

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

**EYM KING OF MISSOURI, L.L.C.  
D/B/A BURGER KING**

and

**WORKERS ORGANIZING COMMITTEE – KANSAS CITY**

**Cases 14-CA-148915  
14-CA-150321  
14-CA-150794**

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

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## 1. Introduction

The findings of the Judge, especially the credibility determinations, were based upon the entire record, including her observation of the demeanor of the witnesses. Respondent has excepted to some of the Judge's credibility findings. The Board's established policy is that it does not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that those resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3<sup>rd</sup> Cir. 1951). Careful examination of the record reveals no basis for reversing the credibility findings challenged by Respondent. The role of a Judge is not only to read and analyze the record, but also to listen to and observe the witnesses and to determine their credibility. Evaluation of witness demeanor can be done only by the Judge. Respondent would have this aspect of decision making ignored, but this would be poor jurisprudence and contrary to Board law. Evaluation of demeanor is part of credibility determinations and must remain so.

The Judge correctly found that Respondent, EYM King of Missouri, LLC, doing business as Burger King, discriminated against employees because they engaged in protected strike activity, because they got together to try to improve wages and working conditions, and because they brought issues to the National Labor Relations Board (the Board). 1) Respondent unlawfully imposed written discipline against six employees because they engaged in protected strike activity in violation of Sections 8(a)(1) and 8(a)(3) of the Act. 2) Respondent refused to hire Terrance Wise, a long-time employee of its processor, because he was a leader in employees' concerted efforts to try to improve wages and working conditions in violation of Sections 8(a)(1) and 8(a)(3) of the Act.

## 2. 8(a)(1) and (3): Respondent unlawfully gave written no call no show warnings to six employees who went on strike on April 15, 2015

Although Respondent would have different conclusions drawn, the conclusions of the Judge were based upon the reliable, credited evidence of record, these conclusions were reasonable, and the law was correctly applied. The Judge concluded that the warnings to the six strikers were given because they engaged in protected strike activity in violation of Sections

8(a)(1) and (3). The analysis must be in two steps: a) the warnings themselves violate the Act; and b) the strike activity did not lose the protection of the Act.

**a. The no call no show warnings to six strikers violate Section 8(a)(1) and (3)**

Employees Susana De La Cruz Camillo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myesha Vaughn went on strike on April 15, 2015. (T 162; 170; 193-94). All six were employed by Respondent at the Burger King located at 2201 E. 47<sup>th</sup> street, also called 47<sup>th</sup> and Troost. All six were given written warnings the day they returned from striking or soon thereafter by Store Manager LaReda (Reda) Hayes. (G. C. Ex. 41; 174; 198-199). Reda Hayes knew, when she gave these employees write ups that they had been on strike the day before. (T. 163; 164-165; G.C. ex 21; 196-198; G.C. ex 22; 354; R. ex. 25; 389; 389). Store Manager LaReda (Reda) Hayes testified that when she gave these warnings to the six employees, she told them “due to your not showing up on your scheduled shift, I have documentation for you.” (T. 389). Respondent did no further investigation before it disciplined these employees. (T. 178; 203; 389). It is undisputed that Hayes received the strike notice signed by employees Coney, Frazier, and Vaughn on April 15 and delivered to the store that day at 2:30 p.m. (T. 354-355) Hayes acknowledged that she knew that Ortiz, Humbert and Camillo had been active with the WOC and its activities. (T. 196-198). While Hayes denies receiving the strike notice signed by Humbert, Ortiz and Camillo, she admitted that after 2:30 on April 15, she knew that employees had gone on strike. (T. 389) Additionally, while Respondent claims that Hayes was not aware that Humbert, Ortiz and Camillo had gone on strike because she did not receive a strike notice from them, this assertion that she was not aware that they were on strike is disingenuous. As with employees Coney, Frazier, and Vaughn, the record is clear that Hayes was aware prior to disciplining Humbert, Ortiz, and Camillo that they had engaged in the strike on April 15. The evidence of knowledge of their strike activity is overwhelming because a return to work notice signed by Humbert, Ortiz and Camillo in the parking lot of the store was handed to Hayes by a member of the clergy and these three employees on April 16, 2015, at about 10:00 a.m.. (G.C. ex. 22, T. 167-169, T-197-198). This unassailable evidence establishes Hayes’ knowledge before Hayes issued the discipline to these employees. It is of no import whether Hayes drafted the discipline prior to receiving the return to work notices. Once she learned that the employees had participated in the strike, she had

the ability to throw the discipline away, or to decide not to give it to them. Instead, knowing full well that all six of her employees were on strike, she disciplined them for engaging in strike activity. As such, the Judge properly concluded that Hayes clearly knew that all six were on strike when the warnings were given to the six employees. Finally, Respondent argues that the shift of Osmara Ortiz began after the planned rally and strike activities for the day were over. Withholding services from an Employer is the essence of a strike. Ortiz, along with other employees, withheld her services for her shift on April 15. The conclusion must be drawn that she too was on strike.

Withholding their services on April 15 was protected, and employees need give no prior notice when they are going to strike. It is well established that employees may not be discharged or otherwise discriminated against for engaging in protected concerted work stoppages to protest wages, hours, or working conditions. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). A discharge of striking employees—purportedly for not calling in or showing up for work – amounts to a discharge for the act of going on strike and accordingly is unlawful. *CGLM, Inc.*, 350 NLRB 974, 979-980 (2007), *enfd* 280 F. App'x 366 (5<sup>th</sup> Cir. 2008). In *CGLM*, the employer argued that it discharged employees because of their failure to report to work and because they did not call in. As explained in *Burnup & Sims, Inc.*, 256 NLRB 965 (1981), “the existence of or lack of unlawful animus” is not material when “the very conduct for which employees are disciplined is itself protected concerted activity.” *Id* at 975. Calling a strike ... an absence from work justifying discharge is to write Section 13 out of the Act.” *Anderson Cabinets*, 241 NLRB 513, 518-519 (1979), *enfd* 611 F.2d 1225 (8<sup>th</sup> Cir. 1979); *CGLM, Inc., supra* 350 NLRB at 979. Section 13, which preserves and protects the right to strike, provides that “Nothing in this Act [subchapter] shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.” See also *Atlantic Scaffolding Company*, 356 NLRB No. 113 (2011) (Advance sheet at p 4-5). Any attempt to argue that handbook provisions regarding attendance or attendance policy can restrict or put conditions on the right to strike as clearly set out in Section 13 has been clearly rejected by the Board. *Wright Line* analysis does not apply. *CGLM, Inc., supra* 350 NLRB at 974 fn 2; *Atlantic Scaffolding Company, supra* 356 NLRB Advance sheet at p 4-5. Discipline or discharge for failing to adhere to attendance policies on the day of a strike cannot be separated

from the strike activity itself. Most certainly, if an Employer cannot discharge employees for striking, it also cannot discipline them for striking—it cannot discriminate against them in any way. As stated in *CGLM, supra* 350 NLRB at 979, “The fact that the employees gave no advance notice of their intention is immaterial. The failure of the employees to report to work was “a concerted action for mutual aid and protection”, citing *Lisanti Foods, Inc.*, 227 NLRB 898, 902 (1977).

As noted above, where employees are disciplined or discharged for engaging in a protected concerted work stoppage, *Wright Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer’s motive. Rather, when the conduct for which employees are disciplined is itself protected concerted activity, the only issue is whether that conduct lost the protection of the Act because it crossed over the line separating protected and unprotected activity. See *Atlantic Scaffolding Company, supra*, 356 NLRB No 113 (2011) Advance sheet at p 5-6; *CGLM, Inc., supra*, 350 NLRB 974 at fn 2. The burden is on the Respondent to show that the conduct lost protection of the Act.

The Respondent failed to show that the strike activity of the six employees lost the protection of the Act. This activity was peaceful, and did not obstruct the premises of the Respondent. The only argument that it was unprotected is the Respondent’s argument that the employees’ actions amounted to an intermittent strike. The Judge correctly rejected this argument, again basing her finding on the preponderance of the credible evidence of record.

Respondent took over ownership and operation of the location in question on about March 26, 2015: April 15, 2015 was the first strike against the Respondent by any of these six employees. Furthermore, April 15, 2015 was the first strike for some of these employees such as Osmara Ortiz who began at that location in November, 2014. (T. 190). It was the second strike for West Humbert. (T. 185). On April 15, 2015, these six employees went on strike against Respondent for the first time. The action of the six employees against their new employer was not an intermittent strike. The six employees here were engaged in protected concerted activity on April 15, 2015: given these facts alone, it clearly was not an unprotected intermittent strike.

As noted above, the test set out in *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert den 455 U.S. 989 (1982) is not applicable here, but, if it were, the facts

here show Respondent violated the Act. The six employees were engaged in protected concerted activity (as discussed above), Respondent knew of this activity (as discussed above), and Respondent had animus against that activity. Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding*, 330 NLRB 464, 464 (2000). The circumstances argued in this brief, including the warnings to six strikers and the refusal to hire Wise, show this animus. Once this initial showing is made, the burden shifts to Respondent to show that it would have taken the same action even in the absence of the employees' protected union activity. Respondent has failed to show that it would have disciplined these six employees in the absence of union activity. Discipline varied from store to store: Respondent offered warnings from stores other than the store at 47<sup>th</sup> and Troost which are irrelevant here. Respondent failed to show at the store in question, 47<sup>th</sup> and Troost, employees were written up every time they were late or absent without calling in.

**b. The April 15, 2015 strike was protected activity and was not an unprotected partial or intermittent strike**

The Respondent is most exercised that the Judge did not find this strike was intentionally planned and coordinated so as to effectively reap the benefits of a continuous strike action without assuming the loss of wages and possible replacement associated with a continuous forthright strike. The issues, evidence of record, and applicable law will be reviewed below. Please note, though, that although Respondent cites many cases, none have facts resembling those present here. For example, on the intermittent issue, Respondent cites and quotes extensively from *C.G. Conn, Ltd. V. NLRB*, 108 F.2d 390 (7<sup>th</sup> Cir. 1939). In that case employees worked regular hours but refused to work overtime. *Id* at 395. Respondent cites and quotes extensively from *Honolulu Rapid Transit Co. Ltd.*, 110 NLRB 1806 (1954). That case also involves employees who worked regular hours but refused to work overtime. As such, those cases deal with a continued partial withholding of services, with employees choosing to only refuse to work overtime. Bear in mind also that the case law is clear that strikes are protected conduct and the burden of proof, which rests on Respondent on this issue, is high to show that a strike loses the protection of the Act.

The Judge rejected the argument of Respondent that this strike was one of a series of strikes which were unprotected intermittent strikes. The Judge ruled correctly. The six employees here were engaged in protected concerted activity on April 15, 2015: it was not part of unprotected intermittent strikes. The right to strike is statutorily protected by Sections 7 and 13 of the Act. Section 7 grants employees the right to peacefully strike, picket and engage in other concerted activities. *NLRB v. Preterm, Inc.*, 784 F.2d 426, 429 (1<sup>st</sup> Cir. 1986). Section 13 provides that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right unless specifically provided for by the Act itself. *NLRB v. Teamsters, Local 639*, 362 U.S. 274, 281 (1960). Without question employees have a protected right to withhold services from an employer whether to protest unfair labor practices or to act together to better their wages and working conditions. *Embossing Printers*, 268 NLRB 710, 722 (1984), enf'd mem 742 F.2d 1546 (6<sup>th</sup> Cir. 1984); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1960).

The Board has been particularly likely to find work stoppages protected when the employees were not represented by a union. This is because unrepresented employees lack a lawfully implemented grievance procedure as well as lacking a recognized bargaining representative to assist them in negotiating improved working conditions and resolving grievances. *See Serendipity-Un-Ltd*, 263 NLRB 768, 775-76 (1982).

Respondent furiously flails at the conclusions drawn by the Judge, but it failed to uphold its burden of proof to show that the strike of the six employees lost the protection of the Act. Given that the right to strike is an important protected right, this is and must be a high burden. The factors relied upon by the Judge were properly considered and decided.

Concerted work stoppages in the past have lost the protection of the Act only in limited circumstances where the tactics have been found to be inconsistent with those of a genuine strike. The mere fact that employees have engaged in multiple work stoppages does not render their activities unprotected. In *United States Service Industries*, 315 NLRB 285, 285-286 (1994), three work stoppages in six months were found protected where employees were not “engaged in a campaign to harass the company into a state of confusion”. *United States Service Industries*, 315 NLRB 285, 285-286 (1994), enf'd mem 72 F.3d 920 (D.C. Cir. 1995). Two work stoppages in three months were found not a pattern of recurrent and intermittent work

stoppages because otherwise employees could not engage in more than one instance of concerted protected activity during an indefinite time period regardless of the variety and number of conditions protested and the identity of the individuals involved. *Robertson Industries*, 216 NLRB 361, 361-362 (1975), enf'd 560 F.2d 396 (9<sup>th</sup> Cir. 1976). In *West-Pac Electric*, 321 NLRB 1322, the Board found that three strikes within a two week period were protected where they were not part of a hit-and-run scheme nor intentionally planned to reap the benefit of a continuous strike, and were for separate employer acts.

Employees are not required to institute the strike at any particular time of the day or to maintain it for any particular period of time to be entitled to the protection of the Act. *First National Bank of Omaha v. NLRB*, 413 F.2d 921, 925 (8<sup>th</sup> Cir. 1969), enforcing 171 NLRB 1145 (1968). A requirement that a strike not be disruptive of an employer's operations, or harassing to it, is a requirement that the strike not be conducted. *Allied Mechanical Services, Inc.*, 341 NLRB 1084, 1102 (2004), enf'd 668 F.3d 758 (D.C. Cir. 2012).

Although the Board has not enunciated a bright-line test for when employees' strike tactics result in the loss of the Act's protection, unprotected work stoppages share a common feature of violating economic "fair play" through actions that are calculated not simply to disrupt the employer's operation, but to prevent the employer from exercising its managerial authority to maintain its operation through the disruption. Such schemes include schemes that seek to bring about conditions that involve neither strike nor work, such as the use of intermittent work stoppages or work stoppages only in a key part of the operation that cripple other parts of the operation. See *National Steel & Shipbuilding Co.*, 324 NLRB 499, 509 (1979); *First Nat'l Bank of Omaha, supra*, 171 NLRB at 1151.

There are two types of scenarios, which partially overlap, in which the Board finds that strike actions lose protection. The Board has found that work stoppages lose protection when they are intentionally planned and coordinated so as to effectively reap the benefits of a continuous strike action without assuming the loss of wages and possible replacement associated with a continuous forthright strike. *WestPac Electric*, 321 NLRB at 1360. Refusal of employees to work in one section while accepting pay for work in other sections was found unprotected. *Audubon Health Care Center*, 268 NLRB 135 (1983).

The April 15 work stoppage of these six employees did not lose protection under this rationale. This work stoppage was not designed to reap the benefits without the risks. There is no evidence that the strike here, or any that preceded it with other employers at other times, brought about a condition that was neither strike nor work such that the strikers were trying to dictate the terms and conditions of employment: employees may not simultaneously walk off the jobs and retain the benefits of working—loss of pay and risk of being replaced. Where employees work regular hours but refuse to work overtime, such activity has been found unprotected. *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1811 (1954); *C.G. Conn, Ltd. v. NLRB* 108 F.2d 390, 397 (8<sup>th</sup> Cir. 1939); *Polytech, Inc.*, 195 NLRB at 696. Here, when employees went on strike on April 15, they ceased all work—they did not remain on the job and cease only some of their duties, and they lost pay for their entire shifts that day. Loss of pay for an entire shift is a severe loss for low wage employees such as these who are barely scraping by on their full wages. (T. 229). Also, in their status as strikers, even for one day, they risked being replaced by the Respondent. Had Respondent wanted to replace the strikers, it could have done so. Hayes was not the only supervisor or manager of Respondent.

The Board has also found multiple work stoppages to be unprotected where they involve calculated unpredictability such as hit-and-run tactics intended to harass the company into a state of confusion. In *Pacific Tel. & Tel. Co.*, 107 NLRB at 1548-1549, strikes were called but the picketing ended when emergency crews reached the picketed location, and these repeated strike actions repeatedly shut down the employer's nationwide operation. The Board noted that the employer was entitled to know whether the operation was going to continue for the day or not, and that the strikers were unwilling to give that assurance. Applying these principles here, the strikes were not unlawfully designed to harass the employer into a state of confusion or to cripple the operations. These employees ceased all work, not just overtime, not just at certain locations, not just in certain departments. Only eight employees joined the strike and only six missed their shift at the 1102 E. 47<sup>th</sup> street location where about 25 people work. (T. 387; R. ex 21) Not all of the strikers were scheduled to work at the same time. In addition, this employer maintains and enjoys the flexibility it has built by using mostly part time employees working what is often short shifts. (T. 387; R. Ex. 21) Also, this employer did not need to hire replacements: it could increase the hours of other employees. Store Manager

Reda Hayes admitted that one worker came in early. (T. 400 ) Non-striking restaurant personnel were able to perform their work, and all positions were covered. (T. 387) Customers were served. The restaurant did not shut down. (T. 387). The main complaints were that customers had to wait longer than usual (T 354), and that the employees remaining worked harder than usual. This was not a high impact strike that utilized only a small number of employees in one department to cripple the work of other departments also. Here, a small percentage of employees participated in the strike and there were lengthy periods – four to six months --between past strikes. This is not a situation where a union leaves an employer in disarray by striking multiple times in a very short period of time. This is not a situation where recurring and unscheduled strikes of skilled employees taxed the Respondent’s ability to hire replacement workers and keep the operation going.

This is not a situation in which these six employees have been involved in multiple prior strikes. Respondent did not show that these six employees have been involved in repetitive hit-and-run type strikes. Some of the employees were involved in prior strikes, but some were not. Respondent argues that each of the six employees disciplined had participated in previous strikes, but cites testimony which does not support that argument. As shown in transcript pages 125 to 127, the question put to the witness was not whether they had engaged in previous strikes, rather the question was whether employees had engaged in “protected activity” (T. 124 line 19; T. 127 lines 9-11), and the witness answers referred specifically to a safety petition, and a photo on the side of a bus. ( T. 127 line 17 and T. 127 lines 9-11). Further, the testimony at pages 333 to 338 was that names had appeared on a prior strike notice – not multiple strike notices. Further, it was not specified how long ago any prior strike participation by employees was. (T. 333 – 338). Although initially, employee Osmary Ortiz misunderstood a question as to whether she was involved in strikes before April 15, 2015, her subsequent testimony showed that those instances were not strikes where employees withheld their services, but rallies with speakers, which were not held at the premises of employers. (T. 212-214). Ortiz began employment with Respondent in November, 2014.

Respondent did not offer all the evidence it would like to rely upon now and argues that the Board should take judicial notice of other material. It would be ill advised to go beyond this

record to accord judicial notice to newspaper articles or events, where there was no prior notice to all parties and an opportunity to present evidence concerning those events.

Respondent argues that newspaper articles show multiple prior strikes. In doing so, it is attempting to rely upon pure hearsay. Reporters do not always get their facts correct, even in the most reputable newspapers. The newspaper articles regarding Wise were offered to show his high profile in the union movement and Respondent's knowledge of his union activity, not to show the truth of everything in the articles. (T. 35, 36, 37, 39-40). Reliance upon such hearsay is unwarranted without much more support than is present in this record. This is particularly true because many of these past actions have been rallies, not strikes. (T. 212-214). Respondent, in its questioning of witnesses at hearing, failed to differentiate between whether employees had participated in past strikes or past rallies. Clearly the Board's analysis of intermittent strikes would not include WOC sponsored rallies without work stoppages and rallies which are not directed at particular employers. This is a serious concern which warrants careful consideration by the Board, and the evidence is not sufficient to support the Respondent's intermittent contentions.

This is not a situation in which employees are represented by a union so that they could effectively communicate with unit members in order to orchestrate a complex plan designed to maximize employer disruption while minimizing employee risk, or to harass the Respondent into a state of confusion. *Cf. National Steel and Shipbuilding Company*, 324 NLRB at 509-510; *Pacific Tel. & Tel. Co.*, 107 NLRB at 1548. Just as importantly, although the Workers Organizing Committee--Kansas City, the Union, coordinated some of the employees' concerted activities, there is no evidence that it intentionally orchestrated the strikes in such a way as to shield employees from the risks associated with the status of strikers. The importance of finding these activities to improve wages and working conditions protected is heightened by the fact that the employees are not unionized, and thus have no exclusive representative to speak on their behalf or any negotiated mechanism for resolving their grievances.

Here, on April 15, 2015, the six employees in question were seeking higher pay from their employer. They were also demonstrating in support of a raise in the minimum wage, but this does not change the fact that they were seeking remedies from their employer. Where employees were clearly protesting against their own Employer and against their specific terms

and conditions of employment, they are engaged in a protected concerted work stoppage. *Gates & Sons Barbeque of Missouri, Inc.*, 361 NLRB No. 46 (Sept 16, 2014). In the absence of special circumstances, a strike to secure higher pay is protected concerted activity. *California Gas Transport*, 347 NLRB 1314, 1319 (2006), *enfd* 507 F.3d 847 (5<sup>th</sup> Cir. 2007).

Wages of at least \$15 per hour and improved working conditions were sought from this Respondent in this strike. The strike notice that each of these six employees signed and which was delivered to Respondent on April 15, 2015 stated:

“ To: Burger King, 1102 E. 47<sup>th</sup> St., Kansas City, MO 64110.  
Attention management and ownership of this restaurant: This is to notify you that on April 15, 2015, we workers are going on strike for respect in the workplace. We are striking to protest unfair labor practices, unsafe working conditions, unpredictable scheduling and wage theft occurring here, in workplaces in our city, and in solidarity with fast food and convenience store workers across the country. We are particularly concerned about ensuring a safe workplace. Here in Kansas City, workers have been subject to burns, lack of protective equipment, lack of first aid kits, and more. We are also striking to demand a \$15 an hour wage and the right to join a union without retaliation. We are not making a present demand for recognition at this time. ...

This company is profitable because of our hard work, but we are paid poverty wages that are not enough to pay for the basics like food, rent, and utilities. We want to properly care for our families, so we are taking a stand to improve our future.”

(G.C. ex 21, 23). One copy of this notice was signed by West Humbert, Osmara Ortiz, and Susana de la Cruz Camillo (G.C. ex 21) and was to be submitted to the Employer on April 15, 2015. Another copy of this notice was signed by Audrika Brown, Kashanna Coney, Myesha Vaughn, Destiny Smith, and MyReisha Frazier (G.C. ex 23) and was submitted to Respondent at about 2:30 p.m. on April 15, 2015. (T. Reda Hayes). Hayes denies receiving the strike notice signed by Humbert, Ortiz and Camillo but admits that after 2:30 on April 15, she knew it was a strike. (T. 389), she knew all six had not come in, and that some of them were engaged in the strike. (T. 389). When asked which three of the six employees signed strike notice that she received, she could not say. (T. 389). The return to work notice signed by Humbert, Ortiz and de la Cruz Camillo (G. C. Ex 22) and received by Hayes on April 16, 2015, at about 10:00 a.m. when the first of the group returned to work for their regularly scheduled shift (T. 164-165), states as follows:

We are unconditionally returning to work for our next regularly scheduled shift. We make this offer following our lawful, peaceful, strike that began April 15, 2015, to demand a \$15 an hour wage, the right to form a union without intimidation, and to protest unfair labor practices, unsafe working conditions, abusive supervisors, and wage theft occurring here, in workplaces in our city, and in solidarity with fast food and convenience store workers across the country. You are prohibited by federal law from firing, discriminating or otherwise retaliating against us for fighting together to improve our jobs and to safeguard our rights.”

(G. C. ex 22). The Judge properly concluded that Hayes knew that all six were on strike when the warnings were written and when they were given to the six employees.

The fact that the Union sought to publicize the campaign and seek support from the public in attaining their goals did not deprive them of the protections of the Act. Employees enjoy a Section 7 right to publicize a labor dispute. See *The Sheraton Anchorage*, 359 NLRB No. 95, slip op at 4 (April 24, 2013). Employees seeking to “improve terms and conditions of employment or otherwise improve their lot” have the Section 7 right to seek support for their cause “outside the immediate employee-employer relationship.” See *Eastex Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

Outside the health care setting, unions and employees are not obliged to provide the employer advance notice that they are going on strike. In the health care setting, unions are obliged to give advance notice of strikes. *Care Center of Kansas City*, 350 NLRB 64 (2007) is distinguishable from the instant case. In that case, because of the strong evidence that the union intended to engage in a series of recurring intermittent work stoppages, because the work stoppages were implemented with two or three week-end strikes within about six weeks (the third was called off two days ahead), because of evidence that the union intended to continue engaging in repeated week end work stoppages as a part of its bargaining strategy until a contract was reached, the strike activity in this health care setting was found to be unprotected. *Id* at p. 68. In reaching this conclusion, the Board relied upon the line of cases in which unions engaged in partial work stoppages—where employees refused to work overtime, citing cases such as *Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954). In the instant case, there was no partial stoppage. The six employees in question all missed a full day of work. In the instant case, there have been no prior strikes against this Employer. In the instant case, this was the first strike for some employees. In this case, the earlier strikes against other

employers were at least 6 months before the April 15 strike. The instant case did not take place in a health care setting. It should be noted, though, that in *Care Center of Kansas City*, it was stated that the strike was not rendered unprotected because it may have been designed to disrupt the employer's operations and to provide an incentive for employees to participate in the strike. *Id* at p. 67. The Board rejected the argument that the employer was effectively deprived of its right to permanently replace employees who engaged in periodic 2-day economic strikes: there was no legal impediment to permanently replacing such economic strikers regardless of the length of each strike. *Id* at p 67.

For the foregoing reasons, the Judge reasonably concluded that the credible, reliable evidence was not sufficient to render the strike unprotected, and the Board should reach the same conclusion.

- 3. 8(a)(1)(3): The Judge correctly concluded that the preponderance of credible record evidence shows that Respondent refused to Hire Terrance Wise because of his union and protected union and protected concerted activity**
  - a. Respondent was hiring and refused to hire Wise while hiring the other employees at 1102 E. 47<sup>th</sup> Street**

Respondent was hiring about March 25 or 26, 2015, when it refused to hire Terrence Wise. Wise applied about March 25, 2015. (T. 64) Respondent hired other employees who had been employed at the store, but not Wise. (T. 76: 162; 192-193; G. C. ex 34) Indeed, the employee witnesses thought that all employees at this store other than Wise were carried over from the previous employer to Respondent. (T. 162; 192-193 ).

- b. Wise was well qualified**

Terrence Wise was qualified for hire. He had been employed at that location, under the direction of supervisors and managers who were carried over from the previous employer to Respondent. He was a long time employee at that location: he had worked at various Burger King locations for 11 years, at the 47<sup>th</sup> and Troost store for 6 years, and under the supervision of Store Manager Reda Hayes since about 2009. (T. 29-30; 42). Wise was a versatile employee who worked in the kitchen, customer service, and performed maintenance duties in the store.

(T. 30). He worked various shifts at various times in his employment. (T. 30). Fellow employees knew him as a capable, hard-working and dependable employee. (T. 176; 201-202).

**c. Wise's protected union, protected concerted, and NLRB activities were clearly known to Respondent**

Wise's union and protected concerted activity was well known to his supervisors and managers, who were also Respondent's supervisors and managers in March and April, 2015. First and foremost, these activities were known to Reda Hayes.

The Workers Organizing Committee—Kansas City (the Union) is a city wide organization of fast food workers and other low wage workers who have been working for \$15 and the right to form a union without retaliation, among other employment related goals. (T. 30). The Kansas City organization is one of such organizations in cities around the U.S, and, banded together at the national level, is called "Fight for 15". (T. 30). Wise explained that they organize as workers to demand better as employees, better wages, respect, and dignity at the work place. (T. 30-31). It is an organization of employees who organize and fight for better in the work place. (T. 31; 269). Employees participate in the group and its activities to attain better wages, hours, and working conditions. (T 31; 269). The group focuses on Employers, who control wages, hours, and working conditions. 9T 31, ) Activities of WOC-KC include rallies, strikes, protests, petitions, and health and safety campaigns. (T 31) In about early March, 2015, employees at the 47<sup>th</sup> and Troost Burger King (under the previous owner), including Wise and fellow employee West Humbert and Osmara Ortiz, signed a petition seeking better health and safety conditions such as safety equipment and well stocked first aid kits, and took it to Store Manager Reda Hayes. (T. 199-201). Wise was an early leader of WOC-KC, starting with the group in the spring of 2013, and continued in his leadership position with WOC-KC at the time of the hearing. (T 33; 272-273). Wise sought the involvement in WOC-KC of other employees at his work place. (T. 272-273 ) Wise was a leader in the WOC organization in Kansas City (T. 202; 270) and nationally in New York, Chicago, and Las Vegas. (T. 32; 201-202; 271). He has also traveled to Ireland to further the efforts of the group. (T.32; 271) Although other employee witnesses were active in the group, none have had such extensive efforts or such well-known and well-publicized efforts as Wise. (T 34; 202; 272-273). He has been quoted and featured in local and national publications, including the New York Times, the

Washington Post, the Huffington Post, the Houston Chronicle, and the Kansas City Star. (T. 34 – 38; 272). He has been interviewed in radio coverage and has appeared in television coverage. (T. 34; G.C. 4, 5, 6; 272 ). A Google search of “Terrance Wise” and “Burger King” yields results showing extensive media coverage of coverage of Wise and his activities on behalf of the Union and the efforts to improve fast food wages and working conditions. (T. 40-41 ).

Store Manager Reda Hayes knew of Wise’s union and protected concerted activity. (T 43). Hayes knew Wise had a stack of flyers for a July 2013 rally for Stand Up KC Workers Fight for 15. (T 43-44). Hayes knew that ever since the Workers Organizing Committee—Kansas City movement started, Wise was involved. (T. 371). She knows that he has been extensively quoted in the media, in newspapers and on television about the movement. (T. 371). Hayes involved Wise in her discussion of store issues with other employees who supported the Union. (T. 44-45). All this is uncontroverted in the record. The early March 2015 health and safety petition was given by employees Wise, Susie De La Cruz Camillo, Kashanna Coney, West Humbert, and others to Reda Hayes. (45-47)

Reda Hayes also knew of Wise’ activity filing and supporting charges with the NLRB. Wise was a charging party in charge against the prior owner of this Burger King location, 14-CA-110164 (G. C. ex 9; T. 48-51), filed July 30, 2013, which included allegations that employees were intimidated and disciplined for engaging in concerted union strike activity, altering Wise’s work schedule to make his working conditions more difficult. Store Manager Reda Hayes and Area Manager Grant were supervisors and managers involved in these actions. (T 51-52). This charge was the subject of a settlement and of a notice posted at the store. (T. 52). The notice covered the charge filed by Wise and two others: 14-CA-110261 and 14-CA-110264. (T 55-56). Wise was a named discriminatee in charge 14-CA-128388 filed in May 9, 2014, (T 56; G.C. ex 12) and in the amended charge in that case. As a result of those charges, a notice to employees was posted pursuant to a settlement agreement in English and Spanish at the 47<sup>th</sup> and Troost store. (T. 57-58; G.C. ex 14). Hayes was a witness in a 2014 charge filed over warnings given to Wise. (T. 367). Hayes knew that at least two warnings were removed from Wise’ file as part of the resolution of the unfair labor practice charge. (T. 368). In about December, 2014, there was a notice reading at the 47<sup>th</sup> and Troost store where a Notice to employees was read. (T 59-60; G.C. ex 18). Hayes and other managers were aware of Wise’ involvement in these

2013 and 2014 charges that challenged their actions and that resulted in settlements and the posting and reading of notices to employees at the store.

By March, 2015, Reda Hayes and other managers of the predecessor were well aware of Wise's protected union activity, his protected concerted activity, and his NLRB charge filing and charge support activity.

**d. The preponderance of credible record evidence shows that Respondent refused to hire Wise because of his union and protected concerted activity**

Respondent argues furiously that the Judge erred in discrediting the testimony of Reda Hayes and in concluding that the real reason Respondent refused to hire Wise was because of his union and protected concerted activity. The evidence of record solidly supports the credibility determination regarding the testimony of Hayes and her conclusions regarding the real reasons for Respondent's refusal to hire Wise.

By the time Respondent acquired the store, Wise was a long time employee at the Burger King at 47<sup>th</sup> and Troost. He was also a valued employee. In December, 2014, Reda Hayes presented him with a certificate for excellent work. (T 60). Wise and two other employees were recognized for work excellence for the year 2014. (T. 60) Reda Hayes praised Wise for his hard work and for being a very good employee. (T. 60). Hayes also told Wise how much she appreciated his work. (T 60-61). This evidence was not denied.

On about March 26, 2015, Respondent took over ownership and operations of the Burger King restaurants at 1102 E 47<sup>th</sup> Street (47<sup>th</sup> and Troost) and on Main Street. On about March 25, Hayes gave employees applications for work with Respondent. Wise got his from her on March 25, filled it out, and gave it back to her that day. (T. 63; 65; G.C. ex 42). The store closed early on March 25 in preparation for the turn over. (T. 62). Wise left the store a little before 5:00 p.m. (T. 66).

For other employees, the application process was a mere formality: they were told they could take the application home and bring it back, and they did so, most turning it in several days after they started work for Respondent. (T.64; 191-192 ) Osmara Ortiz turned hers in on about March 31. (T. 191). Most other employees were given an entire packet, including tax forms and a handbook with the application. (T. 152; 153-157; 190 ). Wise was given only the

application itself, not an entire packet. (T. 63). The others were hired. (T. 76: 162; 192-193; G. C. ex 34; ). Respondent refused to hire Wise.

Despite not hearing whether he had been hired, Wise reported early for his shift the day Respondent took over in case he was needed. (T. 66-67). Shortly before his shift was to begin, Reda Hayes came out, sat down, and told Wise that she had bad news that she received an email saying that she has to let him and three other people go. (T. 67). The Judge credited Hayes that she told him that he was not being hired because of his change in availability and insubordination. Despite crediting Hayes about the words used to tell Wise that he was not hired, the Judge correctly found that the reasons she posited were clearly pre-textual and that the preponderance of the credited evidence, it was clear that Respondent failed to hire Wise based on his activities on behalf of the WOC-KC.

As analyzed by the Judge, under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire in order to discourage union activity. The Board applies *Wright Line* analysis: the General Counsel must show that the employee engaged in union activity, the employer had knowledge of that activity, and the employer harbored animus towards that activity. *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1<sup>st</sup> Cir 1981), cert den 455 U.S. 989 (1982). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding*, 330 NLRB 464, 464 (2000). Once this initial showing is made, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of the employee's protected union activity. *Id.*

To establish a discriminatory refusal to hire, the General Counsel must first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or

affiliation. *FES*, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd 301 F.3d 83 (3<sup>rd</sup> Cir. 2002).

The *Wright Line* initial factors were proven and the Judge correctly found that Respondent was hiring, Wise was qualified, Respondent refused to hire Wise because of his union activity and his protected concerted strike activity.

**e. Respondent failed to show it would have refused to hire Wise regardless of his protected activity: the pretextual reasons asserted by Respondent**

When an employer's proffered reasons for an action are pretextual (either false or not actually relied on), the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). The Judge concluded, based upon the preponderance of the credited evidence, that the Respondent refused to hire Wise because of his union and protected concerted activity. The reasons argued by Respondent were rejected, and properly so: most of the alleged "problems" took place in 2014 or before or were not given a time frame, few were documented, and most were discredited.

Hayes testified that on March 26, 2015 when she told Wise that he would not be hired, she told him that due to his change of availability and some insubordination "and whatever" going on, she decided not to bring him on with Respondent. (T. 346-347). Hayes said that anybody was fair game not to come on. (T. 346-347). Hayes testified that Wise said only: okay, well, I'm out; and Hayes then said well, have a good day. (T. 347).

Wise was a long time employee, who had, at the end of 2014, received from Hayes an award for excellent work in 2014. This was not denied. Hayes stated that in early 2015, she used Wise whenever she needed him, and this was helpful for the business. Hayes admits that some employees were available only for certain shifts, but Wise made often made himself available for other shifts as well. (T.373). Respondent attempted no showing that in his application, Wise limited his availability any more than others who were hired. However, as properly credited by the Judge, Wise did not limit his availability any more than other employees such Cline and Williams who significantly limited their availability, but were still

hired. Hayes admits that the ability to work different positions, as Wise could and did, was a valued trait. (T. 30; 393).

When asked by Respondent's counsel why she did not hire Wise, Hayes said it was because of his insubordination, his tardies, his no shows, and him feeling like he can run the restaurant without management supervision. (T. 348-349). She forgot to include the sandwich –take-out incident until she was asked a leading question by Respondent's counsel. (T. 348-349). Furthermore, in Hayes' description of her March 26 conversation with Wise telling him he would not be hired, she mentioned none of these factors. According to both Hayes and Wise, she gave him NO reasons that he was not hired. As found by the Judge, based on Hayes credibility, the reasons given by Hayes at hearing were not the real reasons for the refusal to hire at all: they were arguments crafted for defense at hearing. The Judge's Thorough examination of the reasons given by Hayes for the Respondent's refusal to hire Wise support her findings that those reasons are pretextual and fatally flawed.

Hayes testified that Wise was not hired because in 2013, he was given three warnings for tardies. These warnings were the subject of an NLRB charges and were to have been removed from his file and should not have been relied upon for any purposes. (T. 370-371. 415-417). Wise explained the circumstances of these warnings, explaining that when he knew he was going to be late, he called in. (T. 419-420). In one instance, Wise misunderstood when he was to be there. Hayes testified that after these three warnings in early 2014, Wise got no further warnings for tardies. (T. 370-371). So the 2014 warnings were the three that were expunged pursuant to an NLRB charge and informal Board settlement agreement (G.C. Exs. 13 and 14, R. Exs. 6 and 75.) These three expunged warnings were dated 4/21/2014, 5/5/2014 and 5/6/2014. (See Respondent Exs. 4, 5 and 6). The 2013 warning also was expunged after an NLRB charge and pursuant to an informal Board settlement agreement (R. Ex. 6).

Hayes admits that some employees have had multiple write ups for tardies and for not showing up, and they are still employed. (T. 396-397). She says that whatever supervisor does the write up puts it in the employee's personnel file and she does not keep track of all the attendance write ups. (T. 397). It appears that Wise has been treated disparately in this regard. Others have had multiple write ups for tardies and for not showing up, and it has not affected their employment. Also, the fact that Hayes does not keep track of all the attendance

write ups shows that generally, these write ups do not matter, and would not have mattered for Wise without his Union and protected concerted activity.

Hayes, who acknowledged that she was making the no-hire decision for Respondent, knew that warnings were to be expunged and were not to be relied upon in future personnel action, yet she testified she relied upon those very warnings in deciding not to hire Wise. (T.368 ). Hayes knew that an unfair labor practice charge alleged that these warnings were given because of union and protected concerted activity. She knew that as a part of the settlement, the warnings were to be removed from Wise' file and not relied upon for future personnel action. (T.368 ). The parties should not now litigate issues that were settled. Respondent cannot knowingly rely upon expunged warnings in its refusal to hire Wise.

This discipline that Hayes says was part of her reason for not hiring Wise took place in 2013 and 2014, was the subject of NLRB charges and was settled by the Employer with removal of that discipline, as Hayes was well aware. The record also shows that other employees had similar discipline but they were hired. (T.396-397 ). The Judge properly concluded that this was not why Respondent refused to hire Wise. Given that the Judge found that General Counsel proved up its *Wright Line* factors, Respondent bears the burden of proof to show that it refused to hire Wise for reasons other than his protected union, protected concerted, and protected Board charge filing activity. It has not shouldered that burden here.

When pressed for specifics on the other reasons that Wise was not hired, Hayes said that another factor was that, on occasion, he cooked too much product. Despite this being a purported reason that Wise was hired, the Judge rightly found that Hays could give no specific examples and no dates. (T. 379-380). Hayes said it happened throughout the time he worked under her direction and that she had counseled him about it twice, and gave him a warning, but again, could give no dates. (T. 380-381). Respondent provided no written disciplinary records to support Hayes' testimony. Hayes did not discharge Wise at the time for cooking too much food, despite the fact that it happened during the time she claims she was allowed to discipline Wise without checking with Human Resources. (T. 381). In fact, Wise's alleged overcooking of food was not enough of a problem that it interfered with Hayes giving Wise the award for work excellence for the year in December 2014, yet incredibly it had turned into such a problem that it was a reason not to hire Wise in March 2015. The Judge correctly discredited the testimony

of Hayes. The testimony of Wise that in late 2014 and early 2015, Hayes told him that she appreciated his good work also stands uncontroverted.

Hayes testified that another factor in her decision not to hire was that Wise had given food to homeless people who occasionally seek shelter in the restaurant. This was food that was left too long before serving that had to be thrown away. Hayes' complaint in this regard is that giving this food away interferes with inventory control procedures when Wise did this without first seeking permission. (T. 382). Hayes stated that she counseled Wise on this but did not give him written discipline, she just instructed to get permission from a manager first. (T. 383). Hayes did not recall exactly when this was a problem—she thought it was in 2014 but it was not in 2015. (T. 383). Clearly, if she did not recall when it happened, if it happened long before the refusal to hire, and if this did not merit even a written warning, this was not a factor in refusing to hire Wise. Once again, the credible evidence of record supports the credibility conclusion of the Judge.

Hayes also stated that it was a problem that Wise sent another crew member on break without a manager's permission. (T. 384). She did not know who he sent on break, and did not recall when it happened. In fact, she did not even know what year it was. (T. 385). Hayes stated that she counseled Wise for this but gave him no further discipline. (T. 385). Once again, it is incredible that something that did not even require written discipline, something that Hayes could not even pin down to a year, was important enough to be a factor in refusing to hire Wise. Once again, the 2014 and 2015 complements and the 2014 year end award were given to Wise regardless of this factor. Wise testified that he was not cavalier with the rules, that he was respectful and tried to be on time and in uniform, and that he was never rude. (T. 421-422). Again, the Judge observed Hayes demeanor and found her lacking in credibility.

Hayes also testified that, in the winter (year not specified), Wise was caught by manager Yon Nonnua (Nia) Cline with sandwiches in his pocket leaving the restaurant. (T. 344; 373). Wise was given no discipline at all for this incident. (T. 373) On direct examination, Hayes gave no date for this incident. During cross examination, and in questioning from the Judge, Hayes said it was in February of 2014. (T. 375). Hayes then said it was close to the end of the year in 2014. (T. 376). It was only on redirect, after suggestive questioning by Respondent's counsel, that Hayes changed her testimony and said it must have been February 2015; this after

having already twice testified it was in 2014. Hayes testified that Wise was caught taking sandwiches only once, and it did not happen any other time. (T. 386). Again, the Judge when observing Hayes testimony and its lack of specificity discredited Hayes.

Hayes explains the lack of any record of discipline to Wise by saying that at some point, she was instructed that all recommendations for discipline had to go to Human Resources, and that after she recommended discipline, and heard nothing back, she did not bother recommending further discipline. Yon Nonnua Cline (called Nia Cline by witnesses) also stated that they were not allowed to write up any employee who was active with the Workers Organizing Committee. Nothing in writing was produced to back up the testimony on this unusual arrangement. Copies of none of Hayes' recommendations were produced. There apparently was no paper trail at all. Nor was there testimony on when these unusual directives were given. Hayes did not explain why, after these incidents, she then gave Wise an award in December, 2014 for excellent work in 2014. That she gave him the award is uncontroverted. Hayes did not deny telling Wise on multiple occasions that he was doing good work. This unusual testimony of Hayes and Cline is a flimsy foundation upon which to build a defense, especially in light of the fact that Hayes' testimony itself lacks the specifics and details which demonstrate memory of events in question. The Judge's conclusion that neither Hayes or Cline were credible on this issue is supported not only by their demeanor, Hayes lack of recollection, and the lack of any writing to support either Hayes or Cline's testimony.

Like Hayes, Cline also placed the sandwich take-out incident in 2014 (T. 318), until Counsel asked whether it was 2014 or 2015. (T. 318). Cline testified that there was no discipline to Hayes for this incident because of email instructions (T. 321) regarding Wise and the other employees on the strike committee. Cline stated that this list of employees who could not be written up included about 40 of their 45 people. (T. 323). These purported email instructions were not offered into evidence and Cline's testimony on this issue was rightly discredited by the Judge.

Osmara Ortiz confirmed that almost everyone in the store eats during their shift or takes food home at the end of their shift with permission from a supervisor. (T. 435-436). This is done without the employee paying for the food and with the permission of a supervisor. (T. 437). Ortiz stated that she has done this, and other employees have done this, and that Reda

Hayes has done this. (T. 436-437). Ortiz has not seen another employee accused of theft or told that they were doing anything improper. (T. 437). The testimony of current employees, particularly those which contradict statements of their supervisors, is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5<sup>th</sup> Cir. 1996).

There was no denial that the practice was for employees to eat food during shifts or take it home after their shift, without paying for it, with permission of a supervisor or manager. According to Hayes, after this incident, Wise was given no discipline at all. Both Hayes and Cline first placed the incident in 2014. Cline stated that there were email instructions that the vast majority—she said 40 of 45 employees—could not be written up by store management without consulting with Human Resources. Cline testified that the email listed the employees who could not be written up. This email was not made part of the record. Once again, a reason has been advanced for refusing to hire Wise for which there was no documentation. Wise was given no discipline whatsoever for this incident. Respondent failed to shoulder its burden to show that this incident was a reason for its refusal to hire Wise.

As outlined above, the Judge found the testimony of both Hayes and Wise unreliable when it came to the sandwich-take-out incident. She found that the incident took place in 2014 and not 2015 for reasons well supported in the record, and found that it was not a basis for a refusal to hire Wise in 2015.

Respondent states that Wise was treated like three other employees who were not rehired. None of these three were comparable to Wise: none were long-time nearly full time employees. (T. 409-410). None of these three applied and all three left before Respondent came in. (T. 376; 377-378) Respondent did not refuse to hire any of the three. (T. 378). Also, Hayes did not tell Wise that he need not apply for work with Respondent. (T. 408).

Respondent argues that it hired employees such as the six who were given written warnings for striking on April 15, even though Hayes knew of their union activity. (T. 331-338). Wise's union activity and protected concerted activity was of a much higher magnitude and was much more prominent than that of the other employees. Wise was a leader in his work place, in the city, and beyond. (T. 177; 270-273). Wise began the organizing effort at the Burger King at 47<sup>th</sup> and Troost. He was the first worker there to support the Union. (T. 272). He has been

at that store for many years so he has strong relationships with the people in that shop. He began to sign up his coworkers to get them involved. Other employees have gotten involved in that shop, but he has been the anchor in the shop. (T. 272). He has been the worker who has signed up the most workers in his store. (T. 273). That has been a defining feature of his leadership: his ability to move his coworkers to take action. They trust him. He is bringing his coworkers together to take action to win \$15 and a union. (T. 273). The Board has long recognized the strong and adverse impact of action directed against the employees who lead union and protected concerted activity. The refusal to hire Wise sent a strong message to other union supporters. Wise was also uniquely identified as a filer and supporter of charges with the NLRB. As noted above, Hayes knew of these activities. Also, the argument that Respondent did not discriminate by refusing to hire others who engaged in union activity does not prove that it did not discriminate against Wise by refusing to hire him.

**f. Credibility resolutions**

The Judge made credibility decisions based upon context, demeanor, the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. These are the factors that should be relied upon. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Northridge Knitting Mills*, 233 NLRB 230 (1976); *Bronx Metal Polishing Co.*, 276 NLRB 299 fn. 35 (1985).

The persuasive credibility facts of record:

1. Context: Respondent refused to hire Wise, a seasoned, knowledgeable, long-time, low-wage employee. Of all the employees at the store who wanted to stay working at the store and applied for work with Respondent, only Wise was not re-hired. Of all the employees at the Store, Wise was by far the most prominent leader of the union activity and the protected concerted activity.
2. Established or Admitted Facts: Wise was a long time employee with a good record in a low wage job with a lot of turnover. It is uncontroverted that Wise was given an award in December, 2014 for outstanding performance in 2014. It is uncontroverted that Hayes told Wise on more than one occasion in late 2014 and early 2015 that she appreciated his good work. Respondent showed no discipline to Wise at all other than the three warnings in 2014 and the one in 2013 all of which were

supposed to have been expunged and not relied upon later, all of which were given over 10 months before its decision not to hire him. With permission and without paying, employees were allowed to eat at the store on break or to take food home with them. A number of employees had multiple disciplines for tardies or no-call no-show and were hired and are still employed.

3. Demeanor: The Judge credited much of the testimony of Wise and of other employee witnesses regarding the circumstances and reasons for the discharge of Wise. The Judge discredited the testimony of Hayes and Cline. Part of demeanor is how witnesses answered questions, and whether their answers were their own or the product of leading questions. The record shows that the questions of General Counsel to Wise, Ortiz, and other General Counsel witnesses were open, and that their answers were detailed and in their own words. Clearly, their accounts were their own and not something General Counsel fed them. In contrast, the questioning of Hayes and Cline was often by leading questions, and their answers were often brief and lacking in description and detail. There was very little cross examination regarding statements made by Wise in his affidavits, and Wise had many long affidavits that were produced before cross examination (T. 78-79 ). No contradictions were found between what Wise said in his affidavits and his testimony at hearing: had there been, Respondent's attorneys would most certainly have used it in cross examination. It is submitted that no contradictions were found because Wise was telling the truth both in his affidavits and at hearing. When a witness is telling the truth, it is easier to be consistent. The testimony of Hayes was on some important occasions couched in terms of "I would have" or "he would": she was clearly not describing her recollection of a particular occasion. She also seldom described a specific incident that happened in a certain period of time or near a definite event, but rather couched her testimony in general terms.
4. Weight of the Evidence: It is submitted that the clear weight of the testimonial and documentary evidence of record, as set forth in this brief, persuaded the Judge. Evidence deemed unreliable pulls no weight.

5. Inherent Probabilities: The position for which Respondent refused to hire Wise is one he held successfully and performed in outstanding fashion for years. His record was as good as or better than many of the employees of Respondent who were re-hired. Respondent relies upon a work force of many employees, many of them part time, all of them low skilled and low wage. Respondent has high turnover. It is incredible that Respondent relied on such remote, minor, undocumented incidents in its decision not to hire a long time valued employee. The multiple reasons given by Respondent were correctly rejected as pre-textual as noted above.
6. Reasonable inferences that should be drawn from this record as a whole: Wise was a long term valuable employee. His union and charge filing activity were well known to Respondent. Respondent cited no discipline to Wise within 10 months of its refusal to hire him. Respondent hired all of the other nearly full time employees at the 47<sup>th</sup> and Troost store. Of the employees that applied, it was only Wise who was not hired. The reasons advanced by Respondent were not the real reasons for the March 26, 2015, refusal to hire. The reasonable inference drawn by the Judge is that Respondent refused to hire Wise because of his protected union and protected concerted activity. The testimony of Hayes and Cline was not internally consistent, and was not consistent with the weight of the credible evidence.

#### **4. Conclusion**

The Decision and Order of the Administrative Law Judge should be adopted.

Respectfully submitted,

March 22, 2016

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