

**IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

US FOODS, INC.

and

GENERAL TEAMSTER (EXCLUDING
MAILERS), STATE OF ARIZONA LOCAL
104, an affiliate of the International
Brotherhood of Teamsters.

Case Nos. 28-CA-156203
& 28-CA-160985

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

Joseph Turner
Karla E. Sanchez
SEYFARTH SHAW LLP
131 South Dearborn St., Suite 2400
Chicago, Illinois 60603
(312) 460-5000

Counsel for US Foods, Inc.

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SUMMARY OF THE CASE

The unfair labor practice charges underlying this case arise from the aftermath of unsuccessful negotiations for a successor labor agreement between US Foods, Inc. ("US Foods" or "Respondent") and General Teamsters Local 104 (the "Union"). After the withdrawal/dismissal of the bad faith bargaining allegations contained in the charges, the General Counsel proceeded on the following six allegations:

- 1) on about July 12, 2015, Night Warehouse Manager Albert Padilla told Union Steward Ryan Proctor and another employee that the Company did not rehire a former employee, Elliott Garrett, and would not accept transfers of several employees from another facility, because of their union status;
- 2) on about July 28, 2015, Warehouse Supervisor Keith LaPlante told Proctor that he was removed from training duties months earlier because of his steward position;
- 3) in April 2015, US Foods removed Proctor from training duties because of his Union activity;

- 4) in May 2015, US Foods refused to rehire an employee recommended by Proctor and previously terminated for cause, Elliott Garrett, because of his union support;
- 5) on about July 28, 2015, US Foods changed its practice of allowing Union stewards (including Proctor) to participate in grievance meetings after clocking in for their scheduled shifts; and
- 6) on about October 5, 2015, Transportation Manager Michael Tavenner threatened an employee by telling him that employees would be discharged if they engaged in Union and other concerted activities. (G.C. Exh. 1(k); G.C. Exh. 1(s)).

After an evidentiary hearing, the Administrative Law Judge (“ALJ”) issued a decision based on his observations and determinations regarding the relative credibility of the witnesses and the supporting evidence. In sum, the ALJ found that the General Counsel had met its burden of proof to show that US Foods violated Section 8(a)(1) through statements made by Warehouse Supervisor Albert Padilla in July regarding the refusal to rehire a former employee, Elliott Garrett, and that US Foods violated Section 8(a)(5) by changing the practice allowing Union stewards to participate in grievance meetings beyond the start-time of their regular shift with pay. The ALJ, however, rejected the General Counsel’s Section 8(a)(1) and (3) allegations that the refusal to rehire Garrett was discriminatory based on the credited testimony of the US Foods’ human resources coordinator who rejected Garrett’s application several months prior to Padilla’s alleged statement based on a long-standing, common sense policy prohibiting the rehire of employees previously terminated by the Company for cause. The ALJ also rejected the General Counsel’s Section 8(a)(4) allegation that the change in practice related to the stewards’ participation in grievance meetings was motivated by the filing of unfair labor practice charges based on the complete lack of proof of causation. The ALJ further rejected the remaining allegations listed above, including the allegation that US Foods’ Transportation Manager Mike Tavenner threatened an employee with discharge if he engaged in protected activity.

The General Counsel now files exceptions and asks the Board to overturn the ALJ's findings that US Foods' decision not to rehire Garrett was legitimate and non-discriminatory, that no threat was made by Tavenner that would chill the exercise of protected activity, and that the filing of an unfair labor practice charge in July 2015 did not motivate the change in practice regarding the conduct of grievance meetings. The judgments of the ALJ with regard to the credibility of witnesses and the weighing of evidence on these allegations are amply supported by the record and should not be disturbed. *See Standard Dry Wall Products, Inc.*, 91 NLRB 544-545 (1950) (holding that the Board attaches great weight to the credibility resolutions of the Trial Examiner and will only overturn those resolutions where the clear preponderance of all the relevant evidence so requires).

THE RELEVANT FACTS¹

I. US Foods' Business Model and Its Phoenix Division.

US Foods is in the food distribution business. (Tr. 309:1-2).² Its customers include nursing homes, hospitals, schools, independent mom and pop restaurants, and other businesses in the food industry. (Tr. 309:3-6). US Foods' Phoenix Division services the entire state of Arizona and parts of California. (Tr. 310:13-20). The Phoenix Division includes facilities in Phoenix and Tucson and seven "resident yards," where drivers pick up and drop off trailers. (Tr. 310:21-25, Tr. 311:1-6). The Phoenix distribution center consists of a warehouse of approximately 300,000 square feet, with roughly 130 warehouse employees. (Tr. 311:7-11). The Phoenix Division also employs approximately 138 drivers, and dispatches deliveries on approximately 75 driver routes on any given day. (Tr. 311:20-22).

¹ Only the relevant facts applicable to the Exceptions filed by the General Counsel are addressed here.

² Throughout this brief, citations to the record are abbreviated as follows: Transcript of the Hearing as (Tr. [Page]:[Line]); General Counsel's exhibits as (G.C. Exh. __); and Respondent's exhibits as (R. Exh. __).

A. US Foods' Warehouse and Delivery Operations.

Warehouse employees work in two shifts: the day and the night shift. (Tr. 311:23-312:1). The day shift employees start between 5:00 a.m. and 6:00 a.m. (Tr. 312:1-6). The day shift employees are primarily responsible for receiving and putting away product in the warehouse and organizing the warehouse for the night crew. (Tr. 312:1-6). The night crew typically starts at 5:00 p.m. (Tr. 312:7-11). The night crew is primarily responsible for selecting customer orders and loading the trucks with those orders in advance of the delivery dispatch times. (Tr. 312:8-11). About 70 to 80 warehouse employees work the night shift. (Tr. 312:12-15).

Trucks begin to dispatch out of the Phoenix warehouse around 8 p.m. to make deliveries to customers. (Tr. 312:24-25). The majority of drivers, however, begin their routes between 11 p.m. and 5:30 a.m. (Tr. 312:24-313:2).

B. US Foods' Key Drivers for Success.

The key drivers for business success for US Foods are outstanding customer service and efficiency. US Foods must deliver outstanding service to its customers, which is defined primarily by delivering a customer's complete order on time and without errors. (Tr. 313:9-19). Efficiency relates to cost containment—"making sure that we can control our costs and we don't have to pass it on to customers to keep us a viable sustainable competitor within the market." (Tr. 313:13-25).

Given these two key drivers, employee attendance is an important issue for US Foods. Regular attendance by employees is critical to ensuring that US Foods meets its customer service and efficiency goals. (Tr. 314:1-6).

C. US Foods' Warehouse Employee Hiring.

When a warehouse position becomes available, the operations group contacts the HR coordinator, who during the relevant time period was Julie Gatson. (Tr. 93:1-14; Tr. 252:2-11).

Gatson causes the available position to be posted on US Foods' website through the posting of what US Foods calls a "requisition." (Tr. 93:8-12). This requisition includes a description of the available position (i.e. night warehouse selector), the number of positions available, and a target start date. (Tr. 255:18-257:2).

On US Foods' website, applicants apply through a system called "Taleo," US Food's electronic application system. (Tr. 277:20-25). Applicants apply for open positions by requisition number, each new posting having a separate requisition number. (Tr. 255:18-256:4; G.C. Exh. 9).

The online application includes several sections. The first section asks the applicant to identify his/her work history. (G.C. Exh. 9). Applicants are next prompted to answer questions referred to as "disqualifying questions" or "prescreening questions." (Tr. 257:4-258:1). This section includes questions such as whether the applicant is legally authorized to work in the United States, whether the applicant is willing to take a drug test, and whether the applicant will require a visa for employment. (G.C. Exh. 9). In addition to the disqualifying questions, applicants are also prompted to answer "ACE" questions, which are questions related to the applicant's work experience. (Tr. 260:6-13). These questions ask, among other things, for the highest level of the applicant's education, the applicant's warehouse experience, and whether the applicant has experience working with an electric pallet jack or high lift. (G.C. Exh. 9). Some of these questions require a "yes" response—a "no" response making the applicant ineligible for hire. (*Id.*). The majority of the ACE questions, however, are used for purposes of assessing "assets" which are "nice to have" qualifications, but not required for the position. (Tr. 260:14-18). Taleo generates a percentage score based on the answers to these questions—the higher the percentage the higher the applicant is rated. (Tr. 260:6-13).

Gatson reviews the applications for warehouse applicants through Taleo. (Tr. 252:2-253:20; Tr. 261:4-8). Gatson begins by reviewing the “work history and determine[s] based on the position that they’re applying for whether they have the appropriate experience.” (Tr. 253:24-254:1; Tr. 258:14-22). If the applicant does not have the appropriate experience, Gatson terminates the application, or “dispositions” the applicant, without forwarding the application to anyone else. (Tr. 253:15-20; Tr. 254:1-4; Tr. 261:4-8). When an applicant is dispositioned, the Taleo system generates a rejection letter that is sent to the applicant. (Tr. 261:9-10).

If the applicant was previously employed by US Foods, Gatson reviews the reason for the former employee’s termination. (Tr. 262:24-263:13). “If it’s a former US Foods employee and they were termed for cause it would be - - they would be ineligible for hire.” (Tr. 264:5-7). Gatson explained that it is US Foods’ policy that no employee who has been previously terminated for cause is rehired. (Tr. 300:21-24).

With respect to former employees who worked at the Phoenix Division, Gatson is able to review the employee’s file and identify the reason for termination. (Tr. 263:2-3; Tr. 288:10-14). With respect to former US Foods’ employees who worked at other divisions, Gatson is only able to search on the US Foods’ system for the date of their termination. (Tr. 288:10-14). Gatson is not able to see the reasons for the terminations of employment. (Tr. 289:21-290:17). Because a “termination” in US Foods’ system includes both voluntary and involuntary reasons, Gatson contacts the former employee’s location of employment to determine whether the termination was for cause. (Tr. 289:21-290:9; Tr. 290-20-23).

If Gatson initially determines that an applicant is qualified, Gatson may conduct a phone screen interview with the applicant. During the phone screen interview, Gatson will verify any responses from the application deemed necessary. (Tr. 253:12-14; Tr. 259:23-260:2; Tr. 262:16-

23). After conducting a phone screen interview, Gatson forwards qualified applications to the supervisor and/or hiring manager for review. (Tr. 93:22-25; Tr. 292:8-20). The supervisor and/or manager determine whether they want to hire an applicant. (Tr. 94:2-16). After the applications are forwarded to a supervisor and/or manager, Gatson is not involved in determining who should be hired. (Tr. 294:7-11).

II. Negotiations for a Successor Labor Agreement.

Teamsters Local 104 represents the hourly-paid warehouse employees, drivers and mechanics. (Tr. 131:13-16; Tr. 312:19-21). The Union and US Foods are signatories to a labor agreement (“CBA” or “labor agreement”) with an effective date of August 21, 2011 and an expiration date June 1, 2015. (G.C. Exh. 2).

In late May 2015, the parties began bargaining for a new labor agreement. (Tr. 335:15-17). On May 28, 2015, the parties agreed to an open-ended extension of the expiring agreement, which could be cancelled by either party with seventy-two hours’ notice. (Tr. 131:2-3; G.C. Exh. 3). The Union cancelled the extension in October 2015. (Tr. 131:10-12). On the afternoon of October 5, 2015, Business Agent Josh Graves sent Vice President of Operations Joe Hefley a letter dated October 3, in which he explained that the Union membership had overwhelmingly rejected US Foods’ contract offer. (Tr. 155:3-12; Tr. 171:15-172:1; G.C. Exh. 25). The Union’s letter further explained that the Union membership had authorized a strike. (Tr. 155:3-12; G.C. Exh. 25). After receiving this letter, Graves asked whether US Foods was willing to return to the negotiation table, and US Foods agreed to resume bargaining. (Tr. 172:2-5).

III. The Parties’ Grievance Handling Process.

The parties’ expired labor agreement contains a grievance procedure (Article 21). (G.C. Exh. 2 at 38). The grievance procedure provides for three “Steps” of discussions before arbitration. (G.C. Exh. 2 at 38). Step 2 meetings are scheduled based on the number of

grievances that need to be processed. (Tr. 133:4-7). Per the grievance procedure, the aggrieved employee, business agent, and the division vice president of operations attend the Step 2 meeting. (G.C. Exh. 2 at 38).

In 2015, Union Business Agent Graves and the night warehouse stewards, Proctor and Frank Solis, typically participated in the Step 2 meetings for the night warehouse grievances. (Tr. 131:20-25; Tr. 325:1-6). Because the Union stewards are US Foods employees who work the night shift, Step 2 meetings are generally scheduled to begin an hour prior to the start of the stewards' regular shift (at 4:00 p.m. based on a 5:00 p.m. shift start), with the intent to end prior to the start of the steward's regular shift. (Tr. 325:7-9). Hefley provided two reasons for this expectation: 1) the terms of the collective bargaining agreement; and 2) the need to have the stewards and the supervisors who participate in the meetings working at the start of the shift. (Tr. 325:11-16).

Indeed, the labor agreement still in effect in July 2015 set forth the Union steward's limited authority and the parties' agreement that the duties of the stewards should be performed outside of their regular shift:

The Union has advised the Company that the authority of the Union Stewards and Alternate Union Stewards, so designated by the Union, shall be limited to, and shall not exceed, the following duties and activities:

1. Posting Union Notices authorized by the Union on the Union Bulletin Board;
2. Relaying information from the Union to the Company and/or employees where authorized;
3. Discussing grievances with the Union and/or the Company for the purpose of relating such grievance information to the proper Union Officials and/or the Company; and
4. Discussion and where possible resolving grievances in accordance with the provisions of the Collective Bargaining Agreement with the Company as Step 1 of the grievance procedure.

D. The duties of the Union Steward **shall not interfere with the regular schedule of work or with the work of any other employee unless permission has been granted in advance by the department shift manager.** The Union Steward shall not absent himself from his place of work to visit other parts of the warehouse without the permission in advance by the department shift manager.

(G.C. Exh. 2 at 44) (emphasis provided).

With respect to Proctor and Solis, when a Step 2 grievance meeting extended beyond their scheduled shift start time, the payroll coordinator for the warehouse adjusted their time back to their scheduled shift start time.³ (Tr. 341:8-12; Tr. 344:4-22). Thus, the stewards were paid, per US Foods' permission, for time spent in a Step 2 grievance meeting during their regular shift time.⁴

This practice did not change in July 2015. On July 21, 2015, pursuant to prior communications between Hefley and Graves to schedule upcoming grievance meetings, Hefley sent Graves an email proposing dates for Step 2 grievance meetings. (G.C. Exh. at 19). Hefley proposed July 28 from 4:00 to 5:00 p.m. and August 4 from 3:30 to 5:00 p.m. In addition to proposing the dates and times for the grievance meetings, Hefley stated in his email: "Also, I will need the stewards to be at the shift start up meeting sharply at 5 pm." (G.C. Exh. at 19).

Hefley's request to move up the time by a half an hour on August 4 and to note the commencement time for the shift was Hefley's response to the spike in the number of grievances that were being filed. At the close of the initial May 28, 2015 bargaining session, Proctor pushed a large stack of blank grievances across the table toward Hefley, stating "here, these are for you,

³ Only the Step 2 grievance meetings are at issue in the instant case. Thus, the remaining steps of the grievance process are not described herein. *See generally* G.C. Exh.2, G.C. Exh. 19.

⁴ Stewards have never been paid for the time they spend in a grievance meeting before their start time. (Tr. 143:1-11).

they're coming your way." (Tr. 326:5-16; Tr. 345:17-347:14).⁵ Proctor followed through with his threat by filing four grievances in the next four days, and 17 grievances between May 28 and July 28. (R. Exh. 1; R. Exh. 2; R. Exh. 3). Proctor also openly proclaimed: "we're going to paper you to death." (Tr. 346:18-25).

The Step 2 meeting went forward on July 28. On July 30, Graves sent Hefley a letter, stating in relevant part:

Per phone conversation with you and last grievance meeting on July 28, 2015 where the Company informed the Union that stewards would no longer get paid for grievance meetings and dealing with issues during their scheduled shift. This is a unilateral change and failure to bargain with the Union over these changes. Please except [sic] this letter as official notification from Teamsters Local Union 104 demanding bargaining over these changes.

(Tr. 147:13-22; G.C. Exh. 21).

On August 4, 2015, a second grievance meeting was held and commenced at 3:30 p.m.

(Tr. 148:8-17). On August 13, 2015, Hefley sent Graves a letter, stating in relevant part:

I am writing in response to your July 30, 2015 letter, in which you inaccurately represented something I said to you. I did not tell you that union stewards would no longer get paid for grievance meetings that extend into their shift. Please be advised that, if and to the extent grievance meetings extend into a union steward's shift, the Company will continue to abide by past practice and pay the union steward for that time. As no "unilateral change" has occurred, I see no reasons to meet to "bargain over the change."

(Tr. 153:10-19; G.C. Exh. 24). Hefley and Graves had no further conversation about this issue.

(Tr. 154:21-23).

Consistent with the parties' contract language, the expectation remains that grievance meetings should finish before the stewards' shift start times. As Union Business Agent Graves testified, either party has the right to end a Step 2 grievance meeting at any time. (Tr. 168:4-5).

⁵ Proctor does not deny making this threat. Rather, Proctor incredibly claimed that he could not recall making that threat, that he did not "believe" he had made that threat, and followed by: "I mean I can't say if I did say it or not." (Tr. 207:1-9).

To the extent Step 2 meetings are extended into the stewards' shifts, the stewards are paid for that time. (Tr. 156:16-157:10). This fact is undisputed.

IV. Elliott Garrett Was Not Rehired Because He Was Previously Discharged for Cause.

Elliott Garrett worked for US Foods at the Phoenix distribution center for about a year and a half prior to December 2014. (Tr. 115:4-8). He began as a casual order selector in April 2013 and became a full-time order selector around July 2014. (Tr. 118:4-14; Tr. 115:9-11).

It is undisputed that Garrett's employment was terminated on December 30, 2014 for exceeding the number of points allowed under US Foods' attendance policy. (Tr. 104:10-17; Tr. 118:21-24; Tr. 178:24-179:2; G.C. Exh. 16). On December 30, 2014, US Foods mailed a letter to Garrett explaining:

Our records indicate your FMLA Benefit was denied from November 2, 2014 through November 24, 2014. Per the attendance policy, you have exceeded the number of points allowed and are at a terminable level. You have not returned phone messages and you have not phoned in or shown up for work. Accordingly, we are considering your work status as terminated and will process your termination effective today.

(G.C. Exh. 16). Garrett did not file a grievance concerning his termination, and the Union did not pursue his reinstatement. (Tr. 127:13-15; Tr. 179:3-4).

On May 27, 2015, Garrett applied for a selector night, casual position pursuant to an open requisition. (Tr. 57:5-10; Tr. 280:23-281:2; G.C. Exh. 15; G.C. Exh. 27). The next day, on May 28, Gatson reviewed his application. (G.C. Exh. 15 (USFOODS002480-81)). Gatson explained that, consistent with her practice, she reviewed Garrett's application, which listed his previous US Foods experience. (Tr. 275:2-12). Garrett's work experience at US Foods was the first job listed under the "Work Experience" section of the application. (G.C. Exh. 15). Gatson, per US Foods' policy, "reviewed his reason for termination and saw that it was involuntary termed for cause so I rejected his application." (Tr. 301:9-13). Gatson "dispositioned" Garrett,

documenting on the Taleo system that Garrett “does not meet basic qualifications, ineligible for rehire.” (Tr. 280: 2-12; Tr. 281:10-12; G.C. Exh. 15; G.C. Exh. 26).

Gatson explained that she did not consult with anyone and only considered Garrett’s prior termination for cause in making her decision to reject Garrett’s application:

Q. Did you consider Mr. Garrett’s experience when determining to reject his application?

A. No.

Q. Why not?

A. Because he had been termed for cause.

Q. Before you rejected his application, did you consult with anyone at US Foods Phoenix?

A. No.

Q. When you made [the] decision to reject Mr. Garrett’s application, did you consider anything other than the fact that he had been previously discharged for cause?

A. I did not consider anything other than he had been termed for cause.

Judge Biblowitz: Did any supervisor speak to you or did you speak to any supervisor before you made the decision about him?

A. No.

(Tr. 301:9-302:6-15).

Gatson’s decision to “disposition” Garrett’s application prompted the Taleo system to generate a rejection email. (Tr. 281:9-16; G.C. Exh. 26).

ARGUMENT

I. The General Counsel Bears the Burden of Proof.

The General Counsel bears the burden of proof on each allegation in the Complaint. *See Nations Rent, Inc.*, 342 NLRB 179, 180 (2004) (“The General Counsel has the burden of proving

every element of a claimed violation of the Act.”); *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 n.5 (2003); *Western Tug & Barge Corp.*, 207 NLRB 163, 163 n.1 (1973).

Because the General Counsel failed to carry the burden of proving each of the allegations now at issue, the ALJ’s findings should stand.

II. The General Counsel Did Not Establish that US Foods Violated the Act by Failing to Rehire Former Employee Elliott Garrett.

The General Counsel argues that the “centerpiece allegation of this case [the refusal to rehire Elliott Garrett] is as straightforward as can be.” (GC Exception’s Br. at p. 1). The General Counsel is correct - this is a straightforward issue. Common sense dictates that a private business with “outstanding customer service” and “cost-efficiency” goals as key success drivers will doom itself to failure by rehiring former employees that it fired five (5) months earlier for unacceptable attendance. Yet, the General Counsel beseeches the Board to suspend common sense and to order US Foods to do precisely that in the case of Elliott Garrett. According to the General Counsel, showing support for your Union by wearing a tee shirt and shouting the Union’s Local number (“104”) on occasion during warm-ups entitles you to rehire even where that same Union chose not to dispute that your termination five (5) months earlier was for just and sufficient cause. Just take some time off and come on back when you feel like it. The General Counsel’s position is absurd, and the ALJ was correct to flatly reject it based on common sense and the evidence presented.

To establish a discriminatory refusal to hire claim (or the newly-minted failure to “resuscitate an application” claim), the General Counsel has the burden of showing: 1) that the employer was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; 2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire; and 3) that anti-union animus contributed to the decision

not to hire (or “resuscitate”) the applicant. *FES, A Division of Thermo Power*, 331 NLRB 9 (2000). If the General Counsel can make out a *prima facie* case, the burden shifts to the employer, under *Wright Line*, to show that it would not have considered the applicant even in the absence of union activity. *Id.*, see *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1436 (2007); *Cardinal Hayes Home for Children*, 315 NLRB 583, 588 (1994).

A. The General Counsel Did Not Establish that US Foods Violated the Act by its Decision to Not Rehire Elliott Garrett.

It is undisputed that Garrett’s employment ended for exceeding the allowable number of attendance points under US Foods’ attendance policy. (Tr. 118: 21-119:1). It is also undisputed that US Foods has a policy prohibiting the rehiring of any former employee who was terminated for cause. Not one of the General Counsel’s witnesses testified that such a policy did not exist. Similarly, not one of the General Counsel’s witnesses testified that they knew of any former employee who had been rehired after being discharged for cause. Moreover, not one of the General Counsel’s witnesses contradicted Gatson’s reasons for rejecting Garrett’s application. When asked to explain why she rejected Garrett’s application, Gatson stated:

Q. Now when you changed his application to ineligible for rehire, on what grounds did you change that?

A. That he had been termed for cause.

Q. And have employees who are termed for cause ever been rehired by US Foods while you’ve been there as HR coordinator?

A. No, not since I’ve been there.

(Tr. 282:3-8).

Given these facts, it cannot be disputed that the only reason why Garrett was not rehired when he applied in May of 2014 was because he had previously been discharged for cause.

Maim Royal Insulation, Inc., 358 NLRB No. 91 (2012) (ALJ noting that many employers do not

rehire employees that they have fired and that under most circumstances, the ALJ's analysis on a failure to rehire a former employee previously fired ends there); *Adams Millis Texturing Plant*, 209 NLRB 899, 903 (1974) (affirming the ALJ's decision that the employer did not unlawfully refuse to rehire employees who were discharged for cause: "Because the record does not establish that they were not discharged for cause, Respondent could refuse to rehire them under its policy of not rehiring persons who had been terminated for misconduct. . ."). Common sense and reason further dictate this conclusion.

Nevertheless, the General Counsel alleged that Garrett was not rehired because of his alleged union activity during his employment with US Foods. His alleged "union activity" consisted of being a member of the union and paying dues, wearing Union logoed shirts about once a week, and "hollering" "104" during some start-up meetings. (Tr. 115:16-116:15; Tr. 178:14-20). During these meetings, Garrett claimed that LaPlante, supervisor Gilbert Mendez, and Warehouse Manager Juan Gandara were present to witness some of his outward displays of union support. (Tr. 116:19-20).

Gatson undisputedly testified, however, that at the time she rejected Garrett's application, she did not know Garrett. (Tr. 269:20-270:1). Gatson, as the human resources coordinator, did not work with the warehouse employees, did not supervise any of the employees, had no input into disciplining the employees or in terminating employees, and did not fill out any paperwork or correspondence at the time employees were terminated. (Tr. 252:17-25). Thus, Gatson was unfamiliar with Garrett and had no way of knowing of any of Garrett's alleged union activities. Moreover, those individuals that Garrett identified as knowing of his alleged union activities—LaPlante, Mendez, and Gandara—did not speak to Gatson before Gatson made the decision to reject his application. Notably, Gandara stopped working for US Foods on or about October

2014. (Tr. 371:12-372:4). Moreover, the General Counsel provided no evidence establishing that LaPlante, Mendez, or even Gandara spoke to Gatson at any time concerning Garrett's employment. In fact, the evidence is undisputed that Gatson did not speak to anyone before rejecting Garrett's application:

Q. Before you rejected his application, did you consult with anyone at US Foods Phoenix?

A. No.

Q. When you made [the] decision to reject Mr. Garrett's application, did you consider anything other than the fact that he had been previously discharged for cause?

A. I did not consider anything other than he had been termed for cause.

Judge Biblowitz: Did any supervisor speak to you or did you speak to any supervisor before you made the decision about him?

A. No.

(Tr. 301:9-302:6-15).

Given the undisputed fact that Gatson did not know of Garrett's alleged protected activity, the General Counsel failed to make out a *prima facie* case. *See, e.g., Cardinal Hayes Home for Children*, 315 NLRB 583, 588 (1994) (noting that General Counsel failed to establish *prima facie* case because, in part, the decision-maker had no knowledge of the alleged discriminatee's union activity); *Diamond Ginger Ale, Inc.*, 125 NLRB 1173, 1177 (1959) ("Essential to such a showing [of an 8(a)(3) violation] . . . is the [e]mployer's knowledge of the fact that his employee was a member of the Union or was actively engaged in its behalf, or both. For it would defy logic to say that an employer could discriminate against his employee because of union activity when the employer never knew of the employee's union membership or activity."); *Volt Info. Sciences*, 274 NLRB 308, 310 (1985) ("The determination of the validity of

the charges made against the [employer] depends, among other things, on the findings made respecting the [employer's] knowledge of the employees' union membership, support, or activities.”).⁶

B. US Foods Would Have Taken the Same Action Even in the Absence of Garrett's Alleged Protected, Concerted and/or Union Activity.

Even if the General Counsel could make out a *prima facie* case, the burden shifts to the employer, under *Wright Line*, to show that it would have rejected the applicant in the absence of union activity. *See, e.g., Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1436 (2007). Gatson testified that it is US Foods' policy not to rehire anyone who has been previously terminated from US Foods for cause. (Tr. 300:21-24). Gatson further testified that she was unaware of anyone being rehired after being terminated for absenteeism. (Tr. 301:5-8).

The General Counsel introduced no evidence to refute Gatson's position. Not one witness testified that they knew of any employee who had been hired after being discharged for cause. That no written policy was introduced memorializing the Company's stance on this issue makes it no less reasonable or believable. It simply makes no sense that an employer would rehire an employee that it fired five months earlier for poor attendance. Given these undisputed facts, no violation of the Act can be found with respect to this allegation.

C. The General Counsel's Resuscitation Theory is Unsupported and Ignores the Fact that Garrett was Terminated For Cause.

The General Counsel argues that the rejection of an application by Gatson does not necessarily end an applicant's job quest because a supervisor can request that a previously

⁶ The General counsel cannot argue knowledge based on the small plant doctrine. *See Basin Frozen Foods, Inc.*, 307 NLRB 1406, 1410 (1992) (finding that “small plant doctrine” does not apply, in part, because there are over 160 employees at the facility in question); *Metro Center, Inc.*, 267 NLRB 288, 299 (1983) (holding that the “small plant doctrine” does not apply to a large facility with a number of employees “in excess of 100”); *Atlantic Metal Products, Inc.*, 161 NLRB 919, 920 (1966) (“[T]he size of the plant--some 180 employees--attenuates any inference of knowledge which might otherwise be drawn from such activity.”).

rejected application be passed through for further consideration. As evidence of this hiring path, the General Counsel points to the change in the application status of Octave Gwin by Gatson at the request of a supervisor. Gatson initially determined that Gwin did not meet the basic qualifications for the job, but changed that status to allow a supervisor to interview Gwin at the request of the supervisors. But, no evidence suggests that Gwin was previously employed by US Foods and terminated for cause. (Tr. 264:15-269:14). Likewise, no evidence exists that any other applicant who a supervisor requested to interview after an initial rejection by human resources for lack of “basic qualifications” was then hired through a “secondary hiring process” despite having previously been terminated by US Foods for cause.

In Garrett’s situation, Ryan Proctor recommended Garrett to Padilla weeks after Garrett’s application had been rejected. Padilla did not know Garrett and did not know that Garrett had been previously fired for unacceptable attendance. Padilla agreed, however, to follow-up on Proctor’s recommendation, but Garrett’s application was never “resuscitated”. While Gatson had no specific recollection of receiving a request for Garrett’s application, nothing in the record suggests that a request by a supervisor to review an application would suspend or nullify the Company policy against hiring a previously fired employee.

III. The General Counsel Did Not Establish that US Foods Made a Change With Regard to Steward Participation in Grievance Meetings Because the Union Filed an Unfair Labor Practice Charge.

The ALJ found that US Foods made a unilateral change in July 2014 to its practice of permitting stewards to remain in, and be paid for, grievance meetings that continued past their start time. The ALJ found, however, that no evidence supported a finding that the change was motivated by the Union’s filing of an unfair labor practice three days before the alleged change, a finding to which the General Counsel now excepts. The General Counsel bases its exception solely on the timing of events and their argument that an inference of retaliation must be drawn

from that timing. The record evidence as a whole does not support drawing such an inference, and the ALJ's finding should not be overturned.

First, the General Counsel cannot prevail because the General Counsel failed to establish that US Foods knew of the protected activity. The General Counsel baldly contends that US Foods' admission in its answer to the Complaint that the July 2014 unfair labor practice charge was served establishes knowledge of the charge for purposes of the *Wright Line* analysis on this specific allegation. Acknowledging the receipt of service of the charge at some point in time and establishing decision-maker knowledge of the charge at the time the change to the practice was announced to the Union are two wholly separate issues. Here, the charge in Case No. 28-CA-156203 was filed on July 17, 2015 (G.C. Exh. 1(a)) and the alleged "change" took place three days later or on July 20, 2015 (G.C. Exh. 19). That timing alone is insufficient to establish knowledge. *See, e.g., NEPTCO, Inc.*, 346 NLRB 18, 20 (2005) ("Coincidence in time between union activity and discharge or discipline is one factor the Board may consider . . . [b]ut mere coincidence is not sufficient evidence of [union] animus.") (quoting *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717-18 (7th Cir. 1992)).

The General Counsel never established that Joe Hefley, the relevant Company actor, knew of the filing of the charge at the time he made the alleged change in practice at issue. Notably, the charge was not addressed to Hefley but to "Tom Kurtis."⁷ (G.C. Exh. 1(a)). The General Counsel did not introduce any evidence that within the short three-day period, the charge was delivered to US Foods, read and distributed to upper management by whomever receives the mail, and reviewed by Hefley. Indeed, the hearing record is devoid of any US Foods personnel having knowledge of the filing of the July 17 charge on July 20, 2015. Because the

⁷ The name in the charge was misspelled. The correct spelling is Tom Kertis. (*See, e.g.*, G.C. Exh. 1(r)).

General Counsel bears the burden of proof on each allegation in the Complaint, the failure to establish knowledge of the filing of the charge means that this allegation must fail. *See Nations Rent, Inc.*, 342 NLRB 179, 180 (2004).

IV. The General Counsel Failed to Establish That Mike Tavenner Made a Threat in Violation of Section 8(a)(1).

The Board's well-settled test for determining a Section 8(a)(1) violation is an objective one:

[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

American Freightways Co., 124 NLRB 146, 147 (1959); *see also Miami Systems Corp.*, 320 NLRB 71, n. 4 (1995), *enf'd in relevant part sub nom.*, 111 F.3d 1284 (6th Cir. 1997) ("The test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one . . ."). The General Counsel bears the ultimate burden of proving under this objective standard, interference, restraint or coercion in violation of the Act. *NLRB v. Fluor Daniel*, 161 F.3d 953, 965 (6th Cir. 1998); 29 U.S.C. § 160(c) (violations of the Act can be adjudicated only "upon the preponderance of the testimony" taken by NLRB); *see also* Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

With respect to these allegations, the General Counsel must prove that US Foods "engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Tissue Corp.*, 336 NLRB 435, 441-42 (2001). In making this determination, the Board must consider the totality of the circumstances, including

the context in which the allegedly unlawful conduct occurred and the protections provided to employers in Section 8(c) of the Act. *See id.* at 442.

The General Counsel takes exception to the ALJ's finding that the testimony of delivery driver Jason Peterson was too confused to find a threat by Transportation Manager Mike Tavenner that might chill the exercise of Section 7 rights. Petersen testimony was indeed muddled and confused as evidenced by the General Counsel's own frustration with Peterson's articulation of his exchange with Tavenner at the hearing. (Tr. 236:1-237:23). That testimony cannot be reconciled with an actionable threat when viewed in full context.

Peterson testified that the morning after the employees voted down the contract and voted to strike, he had a conversation with Tavenner. (Tr. 232:20-233:9). His testimony was short, incomprehensible, and did not establish that any threat was made. Indeed, unsatisfied with Petersen's testimony, the General Counsel tried to read into the record Petersen's alleged affidavit statements. (Tr. 236:1-237:6). The ALJ correctly ruled that the reading into the record of Petersen's affidavit to allegedly refresh Petersen's recollection would not be allowed. (Tr. 237:2-6). The General Counsel did not elicit further testimony concerning Petersen's conversation with Tavenner. Instead of establishing a threat, the testimony merely shows that Tavenner was concerned about his job and that of his coworkers.

Petersen testified that he was walking into the Phoenix warehouse building when Tavenner asked him to go outside for a cigarette. (Tr. 233:18-24). Tavenner started the conversation by saying "thank you for coming in. I know this is not your normal job. I appreciate all you do." (Tr. 234:13-15). Tavenner at some point stated:

'yeah, come Wednesday,' he said, 'you know what's going on?' And I'm like, 'not really, I don't want to talk about it.' And he said something about some union guy wants another guy's job. And I'm like, 'I don't want to talk about it.' And then he got on the subject of, if a vote doesn't happen or something to do with

people not coming to work that, you know, people lose their jobs. And I guess a few minutes later - - or a few minutes - - moments later he said, 'I won't have a job.' And it kind of just ended the conversation and that was the end of that part of it.'

His exact words to - - as I recall is we want - - if this continues about people not showing up to work or striking, that people will - - I don't want anybody to lose their jobs. And then he just waited for a couple seconds and said, 'well, I don't want to lose my job either.' I know what he took it at, but--

(Tr. 234:21-235:7 -25). Tavenner's statement merely show his concern for his job. Nothing about his statement constitutes a threat under the Act. Thus, the ALJ was correct in dismissing this allegation.

V. Conclusion

The ALJ correctly dismissed the Complaint allegations which are the subject of the General Counsel's exceptions, and the ALJ's decision should be adopted by the Board.

RESPECTFULLY SUBMITTED this 21st day of April, 2016.

US FOODS, INC.

By 

Joseph Turner
Karla E. Sanchez
Seyfarth Shaw LLP
131 S. Dearborn St., Suite 2400
Chicago, Illinois 60603
(312) 460-5000

CERTIFICATE OF SERVICE

I, Karla E. Sanchez, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF IN OPPOSITION TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** to be served on all parties of record in the manner listed below on this 21st of April, 2016:

Gary W. Shinnery, Executive Secretary (via E-Filing)
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE - Room 5011
Washington, DC 20570

Cornele A. Overstreet (via E-Filing)
Regional Director
National Labor Relations Board
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004-3099

Kristin E. White (via E-Filing)
Kyler Scheid (via E-Filing)
Field Attorneys
National Labor Relations Board
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004-3099

Joshua Graves (Via FedEx Mail)
General Teamsters (excluding Mailers)
State of Arizona, Local No. 104,
an affiliate of the International Brotherhood
of Teamsters
1450 South 27th Avenue
Phoenix, AZ 85009-6423



Karla E. Sanchez