

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

**EYM KING OF KANSAS, LLC
D/B/A BURGER KING®,**

AND

**WORKER'S ORGANIZING COMMITTEE—
KANSAS CITY,**

§
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§
§

Nos.: 14-CA-148915
14-CA-150321
14-CA-150794

**BRIEF IN SUPPORT OF THE EXCEPTIONS OF EYM KING OF KANSAS, LLC
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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ORAL ARGUMENT REQUESTED, PURSUANT TO NLRB RULES & REGULATIONS § 102.46(I)

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WORKER’S ORGANIZING COMMITTEE—	§	
KANSAS CITY,	§	

INTRODUCTION

For nearly three years, with the support of a number of unions, fast food workers across the country have embarked on a series of one-day, hit-and-run work stoppages to promote their demand for a \$15/hour minimum wage. Under nearly seven decades of precedent from the courts and the Board, these strikes constitute unprotected intermittent work stoppages, for which an affected employer is permitted under the Act to administer discipline to participating employees who fail to show up for work. In this case, uniformly applying its neutral absence control policies, EYM gave disciplinary write-ups to six employees who participated in one such strike on April 15, 2015, and failed to report for work at one of its Kansas City Burger King® restaurants. As a result, the Union filed an unfair labor practice charge, alleging that the discipline violated § 8(a)(1) of the Act. The Union also filed a separate charge alleging that when EYM had acquired the restaurant from the previous franchisee approximately three weeks before the strike, EYM violated the Act by failing or refusing to hire an employee of the previous franchisee who was a union organizer.¹

¹ The Union and the General Counsel also made other allegations in the *Complaint*, which were either later withdraw by the General Counsel or were dismissed on the merits by the ALJ. Accordingly, those additional allegations will not be addressed in this *Brief*.

Following a three-day hearing, in disregard of the long-standing unprotected intermittent work stoppage precedent, the ALJ found that the April 15th strike constituted protected concerted activity and, therefore, the discipline administered to the six employees was unlawful. The ALJ also disregarded the legitimate non-discriminatory reasons for EYM's decision not to hire the previous franchisee's employee and found that decision, too, to be unlawful.

Because the ALJ's decision is factually and legally flawed in numerous respects and, in some instances, the ALJ's findings are directly contradicted by record evidence, EYM excepts to the ALJ's decision.

STATEMENT OF THE CASE

A. EYM'S BUSINESS:

EYM is a Burger King® franchisee. On March 26, 2015, it acquired and assumed operation of a number of Burger King® restaurants in Missouri, including Kansas City. Among the restaurants acquired was one at 1102 East 47th Street.² ALJD, p. 3/5-9.³ The previous franchisee from whom EYM acquired the restaurants was Strategic Restaurants Acquisitions Company II, LLC d/b/a Burger King® ("Strategic"). *Id.*

B. THE EMPLOYEES:

Reda Hayes had been the General Manager of the 47th Street restaurant when it was operated by Strategic. When the restaurant was acquired by EYM, Hayes was hired to remain in the same capacity. ALJD, p. 3/20-21. Other em-

² In this *Brief*, the restaurant will be referred to as "the 47th Street restaurant." During the hearing, the restaurant was often referred to by the General Counsel and some of the witnesses as the "Troost Street restaurant," as the restaurant is located at the intersection of 47th Street and Troost Street.

³ References to the ALJ's decision are by page number, with line numbers following the "/" mark.

ployees who worked as cashiers, cooks, or crew members during Strategic’s operation of the restaurant included Terrance Wise, Kashanna Coney, MyReisha Frazier, Myesha Vaughn, Suzie Camillo,⁴ West Humbert, and Osmara Ortiz. As General Manager for EYM beginning March 26, 2015, Hayes had sole responsibility for hiring. She hired Coney, Frazier, Vaughn, Camillo, Humbert, and Ortiz (in addition to other individuals); but, as explained below, decided not to hire Wise.

C. THE UNIONS:

The Workers’ Organizing Committee (“WOC”) is a national labor organization “known on the national level as ‘Fight for \$15.’” *Id.*, p. 4/5. WOC has been responsible for coordinating nationwide strikes in a campaign to establish a \$15 minimum wage for fast food workers. *Id.*, 7/21-22. The Workers’ Organizing Committee—Kansas City (“WOCKC” or “Union”) is a labor organization which “is a local outpost of the national Workers Organizing Committee.” *Id.*, pp. 2/33-34 and 4/5. With assistance from the WOC, the WOCKC conducts the campaign for higher wages and better working conditions locally. *Id.*, p. 4/5-7. Between November 29, 2012, and April 15, 2015, the WOC conducted the following *eight* intermittent one-day “Fight for \$15” strikes nationally and, with WOCKC’s assistance, *seven* in Kansas City between July 2013 and April 15, 2015. Tr. 96/5-7.

- **November 29, 2012.** See, e.g., <http://www.msnbc.com/the-ed-show/new-yorks-fast-food-workers-strike-why-now>; “Fast-food workers walk out in N.Y. amid rising U.S. labor unrest”. 29 November 2012. Los Angeles Times.⁵

⁴ a/k/a de la Cruz

⁵ The ALJ and Board can take judicial notice of the November strike. See *Whirlpool Corp.*, 216 N.L.R.B. 183, 187 n. 17 (1975) (relying on “news dispatches,” judicial notice taken of the date a strike ended). Judicial notice may be

Footnote continued on next page

- **July 29, 2013:** Tr. 88/7-22; General Counsel Exhibit (“GCE”) 6.
- **August 29, 2013:** Tr. 83/1 to 84/18; Respondent’s Exhibit (“RE”) 1.
- **December 5, 2013:** Tr. 85/15 to 86/17; RE 2.
- **May 15, 2014:** Tr. 86/8 to 88/6; RE 8.
- **September 4, 2014:** Tr. 89/9 to 90/3; RE 9.
- **December 4, 2014:** Tr. 90/6-14; GCE 4; RE 10.
- **April 15, 2014:** Tr. 90/14-23; GCE 3; RE 23.

D. THE COMMON PLAN FOR THE INTERMITTENT STRIKES:

Labor organizations have spent more than \$10 million underwriting the strikes, seeing the strikes “as a powerful lever to raise pay for low-wage workers nationwide.” GCE 4; Tr. 90/24 to 92/11. With one exception, each of the strikes was a one-day strike, part of a common plan by the Union to achieve its goals. Tr. 92/14 to 93/7 (“Q. The purpose of these periodic strikes that you have is to put pressure on those billion dollar companies to pay higher wages, true? A. Yes, sir”); Tr. 104/9 to 105/9. WOCCK sponsored and called for each of the strikes. Tr. 83/1 to 84/18 and RE 1; Tr. 85/15 to 86/17 and RE 2; Tr. 86/8 to 88/6 and RE 8; Tr. 89/9 to 90/3 and RE 9; Tr. 89/1-8. Each of the strikes is organized in similar fashion. *E.g.*, Tr. 185/1 to 186/8 (strike notices signed in the same fashion); RE 2, 3, 8, 9, 10, and 23 (notices for each strike publicly posted on the Union’s Facebook® page). Each strike includes rallies and events intentionally scheduled at times during the strike day to achieve maximum disruption of restaurant business. Tr. 105/18 to 110/16; RE 2, 3, 8, 9, 10, and 23. Each one-day strike follows the same pattern where participat-

. . . footnote continued from previous page:

taken at any time, *see Fed. R. Evid.* 201(d), even after hearing or on appeal. *E.g.*, *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003).

ing employees turn in a strike notice to their employer on the day of the strike and then return to work the next day with a return to work notice. Tr. 103/16 to 10/8; Tr. 139/1-12; Tr. 139/24 to 140/11; Tr. 225/4-12; GCE 21-23, 25, 26; RE 25.

E. THE APRIL 15TH STRIKE:

The April 15th strike followed the same pattern. The Union provided transportation to the strike, picking up workers and bringing them to a breakfast rally at a local church. Tr. 180/16-25; Tr. 204/10-19. At the breakfast rally, the Union manned booths at which workers could sign strike notices before going to breakfast. *Id.*; Tr. 110/8-22; Tr. 169/13 to 170/7; Tr. 180/4-15; Tr. 181/1-20; Tr. 205/21 to 206/24; GCE 21, 23, 25; RE 25. Even though the Union does not represent EYM's employees (Tr. 78/2-13), it provided strike pay for the April 15th strike. Tr. 162/22-24. After strike notices are signed, the normal practice is for Union agents to turn in the strike notices at each location throughout the city where striking employees work.⁶ Tr. 103/22 to 104/8; Tr. 257/19 to 259/6-12.⁷ Similarly, The Union also orchestrates next-day return to work "walk-ins" lead by Union representatives or agents who present a worker-signed return to work notice. Tr. 103/16-21; Tr. 164/23 to 166/14; Tr. 167/12 to 169/6; Tr. 196/18 to 197/25; GCE 22, 26. Both the strike notices and the return to work notices are drafted by the Union on Union letterhead

⁶ The April 15th strike was not in any way targeted specifically the East 47th Street restaurant (or even EYM), but fast food, gas station, retail workers, and a wide swath of low wage workers, generally. Tr. 105/11-17. Indeed, the strike had been in the planning stages for weeks before EYM ever assumed ownership of the East 47th Street restaurant on March 26, 2015. Tr. 126/10 to 127/13 and Tr. 209/24 to 210/9.

⁷ As explained, below, however, no strike notice was ever provided to Hayes for Humbert, Camillo, or Ortiz for the April 15th strike.

in advance of making them available at the breakfast rally booths on the day of the strike and, except for the address for the location where employees work, the boilerplate language of the generic strike and return to work notices is identical. Tr. 103/16-21; 110/8-22. *See* GC 21, 22, 23, 25, 26; RE 25.

F. HAYES' DISCIPLINE OF THE SIX EMPLOYEES:

Humbert, Camillo, Ortiz, Coney, Vaughn, and Frazier each participated in the April 15th strike. Each had also participated in previous strikes while employed by Strategic at the East 47th Street restaurant. Tr. 125/18 to 126/1; Tr. 127/14-17; Tr. 185/1 to 188/16; Tr. 211 to 214; Tr. 333/3 to 338/6.

Humbert, Camillo, and Ortiz *signed* a strike notice (GCE 21) on the morning of the strike. Tr. 163/4-19; Tr. 169/13 to 170/7; Tr. 171/25 to 172/19; Tr. 180/2-8; Tr. 181/1-18; Tr. 185/12-14; Tr. 193/12-25. Coney, Vaughn and Frazier signed a *separate*, second strike notice. GC 23; RE 25. The uncontradicted evidence established that the Humbert, Camillo, and Ortiz strike notice was never delivered to Hayes. Tr. 172/9-19; Tr. 181/14-18; Tr. 195/21-23; Tr. 206/12-24; Tr. 259/19 to 260/; Tr. 261/4-6 (only *one* notice delivered); Tr. 262/2 to /265/10; Tr. 266/14 to 268/13 (RE 25 is the only photo the Union rep has); Tr. 355/17-24; Tr. 356/5-13. Hayes received the Coney-Vaughn-Frazier notice at 2:30 in the afternoon. Tr. 354/20 to 355/18.⁸

⁸ In footnote 16 of the ALJD, the ALJ claims “Hayes denied receiving the [Coney-Vaughn-Frazier] notice [and] Hayes denied making the notation at the top of the strike notice indicating it was received at 2:30 p.m.” The ALJ then draws an adverse inference regarding Hayes’ credibility from these assertions. However, the ALJ’s predicates are demonstrably false. In fact, Hayes *expressly* acknowledged receiving the Coney-Vaughn-Frazier notice at 2:30 in the afternoon *and* annotating it with the time received. Tr. 355/1-16 (“Q. And did you receive Respondent’s Exhibit 25 at some point on April 15th. A. I did. Q. Approximately when? A. At 2:30 p.m. Q. And how do you know that? A. Because I always write what time they give me the letter on the letter. Q. So up in the upper right-hand corner where that handwriting is, is that your handwriting? A.

Footnote continued on next page

None of the six employees showed up for their shifts (Tr. 353/2-7; Tr. 353/18-22; Tr. 356/14 to 358/6), which left the restaurant five employees short during the peak dinner period. Tr. 358/7 to 359/4. See GCE 34; RE 21.⁹

	6:00	7:00	8:00	9:00	10:00	11:00	11:30	12:00	1:00	2:00	2:30	3:00	4:00	4:30	5:00	6:00	7:00	8:00	9:00	10:00	11:00	12:00	
Frazier						Yellow	Lunch period				Yellow	Dinner Period		Yellow									
Camillo										Lunch period		Yellow	Dinner Period		Yellow								
Humbert												Yellow	Dinner Period		Yellow								
Coney												Yellow	Dinner Period		Yellow								
Vaughn												Yellow	Dinner Period		Yellow								
Ortiz												Yellow	Dinner Period		Yellow								
Strike Notice												Green											

The resulting chaos both during the lunch period (Tr. 353/5 to 354/12) and dinner period (Tr. 359/5 to 360/18) was “drastic,” resulting in poor customer service and numerous customer complaints. Tr. 354/13-18; Tr. 360/19 to 361/4.

Early on the morning of April 16th (Tr. 363/10 to 364/25)—before any of the employees had reported for work (Tr. 365/1-2), and before Hayes had seen any of the employees (Tr. 388/22 to 389/9)—Hayes drafted written *Disciplinary Action Reports* for all six employees (GC 41) in accordance with EYM’s work schedule policy (RE 12), referred to as the “no call/no show” policy. The policy is uniformly enforced, against both management and non-management em-

. . . footnote continued from previous page:

That is my handwriting. Q. What does it say? A. It says ‘Brought 2:30.’”). Accordingly, EYM has *never* claimed it did not receive a strike notice for Coney-Vaughn-Frazier; only for Humbert-Ortiz-Camillo. Accordingly, EYM’s Exception Nos. 13, 14, 30 and 31 should be sustained and the adverse inference of credibility should be rejected. This and other examples discussed herein of the ALJ’s complete disregard of the record and willingness to manufacture “findings” from whole cloth are, simply, astonishing.

⁹ Each of the employees was aware of EYM’s “no call/no show” policy and admittedly failed to comply with it. Tr. 182/19 to 183/1-3; Tr. 208/24 to 209/2; Tr. 353/2-4; Tr. 356/14-15; Tr. 356/16-23; Tr. 357/11-19; Tr. 357/20 to 358/2; Tr. 358/3-6; RE 20 and 66; GCE 36 [Bates No. 005654]; GCE 37 [Bates No. 005717]; GCE 38 [Bates No. 005749].

ployees. *E.g.*, Tr. 247/22 to 248/4; Tr. 289/2-5; REs 39, 41, 43-48, 52, 59, 62, and 63.¹⁰

Because Hayes had not received any strike notice for Humbert, Ortiz, or Camillo, she had no knowledge why those three employees had failed to show up for work the preceding day. Tr. 365/3-14 (“Q. Insofar as you knew, they could have been sitting home watching TV on the 15th. A. Yeah, they could have.”). In fact, one of the employees, Ortiz, *admitted* that *after* the day’s strike activities had ended at 6:00 p.m.,¹¹ rather than reporting to work a short distance away for her 7:00 p.m. shift, *she simply chose to go home*. Tr. 203-205. Thus, the evidence is uncontradicted that Ortiz did *not* miss work on April 15th because she was engaged in any concerted activity—protected or otherwise. She simply decided not to go to work!¹²

G. HAYES’ DECISION NOT TO HIRE WISE:

1. Wise’s Employment With Strategic:

Wise began working as a part time employee for Strategic at the 47th Street restaurant in February 2012. Tr. 404/18 to 405/12; RE 77. He continued to work there as a general crew member through March 25, 2015, when Strategic sold the restaurant. Tr. 30/2-7. At the start of his employment he usually worked the morning shift from 9-5 (Tr. 30/9-13), but later, after quitting his second job, he became available to work weekends and at the time Strategic

¹⁰ See Exception No. 43. The ALJ improperly rejected other exhibits which demonstrate uniform enforcement of the policy.

¹¹ The ALJ also found strike activities had ended at 6:00. ALJD, p. 7/37.

¹² Accordingly, Exception 51 should be sustained.

sold the restaurant Wise was working approximately 35 hours per week on the overnight shift, including weekends. Tr. 120/3-18.¹³

In the spring of 2013, Wise became involved with the Union and the “Fight for \$15” movement, becoming a leading organizer and spokesperson for the Union, both in Kansas City and nationally. *E.g.*, Tr. 33/8-16; ALJD, p. 4/7-15. Wise participated in seven of the intermittent one-day strikes and was active in organizing and promoting them. Tr. 4/17-27.

After becoming involved as a union organizer, beginning in July 2013 Wise and the Union began filing a series of unfair labor practice charges against Strategic whenever Wise or any employee who was involved with the Union received any sort of discipline. *See, e.g.*, GCE 9, 14, 18; RE 73-75.¹⁴ In the process of seeking to divest itself of its restaurants, rather than go to the trouble and expense of litigating the ULPs, Strategic settled them—all with a non-admission of liability provision. *E.g.*, RE 4-6, 73-75. Additionally, following the nearly yearlong string of ULP charges, beginning in or about May 2014, Strategic initiated a policy restricting the ability of managers at the 47th Street restaurant from disciplining any employee who was known to be involved with the Union without first submitting the proposed discipline to Strategic’s corporate human resources department in California for approval. Tr. 322/11 to 323/25; 324/7 to 325/5; Tr. 340/2 to 18. Thereafter, Hayes submitted a number of proposed disciplinary actions; but, never got a response from human re-

¹³ In footnote 9 of the ALJD, the ALJ stated she was unable to find this record reference to the days of the week Wise worked.

¹⁴ Wise had received disciplinary write ups on July 30, 2013 (*see* GCE 9 and RE 73, p. 3), April 21, 2014 (RE 4), May 5, 2014 (RE 5), and May 5, 2014 (RE 6). [Note: The reporter incorrectly listed RE 6 as rejected. Although initially rejected (Tr. 115-17), the ALJ later admitted the exhibit. Tr. 440/23 to 441/21.]

sources. Tr. 340/19 to 341/3; 341/13 to 342/2. Consequently, she eventually gave up submitting proposed disciplinary actions because she concluded it would be a waste of time. Tr. 343/24 to 344/9; 345/4-8.

One particular incident occurred in February 2015. Tr. 401/21 to 404/9. One Sunday in February 2015, a shift manager, Yon Nonnua Cline, was coming on duty when Wise was about to leave. She noticed bulges in Wise's coat and asked what he had in his pockets. Tr. 316/25 to 317/11; Tr. 318/1 to 320/5. Although Wise denied having anything in his pockets (Tr. 318/16-21; Tr. 319/12-13), when Cline patted Wise down she discovered he was attempting to steal a number of hamburgers. When caught red-handed, Wise offered no explanation for his conduct. Tr. 319/20 to 320/2. Cline later reported the incident to Hayes (Tr. 320-321), who then questioned Wise. Tr. 344-349. Again, Wise offered no explanation, "he just put his head down." Tr. 386/13-21.¹⁵ Wise recommended to Strategic that Wise be fired for the attempted theft; but—given the proclivity of Wise and the Union for filing ULPs—with only a month to go before divesting itself of its restaurants, Strategic understandably took no action.

2. Wise's Application for Employment With EYM:

When EYM acquired the restaurant in March 2015, Wise completed an application for employment. GC 42. On the application, he significantly restricted his availability for work. Specifically, whereas he had regularly been working

¹⁵ When cross-examined at the hearing, Wise initially denied any knowledge of the incident. However, in rebuttal—after hearing the testimony from Cline and Hayes—Wise allegedly had vivid recall of the incident and gave a vastly different account of events. He claimed another shift manager had given him permission to take the food and that it was a customary practice. ALJD, p. 5/22 to p. 5/8. The ALJ expressly rejected Wise's version of events. ALJD, p. 6/23-24.

the overnight shift on weekends (Tr. 120/3-18), on his application he indicated he could not work after 5:00 p.m. on Saturdays and could not work at all on Sundays. Tr. 405/21 to 407/9. Thus, by eliminating his availability to work the two overnight weekend shifts he had regularly been working, Wise cut nearly in half his availability to work the 35 hour schedule (Tr. 120/3-18) he had been working. Based on the *combination of* (1) the radical change in Wise's availability for work; (2) a combination of performance issues while Wise was employed by Strategic (Tr. 338/9 to 340/4 and RE 4-6); (3) Wise's attempted theft of food while a Strategic employee (Tr. 348/23 to 349/8); and (4) additional instances of insubordination after Strategic had withdrawn Hayes' authority to directly discipline Wise (Tr. 341/4-12; Tr. 379/13-25; Tr. 381/1-25; Tr. 384/7 to 385/23), Hayes decided not to hire Wise.

Accordingly, on March 26, 2015, Hayes met with Wise in the dining area of the restaurant and informed him of her decision. He said "okay" and left. Tr. 345/24 to 348/22.¹⁶

¹⁶ Once again, Wise gave a vastly different and pejorative account of the conversation. ALJD, p. 9/46 to p. 10/12. The ALJ rejected Wise's account. ALJD, p. 10/29-45.

QUESTIONS PRESENTED

WHETHER THE ALJ IMPROPERLY CONCLUDED THAT THE APRIL 15TH ONE-DAY INTERMITTENT WORK STOPPAGE WAS PROTECTED ACTIVITY, NOTWITHSTANDING THE UNCONTRADICTED EVIDENCE THAT THE IT WAS IN FURTHERANCE OF A COMMON PLAN BY THE UNION AND THE EMPLOYEES.¹⁷

WHETHER THE ALJ IMPROPERLY CONCLUDED HAYES VIOLATED THE ACT BY DISCIPLINING HUMBERT, ORTIZ, AND CAMILLO WHEN THE EVIDENCE IS UNDISPUTED THAT HAYES HAD NO KNOWLEDGE THE EMPLOYEES HAD ENGAGED IN CONCERTED ACTIVITY AND ONE OF THE EMPLOYEES SIMPLY DECIDED NOT TO SHOW UP FOR WORK.¹⁸

WHETHER THE ALJ ERRED IN FINDING A VIOLATION OF THE ACT BASED ON HAYES' DECISION NOT TO HIRE WISE.¹⁹

¹⁷ Relevant to Exception Nos. 13-17, 30-44, 46 and 47.

¹⁸ Relevant to Exception Nos. 17, 30, 31, 46, and 47.

¹⁹ Relevant to Exception Nos. 3-5, 8-12m 18-29, 45, and 47.

ARGUMENT

I.

PARTICIPATION IN THE APRIL 15, 2015, STRIKE WAS NOT PROTECTED ACTIVITY UNDER THE ACT BECAUSE THE WORK STOPPAGE WAS, AS A MATTER OF LAW, AN UNPROTECTED INTERMITTENT STRIKE. ACCORDINGLY, EYM WAS ENTITLED, AS IT DID, TO UNIFORMLY APPLY ITS NEUTRAL ABSENCE CONTROL POLICY TO EMPLOYEES WHO FAILED TO REPORT FOR WORK AS A RESULT OF PARTICIPATION IN THE STRIKE.

The ALJ concluded the April 15th strike was protected activity, not an intermittent strike, and, therefore, EYM's disciplinary write-ups given to the six employees of the 47th Street restaurant violated § 8(a)(1) of the Act. In doing so, the ALJ failed to follow decades of uniform, consistent Supreme Court and Board precedent establishing that intermittent work stoppages pursued by employees or unions to achieve a common plan or purpose are not protected activity because employees do not have the right to "arrog[ate] to themselves] the right to determine their schedules and hours of work." *Honolulu Rapid Transit Co. Ltd.*, 110 N.L.R.B. 1806, 1809 (1954).

A. INTERMITTENT WORK STOPPAGES AS PART OF A STRATEGY TO PURSUE A COMMON PLAN OR PURPOSE ARE NOT PROTECTED:

Both the courts and the Board have long held that intermittent work stoppages are not entitled to protection under the Act and "are merely unprotected activity that may legally be the cause of discharge or discipline by the employer." *Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters*, 894 F.2d 36, 40 (2d Cir. 1990), citing *NLRB v. Robertson Indus.*, 560 F.2d 396, 398-99 (9th Cir. 1976). "The vice in such a strike derives from two sources. First [such work stoppages seek] to bring about a condition that [is] neither strike nor work." *Wirebound Box Co.*, 191 N.L.R.B. 748, 762 (1971) (quoting *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1594-95 (1954)). Second, such strikes are (*id.*):

. . . in effect [attempts] to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do[;] that is, to unilaterally determine conditions of employment. Such a result would be foreign to the policy objectives of the Act.

Although employees generally have the right to strike, they do not have the right to come and go from work at their whim and on their terms. *See Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965):

[T]here is nothing in the statute which would imply that the right to strike “carries with it” the right exclusively to determine the timing and duration of all work stoppages. The right to strike as commonly understood is the right to cease work—nothing more. No doubt a union’s bargaining power would be enhanced if it possessed not only the simple right to strike but also the power exclusively to determine when work stoppages should occur, but the Act’s provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power.

Accord, e.g., NLRB v. Blades Mfg. Corp., 344 F.2d 998, 1000–01 (8th Cir. 1965) (quoting *Am. Ship Building*, 380 U.S. at 310).

In other words, employees dissatisfied with working conditions have two options, and only two options: (1) they either may strike/quit, or (2) they may continue to work under the terms set by the employer. They may not do both and attempt to dictate their schedules and hours of work by walking off and on the job at their whim. *E.g., C.G. Conn, Ltd., v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939) (emphasis added):

Undoubtedly, when [the employer] refused to comply with [the employees’] request, *there were two courses open*. First, they could continue work, and negotiate further with the [the employer], or, second, they could strike in protest. *They did neither, or perhaps it would be more accurate to say they attempted to do both at the same time*. We have observed numerous variations of the recognized legitimate strike, such as the ‘sit-down’ and ‘slow-down’ strikes. *It seems this might be properly designated as a strike on the installment plan. We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him*. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest

against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment

Accord Honolulu Rapid Transit Co. Ltd., 110 N.L.R.B. at 1809–10 (emphasis added):

The decision of the employees in this case, implemented in their part-time weekend strike, can only be described as an arrogation of the right to determine their schedules and hours of work. . . . Establishment of work schedules is a responsibility [and prerogative] of the employer which may, of course, be the subject of bargaining. Employees may not, however, simultaneously accept and reject them, and thereby in effect establish and impose upon the employer their own chosen conditions of employment. It follows that *the employer may lawfully insist that the employees choose either of the two avenues available to them—either quit work or discharge the obligations for which they are hired and paid. The employees, however, chose neither of these courses, but instead chose to engage in a form of strike action which has generally been held to be unprotected.*

Thus, a work stoppage is unprotected “*when . . . the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.*” *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972) (emphasis added). Further, as the General Counsel himself has conceded, there are only two factors necessary for a work stoppage to constitute an intermittent strike: “(1) . . . more than two separate strikes, *or threats of repeated strikes*, and (2) they are not responses to distinct employer actions or problems, but rather part of a strategy to use a series of strikes, in support of a single goal, because this would be more crippling to the employer and/or *would require less sacrifice by employees than a single strike.*” *Land Mark Elec.*, 1996 WL 323648 (N.L.R.B. G.C. Advice Memorandum May 17, 1996) (emphasis added). What makes “a work stoppage unprotected is . . . the refusal or failure of the employees to as-

sume the status of strikers, with its consequent loss of pay and risk of being replaced.” *Vencare Ancillary Servs., Inc. v. NLRB*, 352 F.3d 318, 324 (6th Cir. 2003) (quoting *First Nat’l Bank of Omaha*, 171 N.L.R.B. 1145, 1151 (1968)), *enforced*, 423 F.2d 921 (8th Cir. 1969).

Such work stoppages—*i.e.*, multiple strikes or threats of repeated strikes at the whim of employees or a union in an attempt to dictate the employees’ own work schedule as part of a strategy to support an employee or union goal—have been consistently condemned by the courts and the Board for seven decades.

Courts: See, *e.g.*, *Lodge 76, Int’l Ass’n of Mach. & Aero. Wkrs, AFL-CIO v. Wisc. Emp. Rel. Comm’n*, 427 U.S. 132 (1976) (“Machinists;” union strategy for employees to stop work after 7.5 hours and refuse overtime, held not protected); *Am. Ship Bldg. Co.*, 380 U.S. at 310; *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 480–81 & 493–94 (1960) (strategy of intermittent work stoppage at facilities in 35 different states, where employees came and went from work “*as directed by the union*” “to harass the company” held not protected (emphasis added), citing *Briggs-Stratton*); *Int’l Union, UAW, AFL Local 232 v. Wisc. Emp. Rel. Bd.*, 336 U.S. 245, 264–65 (1949) (“*Briggs-Stratton*;” recurrent or intermittent unannounced stoppage during work hours, not protected) *overruled on other grounds, Machinists, supra*;²⁰ *NLRB v. GAIU Local 13-B, Graphic Arts Int’l Union*, 682 F.2d 304, 308 (2d Cir. 1982) (union ban on overtime, unprotected: “The employee cannot have it both ways, *i.e.*, continue to be employed but insist on working part-time as an economic weapon[.]”); *Excavation-Constr., Inc.*

²⁰ *Machinists* overruled the portion of *Briggs-Stratton* which held that because the work stoppages were not protected the state of Wisconsin could regulate the conduct. *Machinists* did *not* alter the holding that intermittent work stoppages are not protected.

v. NLRB, 660 F.2d 1015, 1022 (4th Cir. 1981) (non-union employees' tactic of refusing weekend work, not protected: "[t]he men, then, *were seeking to continue to work under terms prescribed by themselves alone*, and were not engaged in a single, isolated, concerted protest against conditions of employment."); *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 604–05 (1st Cir. 1979) (insurance agent's threat to be disruptive, missing appointments and meetings with management were "fairly categorized as constituting a partial strike, or 'a strike on the installment plan.'"); *NLRB v. Blades Mfg. Corp.*, 344 F.2d at 1000–01 ("walk out for a day" strategy, not protected); *NLRB v. Kohler Co.*, 220 F.2d 3, 11 (7th Cir. 1955); *Home Beneficial Life Ins. Co. v. NLRB*, 159 F.2d 280, 286 (4th Cir.) (non-union employees "*agreed among themselves to report only two days a week*," not protected: "We are aware of no law or logic that gives the employee the *right to work upon terms prescribed solely by him*. That is plainly what was sought to be done in this instance. . . . If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment."), *cert. denied*, 332 U.S. 758 (1947); *C.G. Conn, Ltd.*, 108 F.2d at 397 (refusal to work overtime, not protected).

The Board: See, e.g., *Swope Ridge Geriatric Center*, 350 N.L.R.B. 64, at n.3 (2007) (union engaged in two work stoppages and issued third strike notice; held unprotected: "there was a reasonable basis for finding that the pattern would continue"); *Embossing Printers, Inc.*, 268 NLRB 710, 710 n.3 (1984); *Audubon Health Care Ctr*, 268 N.L.R.B. 135, 137 (1983) (non-union employees' refusal to cover shifts for sick co-worker, not protected: "While employees may protest and ultimately seek to change any term or condition of their employment by striking or engaging in a work stoppage, the strike or stoppage must be complete, that is, the employees must withhold all their services from their

employer. *They cannot pick and choose the work they will do or when they will do it.* Such conduct constitutes an *attempt by the employees to set their own terms and conditions of employment in defiance of their employer’s authority to determine those matters* and is unprotected.” (emphasis added); *Honolulu Rapid Transit Co. Ltd.*, 110 N.L.R.B. at 1809 (refusal to work weekends, unprotected); *W. Wirebound Box Co.*, 191 N.L.R.B. at 762 (two “quickie strikes” not protected); *Valley City Furniture Co.*, 110 N.L.R.B. at 1594–95 (refusal to work overtime, not protected); *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1548 (1954) (“hit and run” work stoppages intended to “harass the company into a state of confusion,” not protected); *see also Davies, Inc. d/b/a Dallas Glass*, 2013 WL 703258, at 6 (N.L.R.B. Div. of Judges Feb. 26, 2013) (“plan to strike, return to work, and strike again,” unprotected).

B. AS A MATTER OF LAW, THE VERY FACTUAL FINDINGS OF THE ALJ ESTABLISH THAT THE APRIL 15TH STRIKE WAS AN UNPROTECTED INTERMITTENT WORK STOPPAGE BY WHICH THE EMPLOYEES AND THE UNION ATTEMPTED TO ARROGATE TO THEMSELVES THE RIGHT TO DICTATE EMPLOYEE SCHEDULES AND HOURS:

The ALJ made the following factual findings (ALJD, pp. 4, 7; emphasis added):

[p. 4]: WOCKC is a *local outpost* of the national Workers Organizing Committee (WOC).²¹ *WOCKC, with assistance from the WOC, conducts local campaigns for higher wages, better working conditions, and unionization.* In spring 2013, Wise became active in WOCKC and eventually assumed a leadership role in the organization.

. . . Wise began participating in *WOCKC sanctioned strikes* in spring 2013. He has participated in strikes on July 29-30, 2013; August 29, 2013; December 15, 2013; May 15, 2014; September 4, 2014; December 4, 2014; and April 15, 2015. *Only one of the strikes has lasted more than a day. WOC coordinated the nationwide 1-day strikes.*

²¹ “On the national level, WOC is also referred to as ‘Fight for \$15.’” [The footnote is part of the ALJD.]

. . . Prior to going out on strike, a third-party representative and one or more workers would give the general manager a strike notice listing the names of striking workers. Strike notices were also posted to the WOC Facebook page which listed upcoming strike dates. After the strikes, a third-party representative would return to the workplace with the workers and present the manager with a return to work notice that noted their unconditional offer to return to work.

[p. 7]: . . . *WOC has been responsible for coordinating nationwide strikes in the campaign to set the minimum wage at \$15 an hour for fast food workers. On a strike day, community organizations and local unions provide food and help to register strikers for the day's action. Prior to the strike, WOC uses individuals from the local community to deliver strike notices to employers. The strike notices contain the name and signature of the striking employees, date of the strike, and an offer to unconditionally return to work after the strike. . . .*

On April 15, WOCCK engaged in a 1-day strike *as part of a nationwide campaign organized by WOC.*

Thus, the ALJ's own findings establish: (1) the existence of a *nationwide* union campaign for common purposes; (2) a series of intermittent one-day work stoppages, not only nationally but also seven in Kansas City, in furtherance of that common strategy; (3) a common plan in each stoppage of attempting to dictate when employees would walk off and back on to the job;²² and (4) the April 15th strike was *part of* that nationwide campaign organized by the union. As a matter of law, these findings establish that the April 15th strike was an unprotected intermittent work stoppage. *See, e.g., Am. Ship Bldg. Co.*, 380 U.S. at 310 (the Act does not afford the union "the power exclusively to determine when work stoppages should occur"); *Polytech, Inc.*, 195 N.L.R.B. at

²² Contrary to the ALJ's characterization, the strike notices did *not* contain an unconditional offer to return to work because the offer was expressly conditioned on first engaging in a one-day strike. *See Sidney Square Convalescent Ctr. & Pers. Care Residence*, 24 N.L.R.B. Advice Mem. Rep. 34029, 1996 WL 34551958 (Aug. 30, 1996) (union's pre-strike notification of its offer to return to work did not constitute an unconditional offer to return to work because it was premised on employees first engaging in one-day strike).

696; *Audubon Health Care Ctr*, 268 N.L.R.B. at 137 (“an attempt by the employees to set their own terms and conditions of employment in defiance of their employer’s authority to determine those matters and is unprotected.”). These repetitive one-day strikes in support of the unions’ national \$15/hour minimum wage campaign are, simply, “a strike on the installment plan” and, therefore, unprotected. *Liberty Mut. Ins. Co.*, 592 F.2d at 604–05; *C.G. Conn, Ltd.*, 108 F.2d at 397.

Rather than simply follow the foregoing law, however, the ALJ improperly applied her own self-imposed judicial gloss on the two requirements to establish that a work stoppage is an unprotected intermittent action.

C. ERRORS IN THE ALJD:

1. “Frequency and Timing of Strikes”:

First, the ALJ concluded that in determining whether the April 15th strike was “part of a strategy to use a series of strikes, in support of a single goal”²³ she could not consider any of the eight previous strikes because the April 15th strike was the first one to occur after EYM acquired the Kansas City restaurants on March 26th. ALJD, pp. 18–19):

The Respondent insists, however, that it is the “character of the strike” rather than the ownership of the business by a succeeding purchaser that dictates whether it is an intermittent strike. However, the Respondent cites no case law to support this proposition. Clearly, a single one-day strike does not constitute intermittent strikes. . . . Even if, as the Respondent argues, Wise and the Union intend to continue holding one-day strikes in the future, it does not render the strike at issue unprotected.

Respectfully, the ALJ is, simply, wrong on multiple counts.

²³ *Land Mark Elec.*, 1996 WL 323648 (N.L.R.B. G.C. Advice Memorandum May 17, 1996)

First, it is, in fact, “the inherent character of the method used [which] sets [a] strike apart from the concept of protected union activity envisaged by the Act.” *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. at 1550.²⁴

Second, the ALJ is, simply, wrong in summarily dismissing the universally expressed intent of the employees²⁵ and unions²⁶ to continue engaging in hit-and-run one day strikes—as they have done for three years—and in concluding that a single work stoppage combined with the *threat* of additional ones cannot constitute unprotected activity. “[T]here is no magic number as to how many work stoppages must be reached before we can say that they constitute [unprotected intermittent strike activity].” *Robertson Indus.*, 216 N.L.R.B. 361, 362 (1975), *enforced sub nom.* The General Counsel has conceded that “more than two separate strikes, or *threats of repeated strikes*” can constitute unprotected

²⁴ Ironically, later in her decision the ALJ, *herself*, acknowledged that, under *Pac. Tel. & Tel. Co.*, it is the *inherent character* of the work stoppage which determines whether it is protected; yet, she simple chose to ignore the law. See ALJD, p. 20 (“I acknowledge that the Board has held that it’s the ‘inherent character’ rather than the impact of the strikes that are probative of whether the strikes are protected concerted activity. See *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547,1549-1550 (1954); *Swope Ridge Geriatric Center*, 350 NLRB at 67.”).

²⁵ Tr. 333/25 to 334/19 (Coney); Tr. 333/3-22 (Camillo); Tr. 125/23 to 126/1, 185/1 to 188/16 (“Q And so both times that you went on strike it was your intent to strike for a day and then go back to work? A Yes, it was.”) and 336/1-16 (Humbert); Tr. 335/2-23 (Frazier); Tr. 125/18-25, 211 to 214, 228/7 to 229/8 (Ortiz); Tr. 127/14-17, 337/13 to 338/6 (Vaughn).

²⁶ The ALJ erroneously precluded EYM from asking Wise about his or the Union’s intent to continue participating in and calling for additional on-day strikes *and* from making an offer of proof on the issue. Tr. 97/14 to 99/19. EYM has excepted to the ALJ’s rulings. Exception Nos. 33 and 34. “Absent extraordinary circumstances, a judge’s refusal to allow counsel to make such an offer of proof constitutes an abuse of discretion and clear error.” *Laborers Local 135 (Bechtel Corp.)*, 271 N.L.R.B. 777, 785 (1984), *enforced*, 782 F.2d 1030 (3d Cir. 1986).

activity. See *Land Mark Elec.*, 1996 WL 323648, at 2 (N.L.R.B. G.C. Advice Memorandum May 17, 1996) (emphasis added). In fact, both the Board and the courts have held that a one-time work stoppage can constitute unprotected activity where it (1) is part of a broader, overall union strategy; or (2) is combined with the threat of additional ones. See *Pac. Tel. & Tel. Co.*, *supra* (union engaged in series of unprotected work stoppages for one group of employees, “the traffic employees,” enlisted a different group of employees, “the tollmen,” to strike in order to put additional pressure on the employer; the one-time strike by the tollmen held unprotected); *NLRB v. Kohler Co.*, 108 NLRB at 218 (affirming ALJ finding that the Act did not protect a single work stoppage protesting lack of ventilation coupled with a threat to engage in repeated work stoppages over the same, unchanged grievance); *Valley City Furniture Co.*, 110 N.L.R.B. at 1594 (“The Union in fact engaged in one stoppage and intended regularly to continue such tactics. It communicated that intention to the Respondent. Nowhere, prior to August 4, does the record reveal any change in the Union’s intentions. . . . This evidence, realistically viewed, establishes both the Union’s plan to engage in a series of partial strikes and its effectuation of that plan.”).²⁷

Third, neither the ALJ, General Counsel nor the Union can point to any authority which *precludes* consideration in the intermittent strike analysis of a string of strikes of the same inherent character, using the same methods, at

²⁷ In fact, on November 15, 2015, the unions engaged in identical hit-and-run one-day strikes nationally and in Kansas City. See <http://news.yahoo.com/fight-15-strike-details-tuesdays-160416096.html>; <http://www.usatoday.com/story/money/business/2015/11/09/fast-food-protest-strike-minimum-wage-15-hour/75473048/> The Board can take judicial notice of the November strike. See *Whirlpool Corp.*, 216 N.L.R.B. at 187 n.17 (relying on “news dispatches,” judicial notice taken of the date a strike ended). Judicial notice may be taken at any time, see *Fed. R. Evid.* 201(d), even after hearing or on appeal. *E.g.*, *Denius v. Dunlap*, 330 F.3d at 926.

the same facility, providing the same goods and services, under the same trade name, using largely the same workforce, merely because there has been a change in ownership at the facility. Rather, it is “the inherent character of the method used [which] sets [a] strike apart from the concept of protected union activity envisaged by the Act[.]” *Pac. Tel. & Tel. Co.*, 107 NLRB at 1549–50, not the legal ownership of the business by a succeeding purchaser, which determines whether a strike is an unprotected intermittent one.

To find otherwise would lead to entirely anomalous results. Under the ALJ’s analysis, had Strategic continued to own the restaurant it would be permissible to consider all of the prior strikes in determining whether the April 15th strike was an unprotected intermittent work stoppage; but, because of the wholly fortuitous change in ownership between the last two strikes, not so here. Similarly, under the ALJ’s reasoning, the strike might be deemed an intermittent one against another Kansas City fast food chain, but not against EYM merely because EYM had recently assumed operation of its restaurant. These would be particularly anomalous results given (1) the strike had been in the planning stages *for weeks before EYM ever assumed ownership of the East 47th Street restaurant on March 26, 2015* (Tr. 126/10 to 127/13 and Tr. 209/24 to 210/9 [public strike promotional material appeared in “early March,” while the restaurant was still operated by Strategic]); and (2) the strike was a national and city-wide strike, not targeted at EYM; but at a wide array of “[f]ast food, gas station retail workers, a wide spot [*sic*] of low wage workers” all across the Kansas City area. Tr. 92/14 to 93/7; Tr. 105/11-17. The recurrent strike which occurred on April 15th would have taken place and the striking workers would have walked off and back on to the job at the restaurant regardless of whether the restaurant was still owned by Strategic or was owned by EYM.

Contrary to the ALJ's analysis, in an analogous context, the Board has not required continuity of the identity of participants from one work stoppage to the next as a condition of finding the actions to be unprotected intermittent work stoppages. *See Pac. Tel. & Tel. Co.*, 107 NLRB at 1549–50, (the first-time strike of the tollmen was deemed unprotected even though the tollmen “might have had no personal knowledge of the [traffic employees’ intentions] . . . It was sufficient . . . that each of the tollmen here involved was a participant in the strike strategy; whether knowingly or unwittingly is of no significance.).

2. “Whether the Strike’s Intent Was to Harass”:

Next, despite giving lip service to the principle that “Board has held that it’s the ‘inherent character’ *rather than the impact of the strikes* that are probative of whether the strikes are protected concerted activity” (ALJD, p. 20, emphasis added), the ALJ then completely ignored that principle and found that the April 15th strike was not unprotected precisely because—in her view—the strike had not caused sufficient “chaos” for EYM. ALJD, p. 19.

[O]nly eight of the twenty-five employees at the Respondent’s 47th Street BK participated in the strike. Moreover, two of the eight employees were not scheduled to work on the day of the strike. The only evidence that the strike negatively impacted the Respondent’s operation was Hayes’ testimony that she was “short-staffed” four employees for the dinner crowd. According to her, this caused complaints from customers about the longer than usual wait times for service; and the employees who worked that day had to work harder. It is difficult for me to discern how a few minutes longer wait time for customers to place an order or receive their food or employees having to work harder amounts to harassment of the Respondent into a state of chaos. The situation experienced at the 47th Street BK on April 15 was likely no more chaotic than a typical day where one or more employees failed to notify management they would not be at work.²⁸ Furthermore, there is no evidence

²⁸ This is pure, unsubstantiated speculation by the ALJ. There is absolutely no evidence in the record to support this conjecture. Additionally, the evidence is undisputed that the strike left the restaurant five employees short during the

Footnote continued on next page

the Respondent experienced a significant drop in sales, had employees quit in frustration, permanently lost customers, or suffered any other adverse impact because of the striking employees' absences.

Once again, the ALJ is, simply, wrong on multiple counts.

First, as the ALJ herself acknowledged, it is the *inherent character* of the methods used, not the *success* of those methods which makes an intermittent work stoppage unprotected. *Pac. Tel. & Tel. Co.*, 107 NLRB at 1549–50. Here, the inherent character of the methods used took the hit-and-run one-day April 15th one strike out of the protections of the Act. Not only was the strike intentionally timed to create maximum chaos (see Tr. 105/18 to 110/16), but the Union never offered explanation or excuse for why it waited until 2:30 in the afternoon—after the busy lunch period—to deliver a strike notice (RE 25) signed early in the morning by three of the absent workers; nor any explanation or excuse for why it never turned in the strike notice (GC 21) signed by the other three workers.

Ironically, in addition to acknowledging—and then disregarding—*Pac. Tel. & Tel. Co.*, *supra*, the ALJ also correctly acknowledged that *Swope Ridge*, *supra*, stands for the same proposition as *Pac. Tel. & Tel. Co.* (ALJD, p. 20)—and then likewise simply inexplicably disregarded the law. In *Swope Ridge*, the Board held the union's intermittent work stoppages to be unprotected notwithstanding that there was little actual impact on the employer's operations. *Swope Ridge Geriatric Ctr.*, 350 N.L.R.B. at 66:

. . . footnote continued from previous page:

peak dinner period. See RE 21 and the chart, *infra*. See also Tr. 358/7 to 359/4 (4-5 workers short during peak periods). The resulting chaos both during the lunch period (Tr. 353/5 to 354/12) and dinner period (Tr. 359/5 to 360/18) was “drastic,” resulting in poor customer service and numerous customer complaints. Tr. 354/13-18; Tr. 360/19 to 361/4.

The record also shows that the Respondent was well prepared for the strikes and that there was no disruption of services and care for the residents. Jones testified that the Respondent did not know whether employees would work or not during the strike: “There were employees who told us that they would be there, but we didn’t know who would show up and who wouldn’t show up. So we had called agency [sic] and given them notice that we may be doing some last minute calls for staffing.”

Accord NLRB v. Blades Mfg. Corp., 344 F.2d at 1005 (“[T]he fact that the Company was first informed of the planned walkouts and what it could do to avert them is unimportant.”). Accordingly, the ALJ’s speculative, subjective bureaucratic assessment concerning the degree of “chaos” at the 47th Street restaurant on April 15 is utterly and completely irrelevant. As a matter of law, the ALJ erred by relying on that subjective assessment to disregard applicable law.

3. “Union Involvement and Whether Strike Part of a Common Plan”:

Next, despite her explicit findings at the outset of her opinion (ALJD, pp. 4 and 7, emphasis added) that (a) “WOCKC, with assistance from the WOC, conducts local campaigns for higher wages, better working conditions, and unionization; (b) each of the seven previous Kansas City hit-and-run strikes had been “sanctioned” the Union; (c) “WOC coordinated the nationwide 1-day strikes;” (d) with each strike, strike notices and return to work notices were delivered in the same manner to stuck employers; (e) “WOC has been responsible for coordinating nationwide strikes in the campaign to set the minimum wage at \$15 an hour for fast food workers;” and (f) the April 15th strike was “part of a nationwide campaign organized by WOC,” and her later finding (p. 20) (g) “that WOCKC was intricately involved in orchestrating the April 15 strike,” the ALJ make the astonishing legal conclusion that the April 15th strike was not “part of a common plan by WOCKC to exert additional economic pressure on the Respondent to accede to their demands.” *Id.*, p. 20. In support for her conclusion, the ALJ relies on two assertions. First, the ALJ stated (*id.*, emphasis added):

While *Wise* admitted that in organizing the strike, the Union utilized similar tactics for the strikes . . . [t]he evidence is not conclusive that all the striking employees provided their different employers *with the same worded strike notice and return to work notice, followed the same procedure for participating in the strikes, or that the strike had an economic impact on all the different employers.*

Second, she stated (*id.*, emphasis added):

Moreover, *unlike cases in which the employees were represented by a union*, there is no evidence that WOCKC had a strategy of using the strike (or even if I were to consider the past strikes under Strategic's ownership) *to harass the Respondent during ongoing collective-bargaining negotiations or any negotiations for higher minimum wages or changes to other terms and conditions of employment.*

Yet again, the ALJ's conclusions are patently incorrect—not only factually incorrect, but also premised on erroneous legal assumptions.²⁹

First, there is no authority whatsoever—and the ALJ cites none—for the novel proposition that recurring work stoppages can only be deemed unprotected intermittent ones *if the exact same procedures are followed in each stoppage.* There is absolutely nothing which requires that strike and return to work notices turned in to the employer at different facilities *have the exact same identical language.* Can it be seriously suggested, for example, that that the hit-and-run” work stoppages in *Pac. Tel. & Tel. Co.*, *supra*, would have been protected activity if the employees had merely used more care to modify the language of a strike notice from one facility to another? Or that the Supreme Court would not have condemned the intermittent stoppages which occurred in 35 different states in *Insurance Agents*, *supra*, had the union drafted differently worded return to work notices at each location? To the contrary, all that is required is “evidence demonstrate[ing] that the stoppage is *part of a plan or pat-*

²⁹ Under *Standard Dry Wall Prods.*, 91 N.L.R.B. 544, 545 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951), the Board reviews ALJ factual and legal determinations *de novo* based on review of the entire record.

tern or intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the Employer.” *WestFarm Foods d/b/a Darigold*, 35 N.L.R.B. Advice Mem. Rep. 28, 2004 WL 6016881 (July 22, 2004) (quoting *Polytech, Inc.*, 107 NLRB at 696); not proof that the procedures in each stoppage are *identical in all respects*. The ALJ’s notion to the contrary is specious.

Third, the ALJ’s contention is also demonstrably factually incorrect. The wording of the strike notices turned in to various restaurants—drafted on Union letterhead—*was* identical (see GC 21, 23, 25 and RE 24,³⁰ RE 25) as was the language of the return to work notices. See GC 22, 26. Further, Wise testified to the similar manner in which strike and return to work notices are prepared for each strike and then distributed to employers. Tr. 110/8-22; 103/16 to 104/8.

Fourth, also flawed are the ALJ’s apparent beliefs that a work stoppage cannot be unprotected unless (1) the workers are represented by a union; and (2) the stoppage occurs during collective bargaining or other negotiations with the union. Both, notions are, simply, wrong. *Excavation-Constr., Inc. v. NLRB*, 660 F.2d at 1022; *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d at 604–05; *W. Wirebound Box Co.*, 191 N.L.R.B. at 762; *Blades Mfg. Corp.*, 344 F.2d at 1005; *Home Beneficial Life Insurance Co.*, 159 F.2d at 286; and *Davies, Inc.*, 2013 WL 703258, at 6, are all examples of unprotected intermittent work stoppages in non-collective bargaining, non-unionized employees. *Blades* and *Davies*, in

³⁰ The ALJ erroneously excluded the exhibit and, given the reliance in her decision on the alleged lack of proof of *identical* strike notices, exclusion of the exhibit is plainly harmful error. It directly refutes the ALJ’s contention.

particular, involved non-unionized employees acting, as here, at the behest of an interested union.

4. “Whether Strike Taken to Address Distinct Acts of the Respondent”:

Next, the ALJ justified her refusal to apply the unprotected intermittent work stoppage doctrine on the theory that the strike was taken “to address distinct acts of the Respondent.” ALJD, pp. 20–21. Specifically, the ALJ based her conclusion on the fact that the boilerplate language of the Union-prepared generic strike notice (GC 21, 23, 25 and RE 24, RE 25)—*the identical one sent to all locations*—alluded to “grievances” employees who happened to sign the notices allegedly had, *e.g.*, a lack of protective equipment and first aid kits,” unspecified “unfair labor practices, unsafe working conditions, unpredictable scheduling and wage theft and, therefore, the strike was not merely economic to gain a higher minimum wage. The ALJ’s conclusions are legally and factually incorrect, and ignore the fundamental rationale for the unprotected intermittent work stoppage doctrine.

First, the ALJ is, simply, incorrect in her belief that an intermittent work stoppage can only be deemed unprotected if it is *economically* motivated. That simply is not the law. In *Embossing Printers, Inc.*, 268 N.L.R.B. at 710, n.3, the Board held that “the Respondent lawfully disciplined its first-shift employees for engaging in unprotected intermittent walkouts” and affirmed the ALJ’s termination (*id.*, at 723, emphasis added):

[I]t is immaterial whether [the work stoppage] would have been considered an unfair labor practice strike. . . . [I]f employees had the right to engage in the activity they did, they had that right regardless of whether it was to protest the Company’s unfair labor practices or to achieve some other end. If, on the other hand, their concerted activity was unprotected, their purpose does not change the unprotected nature of the act.

The Board’s decision was based on the fundamental underpinnings of the intermittent strike doctrine—which the ALJ in this case completely ignored—that employees may not arrogate to themselves the right to dictate their schedules and hours of work. *Id.* (emphasis added):

They did not have a right under the Act to come and go as they pleased. They were entitled to strike. But they were not entitled to walk out and return and to engage in this activity repeatedly. The employees established a pattern of intermittent partial strikes. For this their employer had the right under the Act to discipline them if it choose. *G K Trucking Corp.*, 262 N.L.R.B. 570 (1982). . . . Here a pattern of recurrent walk-outs had been established.

Even assuming *arguendo*, that the language of the generic strike notices the Union drafted on its letterhead was more than just boilerplate, the employees had “the right to cease work—nothing more.” *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. at 310. They did *not* have the right to strike “on the installment plan.” *E.g.*, *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d at 604-05; *C.G. Conn, Ltd., v. NLRB*, 108 F.2d at 397.

Second, moreover, there was no evidence presented that the language in the strike notices was *other than* boilerplate. The April 15th strike was not site specific to the 47th Street restaurant or the conditions there; but, the same notice was distributed to other EYM facilities and—according to Wise—the same generic notice is completed and distributed in like fashion to all targets of the strike without regard to industry. Tr. 110/8-22; 103/16 to 104/8. Additionally, the only evidence presented regarding any employee complaints regarding safety issues at the 47th Street Restaurant involved a petition presented to Hayes by Wise and other employees *in early 2015 while the restaurant was still being operated by Strategic and Hayes promptly remedied their concerns before EYM acquired the restaurant!* Tr. 46/13 to 47/17; Tr. 121/2-16.

5. “Whether Employees Intended to Reap the Benefits of a Strike Without Risk”:

The final reason given by the ALJ for refusing to follow the unprotected intermittent strike cases was her stated belief that in order to prove that a work stoppage is an unprotected intermittent one, there must be proof that striking employees participated in the stoppage “as a way of reaping the benefits of a strike without assuming its risks” and that EYM had “provided minimum evidence to establish” to establish this “factor.” ALJD, p. 21. The ALJ’s conclusions are wrong on both the law and the facts.

First, there is no authority whatsoever—and the ALJ cites none—to support the proposition that a work stoppage can only be deemed an unprotected intermittent one if there is *proof* that employees, *in fact*, engaged in the stoppage “as a way of reaping the benefits of a strike without assuming its risks.” To the contrary, minimization of risk to participating employees is merely an *inherent characteristic* of unprotected hit-and-run work stoppages of short duration that arises from “the refusal or failure of the employees to assume the status of strikers, with its consequent loss of pay and risk of being replaced.” *Vencare Ancillary Servs., Inc.*, 352 F.3d at 324 (quoting *First Nat’l Bank of Omaha*, 171 N.L.R.B. at 1151). See *Walmart Stores, Inc.*, 2016 WL 275280, at 51 & n. 61 (N.L.R.B. Div. of Judges, Jan. 16, 2016) (citing *Honolulu Rapid Transit Co., Limited*, 110 N.L.R.B. at 1807–11, emphasis added):

The length of the work stoppages is relevant because *employees who go on strike for brief periods of time minimize the risks of being out on strike for longer periods, and thus come closer to creating a condition that is neither strike nor work. Conversely, employees who go on strike for longer periods of time take on more of the risks associated with being on strike.*

The proposition that shorter stoppages inherently result in less risk for participating employees is self-evident and needs no “proof.” The ALJ’s conclusion that EYM had provided “minimum evidence” regarding the *actual motivations* of

participating employees to reduce risk because loss of one day's pay "is significant for . . . low-wage employees" completely misses the mark.³¹ All work stoppages create some risk of lost wages and replacement for participating employees; but the inherent character of work stoppages "on the installment plan" is that doing so reduces the amount of risk.

Equally off the mark is the ALJ's rationale that "even though the strike was for one day, they still risked the Respondent permanently replacing them." ALJD, p. 21. In the theoretical world of a bureaucrat, that may technically be true. However, in the real business world—particularly here, where a strike notice was not provided to Hayes until 2:30 in the afternoon, while she was frantically trying to service customers while five employees short during the dinner period—the risk of replacement before the employees appeared early the next morning accompanied by a union representative to "unconditionally" go back to work was non-existent. An employer may only permanently replace economic strikers before they request reinstatement. *NLRB v. Mackay Radio & Telegraph*, 304 U.S. 333, 345-346 (1938). Under the ALJ's rationale, no matter how recurrent, no one-day work stoppage could ever be an unprotected intermittent one because all such stoppages carry some risk to employees.

Moreover, there *was* proof—which the ALJ chose to ignore—that the unions' repetitive strategy of one-day hit-and-run strikes at times and dates of

³¹ Additionally, the ALJ improperly effectively disregarded the uncontradicted testimony from Humbert—who was active in the \$15/hour movement and had participated in previous strikes (*e.g.*, Tr. 141/23-24; 125/23 to 126/1; 185/1 to 188/16)—that striking employees received strike pay from the Union. Tr. 162/22-24 (emphasis added: "I signed a couple documents. One of them . . . was like striker's pay that we get.").

their own choosing was *precisely* designed to minimize risk to participating employees while reaping the benefits of a strike. Tr. 110/21 to 111/16 (Wise):

Q. Why—if you really wanted to put economic pressure on these billion dollar companies that you think aren't paying enough to their workers, why don't you just call for people to go on strike and [stay on] strike until your demand is met?

A. That's just—I'm not sure how to answer that question for you, Mr. Ross.

Q. Do the best you can.

A. We go on a one-day—we just—that's just the way we've been doing it. I just don't have a base answer for you on that question.

Q. You do it because you don't want to run the economic risk of having the employer hire a replacement, isn't that true?

A. Well, I do what I do and am deeply committed for my three little girls that I raise here in the city. That's the true reason why I do what I do is for my family, and that's true.

Q. And so that's why you go back to work after one day because you couldn't economically stand to stay off of work and not get paid, true?

A. You can say that's true.

Q. Well, that's true, isn't it?

A. It's true.

D. BECAUSE THE APRIL 15TH STRIKE WAS NOT PROTECTED ACTIVITY, EYM PROPERLY DISCIPLINED THE SIX RESTAURANT EMPLOYEES UNDER ITS UNIFORMLY APPLIED³² NO CALL/NO SHOW POLICY:

For all of the foregoing reasons, the April 15th strike was, as a matter of law, an unprotected intermittent work stoppage. Consequently, EYM acted lawfully in disciplining the six restaurant employees and the ALJ's findings of § 8(a)(1) violations must be set aside and those allegations must be dismissed. *See Swope Ridge Geriatric Center*, 350 N.L.R.B. at 66 ("I find that in the context of such unprotected activity the Respondent did not violate Section 8(a)(1) and (3) of the Act . . . by issuing warning notices to employees for failure to comply with the 2-hour call-in policy").

II.

EVEN ASSUMING, ARGUENDO, PARTICIPATION IN THE APRIL 15TH STRIKE CONSTITUTED PROTECTED ACTIVITY, AS A MATTER OF LAW, THE GENERAL COUNSEL HAS FAILED TO MAKE OUT A *PRIMA FACIE* CASE OF DISCRIMINATION OR RETALIATION AGAINST CAMILLO, HUMBERT, OR ORTIZ BECAUSE THERE IS NO EVIDENCE HAYES HAD ANY KNOWLEDGE THESE THREE EMPLOYEES HAD ENGAGED IN PROTECTED ACTIVITY.

To find a violation of the Act based on Hayes' discipline of any of the six employees, "[t]he General Counsel must demonstrate by a preponderance of the evidence . . . that the employer had knowledge of [the protected] activity, and that the employer's hostility to that activity 'contributed to' its decision to take an adverse action against the employee." citations omitted. *See, e.g., Columbia Mem'l Hosp.*, 362 N.L.R.B. No. 154 (July 30, 2015). Absent knowledge by Hayes at the time she prepared the disciplinary write ups that Humbert,

³² There is no allegation in this case that the policy was disparately applied and the overwhelming and uncontradicted evidence is that the policy is and has been uniformly enforced. *E.g.*, Tr. 247/22 to 248/4; Tr. 289/2-5; RE 39, 41, 43-48, 52, 59, 62, and 63. Additionally, EYM excepts to the ALJ's exclusion of further evidence of uniform enforcement of the policy. *See* Exception 43.

Ortiz, and Camillo had engaged in protected activity on April 15th, as a matter of law there can be no violation of §§ 8(a)(1) or 8(a)(3). *E.g.*, *CGLM, Inc.*, 350 N.L.R.B. 974, 979 (2007) (“[A] respondent violates Section 8(a)(1) of the Act if, *having knowledge of an employee’s concerted activity*, it takes adverse employment action that is ‘motivated by the employee’s protected concerted activity.’” emphasis added), *review denied, order enforced sub nom., CGLM Inc. v. N.L.R.B.*, 280 Fed. App’x. 366 (5th Cir. 2008) (quoting *Meyers Industries*, 268 NLRB 493, 497 (1984)).

Even assuming, *arguendo*, the April 15th strike constituted protected activity, there is no evidence Hayes retaliated or discriminated against Humbert, Ortiz or Camillo because of their participation in the strike because she had no knowledge regarding why the employees had missed work. To make up for this void in the evidence, the ALJ apparently charged Hayes with *constructive* knowledge that the employees missed work *because* they were engaged in protected activity (ALJD, p. 22/45-47) because (1) the employees had participated in previous strikes while employed by Strategic; (2) as of 2:30 on April 15 Hayes was on notice of the strike; (3) therefore, she should have *assumed* the reason Humbert, Ortiz and Camillo had failed to report was *because* of the strike; and (4) Hayes did not conduct an *investigation* of the reasons for their absence before issuing the discipline. As a matter of law, the ALJ’s syllogism is fatally flawed. ALJD, p. 22/21-31.

First, there is no authority—and the ALJ cites none—to support the proposition that before an employer can discipline an employee for an unexcused absence the employer must first conduct an investigation to determine whether the employee was engaged in protected activity. The ALJ simply improperly substituted her judgment for the business judgment of EYM. “[I]t is well established that the Board does not substitute its own business judgment for that of

the employer in evaluating whether conduct was unlawfully motivated.” *Framan Mechanical*, 343 N.L.R.B. 408, 417 (2004) (quoting *Ryder Distribution Resources*, 311 N.L.R.B. 814, 816 (1993)).

Second, imposing a duty on Hayes to first interrogate the absent employees about their activities on the day of the strike before imposing discipline on them would subject EYM to the likelihood of an unfair labor practice charge. Indeed, at least one of the ULPs the Union had filed against Hayes when Strategic operated the restaurant was based on the allegation that she had unlawfully interrogated employees about protected activity! See GCE 9, 10.

Finally, some of the “knowledge” with which the ALJ constructively charged Hayes—*i.e.*, “by April 15 at about 2:30 p.m. Hayes was aware that *all six* of the employees were not at work *because* they were on strike” (ALJD, p. 22/28-30; emphasis added)—*is demonstrably not true!* Ortiz did *not* miss her 7:00 p.m. shift because she was on strike. *She simply decided to go home at 6:00 p.m. after the strike ended, rather than report for work!*³³

Accordingly, the ALJ’s findings of violations of §8(a)(1) of the Act based on the discipline of Humbert, Ortiz, and Camillo must be rejected.

³³ Additionally, the ALJ concluded that no demonstration of discriminatory animus was necessary regarding the discipline of the employees because “the very conduct for which employees [were] disciplined is itself protected concerted activity.” ALJD, p. 22/36-37. As a matter of law, as to Ortiz that is clearly erroneous.

III.

AS A MATTER OF LAW, THE GENERAL COUNSEL FAILED TO ESTABLISH THAT LAREDA HAYES' DECISION NOT TO HIRE WISE WAS UNLAWFUL.

A. APPLICABLE LAW—ALLOCATION OF THE ORDER AND BURDEN OF PROOF:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of the order and burden of proof set forth in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), demonstrate that: (1) EYM was hiring or had concrete plans to hire on March 26th; (2) Wise was qualified for hire; and (3) that anti-union animus contributed to the decision not to hire Wise. “The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer’s decision to take adverse employment action against an employee was the employee’s union or other protected activity.” *E.g., Don Chavas, LLC d/b/a Tortillas Don Chavas*, 196 L.R.R.M. (BNA) ¶ 1148 (N.L.R.B. Div. of Judges Feb. 15, 2013) (Dibble, ALJ).

To meet this burden, the General Counsel may rely on direct or circumstantial evidence, or a combination of both. *Laborer’s Int’l Union of N. Am., Local No. 16, AFL-CIO*, 2014 WL 1715070, at 14 (Apr. 30, 2014). To rely on circumstantial evidence, however, as the General Counsel does in this case, “*the circumstantial evidence [must be] substantial and the inferences drawn therefrom reasonable.*” *Fes, A Div. of Thermo Power*, 331 N.L.R.B. 9, 21-22 (2000) (quoting *N.L.R.B. v. Instrument Corp. of America*, 714 F.2d 324, 328 (4th Cir. 1983)) (emphasis added):

The Board and the courts have also held that “the Board may rely on circumstantial evidence presented by General Counsel in establishing that anti-union animus figured in the employer’s actions, *provided that the circumstantial evidence is substantial and the inferences drawn therefrom reasonable.*”

“The General Counsel may offer proof that the employer’s articulated reason is false or pretextual. . . . Ultimately, the General Counsel retains the ultimate burden of proving discrimination.” *E.g., Fed. Signal Corp.*, 197 L.R.R.M. (BNA) ¶ 1601 (N.L.R.B. Div. of Judges Mar. 20, 2013) (Dibble, ALJ).

As a matter of law, the General Counsel’s has failed to meet this burden.

B. THE GENERAL COUNSEL NEITHER ESTABLISHED A *PRIMA FACIE* CASE NOR PROVED PRETEXT:

The ALJ made erroneous factual findings, drew impermissible inferences, and improperly substituted her judgment for EYM’s business judgment.³⁴

1. “Availability”:

The ALJ improperly rejected Hayes’ explanation that one of the factors in her decision not to hire Wise was the change in his availability noted on his application. ALJD, p. 13/36-45. The ALJ rejected this as a reason because—in her view (a) Wise’s availability “was no more limited than some other employees who were hired;”³⁵ and (b) Cline and Williams had some restrictions on their time because Cline had another job and Williams went to school during the day. *Id.* The first conclusion fails to take into account that Wise had cut nearly half his availability to work the 35 hour schedule which he had been working, eliminating any night shift on the weekends. Moreover, whether the availability of any given applicant meets the employer’s scheduling and staffing needs is a matter of business judgment for the employer, not an ALJ. The second conclu-

³⁴ The ALJ’s decision to the contrary is subject to *de novo* review. *E.g., Standard Dry Wall Prods.*, 91 N.L.R.B. at 545.

³⁵ The ALJ does not identify the “other employees” to whom she refers, nor does she identify the evidence or exhibits on which she relies for this conclusion. Accordingly, there is no way to determine whether the “other employees” are similarly situated to Wise.

sion—that Wise was disparately treated in comparison to Cline and Williams—is also erroneous. Disparate treatment requires a showing that the alleged comparator was “similarly situated” to the disciplined employee. *E.g.*, *In Re Int’l Ass’n of Machinists & Aerospace Workers*, 355 NLRB 1062 (2010). As a matter of law, neither Cline nor Williams can be similarly situated comparators to Wise because both Cline and Williams were managers, subject to different scheduling considerations. *See, e.g.*, *Ryan v. Capital Contractors, Inc.*, 679 F.3d 772, 775, 778 (8th Cir. 2012) (even though supervisor worked alongside employee, supervisor and employee were not similarly situated because they held different roles in the company); *Mann v. Navicor Group, LLC*, 488 F. App’x. 994, 999 (6th Cir. 2012) (supervisor not similarly situated to subordinate).

2. Wise’s Disciplinary Record at Strategic:

The ALJ also improperly rejected Hayes’ explanation that Wise’s disciplinary and performance record at Strategic was a factor in Hayes’ decision. ALJD, p. 14/1-44. Again, the ALJ’s finding is erroneous, based on impermissible inferences, and involves the ALJ’s impermissible substitution of her judgment for EYM’s business judgment.

First, the ALJ erred in finding the disciplinary record of Wise during the three years he worked for Strategic to be “scant.” ALJD, p. 14/13. Specifically, the ALJ claimed that Hayes had only written Wise up twice for attendance. ALJD, p. 14/37. In fact, Hayes did so *four* times. *See* GCE 9, 10, RE 4, 5, 6, and 73, p. 3.

Second, the ALJ improperly failed to give any credence to Hayes’ testimony that she had also recommended multiple disciplinary actions in the latter half of 2014 which had not been acted upon by Strategic. Tr. 340/19 to 341/3; 341/13 to 342/2. The ALJ rejected this testimony based on a perceived lack of

“documentation” to support either the existence of Strategic’s policy restricting Hayes’ authority or of the additional recommendations Hayes made to Strategic. ALJD, p. 5 (footnote 11, last sentence; footnote 13),³⁶ p. 7/1-9,³⁷ p. 14/17-20,³⁸ p. 15/10-11. As a matter of law, it was impermissible for the ALJ to (a) assume that “documentation” from Wise’s tenure at Strategic was still in existence;³⁹ or (b) draw an adverse inference against EYM because all of the “missing” “documentation” to which the ALJ alludes in her decision would have been *Strategic* documents, not documents within *EYM*’s possession, custody, or control.⁴⁰ “Generally, it is improper to draw an adverse inference if a satisfactory explanation is provided for the failure to produce the documents.” *Sb Tolleson Lodging, LLC*, 2015 WL 1539767 (N.L.R.B. Div. of Judges Apr. 7, 2015), *adopted*, 2015 WL 2395865 (N.L.R.B. May 19, 2015).⁴¹

³⁶ Exception Nos. 3 and 5.

³⁷ Exception Nos. 9 and 11.

³⁸ Exception No. 23.

³⁹ Indeed, as the General Counsel repeatedly noted during the hearing, Strategic’s settlements of the many ULPs *required that disciplinary records be expunged* from Wise’s personnel file. Tr. 116/9 to 117/5; pp. 368-69. Additionally, regarding any *copies* of any such Strategic documents which Hayes might have initially retained locally at the restaurant, Wise himself testified all Strategic documents were cleaned out of the restaurant and tossed in the dumpster on the evening of March 25th before EYM assumed operation of the restaurant at midnight. Tr. 65-66.

⁴⁰ Ironically, this is the precise argument made by the *Union’s lawyer* to explain why, in response to EYM’s subpoena, neither the Union nor Wise were able to produce “documentation” of Wise’s disciplinary record at Strategic. Tr. 231/18-24.

⁴¹ Another reason given by the ALJ for placing such weight on the absence of “documentation” was the ALJ’s assertion that Hayes claimed that Wise’s cumulative tardiness alone warranted termination. ALJD, p. 14/37-38. There is no evidence whatsoever in the record to support that finding.

In this regard, the ALJ seems to have lost all sight of the distinction between Strategic and EYM and to have conflated the two separate entities because a portion of her decision makes absolutely no sense. ALJD, p. 14/43-47:

While Hayes alleged that the Respondent [*sic*] limited her ability to discipline Wise, she admits there were no such restrictions on her ability to discipline him under the Respondent's [*sic*] ownership. Further, I have already found not credible her assertion that she received an email limiting her authority to discipline.

This passage makes no sense for several reasons. First, Hayes has *never* alleged that “Respondent”—that is, *EYM*—“limited her ability to discipline Wise. *Strategic* did so. Second, that “there were no such restrictions . . . under Respondent’s ownership” is a non-sequitur because *Wise has never been employed by EYM*. Finally, the predicate for the ALJ’s rejection of Hayes’ testimony regarding the restrictions *Strategic* imposed on her was the ALJ’s impermissible inference based on “lack of documentation” of the policy. Not only is the ALJ’s reasoning completely circular, it should also be rejected because *Hayes’ testimony was corroborated by Cline*. Tr. 322/11 to 323/25; 324/7 to 325/5.

Further, Wise himself admitted the substantive facts on which his prior disciplinary actions had been based. See RE 4 (failure to show up for work on time, April 21, 2014) and Tr. 112/2-14 (admitted by Wise); RE 5 (late to work, May 5, 2014) and Tr. 114/23-25 (admitted by Wise); RE 6 (failure to comply with call-in policy, May 6, 2014) and Tr. 115/21 to 116/4 and Tr. 117/9-13 (admitted by Wise). Wise’s account of his attempt to steal food from the restaurant was disregarded by the ALJ and the General Counsel failed to call as a witness the assistant manager who Wise claims gave him permission to take the food.⁴²

⁴² Contrary to the suggestion that EYM could have also called the former manager as a witness, until Wise concocted his story during his rebuttal testimony.

Footnote continued on next page

3. The Other Circumstantial Evidence:

The other circumstantial evidence in this case negates the General Counsel's allegations and the ALJ's decision.

First, although Wise worked for Hayes for more than three years at Strategic, no evidence whatsoever was presented that Hayes at any time exhibited discriminatory anti-union animus against Wise or any of the other employees who were involved in union activities or prior strikes.⁴³ There is no evidence of disciplinary actions taken by Hayes against any of the employees while working for Strategic. Further, despite the number of union activists working at Strategic while Hayes was the manager, there was no evidence whatsoever of so much as a single anti-union statement or sentiment allegedly expressed by Hayes.

Second, there is no evidence of disparate treatment. There is no evidence of a similarly situated former Strategic employee, *i.e.*, one with a similar history of, *e.g.*, tardiness, insubordination, attempted theft, *etc.*, who had *not* engaged in protected activity who was treated more favorably. Tr. 408/10-20 (no similarly situated employees).

Third, conversely, the evidence is undisputed that Hayes hired numerous other former Strategic employees to work for EYM who, to Hayes' knowledge

. . . footnote continued from previous page:

mony, EYM had no way of knowing that the former manager might have had any probative testimony because Wise had never *told* Cline or Hayes that he allegedly had permission to take the food. Tr. 318/16-21; Tr. 319/12-13; Tr. 319/20 to 320/2; Tr. 386/13-21.

⁴³ Although allusions were made to the fact that Wise and the Union had previously filed a number of ULPs against Strategic, all of the ULPs were settled with an agreement which contained a no-admission of liability provision and the General counsel offered no evidence whatsoever during the hearing to substantively prove any of the violations alleged in the prior ULPs.

(Tr. 371/12-22), were similarly situated with Wise *vis-à-vis* having previously engaged in union and protected concerted activity. See, Tr. 121/2-9 and 333/3-24; Tr. 121/10-11, 141/20-24, 333/25 to 334/21; Tr. 121/12-13, 125/23 to 126/1, 177/18-23; Tr. 185/1 to 188/16, 336/1-18; Tr. 125/23 to 126/1, 126/9-12, 126/25 to 127/13, 210/3-9, 140/12-19, and 141/4-7; Tr. 127/14-17, 142/1-6, 337/13 to 338/8; Tr. 125/18-22, 331/20 to 333/2 (Audreka Brown); Tr. 127/18-19, 142/1-6, 334/22 to 335/25; Tr. 336/19 to 337/12.

Fourth, conversely, Hayes did not hire two former Strategic employees who had not, to Hayes' knowledge, been involved in any union or protected activity. Tr. 325/14 to 330/14, Tr. 407/24 to 408/4 (Drucilla McCoy); Tr. 330/15—331/7; 407/10-23 (Joshua Comeaux).

Fifth, Hayes expressly denied that Wise's prior protected activity played any role in her decision not to hire Wise, and she would have made the same decision regardless of whether Wise had previously engaged in any protected activity. Tr. 349/8-12.

In short, the ALJ's finding that Hayes' decision not to hire Wise was motivated by discriminatory animus is nothing more than suspicion, surmise, and conjecture, see *Cardinal Home Prods., Inc.*, 338 N.L.R.B. 1004, 1009 (2003), and the improper substitution of the ALJ's judgment for the business judgment of EYM. "The mere fact that [Wise] was active in the union cannot alone support a finding of discriminatory [failure to hire] because there is here substantial evidence that the employer [refused to hire] him for cause." *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 492-93 (8th Cir. 1946).

CONCLUSIONS AND REQUESTED RELIEF

The notice posting remedy at the other restaurant is improper. P. 24, 25

For all of the foregoing reasons, the decision of the ALJ should be rejected and the *Complaint* should be, in all things, dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 8th day of March, 2016, a copy of the foregoing document was served by email and by certified mail, return receipt requested, on:

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