General Counsel failed to establish that the conversation was encompassed by the Complaint. (ALJD 9:43-44).

Employee witness Abiel Ventura recounted two distinct conversations he had with Santana, during which she told him, in sum, that if employees voted the Union out, Respondent would return to its practice of awarding regular raises. (Tr. 143:16-21; 161:9-16; 150:1-7; 167:23-168:4). One of those conversations occurred the day before the decertification election. (Tr. 141:19-21). For the second conversation, Ventura did not have a similar frame of reference, and could only estimate when it occurred. However, he testified that it occurred a couple months before the election on August 8, and that he was aware at the time it happened that there would be an election. (Tr. 148:12-149:10). The decertification petition was filed and served on Respondent on June 27. (GC Exh. 3). One can therefore conclude that the second conversation Ventura described occurred sometime around June 27, well within the mid-June through August 7 timeframe set forth in the Complaint. Judge Green's apparent failure to evaluate whether unlawful statements were made during this second conversation, based on his

conclusion that Ventura could not recall when the conversation occurred, is thus in error, as the record evidence as a whole shows this conversation is encompassed by the Complaint. For nearly its entire history, the Board has declined to require witnesses to remember with exactness the date a conversation occurred. *Detergents, Inc.*, 107 NLRB 1334, 1337 (1954) (upholding judge's finding of a violation of § 8(a)(1), even though witnesses could not "fix the precise day and hour of an event").

Exception 6: Judge Green erred in concluding that Respondent, by Santana, stated "simply what is permissible under the Act and as such [did not] violate Section 8(a)(1) of the Act." (ALJD 11:18-19).

The General Counsel excepts to Judge Green's finding that Respondent, by Santana, did not violate § 8(a)(1) of the Act during the two conversations between Santana and employee Abiel Ventura. As discussed extensively in the previous sections, Judge Green's credibility resolutions, which favored Santana over Ventura, are wholly unsupported by the record, when considered in its entirety, and were based on critical factual errors. The result of Judge Green's failure to consider the entire record, and of his mistakes, is an unwarranted and unsupported conclusion that Respondent did not violate the Act as alleged. The General Counsel respectfully requests that the Board correct these errors by making factual findings consistent with the record evidence. This, the General Counsel submits, will lead to the conclusion that Respondent, via Santana, violated § 8(a)(1) of the Act.

On two occasions leading up to the August 8 election, including the day before the election, Santana pulled Ventura aside, requesting that he accompany her to the bale area for a private conversation. (Tr. 142:14-143:11; 149:15-17). These actions contributed to the coercive nature of what was next to come. *See Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999) (finding unlawful supervisor's anti-union remark to an individual employee after considering the totality of the circumstances, including that the supervisor had requested the employee come to his office). Once at the bale area, Santana told Ventura that, prior to unionization at the Bronx store, employees received regular wage increases. She told him further that, once the Union is no longer in place, and there are no longer negotiations, employees will once again receive raises. Santana emphasized: the reason employees are not getting regular raises is because the Union is in place. (Tr. 143:16-24; 150:1-7; 161:9-16; 167:23-

168:13; 169:7-11). No employee would forget those comments when going to cast his ballot. By pulling Ventura aside, on multiple occasions, then telling him employees used to get raises based on the amount of work they put out, then informing him he was not getting a raise because the Union is in place, and then assuring him that, if the Union was not there, Respondent would go back to its old wage increase system, Santana essentially equated voting out the Union with the granting of raises. This certainly constitutes interference with employees' rights guaranteed by § 7 of the Act, and is a violation of § 8(a)(1) of the Act.

Exception 7: Judge Green erred in failing to consider General Counsel's argument that, even if Respondent told employees only that wages are in negotiations, Respondent nonetheless interfered with employees' § 7 rights, in light of its failure to negotiate in good faith.

On brief to Judge Green, the General Counsel presented an alternative argument that, even if one credits the testimony of Respondent's witnesses with regard to wage-related comments made to employees, Respondent nevertheless violated § 8(a)(1) of the Act. Judge Green did not consider this argument, seemingly in light of his failure to find that Respondent had engaged in bad faith bargaining. The General Counsel respectfully presents this argument again for consideration.

The Board has long recognized that an employer's free speech rights, protected by § 8(c) of the Act, must be balanced with the § 7 rights of employees. *See Mediplex of Danbury*, 314 NLRB 470 (1994). When striking this balance, the Board has considered an employer's statements "against the background of the Respondent's other unlawful conduct." *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 (1989). Here, as discussed further in the following sections, such unlawful conduct includes Respondent's failure and refusal to bargain in good faith.

In this context, informing employees that wage increases are under negotiation is unlawful. It would be perverse indeed for an employer guilty of bad faith bargaining to be protected by § 8(c) of the Act when referring its employees to that bargaining process. In other words, an employer who refuses to bargain in good faith should lose the protection afforded by § 8(c) when making comments to employees about bargaining. An employer should not be permitted to benefit from its unlawful conduct at the bargaining table when it enters the shop. Telling employees, as Respondent submits it did here, that wage

increases are under negotiation, while in actuality attempting to thwart the execution of a first contract, and the concomitant implementation of a wage increase, should not win the Board's approval.

This conclusion is supported by Board precedent, particularly cases in which employer statements are considered not in isolation, but in the context of the surrounding circumstances. *See e.g. M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. at 1 (2014) (concluding that employer's comment that a grievance would go nowhere was, in context, not simply an example of "opining on the merits of a potential grievance," but conveyed the impression of futility, where employer had also undermined the union by engaging in direct dealing, threatened loss of benefits, and unlawfully discharged an employee); *E.L.C. Electric, Inc.*, 344 NLRB 1200 (2005) (finding unlawful employer's statement that it was actively seeking to improve health insurance benefits, when made in the context of an anti-union speech, a pending election, and in the midst of numerous other unfair labor practices); *Alterman Transport Lines, Inc.*, 308 NLRB 1282, 1287 (1992) (finding unlawful "arguably ambiguous" comments made by a supervisor regarding employees' reduction in hours, when considered in the context of other unfair practices, including unlawful discharges and reductions in hours); *see also Flying Foods Group, Inc.*, 345 NLRB 101, 112 (2005) (member Liebman, dissenting) (arguing that, after a union has been certified, "what once may have been legitimate campaign propaganda" may become an unlawful statement).

Exception 8: Judge Green erred in failing to recommend a traditional notice-posting remedy.

For all of the reasons discussed above, the General Counsel respectfully requests that Respondent be ordered to post at its facility, in areas where notices to employees are customarily posted, a traditional Board notice, in English and in Spanish.

Exceptions 9-12: In sum, Judge Green erred in failing to consider documentary and other evidence regarding the substance of the parties' bargaining meetings, and made factual findings unsupported by the record.

A primary dispute that arose at the hearing before Judge Green, for the first time over the course of the Region's consideration of Respondent's alleged bad faith bargaining, was whether Respondent's Chief Executive Officer, David Kloeber, posed a series of questions and concerns regarding union security and dues check-off to the Union's Director of Contract Administration and Research, Neil

Gonzalvo, and, if so, when those questions were asked. The testimony in this regard of Respondent witnesses Kloeber and Stuart Weinberger, Respondent Counsel, conflicted in numerous ways with that of Union witnesses Gonzalvo and William Anspach, Union counsel. Judge Green, in receipt of two conflicting factual accounts, thus had to determine which fact pattern to credit. But rather than evaluate the witnesses' testimony, the documentary evidence, and any consistencies or inconsistencies between the two, Judge Green simply made unexplained factual findings. Moreover, his findings reflect, yet again, a misreading of record evidence and a blatant disregard of critical, relevant evidence. Judge Green's factual findings regarding the substance of two key bargaining meetings, May 1 and June 26, must therefore be revisited. The General Counsel respectfully requests that the Board, contrary to Judge Green, make factual findings that are consistent with the record evidence, or at the very least remand the record to Judge Green with the directive that he base his credibility resolutions on all of the relevant evidence.

Respondent's witnesses, Kloeber and Weinberger, claim that they, and Kloeber in particular, raised a multitude of questions regarding the mechanics of union security and dues check-off during the June 26 bargaining meeting, and that the Union thereafter utterly failed to respond.²² (Tr. 663:4-664:10; 668:1-2; 720:24-721:12; 721:18-19; 721:23-722:3; 756:15-22). An examination of all of the record evidence – an effort Judge Green failed to make – shows that Respondent's factual framework is a post-hoc fabrication, developed for presentation at trial.

²² The Union, in contrast, asserts that, when the discussion on May 1 turned to the issues of union security and dues check-off, Weinberger informed the Union that the RWDSU had initially proposed a potentially illegal union security clause, requiring employees to become union members within thirty-one days of the effective date of the collective-bargaining agreement. (Tr. 557:2-13; 601:19-21; *see also* "Union Proposal: October 22, 2013," Joint Exh.). Kloeber then asked how the dues deduction is processed in the event an employee leaves the job before the end of a month. (Tr. 557:23-558:8). Considering this question, and Weinberger's comments about the timing of the union security clause, Gonzalvo noted to himself that he would propose modified union security language. (Tr. 558:10-11; 609:16-610:1; 614:20-25; 618:14-19). He told Weinberger and Kloeber that he would work on compiling a comprehensive contract proposal. (Tr. 657:11-14, 18; 713:22-24).

Regarding the June 26 meeting, Gonzalvo testified that, as they had done on May 1, Respondent and the Union spent the meeting discussing the contract proposals, article by article. (572:12-15; 662:9-11; 719:7-8). When the issue of union security arose, Gonzalvo explained that he had extended the timing, from thirty-one to ninety days, in alignment with Respondent's proposed ninety-day probationary period. (Tr. 572:17-24). Weinberger responded that he would get back to the Union. (Tr. 573:2). Gonzalvo therefore recorded in his notes, taken on a copy of the proposed comprehensive contract, that the Union Security article was "open." (Tr. 631:6-7; R. Exh. 4).

Aside from Kloeber's and Weinberger's self-serving testimony, there is not a single piece of evidence in the record that supports Respondent's contention that, on June 26, Kloeber posed a series of questions about the mechanics of dues check-off and raised concerns about Respondent's liability under a union security clause, as well as the effect of union dues on minimum wage employees. To the contrary, *two* sets of bargaining notes of the June 26 meeting, recorded by Gonzalvo *and* Weinberger, reflect that no such questions or concerns were voiced. (GC Exh. 15; R. Exh. 4). Although his client allegedly raised numerous questions about union security and dues check-off, many of which Weinberger himself could answer, Weinberger wrote down not a single one of them. Instead, what Weinberger's and Gonzalvo's notes show is that, when the issues of union security and dues check-off came up on June 26, there was very little discussion of them; rather, Weinberger simply stated, as Gonzalvo testified, that he would get back to the Union. (Tr. 573:2). For this reason, Gonzalvo wrote "open" in the margin of the Union's proposed collective-bargaining agreement, just outside the proposed union security clause. (Tr. 631:6-7; R. Exh. 4).

The correspondence in the record between the Union and Respondent also contains no mention of any of Kloeber's questions or concerns, and no mention that those concerns were allegedly shared with Gonzalvo on June 26. During a phone call placed on July 24, Union Counsel William Anspach, after communicating the Union's acceptance of all counterproposals submitted by Respondent the day before, informed Respondent Counsel Weinberger that the only remaining open items were union security and dues check-off, and cautioned Weinberger that, if Respondent did not provide a reason for its rejection of union security and dues check-off, the Union would have to file an unfair labor practice charge. (Tr. 394:13-17; 586:17-24; 728:8-11; GC Exh. 11). Despite this urgency, rather than articulate the questions and concerns he and Kloeber so aptly described on the witness stand, or simply inform Anspach that Gonzalvo knew Respondent's thoughts on union security and dues check-off, Weinberger repeatedly provided Anspach with vague, hypothetical objections. None of Weinberger's subsequent emails to Anspach corroborates the testimony he and Kloeber provided at the hearing.

On July 29, Weinberger wrote Anspach, “there are issues with the union security clause and the check-off.” (*Email from Weinberger to Anspach*, 7.29.14:10:14 p.m., Joint Exh.). At 8:44 a.m. the next morning, Anspach attempted to ascertain what exactly Respondent’s “issues” were with union security and dues check-off, reminding Weinberger that he has “yet to hear any reason for your client to reject those, particularly since we don’t live in Alabama.” (*Email from Anspach to Weinberger*, 7.30.14:8:44 a.m., Joint Exh.). Weinberger responded, not with a recitation of Kloeber’s questions or concerns, but rather with the following:

As I am sure that the Union is aware, there are contracts with unions that do not have dues check-off. I think the Union is aware that many employers do not wish to get involved in the check-off of dues for many reasons, including, but not limited to, that they do not want to be responsible for checking-off dues and the issues that arise with checking off the dues.

While the union security provision is a mandatory subject of bargaining, the NLRB as recently as 2013 said that the employer is not required to agree to a union security provision that is proposed by the Union. The ALJ in that case held that “[A]n employer may insist on not having a union-security clause at all. . . .” Your statement that New York is not Alabama does not mean that there are not contracts with unions that do not have a union security clause as proposed by the Union. I am sure the Union is aware of the reasons why employers have not agreed to union security clauses that have been proposed by the Union.

(*Email from Weinberger to Anspach*, 7.30.14:11:39 p.m., Joint Exh.). Then, even after learning the Union had filed an unfair labor practice charge, prompted by Respondent’s refusal to articulate its reasons for rejecting union security and dues check-off, Weinberger stated nothing more than: “[T]here are union contracts without dues check-off. There are contracts without the union security provisions proposed by the Union.” (*Email from Weinberger to Anspach*, 8.1.14:6:56 p.m., Joint Exh.). And finally, in response to Anspach’s persistent efforts to engage in a meaningful discussion of union security and dues check-off, the only remaining items on the bargaining table, Weinberger merely repeated: “I think my email the other day outlined reasons.” (*Email from Weinberger to Anspach*, 8.3.14:12:29 p.m., Joint Exh.).

Kloeber’s questions and concerns are also conspicuously absent from one final, critical piece of documentary evidence – Respondent’s position statement to the Region, submitted for the purpose of defending the bad faith bargaining allegation. In a letter to the Regional Director, Respondent, at great

length, provided a review of the bargaining meetings, including the meeting on June 26. Yet here is all Respondent informed the Regional Director occurred on that day:

[O]n June 26, the Company discussed with the Union proposals made by the Union regarding union security clause [*sic*], check-off, and PAC contributions. The Company indicated that it was willing to deduct monies if the employees voluntarily wanted to contribute to the Union's PAC but did not want to be in a position where the employees might be required in the case of a union security clause to pay monies. (Check-off presents different issues than voluntary contributions. If the Region needs an explanation of the difference, I will be glad to provide and [*sic*] explanation. Check-off, for example, becomes difficult when employees do not work a complete period and monies have to be remitted.) It is simply false to claim that the Company never discussed why it did not want to have the union security clause and dues check-off. In fact, during this discussion, Apogee told the Union that it might not be able to deduct PAC contributions from an employee's pay because under New York Law there may be a prohibition against deducting monies for this reason.

(GC Exh. 16, pp. 2-3). Nowhere in its letter to the Regional Director does Respondent even mention workers' compensation, leaves of absence, minimum wage, or any of the other questions Respondent claimed were presented to the Union on June 26.²³ Further, nowhere in its letter to the Regional Director does Respondent mention that the Union failed to address Respondent's concerns. Remarkably, Weinberger, who prepared Respondent's submission to the Regional Director, was present at the June 26 bargaining meeting. Thus, the omission here was not the result of a miscommunication or incomplete communication between Counsel and his client. Respondent's entire defense to the bad faith bargaining allegation revolves around the litany of concerns and questions allegedly raised by Kloeber on June 26, and the Union's alleged failure to respond. It is suspicious that that defense was not worthy of the Regional Director's attention during the investigation of this matter.

Additionally, Weinberger's and Kloeber's testimony about the June 26 bargaining meeting, when considered in the context of undisputed facts in the record, is inherently suspect. Respondent would have

²³ The first concern Respondent mentioned in its letter, that it did not want to be in a position where employees are required to pay money, was not mentioned by even Respondent's witnesses during the hearing. (Tr. 662:9-667:11; 720:24-721:20). To the contrary, Kloeber asserted that his "concern was the HR portion of it." (Tr. 666:21-22). Regarding the second concern Respondent mentioned in its letter, that check-off becomes difficult if an employee does not work a complete period, the parties are in agreement that Kloeber, at some point, made that or a similar remark. (Tr. 557:23-558:8). Gonzalvo testified that he addressed Kloeber's concern regarding turnover at the Bronx store and the possibility that an employee would leave before the end of a month by extending the union security clause trigger point from 31 days to 90 days. (Tr. 567:6-20).

us believe that, until June 26, Kloeber did not understand the implications of union security and dues check-off because, until that point, those proposals had not been worth discussing. In this regard, Respondent emphasizes that the RWDSU proposed an illegal union security provision. But there is no dispute that the RWDSU, as far back as October 2013, had added the phrase, “or the date of its execution, whichever is later,” to its proposed union security clause, thereby addressing Respondent’s legality concern. (“Union Proposal: October 22, 2013,” Joint Exh.). Further, Weinberger and Kloeber admit that, during negotiations with the RWDSU, the discussion of union security continued after the RWDSU addressed Respondent’s legality concern, and included matters beyond the legality of the RWDSU’s proposal. (Tr. 680:20-21; 709:17-24; 710:25-711:1). Respondent stresses further that the Union’s initial, comprehensive contract proposal, first received by Respondent on June 17, served as the catalyst for Kloeber’s reaction to union security and dues check-off on June 26. But the Union’s June 17 union security and dues check-off proposals are substantively *identical* to those put forth by the RWDSU. (*Compare* “Union Proposal: October 22, 2013” *with* 6.17.14 CBA, Joint Exh.). It is simply not believable that, for nearly a year of bargaining, Kloeber remained ignorant of the meaning of union security and dues check-off, and felt no need to ask the questions that so burned inside him on June 26.²⁴

Respondent also submits, in essence, that it would have been a waste of time to discuss union security and dues check-off prior to June 26, because Gonzalvo informed Weinberger and Kloeber, on May 1, that he would revise the RWDSU’s bargaining proposals, including those on union security and dues check-off. (Tr. 657:11-18; 713:22-24; 714:5-6). But Gonzalvo’s commitment to modifying the RWDSU’s proposed collective-bargaining agreement presented Respondent with an opportunity to discuss the changes it wanted to see. Indeed, the evidence suggests that Respondent seized that opportunity on a number of subject matters. For example, in its June 17 proposal, the Union accepted some or all of Respondent’s proposed contract language on the visitation rights of Union personnel, Respondent’s obligation to provide the Union with information on bargaining unit employees,

²⁴ Kloeber testified in this regard that “Chernobyl” went off on June 26 when he learned what it would mean to have a contract with union security and dues check-off. (Tr. 662:19; 664:13).

management rights, shift- and lunch-breaks, recall rights, and leaves of absence. (*Compare* 6.17.14 CBA with “Company’s Response: 10/1/13” and “Company’s Proposal (11/21/13),” Joint Exh.). It is not plausible that Local 338 made such significant movement of its own accord, in the absence of discussion with Respondent. That is simply not how collective-bargaining works. It is much more likely that Gonzalvo listened to the thoughts and concerns of Respondent on at least some of the aforementioned subjects, and responded accordingly. It is inherently implausible that Gonzalvo’s commitment to revising the RWDSU’s bargaining proposals was a hindrance to Respondent with regard to the subjects of union security and dues check-off, but not with regard to any other subject under discussion.

Finally, it is not believable that the Union, given its extensive effort to reach agreement on a first contract, would simply fail to respond to Kloeber’s questions. In this regard, consider the significant movement the Union made during the course of its negotiations with Respondent. In its initial, June 17 proposal, the Union accepted Respondent’s language on a number of subjects, including management rights and Union visitation. As of July 9, the date of its second proposal, the Union made additional movement on: performance of bargaining unit work by non-unit employees, posting of Union notices at the Bronx store (withdrawn), holding meetings on an as-needed basis (withdrawn), raises, grievances, and health and safety. (*Compare* 6.17.14 CBA with 7.9.14 CBA and “Company’s Response: 10/1/13,” “Company’s Proposal (11/21/13),” Joint Exh.). In its third proposal, dated July 17, the Union moved even further, accepting much or all of Respondent’s language on the performance of bargaining unit work by non-unit employees, the management right to subcontract, changing an employee’s work schedule, raises, recall rights, no strike, severance pay (withdrawn), and paid-time off for part-time employees (withdrawn). (*Compare* 7.17.14 CBA with 7.9.14 CBA and “Company’s Response: 10/1/13,” “Company’s Proposal (11/21/13),” “7/9/14 Employer Proposals,” Joint Exh.).

It is inconceivable that the Union would reflect upon the discussion of all of the aforementioned contract proposals, moving closer and closer to Respondent’s position, yet remain completely silent on the subjects of union security and dues check-off. The Union’s desire to reach agreement on a first contract – and to reach agreement with ample time to inform employees before the August 8 election – is

readily apparent from even a cursory review of the contract proposals and counterproposals. The only plausible explanation for its failure to address Respondent's concerns with union security and dues check-off is that Respondent never raised them.

For all of the foregoing reasons, Respondent's factual recitation should be viewed with skepticism, and rejected for the post-hoc fabrication that it is. Yet Judge Green did not even consider the evidence reviewed above, let alone evaluate it and reject it. Instead, he inexplicably asserted the following:

- "To the extent that there was any discussion of Article 3 [on May 1], which contained union security and dues checkoff clauses, Weinberger indicated that the earlier RWDSU proposal was illegal because it did not give employees the full 31 days before having to become a union member. Gonzalvo stated that he would prepare an alternative to Article 3." (ALJD 2:47-3:4) (Exception 9).
- "During the June 26 meeting, Mr. Kloeber questioned Gonzalvo as to what exactly a union security clause would require. Kloeber raised a number of questions. One issue was whether the Company could be sued if it was forced to discharge an employee who failed to pay union dues. There were other issues raised by Kloeber including his observation that many of his employees were paid the minimum wage and even with a wage increase many, if they had dues deducted from their wages, would still be earning at or below the minimum wage." (ALJD 3:30-39) (Exception 10).
- "The un rebutted testimony was that Gonzalvo replied that these were great questions and that he would get back to them. He didn't." (ALJD 3:40-4:2) (Exceptions 11 and 12).

With regard to the first two points, Judge Green in essence hand-picked a selection of facts, then failed to provide a basis for his selection. For this reason, General Counsel respectfully urges the Board to, unlike Judge Green, evaluate the entire record and make factual findings consistent with the record evidence, or, at least, remand the record to Judge Green with the directive that he consider all relevant evidence in the record.

With regard to the third point, Judge Green is blatantly wrong. Throughout the testimony of Gonzalvo, Anspach, Kloeber and Weinberger, it was clear that the parties were in fundamental disagreement about what was and was not said on May 1 and June 26. To assert that it was un rebutted that Gonzalvo replied "these were great questions" is a complete distortion of the record testimony, and far from the truth. To the contrary, Gonzalvo testified, repeatedly, that the questions and concerns Kloeber claims he raised were never uttered. (Tr. 584:16-19 (stating with regard to Respondent's

counterproposal of July 23 that, to date, Respondent had given no explanation for not agreeing to the proposed union security and dues check-off clauses); 587:25-586:2; 592:16-21 (stating “no” in response to the question of whether Respondent had at any point informed the Union why it was rejecting union security and dues check-off); 626:9-10 (testifying with regard to the questions Kloeber allegedly raised that “there was no discussion on it”)).

In conclusion, because Judge Green failed to articulate his rationale for finding that Respondent, on June 26, posed a series of questions and concerns regarding union security and dues check-off, and that the Union never responded to those questions and concerns, the General Counsel respectfully asks the Board to revisit Judge Green’s hollow, generalized credibility resolutions, and to examine the entire record.²⁵ That examination, for the reasons articulated above, will lead to the conclusion that Respondent’s questions and concerns regarding union security and dues check-off were never raised on June 26, or at any other time before the hearing began.

Exception 13: Judge Green erred in his finding that, “as of the June 26 meeting, the parties had agreed to a 24 cent per hour raise for [the] first year of a contract. (ALJD 3 fn. 3).

On what piece of evidence Judge Green relied, documentary, testamentary or otherwise, in asserting that the parties had agreed as of June 26 to a \$0.24 per hour raise for the first year of the contract, is a complete mystery. No witness testified to this fact, and no document supports this finding. It follows, then, that Judge Green’s subsequent reliance on the phantom \$0.24/hour wage agreement is flawed. In calculating employees’ take-home pay following a \$0.24/hour raise, after factoring in union dues, Judge Green found that some employees “would have incurred a net loss if they had to pay union dues.” (ALJD 3 fn. 3). Judge Green seemingly relied on the gravity of the outcome of his calculations – a loss in pay – to support his conclusion that Respondent must therefore have voiced a concern, on June 26,

²⁵ Note that, with regard to the substance of the July 9 bargaining meeting, Judge Green seemingly credited General Counsel’s witnesses over Respondent’s witnesses. In this regard, he found that “Anspach pressed Weinberger as to why the Company would not agree [to union security or dues check-off].” (ALJD 4:19-20). That finding came solely from the testimony of Union witnesses Anspach and Gonzalvo, as well as Anspach’s notes of the July 9 meeting. (Tr. 348:3-5; 576:23-24; GC Exh. 10). Judge Green did not explain why he made the drastic transition from discrediting the General Counsel’s witnesses to crediting them. While the General Counsel certainly does not except to this particular credibility resolution, the General Counsel submits that the unexplained inconsistencies in Judge Green’s decision provide still more reason for the Board to review this entire record anew.

about the effect of union dues on minimum wage employees. But the wage proposal as of June 26 was for a \$1.00/hour raise, far higher than \$0.24/hour. The very premise on which Judge Green relied in making his calculations is therefore incorrect. It follows that Judge Green's assumption, that Respondent on June 26 raised a concern about the effect of union dues on minimum wage employees, is unfounded.²⁶

Contrary to Judge Green's baseless finding regarding agreement on a \$0.24/hour wage increase, the contract proposals under consideration as of June 26 show that the Union proposed a \$1.00/hour increase upon ratification, a \$1.00/hour increase one year after ratification, a \$1.00/hour increase two years after ratification, and a \$0.35/hour increase upon completion of the probationary period. (6.17.14 CBA, Joint Exh.). Further, no witness testified to reaching an agreement on wage rates prior to, or on, June 26. Turning again to the documentary evidence, the Union's July 9 and July 17 proposals show further that, after the June 26 meeting, far from having reached an agreement on wages, the Union continued to modify its wage proposal. In its July 9 proposal, the Union adjusted its demand for the ratification increase to \$0.75/hour, and adjusted its demands for increases in subsequent years, and after probation, to \$0.25/hour. In its July 17 proposal, the Union adjusted its demand for the ratification increase still further, to \$0.50/hour. Perplexingly, neither party, at any point, proposed a \$0.24/hour wage increase, the amount upon which Judge Green inexplicably settled.

Exception 14: Judge Green erred in finding that Board law does not require an opponent to a proposal on a mandatory subject of bargaining to "justify or offer a reason for its opposition." (ALJD 13:50-14:1).

Judge Green's assertion that there is "no other type of mandatory subject contract proposal that would require, as a matter of law, that the proposal's opponent justify or offer a reason for its opposition" (ALJD 13:50-14:1) reflects a misunderstanding of the meaning of bargaining in good faith, and a misreading of Board law. Although Judge Green is correct that § 8(d) of the Act does not compel agreement or the making of a concession, he has apparently lost sight of the fact that § 8(d) revolves

²⁶ Far more telling is the fact that the meager \$0.25/hour increase to which the Union eventually acceded, on July 24, was never a proposal presented by the Union, but has since the outset of the Union's negotiations with Respondent been Respondent's demand. It is disingenuous for Respondent to claim it has been concerned since June 26 with its employees falling below the minimum wage, when Respondent's refusal to adjust its wage proposal is just as much to blame for that possibility as are union dues.

around the concept of meeting *and* conferring *in good faith* with respect to wages, hours and other mandatory subjects of bargaining. Thus, the statutory language itself places upon Respondent the requirement that it discuss mandatory subjects of bargaining. It would be a distortion of the concepts “confer” and “good faith” to conclude, as Judge Green did, that a bargaining proposal on a mandatory subject may be rejected without reason, or without “much of a reasoned reason.” (ALJD 13:50). Judge Green has ignored not only the plain meaning of “to confer,” but also extensive Board law on the foundations of good faith bargaining.

“[I]t has often been reiterated that the Act establishes a duty ‘to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement.’” *Palestine Bottling Co.*, 269 NLRB 639, 644 (1984) (citing *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 213 (5th Cir. 1960)). Further, a “failure to define, explain, or advocate [a] position” is an indication of a “lack of good faith.” *Id.* at 645. Stated somewhat differently, “more than plodding mechanically through the forms of collective-bargaining and ‘a willingness to enter upon a sterile discussion of union-management differences’ are necessary to satisfy [the “confer in good faith”] stricture of the Act.” *Preterm, Inc.*, 240 NLRB 654, 671 (1979) (internal citation omitted). *See also Sparks Nugget, Inc.*, 298 NLRB 524, 527 (1990) (conduct that suggests a party is not bargaining in good faith includes, “a refusal to budge from an initial bargaining position, *a refusal to offer explanations for one’s bargaining proposals* (beyond conclusional statements that this is what the party wants), and a refusal to make any efforts at compromise in order to reach common ground”) (emphasis supplied); *Barry-Wehmiller Co.*, 271 NLRB 471, 472 (1984) (overturning administrative law judge’s decision that employer bargained in bad faith, finding that employer, among other things, provided explanations for its bargaining posture); *Irontiger Logistics, Inc.*, 359 NLRB No. 13, slip op. at 3 (2012) (aff’d after *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014) at 362 NLRB No. 45 (2015)) (finding with respect to a request for presumptively relevant information that the duty to bargain in good faith “requires the employer to respond promptly with its reasons for not providing the

information”). In sum, contrary to Judge Green’s assertion, the statute and Board law require more than an unexplained rejection for matters categorized as mandatory.²⁷

Exception 15: Judge Green erred in concluding, with regard to Respondent, that “the evidence in this case shows that the parties bargained in good faith.” (ALJD 15:42).

In addition to the strictures set forth above with regard to conferring in good faith, the Board requires that an employer’s opposition to union security and dues check-off “reflect a legitimate business purpose.” *CJC Holdings, Inc.*, 320 NLRB 1041, 1046 (1996) (citing *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1165 (4th Cir. 1976)). Respondent gave no justification for its rejection of union security and dues check-off, let alone a legitimate business reason. Further, even when a “legitimate business purpose” is provided, if an employer’s overall conduct suggests “its opposition to the dues checkoff seems to be an attempt to frustrate the bargaining process,” the requirements of § 8(d) have not been met. *Id.* at 1047.

Under this precedent, there is ample reason to conclude that Respondent has bargained in bad faith, in violation of § 8(a)(5) and (1) and § 8(d) of the Act. First, as stated above, Respondent has not provided any reason for rejecting union security and dues check-off provisions. Instead, when pressed for an explanation or justification, Respondent insisted that it does not have to agree to union security or dues check-off. Thereafter, Respondent informed the Union, with regard to dues check-off, that, “the Union is aware that many employers do not wish to get involved in the check-off of dues for many reasons, including, but not limited to, that they do not want to be responsible for checking-off dues and the issues that arise with checking off dues.” (*Email from Weinberger to Anspach*, 7.30.14:11:39 p.m., Joint Exh.). This vague generalization is far from sufficient to meet the requisite “legitimate business purpose.” Moreover, opposition to filling the payroll function of automatically deducting dues “is not a legitimate business purpose. Checking off union dues generally imposes no burden on an employer.” *CJC Holdings, Inc.*, 320 NLRB at 1047 (citing *H.K. Porter Co.*, 153 NLRB 1370 (1965)). Respondent’s

²⁷ Judge Green’s conclusion, that it was sufficient for Respondent to state that it does not have to agree to union security or dues check-off, is more appropriate for permissive subjects of bargaining. If his conclusion were correct, there would be no distinction between a mandatory and a permissive subject.

explanation of its rejection of union security, “I am sure the Union is aware of the reasons why employers have not agreed to union security clauses that have been proposed by the Union,” is similarly vague and therefore insufficient.

Consider Respondent’s justification clause by clause. First, “the Union is aware that many employers do not wish to get involved in the check-off of dues.” Whether or not the Union, in its experience, has encountered opposition to dues check-off does not alleviate Respondent of its obligation to communicate a legitimate business reason for rejecting those provisions, or of its obligation to bargain in good faith. A hypothetical “many employers” and their feelings on dues check-off shed no light on Respondent’s position. Further, simply not wishing to “get involved” in the dues check-off process, without articulating why, is hardly a legitimate basis on which to reject dues check-off. Finally, as stated above, the Board has already rejected an employer’s reluctance to enter the dues collection business as a legitimate business reason. *CJC Holdings, Inc.*, supra.

With regard to union security, again, the Union’s “aware[ness] of the reasons why [hypothetical] employers have not agreed to union security clauses” is irrelevant. Respondent has an obligation to articulate *its* reason for not agreeing to the Union’s union security proposal.

Subsequent communications Respondent sent the Union fail to cure these deficiencies. Two days later, Respondent informed the Union that it had rejected its proposals on union security and dues check-off because, “there are union contracts without dues check-off” and “there are contracts without the union security provisions proposed by the Union.” (*Email from Weinberger to Anspach*, 8.1.14:6:56 p.m., Joint Exh.). How the existence of contracts without union security and/or dues check-off clauses, between other employers and other labor organizations, helps explain Respondent’s opposition to requiring bargaining unit employees at the Bronx store to join the Union, and to agreeing to automatic deduction of union dues, is a mystery. Respondent utterly failed to articulate its rationale for rejecting the union security and dues check-off clauses proposed by the Union, and thereby completely halted the collective-bargaining process. With no substantive response to consider, the Union was left with no understanding

of how to modify its union security and dues check-off proposals.²⁸ Moreover, because union security and dues check-off were the only remaining items on the bargaining table, the Union was left with no possibility of achieving a first contract.²⁹ In essence, Respondent orchestrated the Union's failure. Such conduct is certainly not in line with § 8(d) or 8(a)(5) of the Act.

In addition, Respondent's overall conduct suggests that its primary goal was to avoid reaching agreement on a first contract. In this regard, in addition to the above hollow communications, Respondent provided the Union with minimal contract language; made no concessions and miniscule movement at the bargaining table; put forth little effort to continue discussions, and frustrated the Union's attempts to reconvene; and repeatedly communicated to employees that they have gone more than a year without raises because of the Union.

Regarding the provision of proposed contract language and movement at the bargaining table, a thorough examination of all bargaining proposals in this record shows that the vast majority of movement toward agreement was entirely one-sided, and made by the Union.³⁰ In concluding that Respondent

²⁸ Had Respondent actually expressed a concern about liability, there could have been discussion of an indemnification clause, for example. Similarly, had Respondent actually expressed a concern about minimum wage employees, there could have been discussion of delaying payment of union dues or of altering the dues structure.

²⁹ Particular attention should be paid to the fact that this is a case in which the parties are negotiating for a first contract. "[T]he Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith." *APT Medical Transp., Inc.*, 333 NLRB 760 fn. 4 (2001). Judge Green made no mention of this fact.

³⁰ For example, in its initial comprehensive proposal, the Union accepted Respondent's language on Union access to the Bronx store, on Respondent's obligation to provide the Union with information on bargaining unit employees, on the majority of Respondent's proposed management rights (disagreeing only with Respondent's proposal that it be allowed to subcontract), on the duration of employee breaks and the status of breaks as unpaid, on the duration of an employee's recall rights in the event of layoff, and on the duration of leaves of absence. By July 9, the Union had agreed, among other things, to withdraw its proposal that it be permitted to post notices at the Bronx store, to withdraw its proposal that the Union and Respondent meet on an as-needed basis, to withdraw its proposal that part-time employees be entitled to all contract benefits, to decrease its wage proposal, to the majority of Respondent's proposed grievance and arbitration language (disagreeing only with Respondent's proposed timeline for the filing and appeal of a grievance), and that it will not picket. On July 17, the Union made additional adjustments in Respondent's favor, including to the proposed language regarding the performance of bargaining unit work by non-unit employees, Respondent's right to subcontract, Respondent's ability to change employee schedules, wage increases, and recall rights. The Union accepted in full Respondent's no-strike/no-lockout proposal. In its July 23 response, Respondent moved not even an inch in the Union's direction. To the contrary, it added a clause providing that it be permitted to continue its practice of allowing "owners, managers, and supervisors" to perform bargaining unit work; increased the time other non-unit personnel may perform unit work from five days to ten days; rejected the Union's proposal for a bulletin board at the Bronx store; rejected the Union's proposed union security and dues check-off provisions; expanded the circumstances under which it may change an employee's schedule; rejected the Union's wage proposal and held firm to its proposed \$0.25/hour wage increase; and rejected language granting more senior employees a higher rate of accrual of sick leave. The next day, the Union conceded.

bargained in good faith, Judge Green placed great emphasis on the fact that the Union and Respondent had “reached agreement on all subjects except for the union dues/checkoff provisions” and on the fact that Respondent had agreed to “some wage increases and a grievance/arbitration procedure.” (ALJD 15:44-47). In doing so, he completely removed this case from the context in which it arose, and gave Respondent credit for progress reached at the bargaining table where no credit is due. As a review of the iterations of the Union’s proposed collective-bargaining agreement shows, it is due entirely to the Union, not Respondent, that significant progress was made at the bargaining table. With regard to the grievance and arbitration procedure, Judge Green failed to mention that the *Union* acceded to *Respondent’s* proposed grievance process, including to two arbitrators hand-picked by Respondent. (*Compare* “Employer Response 10.1.13” *with* 7.9.14 CBA, Joint Exh.).

Additionally, although Respondent indicated a willingness to continue the discussion of union security and dues check-off, it ultimately left the Union to negotiate with itself. In this regard, Respondent refused to provide a reason for its continued rejection of those clauses, and failed to provide a counterproposal. Instead, it suggested that the Union “present other alternatives.” (*Email from Weinberger to Anspach*, 8.3.14:12:29 p.m., Joint Exh.). On what grounds the Union was to base “other alternatives” Respondent left to the Union to guess. Simply expressing a willingness to discuss fundamental contract proposals like union security and dues check-off, without helping to lay the foundation for that discussion, is insufficient to meet the requirements of § 8(d) of the Act. Stated somewhat differently, voicing a commitment to engage in bargaining is not, in and of itself, good faith collective bargaining. “Mere willingness to talk does not constitute a willingness to bargain collectively.” *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 88 (1995).

Further, Respondent frustrated the Union’s attempts to arrange a time to discuss Respondent’s opposition to union security and dues check-off. On July 28, the day by which Weinberger informed the Union he would provide his client’s response to the Union’s July 24 package proposal, Weinberger

insisted he needed a day or two more.³¹ When the Union thereafter suggested scheduling a conference call, within Weinberger's newly-established deadline, Weinberger expressed a willingness to "squeeze something in." (*Email from Weinberger to Anspach*, 7.31.14:8:30 p.m., Joint Exh.). Jumping at this limited opportunity, the Union made itself available for the *entire day* on August 1. However, Respondent blatantly ignored the Union. When thereafter informed that the Union had filed an unfair labor practice charge, Respondent defended that the Union had failed to provide a call-in number. At what point such a service became necessary for the parties to communicate telephonically, and at what point making such arrangements became the Union's responsibility, is conspicuously absent from this record. Given that most, if not all, twenty-first century office telephones and cellular telephones allow for the placing of a conference call, Respondent's assertion that bargaining did not continue on August 1, because the Union failed to arrange a phone conference service, seems particularly indicative of its attempt to frustrate the collective-bargaining process. Three days later, and with only about three hours left to the regular business day, Respondent offered to "have a conference later today." (*Email from Weinberger to Anspach*, 8.4.14:2:38 p.m., Joint Exh.). Notably, Respondent did not state when "later today" it was available. Finally, with thirty-two minutes' notice, Respondent gave the Union a single hour of availability. Significantly, at no point during this exchange did Respondent propose using a phone conference service; a tacit admission that no such service was needed, then or three days before, in order for the Union and Respondent to communicate telephonically.

Finally, the blame Respondent placed on the Union for lack of wage increases, even pulling employees aside to inform them that, if it was not for the presence of the Union, wage increases would

³¹ Respondent's suggestion that the Union's delay in committing to writing its July 24 package proposal is to blame for Respondent's extension of its July 28 deadline is unavailing, for multiple reasons. First, Respondent had the contract language in writing as of July 23, the date it shared its response to the Union's July 17 comprehensive proposal. The Union accepted all of Respondent's counterproposals; therefore, there was no new language for the Union to put into writing. Second, Respondent's witnesses claim that Kloeber informed Weinberger he needed to see the Union's package proposal in writing, prompting Weinberger to request from the Union written confirmation of the July 24 phone call. (Tr. 684:2-5). But the date on which Weinberger requested a written account of the Union package proposal, July 25, precedes the date Weinberger stated he first contacted Kloeber regarding the Union's package proposal by three days. (*Compare Email from Weinberger to Anspach*, 7.25.14:4:52 p.m., Joint Exh. *with* Tr. 768:9-11). The delay thus has nothing to do with the timing of the Union's response to Respondent's request for a written account of its package proposal, and everything to do with Weinberger's decision to allow days to elapse before sharing the Union's package proposal with his client.

have been granted every quarter, shows that Respondent was not bargaining in good faith, but rather attempting to frustrate the collective-bargaining process. With a decertification election on the horizon, Respondent made repeated attempts to influence employees' votes in its favor, and thereby eliminate its obligation to collectively bargain at all.

The foregoing bargaining history must be framed by the pending decertification petition, a fact to which Judge Green gave very little notice. By the June 26 bargaining meeting, the Union had modified its proposed union security clause in Respondent's favor. Weinberger responded that he would get back to the Union, but, one day later, a decertification petition was filed, and nothing further was said about union security or dues check-off, until Respondent summarily rejected both proposals, on July 9. Notably, the July 9 meeting occurred only two days after Respondent and the Union had agreed to schedule a decertification election for August 8. Subsequently, Respondent provided its only comprehensive counterproposal to the Union's proposed collective-bargaining agreement, making not a single concession, and not even the slightest movement in the Union's favor. Nonetheless, within a day, the Union responded to Respondent's counterproposal, and acceded to *all* of Respondent's requests, thereby making the final movement needed to reach agreement on a first contract. The only items the Union refused to adjust (indeed, because it had been given no basis on which to adjust them) were union security and dues check-off. Thereafter, as discussed above, it quickly became apparent, as the days remaining until the August 8 election grew smaller in number, that Respondent was not committed to further discussion. On August 8, without a contract, and after hearing that the Union is to blame for stagnant wages, employees cast their ballots in the decertification election.

In sum, the evidence shows that Respondent held firm to its blanket rejection of union security and dues check-off, and evaded the Union as the decertification election drew near, because anything more was likely to result in a first contract. In this context of significant concessions on the part of the Union, Respondent knew that, after July 24, its only remaining weapon was to continue to reject union security and dues check-off – provisions that are essential to the Union's ability to perform its function as

employees' exclusive collective-bargaining representative, and therefore of supreme importance to the Union.

Comparing these facts with those the Board considered in a similar case, *Phelps Dodge Specialty Copper Products Co.*, 337 NLRB 455 (2002), the bad faith bargaining conclusion here becomes inescapable. In *Phelps Dodge*, a case in which the Board, in agreement with the administrative law judge, determined there had been no bad faith bargaining, the union and employer had discussed the issue of dues check-off at length, for about two to three hours on one occasion, and again at a subsequent bargaining meeting. *Id.* at 455-456. During those discussions, the employer explained its opposition to the requirement that employees pay union dues, and informed the union that some employees had made known their objection to joining the union. *Id.* at 455 fn. 1. Additionally, the employer presented the union with a counterproposal, suggesting that employees be allowed to revoke their check-off authorization at any time. *Id.* at 456. The Board noted further that the employer had made “numerous concessions during negotiations” on issues as significant as wages, as well as other matters, and had proposed that the parties adopt their expired contract, which contained a union security clause. *Id.* at 455 fn. 1. As discussed extensively above, no such factors are present here. *See also APT Medical Transp., Inc.*, 333 NLRB 760, 770 (2001) (where employer stated it was not agreeing to union security “at this time,” and later explained its hesitation was based on a concern that union security might give a minority of union members power to ratify the contract or impose union dues on nonmembers, Board agreed employer had not “evinced an intent not to reach agreement and to produce a stalemate in order to frustrate bargaining”); *National Steel and Shipbuilding Co.*, 324 NLRB 1031 (1997) (allegedly regressive union security proposal found not to be an effort to frustrate reaching final agreement, where many other contract proposals remained open at the time it was proposed, and the employer had communicated to the union that new hires had questioned existing union shop contract language).

Exception 16: Judge Green erred in failing to consider documentary and other evidence that shows that, even if Respondent posed questions about union security and dues check-off, its overall conduct evinced an attempt to frustrate the collective-bargaining process, and is indicative of a refusal to bargain in good faith.

Even if Judge Green's factual assertions regarding the substance of the May 1 and June 26 bargaining meetings are left untouched, the conclusion that Respondent was attempting to frustrate the collective-bargaining process is still warranted. As set forth above, Judge Green either misrepresented or failed to consider critical record evidence, and misinterpreted Board law on the concept of conferring in good faith; therefore, the General Counsel respectfully requests that the Board review all that Judge Green either distorted or ignored. Such a review will lead to the conclusion that Respondent, even under its version of what occurred at the May 1 and June 26 bargaining meetings, was trying desperately, and in bad faith, to avoid reaching agreement on a first contract.

In this regard, it is especially dubious that Respondent failed to put its concerns in writing at any point, but rather emailed the Union vague, general explanations for its rejection of union security and dues check-off; failed to repeat its concerns, even when asked repeatedly and even when the identity of the Union's chief negotiator changed; and, as discussed above, repeatedly thwarted the Union's attempts to have a telephone discussion of Respondent's concerns. When the issues of union security and dues check-off were the only two remaining items on the bargaining table, and a decertification election was on the horizon, Respondent refused to articulate, in a manner anywhere near as specific as it did at trial, its justification for rejecting the Union's proposals. This refusal was demonstrably intentional, done in an effort to avoid executing a contract before employees cast their ballots and, Respondent undoubtedly hoped, voted out the Union. Further, although Union Counsel Anspach repeatedly asked Respondent to explain its position, in numerous emails to Weinberger – essentially begging Respondent for some sort of reply to which the Union could formulate a response – Weinberger remained calculatingly vague and non-committal. Weinberger's responses to Anspach are particularly revealing of Respondent's intentions here, as Weinberger, who was present for the June 26 bargaining meeting and therefore privy to the discussion that occurred on that day, knew Anspach was not on similar footing. Yet rather than simply

repeat Kloeber's questions and concerns, or at the very least inform Anspach that he should speak to Gonzalvo, Weinberger continued to provide elusive responses, with only days to go before the August 8 election.

Finally, none of Respondent's concerns regarding the mechanics of dues check-off should serve as a barrier to agreeing to the principle of union security and the principle of automatic dues deduction. In other words, answering Kloeber's questions was not a prerequisite to agreeing to union security and dues check-off. To the contrary, save for an indemnification clause to address Kloeber's concern that he not be the one who has to "separate" an employee, the remainder of Kloeber's questions are appropriately answered extra-contractually. What happens to union dues when an employee leaves mid-month, or goes on workers' compensation, or takes an extended leave of absence, has no impact on the substance of the Union's proposed union security and dues check-off language. Demanding that such mechanical, rather than substantive, concerns be answered before agreeing to reconsider a rejection of union security and dues check-off is a thinly veiled attempt to frustrate reaching agreement on a first contract, particularly when agreement has been reached on all other contract items. Further, Respondent's asserted concern with the impact Union dues would have on employee earnings is, in this context, disingenuous. The \$0.25/hour wage increase was Respondent's proposal, not the Union's. The Union made repeated attempts to find middle ground between its wage proposal and Respondent's, to no avail; Respondent refused to budge.

Respondent's actions are a perfect illustration of the logic underlying the obligation to meet and confer in good faith. By belligerently refusing to repeat its justification for rejecting union security and dues check-off, or even, at the very least, inform Anspach that Kloeber had articulated his concerns to Gonzalvo, Respondent made it impossible to engage in collective bargaining on a mandatory subject, and thereby impossible to reach agreement on a first contract. Respondent's conduct is a blatant violation of § 8(a)(5), 8(a)(1) and 8(d) of the Act, regardless of how the facts are framed.

Exception 17: Judge Green erred in failing to recommend as the appropriate remedy that Respondent bargain in good faith with the Union.

For all of the reasons discussed above, the General Counsel respectfully requests that Respondent be ordered to bargain in good faith with the Union. It was in error for Judge Green to fail to do so.

Respectfully submitted,



Moriah H. Berger
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

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