

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

US FOODS, INC.

and

**Cases 28-CA-156203
28-CA-160985**

**GENERAL TEAMSTERS (EXCLUDING
MAILERS), STATE OF ARIZONA, LOCAL
UNION NO. 104, an affiliate of the
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

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

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I. INTRODUCTION

The centerpiece allegation of this case is straightforward as can be. Respondent’s employee Elliott Garret was an active and open Union supporter, who wore union t-shirts each week and shouted out the number of his local Union in the presence of management on numerous occasions. Despite an otherwise good reputation, Garrett was discharged for attendance violations arising out of a Family and Medical Leave Act (FMLA) claim mix-up. Garrett was encouraged to re-apply by both his former Union steward and one of Respondent’s managers, Albert Padilla. Padilla was involved integrally in, or in control of, the hiring process. Though Garrett’s application was initially rejected due to his previous discharge, Padilla explicitly requested that Garrett’s application be “pulled” and pushed forward in the hiring process. This alternative hiring path is well-trod by Respondent. In fact, Respondent’s HR Coordinator Julie Gatson admitted that she would resuscitate previously rejected applicants – even if they are “in fact” unqualified – at the request of a manager. However, Garrett’s application was never resuscitated and he was never rehired.

Importantly, the ALJ found that Padilla directly and explicitly admitted to the Union steward and to other employees that Respondent (specifically, Hiring Manager Steve Hoyt) did not re-hire Garrett because of his pro-Union status. By every standard potentially applicable to such cases – *Wright Line* and *FES* standards – Respondent’s refusal to rehire Garrett violated Section 8(a)(3) of the Act.

Notwithstanding these facts, the ALJ found that the General Counsel failed to prove a *prima facie* case of discrimination, and that Respondent did not violate the Act when it refused to hire Garrett and refused to consider Garrett for hire. The ALJ’s conclusions are problematic for four reasons. First, the ALJ only referenced *Wright Line* in his decision, ignoring the fact that *FES* governs refusal-to-hire and refusal-to-consider-for-hire cases, and ignoring the General Counsel’s extensive briefing of a violation under *FES*.

Second, the ALJ found no evidence of union animus from Respondent. This finding is belied with the ALJ’s conclusions that (1) Respondent violated Section 8(a)(1) by threatening its employees with not being rehired or being transferred to another facility because of their union activities; and (2) Respondent violated Section 8(a)(5) by unilaterally changing its practice of allowing Union stewards to participate in grievance meetings after they clocked in for their work shifts, which constitute more than enough proof to meet the *prima facie* burden.

Third, the ALJ found that General Counsel failed to prove a *prima facie* case because Garrett’s union activities were “extremely limited.” The record overwhelmingly demonstrated, and the ALJ adopted, that Garrett engaged in union activities in Respondent’s presence. Garrett’s activities exceeded the ALJ’s characterization of “extremely limited.”

Fourth, the ALJ’s legal analysis entirely omitted the undisputed facts relating to supervisor Padilla’s request that Garrett’s application be resuscitated, the undisputed evidence

that Respondent's managers can push otherwise disqualified applicants forward in the hiring process, or Hoyt and Gatson's conflicting and unresolved testimony on the subject. Indeed, the alleged Section 8(a)(3) violation stems from Respondent's refusal-to-hire or consider-for-hire Garrett through this alternative "resuscitative" hiring path, rather than because of Gatson's initial refusal to consider Garrett's application.

Besides the refusal to hire and refusal to consider for hire allegations, the General Counsel also excepts to the ALJ failure to find an independent Section 8(a)(1) violation and a Section 8(a)(4) violation. Regarding the former, Respondent's supervisor Michael Tavenner threatened employee Jason Peterson (and other employees) with job loss if the Union went on strike. Peterson testified to the "exact words" Tavenner told him: that a "strike" would be the reason for Respondent's employees to lose their jobs. This threat violates the Act, but the ALJ reasoned that Peterson's testimony was "confusing" and did not evince a "clear" threat to be unlawful.

The Section 8(a)(4) allegation is concomitant with the Section 8(a)(5) allegation: Respondent changed its past practice of allowing Union stewards to participate in grievance meetings after clocking in for their scheduled shifts. The ALJ had little difficulty in finding the Section 8(a)(5) violation. But the ALJ rejected the contention that the unilateral change was motivated by the Union's filing of the first charge in this matter, 28-CA-156203, despite finding (1) a close proximity between the Union's filing of the charge and Respondent's unilateral change; and (2) Respondent did not conduct any grievance meetings between the filing of the unfair labor practice charge and the date of the unilateral change. The ALJ concluded that there was no evidence of animus. However, the Board has found that timing alone is a valid proof of animus.

The Board should find that General Counsel met its *prima facie* burden under *Wright Line* and *FES*, and that Respondent violated the Act, as alleged, including by refusing to hire Garrett and refusing to consider him for hire; threatening its employees with job loss if the Union went on strike; and changing its practice of allowing Union stewards to participate in grievance meetings after they clocked in for their work shifts because the Union filed an unfair labor practice charge. The Board should correct these oversights, as described more fully below, and enter an appropriate order.

II. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING ITS EMPLOYEES WITH JOB LOSS IF EMPLOYEES WENT ON STRIKE.

1. Factual Background

During the course of contract negotiations between the Union and the Respondent, The Union's general membership overwhelmingly voted both to reject Respondent's last, best and final offer, and to authorize a strike.¹ Around 6:30 a.m. or 7:00 a.m., on the morning after the strike vote occurred, Michael Tavenner, Respondent's Transportation Manager—a manager Truck Driver Jason Peterson (Peterson) testified was higher up than an ordinary supervisor—initiated a conversation with Peterson about the bargaining situation as he was ending his shift. (Tr. 232-33).

Tavenner approached Peterson and asked if Peterson wanted to step outside and have a cigarette before lunch. (ALJD 7:46-48; Tr. 233). According to Peterson, Tavenner twice tried to bring up the union's strike vote. Tavenner first tried to initiate the conversation by asking Peterson, "come Wednesday, you know what's going on?" Peterson replied, "not really, I don't want to talk about it." (ALJD 7:49-50). Tavenner persisted, saying that some union guy wants

¹ Between October 1 and October 4, 2015, the Union held a membership vote regarding the Respondent's last, best, and final offer (Tr. 232:7-10; GCX 25). Union members voted against ratifying Respondent's final offer by a tally of 178 to 6. Union members also voted in favor of a strike by a tally of 175 to 5 (GCX 25).

another guy's job. Peterson repeated that he did not want to talk about it. (ALJD 7:50-51).

Peterson testified that Tavenner then got on the subject of the recent vote, saying "if a vote doesn't happen or something to do with people not coming to work that, you know, people lose their jobs." (Tr. 234-235).

Following this testimony, the ALJ and General Counsel asked Peterson to clarify exactly what was said during the conversation. (Tr. 235-236). Peterson explained that Tavenner's exact words as he recalled were "if this continues about people not showing up to work or striking, that people will—I don't want anybody to lose their jobs." After a few seconds, Tavenner added "well, I don't want to lose my job either." (Tr. 235). None of Peterson's testimony was rebutted as Respondent did not call Tavenner as a witness. (ALJD 8:8).

2. Legal Analysis

The Act explicitly protects the right to strike. 29 U.S.C. § 163 ("Nothing in this Act, except as specifically provided for herein, 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."). Section 8(a)(1) of the Act prohibits employers from threatening employees with job loss for engaging in protected strike activities.

The ALJ dismissed the allegation because he found there was no "clear threat" in the statement made by Tavenner to Peterson, and because he found Peterson's testimony was "so confused that I cannot find such a threat." (ALJD 10:14-19). However, the ALJ's analysis of the conversation between Tavenner and Peterson does not comport with the ALJ's own summary of the testimony as contained in the facts section of his decision, nor does it comport with the case law.

Although some of Peterson’s testimony may have been confusing, the ALJ acknowledged in his facts section that Peterson recalled Tavenner’s exact words as follows: “His exact words...as I recall is we want—if this continues about people not showing up for work or striking, that people will—I don’t want anyone to lose their jobs. And then he just waited for a couple of seconds and said, “well, I don’t want to lose my job either.” (ALJD 8:4-6).²

There is nothing confusing or unclear about the above-quoted statement. Tavenner impermissibly linked strike participation with job loss in violation of the Act. *See, e.g., Connecticut Humane Society*, 358 NLRB No. 31, slip op. at 62-63 (2012) (statement that “some employees could even find themselves without a job when the strike was over” impermissibly linked strike participation with job loss in violation of the Act); *Wild Oats Markets*, 344 NLRB 717, 740 (2005) (employer's statement to employees in a letter that “when Unions go on strike ... many have lost their jobs because striking workers are replaced” indicated to employees that they will likely lose their jobs if they are replaced as a result of a strike); *Baddour, Inc.*, 303 NLRB 275, 275 (1991) (employer’s statements that “union strikers can lose their jobs” and that “you could end up losing your job by being replaced with a new permanent worker” were unlawful threats); *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989) (employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement).

Moreover, in determining whether a statement constitutes a threat in violation of Section 8(a)(1) of the Act, the Board does not require a “clear threat.” Instead, the Board considers whether, under all circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees’ rights guaranteed under the Act. *Reeves Bros., Inc.*, 320 NLRB 1082, 1084

² The ALJ’s analysis of this conversation inexplicably leaves off Tavenner’s reference to the strike. (ALJD 10:14-19).

(1996); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). Although the ALJ found there was no “clear threat” in Tavenner’s statement, the statement was nonetheless unlawful in the circumstances present in this case.

Tavenner was Respondent’s Transportation Manager, and a high level supervisor above Peterson’s supervisors. He approached Peterson after his shift on the morning after the strike authorization vote, and initiated a conversation about the vote. After Peterson repeatedly told Tavenner that he did not want to talk about it, Tavenner persisted, linking the strike with wide ranging job loss. Tavenner not only stated that he did not want anyone to lose their jobs, but he also said he was worried about what might happen to his job. Even if Tavenner tiptoed around the issue—as might be expected of a sophisticated upper level manager in this situation—his message was clear: if this continues about people not showing up for work or striking, we may all be out of work. Tavenner’s statement, given the circumstances, reasonably tended to restrain, coerce and interfere with employees’ rights guaranteed under the Act.

III. RESPONDENT VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO HIRE OR CONSIDER FOR HIRE ELLIOTT GARRETT.

1. Factual Background

a. Respondent’s Two Distinct Hiring Paths

i. Initial Screening, and Gatson’s Determination of Eligibility and Qualifications

According to the repeated assertions of Respondent’s Human Resources Manager Chad Murphy, Respondent is “always hiring” night warehouse order selectors. (Tr. 106). From April 2015 to August 2015, Respondent hired at least 25 night warehouse order selectors.³ (GCX 18). When Respondent posts for a night warehouse selector opening, it creates a “requisition” for that opening in its TALEO computer system. (Tr. 93).

³ All dates refer to Year 2015, unless otherwise noted.

The requisition details the requirements for the position, lists the initial prescreening questions that applicants must answer, and allows HR Coordinator Julie Gatson (Gatson) to begin receiving, evaluating, and processing applications. (ALJD 5:30-32; Tr. 93, 257-59; GCX 4-5, 9-15). The ALJ found Gatson to be a totally credible witness when describing “her method of vetting the employment applications.” (ALJD 9:32-33).

The prescreening questions are divided into two categories, the “Disqualification Questions” and the “ACE Questions.” (ALJD 5:33-37; GCX 9:1014-1015).⁴ The Disqualification Questions are a series of eight yes-or-no questions, and are listed below:

1. Are you 18 years of age or older?
2. Are you legally authorized to work in the United States?
3. Have you ever been terminated for cause (e.g. violation of company policy)?
4. Are you willing to take a drug test?
5. Do you have any relatives employed by U.S. Foods, Inc. or its affiliates?
6. Have you entered into any agreements with any former employer or other entity (for example, an agreement not to compete or confidentiality agreement) that may impact your ability to work for U.S. Foods, Inc.?
7. Were you previously employed by U.S. Foods, Inc. or its affiliates?
8. Will you now or in the future require sponsorship for employment visa status (e.g. H-1B visa status)?

(ALJD 5:33-37; GCX 9)

Employees who answer “No” to questions 2 or 4 have a result of “The Candidate Is Disqualified.” If an employee answers “Yes” to questions 1, 2, or 4, or answers “No” to questions 3, 5, 6, 7, and 8, the result is “The Candidate Passes.” However, if an employee answers “No” to Question 1, or answers “Yes” to questions 3, 5, 6, 7, or 8 the result is “To Be Verified.” (ALJD 5:34-37; GCX 9). Though Gatson initially testified at hearing that a “To Be Verified” result leads to immediate disqualification, she ultimately agreed that answers to the

⁴ For efficiency purposes, references to the order selector requisitions will use GCX 9. GCX 10-12 have different requisition numbers and dates but the same questions and descriptions are used, which Gatson admitted. (Tr. 283-84)

Disqualification Questions in the night selector requisition would not actually result in automatic disqualification. (Tr. 257:23-24, 258-60).

The ACE Questions are a series of 14 yes-or-no or multiple choice questions which measure an applicant's qualifications for the job. (ALJD 5:37-40; GCX 9:1015-17). The ACE Questions inquire about: (1) an applicant's experience in the foodservice industry; (2) an applicant's willingness to work part-time; (3) an applicant's education level; and (4) an applicant's experience with a pallet jack. (GCX 9:1015-17). 6 of the 14 questions have answers for which a particular answer is "Required", all of which deal with whether the applicant is willing to work in the conditions required by the job and is available to work during the hours and days casual selectors are assigned work. (GCX 9:1015-17) The remaining eight questions deal with job qualifications which would qualify applicants' skills as an "asset" or not. (GCX 9:1015-17). According to Gatson, if the applicant's answer to an Asset question is positive, "it would put them at the top of the list." (ALJD 5:39; Tr. 260:11-13). More experience is preferred over less. (Tr. 261:19)

Gatson is the only person who performs the initial evaluation of casual order selector applications. (Tr. 93-94). Gatson decides whether or not to send the application up the chain of command to the relevant supervisors and hiring managers. (Tr. 94, 253-54) Gatson may "disposition" (i.e. "reject") applicants based on their prescreening answers, though this ultimately depends upon Gatson's discretion. (Tr. 261:1-8). Likewise, Gatson may disposition candidates as "Does Not Meet Basic Qualifications" if she determines they do not have the basic qualifications or appropriate experience to perform the job. (Tr. 253-54, 260-61, 268-69; GCX 4:2861). Gatson also does phone screenings, in which she seeks to "find out what [an applicant's] basic experience has been." (Tr. 253:13-14, 255).

Moreover, Gatson considers if applicants were previously employed by Respondent and whether they were “involuntarily” terminated by Respondent, as well as whether they had been terminated “for cause” by another employer. (Tr. 264, 280-82; GCX 15:2480). Gatson claimed that if Respondent previously terminated an employee for cause, Gatson would consider that applicant ineligible for rehire. (ALJD 5:48-52, 6:1-7). Neither Gatson nor any other representatives of Respondent were able to point to a policy, document, procedure, collective-bargaining agreement (CBA) article, or a memorandum of understanding that makes previously terminated employees ineligible for rehire. (Tr. 273-74).

An example of this scenario involved Garrett Sheppard (Sheppard), who, in July 2014, applied for a position with Respondent. Sheppard showed up in TALEO as having been terminated by a U.S. Foods facility in Missouri. (ALJD 5:48-52, Tr. 289-91). Gatson testified that she could not see the reason for an employee’s discharge if that employee was terminated for cause at a different U.S. Foods facility, but can only see that they had been terminated. (Tr. 289-90). Gatson did not automatically reject Sheppard due to his termination, but instead emailed Maria Smith, Respondent’s HR Manager in Salem, Missouri. Smith replied by email that Sheppard “was a no call no show, so we would not rehire him.” (ALJD 5:51-52; Tr. 289-91; GCX 32).

Gatson testified if she rejected an applicant at this stage of the hiring process, she would not forward the employment application to other supervisors or managers for their review. (Tr. 254:4). If Gatson decided to disposition an applicant at this stage, she would click a button in the computer system to generate an application rejection letter which is sent to applicants by email. (Tr. 261:10-13).

ii. Manager's Recommendations and Ability to Resuscitate Previously Rejected Applicants

The fact Gatson formally rejects an applicant at this stage of the hiring process does not necessarily end an applicant's quest for employment with Respondent. (ALJD 6:9-13; Tr. 266-69; GCX 13:1114-15). Gatson has the power to override her determination from the prescreening questionnaires. (ALJD 6:9-13; Tr. 268-69; GCX 13:1114-15). For example, on January 29, Gatson rejected applicant Octave Gwin in the TALEO system because Gwin "Does Not Meet Basic Qualifications –Relevant Experience/Skills/ Abilities[.]" Gatson generated Gwin's rejection letter and sent it out. After Gatson rejected Gwin, supervisor Mendez told Gatson he wanted to interview Gwin. (ALJD 6:10-12; TR. 268-69; GCX 13:1114-1115).

On January 30, Gatson changed Gwin's status to "Confirmed Basic Qualifications Met" and forwarded Gwin's application in the hiring process, even though Gwin did not possess the basic qualifications for the position." (ALJD 6:12-13; Tr. 268-69; GCX 13:1114-15). Respondent's resuscitation of Gwin's application resulted in Gwin's hiring. (Tr. 267-69, GCX 13). Respondent acknowledged that the resuscitation of an individual's employment application - like Gwin - by a supervisor occurs one or two times every quarter. (Tr. 302-03).

Though the ALJ fully credited Gatson's explanation that she rejected Sheppard's application because he was ineligible for rehire, and relied upon this comparator in finding Elliott Garrett's application was lawfully rejected, the situations are very different. (ALJD 9:33-41). Respondent did not enter any evidence showing that any supervisors requested that Sheppard's application be "pulled" or forwarded for an interview. Sheppard was not involved in the secondary, resuscitative hiring process. As shown below, the same cannot be said for Elliott Garrett's application.

b. Respondent's Consideration of Applications after Initial Screening or Resuscitation

If an applicant passes Gatson's initial screening and/or phone interview, or if a rejected applicant has their application resuscitated upon the request of a supervisor or manager, the applicant's file is forwarded to the Hiring Manager and a supervisor. (ALJD 4:27-35, 5:7-13, 5:26-28; Tr. 101, 292-93). From January 2015 to about August or September 2015, Director of Operations Steve Hoyt formally served as the Hiring Manager. (Tr. 64, 101, 293; GCX 4, 5, 12-15). During this same period, Gatson also forwarded applications to Transportation Manager (or "Route Manager") Albert Padilla. (ALJD 4:277-29, 5:26-28; Tr. 28, 32, 40, 48, 71, 293; GCX 4, 5, 14:2686).

By August 2015, Hiring Manager Steve Hoyt played no role in the hiring process and all hiring decisions, including those involving night warehouse order selector applications, were being made by Padilla.⁵ (ALJD 9:21-22; Tr. 37:1-10, 41:16, 72, 80). This was evidenced by Padilla's "name [being] attached" to the application in TALEO system documents that Gatson forwarded to Padilla, which he was expected to review and respond. (Tr. 72; GCX 14:2686). Indeed, as of June 2015, Padilla had been deciding which applicants would be hired, including (1) May 22 application forwarded on June 2, and (2) June 9, application forwarded on June 12.⁶ (ALJD 4:24-29; Tr. 296:14-18, GCX 4:2863, 5:2843).

⁵ While the ALJ generally discredited Padilla due to his evasive testimony, the ALJ stated that Hoyt was "credible and believable witness", including when he specifically credited Hoyt over Padilla. (ALJD 9:5-22).

⁶ The TALEO system consistently generates date and timestamps which are 14 hours later than the event they registered. Gatson admitted the date and time stamps were clearly wrong. (Tr. 279-281). The date stamps consistently showed Gatson working in the middle of the night or very early morning when she works a normal day shift. The "14 hour" nature of the discrepancy is clear from comparing evidence entered by CGC. For example, TALEO registered Garrett's application as rejected at 5:54 a.m. on May 29, and the rejection email was generated at 5:55 a.m. on May 29. (GCX 15:2480-81). However, Garrett actually received the email at 3:55 p.m. on May 28. (GCX 16). This is a 14-hour gap. Similarly, TALEO indicates that it generated Garrett's initial application confirmation letter on May 28 at 2:53 a.m., but Garrett's email lists 12:53 p.m. on May 27. Once again, this is a 14- hour gap.

c. Elliott Garrett's First Stint of Employment with Respondent

In 2013, Respondent hired Garrett as an order selector, a position he had worked for eight years previously with Shamrock Foods. (ALJD 3:8-10; Tr. 115, 117; GCX 15:2473-2474). In July 2013, Respondent promoted Garrett from "casual" selector to full-time status. Upon moving to full-time status, employees are eligible to join the Union, and Garrett signed up with the Union "immediately" after he became a full-time employee. (Tr. 117:18). Based on the evidence in the record, the ALJ found Garrett engaged in union activities by (1) wearing union paraphernalia, including tee-shirts (nearly every week) and Union hats; and (2) "holler[ing]" out "104[!]" (the number of the Union local) in the presence of his managers during lulls in morning shift meetings. (ALJD 3:18, 9:27-29; Tr. 116:7, Tr. 116:12-18, 178:18). Garrett even filed a grievance over a discipline Respondent issued him. (Tr. 117, 178:18-19)

In November 2014, Garrett got into a car accident and applied for FMLA leave due to injuries he suffered. (ALJD 3:8-12; Tr. 104-05, 118, 179, 181). However, the insurance did not certify all of Garrett's FMLA days, and Garrett subsequently exceeded the number of "attendance points" that an employee can accrue before being terminated under the CBA. (ALJD 3:8-13, 9:29-30; Tr. 104-05, 118-19, 270-72; GCX 16). Effective December 30, 2014, Respondent discharged Garrett, and the only reason given was for FMLA/attendance issue. More significantly, Garrett's termination letter did not state that Garrett was ineligible for rehire. (Tr. 104-05, 118, 272-73; GCX 16).

d. Garrett Applies for Re-Hire and is Initially Rejected

In late May 2015, Garrett called up Union Steward Ryan Proctor to ask if Garrett could get his order selector job back. (ALJD 3:12-20; Tr. 121-22, 179-80). This conversation prompted Proctor to go to Padilla's office and ask if Garrett was re-hirable. (ALJD 3:33-35; Tr.

180). Padilla told Proctor he was going to check and get back with Proctor. (ALJD 3:35-39; Tr. 180). The next day, Proctor went back to Padilla's office and asked if Padilla had indeed checked, but Padilla said that he was going to check with a supervisor to "vouch for Elliott Garrett's character, and if Elliott Garrett's character came back as he was a good person, that [Padilla] would tell me to tell [Garrett] to put in an application and [Padilla] would hire him." (ALJD 3:38-39; Tr. 180:17-22). During this conversation, Proctor emphasized to Padilla that while Garrett was a "good guy" and "a good worker", Garrett had been "termed" for attendance issues arising from his failed FMLA claim.⁷ (Tr. 181:1-8). However, even after Proctor explained this to Padilla, Padilla still said he was going to check on Garrett's reputation, specifically with supervisor Keith LaPlante. (ALJD 3:39-41; Tr. 181).

As Proctor and Padilla left Padilla's office, Padilla saw LaPlante coming out of the operations area, while Padilla had kept going straight towards his destination. Proctor approached LaPlante and told LaPlante that Padilla was going to check with him about Garrett's character because Garrett was looking to get his job back. LaPlante was pleased and said he would vouch for Garrett because "Elliott is a good dude, you know, he's a good worker." (ALJD 3:38-39; Tr. 182:1). Later during that shift, Proctor spoke with Padilla, and Padilla confirmed LaPlante had vouched for Garrett's character. (ALJD 3:40-41; Tr. 182:6-10). As a result, Padilla told Proctor to relay the message to Garrett to put in an application online, which Proctor did. (Tr. 120-23, 182).

On May 27, Garrett applied online for an open order selector position, under requisition number 15002362. Later that day, Garrett received a confirmation email from U.S. Foods that

⁷ Padilla denied that Proctor informed him that Garrett had been previously terminated for FMLA/Attendance issues. (Tr. 365). However, the ALJ generally broadly discredited Padilla's testimony "because he appeared to be evasive in his answers to questions from the General Counsel and often claimed that he could not remember subjects and conversations that he should have remembered." (ALJD 9:5-11).

his application had been received. (Tr. 120-24; GCX 10, 15, 27). Garrett achieved the highest possible rating on the “ACE” Questions (6/6 for Requirements, 8/8 on Assets), and had the highest sub-category ratings of “more than 5 years” in response to ACE Questions 3, 6, 12, and 13. (GCX 15:2474-2476). In terms of experience and skills, his application was superior to hires Demetrius Parker and Octave Gwin. (GCX 5:2626-2628, 13, 14). As far as an applicant’s ability to be hired based on these questions, Gatson testified that employees who achieved only six out of eight “assets” had been hired, and that it was possible employees with even lower asset scores had been hired. (Tr. 277)

The day after Garrett applied, Gatson rejected his application and selected the reason(s) as “Does not meet Basic Qualifications - ineligible for Rehire.” Gatson did not consult with any other supervisors or managers before she rejected Garrett’s application, and rejected Garrett solely because Respondent had previously terminated him for cause for violating Respondent’s attendance policy. (Tr. 282, 301-02; GCX 15:2480). As a result of rejecting Garrett in the system, Gatson generated a rejection letter e-mail, which Garrett received on May 28.⁸ (GCX 26). Nothing in the letter addressed Garrett’s ineligibility to apply or re-apply for a position with Respondent.

e. Padilla Resuscitated Garrett’s Application, and Recommended Garrett for Hire.

Approximately a week after Garrett received his rejection letter, Garrett informed Proctor that his application had been denied. (Tr. 126, 182-83). Upon learning that, Proctor asked Padilla “what was up with [Garrett’s] application and why it was denied [?]” Padilla told Proctor “that he’s got to check into it, that he is going to look into it.” (Tr. 183: 6-10).

⁸ See discussion of TALEO timestamps in fn. 6, supra.

On June 12 - more than two weeks after Respondent rejected Garrett's application for casual night warehouse order - Gatson shared with Padilla the application of Daniel Angulo, who applied for the same job as had Garrett. (GCX 5:2843). Later that day, Padilla e-mailed Hoyt, requesting the application of Garrett and another applicant in order for Padilla "to recommend them to be hired." (Tr. 44). Padilla's e-mail read:

"Steve,

Could you get Julie to forward me these applications please.

Solid people.

Elliott Garrett
Martin Llamas".

(GCX 6)

- f. Respondent Refused to Hire Garrett, or Consider Garrett for Hire, Because of Garrett's Union Activities.

Despite Padilla's request that Garrett's application be resuscitated (so that Garrett could be hired), Respondent chose to keep Garrett's application dead. One month later, Padilla admitted to employees that Garrett's union activities were the reason for Respondent refusing to hire Garrett, much less consider Garrett for employment.

On July 12, during a pre-shift start-up meeting, Padilla told employees Antonio Hernandez (Hernandez), Damasus Hardin (Hardin), and Proctor that Respondent did not hire Garrett because he was Union, and Respondent would not allow employees to transfer because of their Union status. (ALJD 9:12-14). The ALJ had no difficulty in finding that Respondent violated Section 8(a)(1) through Padilla's admission. (ALJD 9:12-14).

2. FES Governs in both Refusal-to-Hire and Consider-for-Hire Cases and General Counsel proved its case under both FES standards.

The Board has long established that an employer violates Section 8(a)(3) when it refuses to hire applicants because of their union status or activities. *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941). Refusal to hire allegations are evaluated under the test the Board set forth in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.2d 83 (3rd Cir. 2002).⁹ General Counsel fully briefed the ALJ on *FES*. Nonetheless, *FES* is not addressed in the ALJ's decision. The ALJ instead evaluated the case solely under *Wright Line*. As the ALJ did not once reference *FES* in his decision, General Counsel therefore submits that the Board should evaluate *de novo* the refusal-to-hire and refusal-to-consider-for-hire allegations involving Elliott Garrett.

Under *FES*, in refusal to hire cases, the General Counsel has the initial burden of showing that: (1) Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) 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 had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

To prove a refusal-to-consider violation, “the General Counsel must show that the Respondent [1] excluded the applicants from a hiring process, and [2] that the Respondent was motivated by antiunion animus.” *Dynasteel Corp*, 346 NLRB 86, 89 (2005) (citing *FES*, supra). Under each of these analyses, General Counsel proved Respondent's conduct regarding Garrett's application for employment was unlawful.

⁹ *Toering Electric Co.*, 351 NLRB 225 (2007), and its progeny are inapplicable to this case, as there are no allegations that Garrett was a Union salt, and no evidence was presented by Respondent averring that Garrett was a salt or potential salt.

3. Respondent Unlawfully Refused to Rehire Garrett under *FES*

a. General Counsel Established a *Prima Facie* Case

The first prong of *FES* requires a showing that Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct. Respondent admitted: (1) it was “always hiring” night warehouse selectors; (2) Garrett initially applied under a specific requisition for night warehouse order selectors; and (3) Respondent hired an order selector under the requisition through which Garrett applied. In fact, Padilla solicited Garrett to apply by telling Union steward Proctor to have Garrett put in an application and “he would hire him.” Respondent also hired another order selector through an additional requisition which existed at the time Padilla requested that Garrett’s application be “pulled” for further consideration. Respondent hired several more order selectors from a requisition which existed at the time Padilla informed Proctor, Hernandez, and Hardin that Garrett was not hired because of his union activities.

Between April and August 2015, Respondent hired approximately 25 night warehouse order selectors. Therefore, at all material times relevant to Garrett’s application, Respondent had concrete plans to hire night warehouse order selectors and actually hired night warehouse order selectors. Thus, the General Counsel has proven the first prong of the *FES* standard.

Second, Garrett possessed the qualifications and experience necessary to be an order selector for Respondent. Garrett worked as a night warehouse selector for Respondent (and for Shamrock Foods for seven years). HR Coordinator Gatson admitted that Garrett received the highest possible rating on Respondent’s “ACE questionnaire” documenting applicants’ relevant skills and experience. Garrett’s 10 years of experience as an order selector placed him in the highest “category” for previous experience.

Unlike Sheppard, whose application was rejected due to “no call no show” like Garrett. Garrett’s application was specifically pushed forward in the application chain by Padilla. Again, Gatson admitted she had the power to change an employees’ record from “Does not meet basic qualifications” to “meets qualification” even if the latter is untrue. Therefore, Garrett’s initial disqualification was no longer a barrier.

By all remaining metrics, Garrett had the relevant skills and experience necessary to meet the second prong of *FES*, and was an objectively more qualified candidate than applicants Octave Gwin and Demetrius Parker, whom Respondent hired as night selectors in 2015. The fact that Garrett had equal or superior skills to comparators buttresses his case.¹⁰ See e.g. *Suburban Electrical Engineers, Inc.*, 351 NLRB 1, 16 (2007)

Third, General Counsel produced corroborated testimonies from employees Proctor, Hernandez, and Hardin, all of whom stated that Night Warehouse Manager Albert Padilla told them that Hiring Manager & Director of Operations Steve Hoyt refused to hire Elliott Garrett - and refused to allow two unknown employees “from Cali” to transfer - because “they were Union.” The ALJ found that Padilla’s admission violated Section 8(a)(1) of the Act and completes General Counsel’s *prima facie* case. Padilla’s statement, attributable to Respondent, establishes the requisite union animus because the animus prong of *FES* is the same as in other 8(a)(3) cases: “[proof of animus] is inferred from all of the circumstances. We know of no case which eschews this approach, and we would not abandon it.” 331 NLRB 9, 18 fn. 8 (2000).

The ALJ’s reliance on the lack of union animus by Respondent because it transferred two employees - Juan Morales and Daniel Valenzuela – to Respondent’s Phoenix unionized facility is misplaced for two reasons. (ALJD 3:48-4:1, fn. 2; 9:20-26) First, there was no evidence to suggest either employee was supportive of the Union, much less a Union member. Second,

¹⁰ Garrett’s job requisition notes that previous experience in this kind of work is preferred (GCX 10:2648-49).

Morales' transfer occurred one year prior to Garrett re-applying for employment, while Valenzuela's transfer lasted three months (and Valenzuela was not working when Garrett submitted his application).

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee - include statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat). Here, the ALJ found that Padilla threatened employees with refusal-to-rehire if they engaged in Union activities, and made this threat in the context of Respondent's refusal to hire Garrett. The facts and case law are inseparable here.

b. Respondent's Alleged Legitimate Motive is Pretextual, and it cannot overcome General Counsel's *Prima Facie* Case.

Respondent's reasons for not hiring Garrett are pretextual. The evidence showed Respondent hired Gwin after HR Coordinator Gatson initially rejected him, and Gwin's application was evaluated solely because a low-level supervisor made such a request. Conversely, Respondent provided no examples of a supervisor requesting a rejected applicant be "pulled" but Respondent still refusing to consider that application, except for Garrett. Though the ALJ acknowledges this reality in his decision, it is of the utmost importance to note that *both* Gwin and Garrett were initially deemed ineligible under the same rubric in the TALEO system: "Does Not Meet Basic Qualifications". (ALJD 6:9-15; Tr. 268-69, 282, 301-02; GCX 13:1113-14, 15:2480). While Garrett may have been ineligible for rehire in the same way Gwin was

ineligible for hire, once Padilla requested Garrett be reconsidered, Respondent had no excuse for refusing even to pull his application for reconsideration. In fact, Garrett undisputedly had better qualifications than Gwin under the “ACE Questions” rubric. Thus, evidence of disparate treatment exists, defeating any legitimate, non-discriminatory reason Respondent proffered.¹¹

Furthermore, Proctor testified that even after he told Padilla that Garrett had previously been discharged for an attendance violation, Padilla still told Proctor to have Garrett put in an application and “we would hire him.” Considering Padilla’s active involvement with hiring employees and recommending employees for hire, it is evident that Garrett’s previous discharge was not a “but-for” barrier to being considered for hire.

“[A]n employer cannot rebut the General Counsel's initial showing of discriminatory motivation with a pretextual explanation, such as an asserted hiring policy that was not actually relied on.” *Aim Royal Insulation, Inc.*, 358 NLRB No. 91 (2012). The Board has stated that “Where an employer departs from such a policy in a sufficient number of instances, however, it cannot carry its rebuttal burden by relying on the policy.” *Jesco, Inc.*, 347 NLRB 903, 906 (2006); *Also see American Residential Services of Indiana*, 345 NLRB 995, 997-998 (2005).

The evidence demonstrated that Respondent did not rely upon Gatson’s initial rejections, however lawful and reasonable, if a supervisor overrides those rejections. And supervisors resuscitated the applications of previously rejected applicants, by Gatson, between four to eight times per year. Accordingly, Respondent failed to carry its rebuttal burden.

4. Respondent refused to consider Garrett for hire under *FES*

a. General Counsel Established a *Prima Facie* Case

The refusal-to-consider for hire test has only two prongs. The General Counsel only needed to prove that Respondent excluded the applicant from *a* hiring process, and did so

¹¹ Sheppard is not a comparator because his application was never resuscitated by a supervisor of Respondent.

because of union animus. Again, the General Counsel satisfied both prongs.

Regarding the first prong, Garrett was excluded from a hiring process as his application never even reached a pre-screening interview, much less an interview with a supervisor. Gatson initially rejected Garrett's application because she claimed Garrett was "did not meet Basic Qualifications" and was "ineligible for hire." (GCX 15). Gatson testified that this was because Garrett had previously been discharged by Respondent for violating Respondent's attendance policy. (ALJD 9:30-42). General Counsel does not dispute this motive, nor the legality of Gatson's initial refusal to consider Garrett's application. Rather, General Counsel reiterates that the exclusion was Respondent's refusal to reconsider Garrett's application after Padilla specifically requested that Garrett's application be pulled. This secondary hiring process is used between four to eight times per year by Respondent's supervisors when they want to hire a particular applicant.

As previously detailed, on June 12, Night Warehouse Manager Padilla e-mailed Hoyt, resuscitating Garrett's application, about two weeks after Garrett had initially been rejected by Gatson. (GCX 6, 15) Padilla admitted to requesting Garrett's application specifically in order "to recommend [him] to be hired."

The evidence showed that supervisors made requests to pull an unqualified applicant's application from the rejection pile and move that applicant forward in the hiring process. But, despite Padilla's request and Respondent's history of overriding initial rejections upon a supervisor's request, Garrett's application was never resuscitated. Respondent's TALEO system confirmed that Garrett was never considered for hire, was never interviewed, and that his application never moved forward in the application process. Simply stated, Respondent discriminately excluded Garrett from being hired or considered for hire.

Regarding the second prong of the test, it is functionally identical to that prong for the “refusal to hire” test. The General Counsel has addressed that prong and, for purposes of brevity, incorporates by reference its argument for this analysis in the refusal to consider for hire allegation.

b. Respondent’s Alleged Legitimate Motive is Pretextual, and it cannot overcome General Counsel’s *Prima Facie* Case.

Just as Respondent failed to carry its rebuttal burden in the refusal to hire allegation, Respondent is equally unsuccessful in rebutting General Counsel’s *prima facie* case in refusing to consider Garrett for hire. As previously discussed above, Respondent’s supervisors override Gatson’s rejection of applicant’s employment application as much as eight times per year, thereby resuscitating the applicant’s ability to be hired. When the supervisor manager requests Gatson pull a previously rejected application, she does so, or at least has a “discussion” with the supervisor.

However, Gatson admitted she never pulled Garrett’s application or had a “discussion” with supervisors Hoyt or Padilla about Garrett, even after Padilla’s request to resurrect Garrett’s application. (Tr. 281-82). Instead, Garrett’s application remained dead once Gatson rejected it

5. General Counsel Proved its Case under *Wright Line*

a. Contrary to the ALJ’s Finding, the General Counsel Established a *Prima Facie* Case

While the General Counsel argued *FES* in its brief to the ALJ, it is equally clear from the transcript, exhibits, and the ALJ’s own findings that General Counsel met its burden under the *Wright Line* test, which the ALJ applied. (ALJD 9:14-42).

Based on an analysis of the Board’s decisions, in order to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General

Counsel must demonstrate by a preponderance of the evidence that 1) the employee was engaged in protected activity, 2) that the employer had knowledge of that activity, and 3) that the employer's hostility to that activity "contributed to" its decision to 4) take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

It is not entirely clear why the ALJ found that General Counsel did not establish its *prima facie* case under *Wright Line* regarding Respondent's refusal to hire or consider-for-hire Garrett. (ALJD 9:26-27). Regardless, the facts (and the ALJ's findings) demonstrate otherwise.

The evidence demonstrated that Garrett engaged in union activities and Respondent had knowledge of those activities. Based on the evidence in the record, the ALJ found Garrett engaged in union activities by (1) wearing union paraphernalia, including tee-shirts (nearly every week) and Union hats; and (2) "holler[ing]" out "104[!]" (the number of the Union local) in the presence of his managers during lulls in morning shift meetings. (ALJD 3:18, 9:27-29; Tr. 116:7, Tr. 116:12-18, 178:18). Garrett even filed a grievance over a discipline Respondent issued him. (Tr. 117, 178:18-19).

Instead of finding that these facts supported or proved part of the General Counsel's *prima facie* case, the ALJ concluded that it weighed *against* General Counsel because "Garrett's union activities were extremely limited". (ALJD 9:28-29). Under *Wright Line*, there is no requirement that the General Counsel proved the level frequency a discriminatee must wear union paraphernalia, or wholly disrupt Respondent's activities with pro-Union belligerence, in order to show that he or she was engaged in union activities. The General Counsel only needs to

prove that the discriminatee engaged in such activities. And the ALJ found Garrett engaged in union activities.

Furthermore, the ALJ found that the General Counsel fell short of establishing its initial *Wright Line* burden because Garrett was “terminated for excessive absenteeism in January and reapplied only 4 or 5 months later.” (ALJD 9:29-30). The ALJ continued, saying that “[a]bsent a pretextual reason for the refusal to rehire, which I do not find here, it is not unreasonable for an employer to refuse to rehire an employee it had discharged 4 or 5 months earlier.” (ALJD 9:30-32). But those arguments the ALJ noted are appropriate for Respondent’s affirmative defense, not General Counsel’s *prima facie* case to establish union animus as a motivating factor.

The evidence in the record demonstrated that the General Counsel established union animus was a motivating factor in Respondent’s decision not to hire Garrett, much less consider him for hire. Such animus exists in the ALJ findings that (1) Respondent violated Section 8(a)(1) when supervisor Padilla informed employees that Respondent would not hire or transfer employees because of their union activities 8(a)(1) statement; and (2) Respondent violated Section 8(a)(5) by unilaterally changing its practice of allowing Union stewards to participate in grievance meetings after they clocked in for their work shifts.

b. Respondent Has Failed to Meet Its *Wright Line* Burden Regarding Its Failure to Hire or Consider-for-Hire Garrett

Under *Wright Line*, once the General Counsel established a *prima facie* case of discrimination, Respondent shoulders the burden of proving that it would have refused to hire or consider-for-hire the alleged discriminatee even in the absence of his Union activity. As explained in the analyses under *FES* above, Respondent cannot meet this burden, and, for purpose of brevity, the General Counsel incorporates its arguments and analyses to show that Respondent failed to rebut the General Counsel’s *prima facie* case.

Based on the forgoing, General Counsel respectfully urges the Board to find that Respondent did not sustain its burden under *Wright Line*, and that Respondent's refusal to hire and refusal to consider for hire Elliott Garrett violated Section 8(a)(3) of the Act.

IV. RESPONDENT VIOLATED SECTION 8(a)(4) BY CHANGING ITS PRACTICE OF ALLOWING UNION STEWARDS TO PARTICIPATE IN GRIEVANCE MEETINGS AFTER THE CLOCK IN BECAUSE THE UNION FILED THE CHARGE IN CASE 28-CA-156203.

The Consolidated Complaint alleged that Respondent violated Section 8(a)(5) of the Act when it “changed its practice of allowing union stewards in the Unit to participate in grievance meetings after clocking in for their scheduled shifts” and did so without bargaining or notice to the Union. (GCX 1(k), (r)). The ALJ had little difficulty in finding that Respondent's action violated Section 8(a)(5) (ALJD 10:7-9).

The Consolidated Complaint also alleged that Respondent's action violated Section 8(a)(4) of the Act “because the Union filed the charge in Case 28-CA-156203.” (GCX 1(k), (r)). The General Counsel relied upon the close timing between the charge and the unilateral change in alleging this 8(a)(4) violation. The ALJ referenced this timing, but inexplicably used it as a justification to dismiss the allegation: “As there is no evidence that [the unilateral change] resulted from unfair labor practice charges filed by the Union other than the fact that the initial unfair labor practice charge was filed 11 days before the July 28 grievance meeting, I recommend that the Section 8(a)(1)(4) allegation be dismissed.” (ALJD 10:9-12). The ALJ's reference is elliptical, because the Board holds that timing alone can suffice as an inference of animus. The ALJ's conclusion also oversimplifies the facts relevant to the timing inference, as the ALJ's own analysis tends to show.

1. Factual Background

On July 17 the Union filed the charge in Case 28-CA-156203, alleging Respondent had denied applicants opportunities for employment due to their Union affiliations. A copy of this charge was served by mail on Respondent, on that same date, by a designated agent of the NLRB. (Tr. 137; GCX 1(a), (b), (r)). That same day, Union Business Agent Josh Graves emailed Vice President of Operations Joe Hefley asking to schedule a grievance meeting the following week, preferably on July 21 at 4:00 p.m. (Tr. 134-35, 327-328; GCX 19:3). The parties eventually agreed to have the grievance meeting on July 28.

The ALJ credited Graves' testimony regarding the relevant communications between Hefley and Graves. (ALJD 6:32-43, 9:52, 10:1-5). On July 20 - three days after the Union filed the charge - Hefley telephoned Graves and told him stewards would no longer get paid for grievance meetings that went past 5:00 p.m. Hefley informed Graves that, beginning at the upcoming July 28 grievance meeting, Union stewards attending that meeting would have to be on the shop floor at 5:00 p.m. for the start of their shifts. (ALJD 6:32-43, 10:2-5). The next day, Hefley removed all doubt, writing an email to Graves stating, "I will need the stewards to be at the shift start up meeting sharply at 5pm." (ALJD 10:1; GCX 20:1).

The ALJ found that Respondent's words were no mere idle threat. At the July 28 and August 4 grievance meetings, the Union stewards were required to leave the grievance meetings early in order to be on the floor for the beginning of their shifts. (ALJD 6-7, 9:50-52). This was in direct opposition to what all parties admitted was a past practice. (ALJD 9:47-50).

2. Legal Analysis

Section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony

under this Act.” *Abramson, LLC*, 345 NLRB 171, 175 (2005). The Board has stated that “An analysis pursuant to *Wright Line* [...] is applicable in cases involving the 8(a)(4) allegations.” *Rochelle Waste Disposal, LLC*, 353 NLRB 416, 422 (2008) (citations partially omitted). As such, violations of the Act can be proven by circumstantial evidence, and timing can suffice as proof of animus on its own. *See, e.g., Kag-W., LLC*, 362 NLRB No. 121 (June 16, 2015); *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); *Masland Industries*, 311 NLRB 184, 197 (1993); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)).

The General Counsel has met the *Wright Line* standards for a *prima facie* case under 8(a)(4). First, the Union filed a charge on July 17. Second, Respondent admitted service of the charge, which establishes Respondent’s knowledge of the charge. Third, the ALJ found that the Union’s stewards suffered a change in their terms and conditions of employment, specifically in the form of being forced to leave grievance meetings at 5:00 p.m. or forfeit pay for their customary hours. Finally, the timing alone between service of the charge and the adverse employment action suffices to create an inference of animus.

Here, the timing inference is exceedingly strong. Three days after service of the charge, Respondent announced its plan to implement the unilateral change. Eleven days after the Union filed its charge, Respondent unilaterally implemented its change. *See, Kag-West, LLC*, 362 NLRB No. 121, slip op. at 3 (2015) (less than a month between discovery of Union activity and grant of wage increase proved animus). *Stringfellow's of New York*, 296 NLRB 424, 428 (1989) (Board agreed that gap of three days between employer’s discovery of Union activity and discharge of employee independently supported inference of anti-union animus).

Moreover, Respondent presented no evidence to rebut the General Counsel's *prima facie* case because its unilateral action, as found by the ALJ, violated Section 8(a)(5) of the Act.

Accordingly, the Board should find that Respondent's unilateral action violated Section 8(a)(4).

V. GENERAL COUNSEL SEEKS AN ORDER REQUIRING RESPONDENT TO MAKE ELLIOTT GARRET WHOLE, INCLUDING THROUGH PAYMENT OF SEARCH-FOR-WORK AND WORK-RELATED EXPENSES, REGARDLESS OF WHETHER THESE AMOUNTS EXCEED INTERIM EARNINGS

As specifically requested in the Consolidated Complaint (and argued in the General Counsel's ALJ Brief), in addition to being entitled to all traditional remedies for an unlawful refusal to hire and/or refusal to consider for hire, Elliott Garrett is entitled to be made whole for search-for-work and work-related expenses regardless of whether these amounts exceed any interim earnings. Because the ALJ found that the General Counsel did not establish a *prima facie* case of discrimination, the ALJ refused to address the General Counsel's request for such relief.

However, as demonstrated through its Brief in Support of its Exceptions, the General Counsel has demonstrated, both under *FES* and *Wright Line*, that it proved Respondent violated Section 8(a)(3) by refusing to hire Garrett, and refusing to consider Garrett for hire, because of his union and other concerted activities. Accordingly, for the following reasons, the Board should order Respondent to make Garrett whole for search-for-work and work-related expenses regardless of whether these amounts exceed any interim earnings.

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment, *D.L. Baker, Inc.*, 351 NLRB 515, 537

(2007); the cost of tools or uniforms required by an interim employer, *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965); room and board when seeking employment and/or working away from home, *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976); contractually required union dues and/or initiation fees, if not previously required while working for respondent, *Rainbow Coaches*, 280 NLRB 166, 190 (1986); and/or the cost of moving if required to assume interim employment, *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See West Texas Utilities Company, Inc.*, 109 NLRB 936, 937 fn.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also North Slope Mechanical*, 286 NLRB 633, 641 fn.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses. *Midwestern*

Personnel Services, 346 NLRB 624, 625 (2006) (“To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.”).

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Kentucky River Medical Center*, 356 NLRB No. 8 slip op. at 3 (2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners*, 361 NLRB No. 57 slip op. at 2 (2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991*, Decision No. 915.002, at *5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep 't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its

objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." *Tortillas Don Chavas*, 361 NLRB No. 10 slip op. at 3 (2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period. Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerboxer Plastic Co., Inc.*, 104 NLRB 514, 516 (1953). These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Kentucky River Medical Center*, 356 NLRB No. 8 slip op. at 1 (2010) (interest is to be compounded daily in backpay cases).

VI. CONCLUSION

Based upon the foregoing and the record evidence considered as a whole, the General Counsel respectfully requests that the Board find that Respondent violated Section 8(a)(1) by Michael Tavenner's coercive threat that employees could lose their jobs if they struck; Section 8(a)(3) by refusing to hire and refusing to consider-for-hire Elliott Garrett because Garrett's history of Union activities and sympathies; and Section 8(a)(4) by making a unilateral change to the method by which Union stewards are allowed to attend (and receive payment) for grievance meetings, in retaliation for the Union filing its charge in Case 28-CA-156203. General Counsel urges the Board to issue an order providing a full and appropriate remedy for such violations, in addition to those allegations which the ALJ already found merit to, including requiring Respondent to make Garrett whole, consistent with the Board's recent decision in *Tortillas Don*

Chavas, 361 NLRB No. 10 (2014), including through payment for search-for-work and work-related expenses, regardless of whether those amounts exceed Garrett's interim earnings.

Dated at Phoenix, Arizona, this 7th day of April 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF IN SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in Cases 28-CA-156203, et al., was served by E-Gov, E-Filing, and E-Mail, on this 7th day of April 2016, on the following:

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