UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALSTATE MAINTENANCE LLC

Respondent

and Case 29-CA-117101

TREVOR GREENIDGE, an Individual

Charging Party

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

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PROCEDURAL HISTORY

On November 13, 2013, Trevor Greenidge ("Greenidge"), an individual, filed an unfair labor practice charge against Alstate Maintenance, Inc. (" Respondent") in Case No. 29-CA-117101. The charge alleged that Respondent violated Section 8(a)(1) of the National Labor Relations Act ("Act") by discharging Greenidge in retaliation for his protected concerted and other Union activities.

After thorough investigation of the charges, on November 21, 2014, the Regional Director for Region 29 of the National Labor Relations Board ("Board") issued and served on the parties a Complaint and Notice of Hearing in Case No. 29-CA-117101 ("Complaint"). [GC Exh. 1(E)].[1] The Complaint alleged, *inter alia*, that Respondent violated 8(a)(1) of the Act by discharging Greenidge because he engaged in concerted activities with other employees for the purpose of mutual aid and protection. On December 10, 2014, Respondent filed an Answer that denied the allegations, including that Respondent falls within the Board's jurisdiction.

The case was heard before Administrative Law Judge ("ALJ") Raymond P. Green on May 21, May 22, June 18, 2015, and February 23, 2016. The ALJ issued a Decision in the matter on June 24, 2016 and for the reasons discussed in detail below, dismissed the Complaint. In the separate but related Case No. 29-CB-103994, also involving Respondent, the ALJ found that Respondent fell within the Board's jurisdiction.

STATEMENT OF FACTS

[1] References to the official record of the hearing are abbreviated as follows: "GC Exh." denotes General Counsel's exhibits. "Resp. Exh." denotes respondent's exhibits. "Jt. Exh." denotes joint exhibits. Citations to the transcript and administrative law judge decision will appear "Tr. _" and "ALJD," respectively, with numbers specifying the particular page(s) cited in the transcript

General Counsel takes only limited exception to the Findings of Fact stated in the ALJ's decision. The following is a brief summation of the facts, undisputed except in areas noted below:

A. Respondent's Business

Respondent has a contract with an airline consortium called Terminal One Management, Inc. in John F. Kennedy Airport's Terminal One to provide ground services, including skycap, baggage handling and wheelchair services, to TOMA's partner airlines including Lufthansa Airlines. [ALJD 2: 5-10]. At the time relevant to these proceedings, Klaudia Fitzgerald ("Fitzgerald") served as TOMA's Terminal One Manager and Isabelle Roeder ("Roeder") served as Lufthansa's Station Manager.

B. Trevor Greenidge's Employment with Respondent

Alleged discriminatee Trevor Greenidge began his employment with Respondent as a skycap at Terminal One of JFK Airport in February 2005 [Tr. 29]. He worked as a skycap from the time of his hire until Respondent discharged him in July 2013, with the exception of an eight (8) month period in 2006 when he worked as a supervisor [ALJD 2:11; Tr. 30].

C. Tips Compose The Lion's Share of The Skycaps' Income

Skycaps who work for Respondent are principally responsible to assist passengers of airlines who operate out of Terminal One with their personal luggage at the curb outside the arrival and departure areas and in the customs area. [Tr. 30-31; 104]. Because Lufthansa Airlines is one of the airlines that operates out of Terminal One, Respondent's skycaps provide ground services to Lufthansa passengers. [ALJD 2: 7]. Several times a year, airlines would make special requests to Respondent for skycap services on group jobs like athletic team equipment.

[Tr. 45-46]. These special jobs require skycaps to handle larger quantities of baggage (e.g. sports equipment) and often last longer than jobs involving individual passengers. [Tr. 45-46, 49]. In these circumstances, skycaps do not generally deal with individual passengers and they would rely on the airline for their tip.

During the time that Greenidge worked for Respondent, skycaps earned an hourly rate of between $3.90/hour and $4.15/hour, an hourly rate that fell well below the state required minimum wage.[2] The rest of their income came from passenger tips. [ALJD 2: 11-13; Tr. 31, 104]. By the end of his employment, Greenidge was earning $4.15/hour and between $10.00 and $150.00 a day in tips. [Tr. 31].

The lion's share of skycap earnings came from the tips they received [ALJD 14; Tr. 31].[3]

D. Greenidge Raised Concerns about Skycap Tips in the Presence of his Supervisor and Fellow Skycaps

On the evening of July 17, 2013, while Greenidge was working outside Terminal One with three other skycaps named Allan Wills, Terrence Boodram and Basil Rodney, Respondent's skycap supervisor Crawford approached and told them that Lufthansa Airlines had requested four skycaps to assist with a soccer team's equipment. [ALJD 2: 15-22; Tr. 35, 196]. Greenidge, in the presence of supervisor Crawford and his fellow skycaps, said, "We did a similar job a year

[2] The ALJ found that Greenidge "earned the minimum wage for tipped employees and the remainder of his income consisted of passenger gratituties." [ALJD 2:12]. The basis for this finding is unclear as the record contains no evidence that skycaps always [sic] earned a "minimum wage for tipped employees." The record does however contain documentation of an Attorney General investigation that revealed that Respondent paid skycaps in Terminal One less than the permissible minimum wage during Greenidge's tenure [Tr. 87-89; GC Exh. 100, 101].

[3] The ALJ stated that skycap tips "more than compensate for the lower wage rate." [ALJD 2:13:15]. This is an assumption, not a fact and to the contrary, Greenidge testified that there was little consistency in the amount of tips he earned on a daily basis. *E.g.* Greenidge Testimony at Tr. 31 ("Well, on a daily basis sometimes you made 10 [dollars], sometimes 13 you make 150, sometimes you make 50. It depends."')

prior and we didn't receive a tip for it." [Tr. 34; ALJD 2:23-25].[4] Crawford told the skycaps that he was he was going to bring their concerns to the airline and terminal managers [Tr. 34].

E. Respondent's Supervisor Communicated Greenidge's Concern about Group Tips to Respondent Customers

It is undisputed that Crawford interceded on the skycaps' behalf after hearing Greenidge's comment. [ALJD 2:30-32]. Crawford promptly approached Lufthansa Station Manager Isabelle Roeder, who was standing at the curb outside the Lufthansa terminal door, and told her that "the skycaps did not want to take the equipment because they did not think that they would get a big enough tip." [ALJD 2: 29-32]. Terminal One Manager Klaudia Fitzgerald came out of the terminal around that time and according to Fitzgerald, Crawford told her also that the skycaps "weren't going to take coins for that amount of baggage." [Tr. 182].

F. Greenidge and His Fellow Skycaps Transported the Team's Equipment from the Curb to Ticketing to the Security Staging Area

1. The ALJ's Factual Findings Relevant To The Performance of Work

The ALJ found that when the soccer team arrived, "the four skycaps did not go to the van to offer assistance in unpacking the luggage" but instead walked away [ALJD 2:26-29]. He made no distinction between the players' personal baggage and the equipment bags but found simply that "the skycaps refused to assist the soccer team with their equipment and luggage and thereby refused to do their jobs." [ALJD 2:32-34]. He found that after Crawford told Roeder and Fitzgerald that they skycaps "did not want to take the equipment because they did not think that

[4] The ALJ made no mention of the important fact that Greenidge made this comment in the presence of supervisor Crawford.

they would get a big enough tip." Fitzgerald directed Respondent to call baggage handlers in to do the work. According to the ALJ, "only after the baggage handlers started bringing in the luggage did the skycaps begin to assist the customer." [ALJD 2:33-37]. The ALJ found that Lufthansa gave the skycaps an $83.00 tip upon completion of the work. [ALJD 2:37]. There is no evidence that baggage handlers received a tip for assisting with the job.

With respect to the facts surrounding the performance of work, the ALJ's factual findings differ in substance and omission from the testimony of General Counsel and Respondent witnesses described below.

2. Skycap Testimony Relevant to the Performance of Work

Skycap witnesses Trevor Greenidge and Terrence Boodram testified that promptly upon the soccer team's arrival, the skycaps began the work of transporting the team's baggage from the curb through to security. [Tr. 39-41, 110-111]. According to Greenidge, skycap supervisor Crawford communicated skycap concerns about the group tip *before* the equipment truck arrived and that once the equipment truck arrived, Greenidge and his fellow skycaps promptly approached the truck with their baggage carts. [Tr. 37]. After the truck's driver unloaded the baggage from his vehicle to the curb, all four skycaps filled their individual skycap carts with the equipment [Tr. 37-41; 110-111].[5] They then rolled their carts into the terminal, tagged the bags at the ticketing counter and transported them to the security staging area. [Tr. 43-44, 111]. The large number of bags required each skycap to make about two trips with their carts filled with bags. [Tr. 41, 111]. The entire job – from the time the equipment truck pulled up to the curb until the skycaps finished transporting all baggage to the security staging area – took

[5] They did not physically assist the truck's driver with unloading the baggage because Respondent had a policy specifically prohibiting skycaps from entering customer vehicles to unload baggage. [Tr. 68-69, 90].

about 15 to 20 minutes. [Tr. 47, 125].[6] Boodram testified that after they finished transporting all of the soccer team's equipment from the equipment truck through ticketing to the TSA checkpoint, Respondent supervisor Crawford presented him with an $83.00 tip to distribute among the skycaps. [Tr. 114-15]. Boodram divided the tip evenly among the skycaps.

Neither Greenidge nor Boodram had any conversations with Roeder, Fitzgerald or any other customer of Respondent relevant to this job.

3. Respondent Witness Testimony Relevant to the Performance of Work

Respondent witnesses Lufthansa Station Manager Isabelle Roeder and Terminal One Manager Klaudia Fitzgerald testified that the skycaps delayed providing assistance to the soccer team because of their concerns about tips. Roeder testified that as she waited at the curb for the truck to arrive, she waved the skycaps over to help [Tr. 170-71]. The skycap supervisor Crawford responded by coming to speak to her and as mentioned above, he told her that the skycaps "don't want to take care of the equipment" because there were "too many boxes, not enough tip." [Tr. 170-71]. Fitzgerald then came out to the curb from the terminal. Hearing what Crawford had to say, she directed Crawford to call in baggage handlers to assist with the job. [Tr. 182]. Fitzgerald estimated that fifty (50) to seventy (70) bags were unloaded from the truck. [Tr. 170, 189]. She saw the baggage handlers carry two carts of equipment from the curb into the terminal but neither Roeder nor Fitzgerald were able to testify about who transported the remainder of the fifty (50) to seventy (70) equipment bags into the terminal, or whether Greenidge and his skycap colleagues participated in transporting the remainder of the baggage from the curb through ticketing to the TSA staging area. [Tr. 171, 183, 188].

[6] This time estimate is supported by Respondent's Manager Deborah Traynor's statement to Greenidge two days later that she viewed a video of skycaps doing the work and observed that they did it in "record time". [Tr. 52]. In an internal email, dated Thursday, July 18, 2013 1:07 p.m., Traynor wrote that she saw the video footage and the equipment was taken from the truck in to the terminal in 12 minutes. [Jt. Exh. 1 pp. 1].

Neither Roeder nor Fitzgerald had conversations with Greenidge or any of the skycaps regarding this job.

G. Respondent Summarily Discharged the Skycaps as a Group

Following the skycaps' completion of the soccer team job, Terminal One Manager Fitzgerald sent an email to Respondent managers Deborah Traynor and Vince Orodisio and Terminal One Executive Director Ed Paquette that read:

> As you may be aware, a French soccer team is travelling [sic] on LH405 tonight and on behalf of Lufthansa, we had requested skycap services. There were no issues with the soccer team players regular baggage as they dropped them off directly at the pit, however, the equipment was a totally different story. At approximately 1900hrs, we were advised by LH that the truck with the equipment was stuck in traffic and wasn't going to arrive for at least another hour, but at 1920 LH ASM Isabelle informed that the equipment should be arriving in the next five minutes. I requested assistance from Crawford via radio to mobilize all the sky caps so that they are standing by. I observed only one skycap standing outside, but not assisting the soccer team and LH ASM Isabelle. I proceeded outside and at this point Crawford was explaining to Isabelle that the skycaps don't want to handle it because of the large quantity of bags and a small tip. I interjected and instructed Crawford to get all the skycaps on departures by revolver #2 to handle these bags immediately. As per Crawford and LH Isabelle, Wills was one of the skycaps who refused to assist an eventually showed up after being called on the radio for the third time. I believe Crawford will fill you in with the additional details as to who were the other employees and supervisors being uncooperative. In attempt to compensate for the mishandling, I asked Crawford to send over few baggage handlers to assist and Crawford went above and beyond to do so. One of the soccer coaches said to LH ASM that they might as well handle these bags themselves. Even after providing this substandard service, the skycap captain received a tip from LH Isabelle. [Jt. Exh. 1 pp. 2].

In response to Fitzgerald's email, Terminal One Executive Director Edward Paquette wrote two emails to Respondent President Al DePhillips. The first email at 5:28 a.m. read in relevant part:

> This is totally unacceptable and embarrassing to say the least. I expect a full report on my desk before lunchtime. I want each of the SKYCAPs involved removed from the Terminal One project immediately, the supervisors as well. I do not need supervisors on duty who cannot control their people. Figure out how you are going to cover the vacancies as I also expect uninterrupted service. [ALJD 3:10-40].

Paquette's second email, sent at 12:25 p.m., read:

> It's now 12:30 and I have yet to hear from anyone regarding this incident or the one Neil sent to you regarding wheelchairs. If I do not hear from someone shortly I will pull everyone I think was involved from the swipe system. [ALJD 3:44 – 4:13].

Respondent, by Deborah Traynor, replied to Paquette's email by the following:

> Based on my investigation this morning all 4 skycaps will be removed from service, it is unacceptable to Alstate as well to speak or behavior [sic]. unprofessional at any time while doing your Job. Based on the video footage, I watched the equipment was taken from the truck in to the terminal in 12 minutes. I do understand that it was not the service provided but the lack of professionalism on Alstate employees part. I assure you that the removal of this [sic]. employees will not impact Terminal Ones operation. [ALJD 4:21:27].

Following these emails, Respondent discharged all four skycaps involved. The discharge letters of Greenidge, Boodram and Rodney state in no uncertain terms that they were being discharged based on Greenidge's expressed concerns about the group tip. In relevant part, Greenidge's discharge letter states:

> You were indifferent to the customer and verbally make [sic] comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa. [Jt. Exh. 2].

Rodney and Boodram's discharge letters similarly state:

> You were indifferent to the customer and per the Mod report you did not act in a courtesy and professional manner. The report also states some conversion [sic] about no tip or small tip for the job. Basil [Rodney], this is unacceptable behavior and was seen and stated in front of other skycaps, Terminal One Mod and the Station Manager of [GC Exh. 8, p. 2].

> You were indifferent to the customer and per the Mod report you did not act in a courtesy and professional manner. The report also states some conversion [sic] about no tip or small tip for the job. Terrence [Boodram], this is unacceptable behavior and was seen and stated in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa [Jt. Exh. 5, p. 3].

Only Wills' discharge letter is mentions a refusal of service and that does not mention Greenidge's comment:

> You were indifferent to the customer and per the Mod report you refused to assist and

> eventually showed up after being called on the radio for a third time. Allan, this is unacceptable behavior and was seen in front of other skycaps, Terminal One Mod and the Station Manager of Lufthansa. [Jt. Exh. 4, p. 3].

Respondent Manager Traynor verbally further confirmed that the skycaps' expressed concern about tips were the basis for the skycaps' group discharge. When Boodram met with Traynor to discuss his discharge, Traynor told him "there were some unprofessional comment or…behavior…directed towards the customer of the job." [Tr. 118, 121-122]. She said, "this was basically over tips, that we were complaining that the tip for the job was too small." *Id.* Traynor told Greenidge that she watched a video of the job and observed that the skycaps had done the "job in record time" but nevertheless, she had to fire him [Tr. 52-53].

H. Respondent Returned Boodram, Wills and Rodney To Work But Refused To Return Greenidge To Work

After Greenidge and the three other skycaps were terminated, they each filed grievances with Local 660. [Tr. 53, 123; Jt. Exh. 4, 5, 6]. According to evidence in the record, Greenidge's grievance was denied [Jt. Exh. 6 p. 1]. Boodram testified that about one year after he was terminated by Respondent, he was offered a job with Airway cleaners [Tr. 132]. Boodram, Wills and Rodney were all offered job at JFK airport with Airway Cleaners [Tr. 124]. Airway Cleaners and Respondent have common ownership [Tr. 194].

THE ALJ'S DECISION

A. The ALJ Found The Respondent Discharged Greenidge And His Fellow Skycaps Based On The Comments About Group Tips

The ALJ found that Greenidge and his colleagues refused to perform their job duties based on their concerns about the tip that they would receive:

> In my opinion, the skycaps simply refused to assist the soccer team with their equipment and luggage and therefore refused to do their jobs. It is also clear that their refusal was based on the belief that the soccer team would not be generous in their tips. [ALJD 2: 32-34].

The ALJ further found that Respondent explicitly discharged Greenidge and his colleagues because "of their refusals to perform their duties and the comments made about tipping." [ALJD 4: 43-44].

B. The ALJ Found That Greenidge Did Not Engage In Protected Concerted Activity

The ALJ found that Greenidge's comment about the skycaps' group tips was neither protected nor concerted. He reasoned that while tips are considered wages for IRS purposes, they are unprotected under the NLRA because they are paid by a customer to an employee and "twice removed from the Respondent." [ALJD 7:7-11]. He found that Greenidge's comment about the skycaps' group tip cannot be "construed as concerted activity because it did not relate to the skycap's wages, hours, or other terms and conditions of employment." [ALJD 7:1-3] and because it "did not call for or request the other skycaps to engage in any type of concerted action or to otherwise make any kind of concerted complaint to their Respondent about their wages." [ALJD 6:45-47].

ARGUMENT

A. The ALJ Erred by Failing to Find that Respondent Violated Section 8(a)(1) of the Act by Discharging Skycap Trevor Greenidge for Engaging in Protected, Concerted Activities.

The ALJ Erred By finding that Respondent's discharge of skycap Trevor Greenidge did not violate Section 8(a)(1) of the Act. This erroneous finding was based on factual and legal errors, including the blatant misapplication of Board precedent.

Viewing the ALJD in light of the record evidence requires the conclusion that the ALJ did not make his factual findings based on an objective review of the credible, probative evidence, undisputed facts and inferences drawn from the record. Rather, the ALJ committed reversible error by ignoring critical facts, inserting his assumptions for otherwise undisputed facts and failing to address critical differences between the testimony of skycap witnesses and Respondent witnesses.

In addition to containing critical factual errors, the ALJD is replete with omissions and misapplications of well-settled Board precedent. Ignoring the Board's structured method for deciding what constitutes protected concerted activity, the ALJ conflated the analysis for "concerted activity" with the analysis for "mutual aid and protection." He further ignored long-standing Board law that holds that wages, including tips, are directly related to the terms and conditions of employment. He also concocted a legal fiction that would absolve direct employers from any responsibility over employee tips and tipped employees' work assignments. The result is an unclear ALJD that ignores facts, confuses legal elements, invents new standards and reaches the untenable conclusion that Greenidge did not engage in protected concerted activity. Based on this untenable conclusion, the ALJ cut short the *Wright Line* analysis and dismissed General Counsel's complaint.

If the ALJ had given proper weight to the probative, credible evidence and appropriately applied Board standards, including its structured method for considering "protected concerted activity" and its *Wright Line* test, he would have reached the conclusion that Respondent violated

Section 8(a)(1) when it discharged Trevor Greenidge for engaging in protected concerted activity. For these reasons, which are fully supported below, General Counsel respectfully urges the Board to reverse the ALJ's findings and conclusions of law. *See E.S. Sutton Realty, Co.*, 336 NLRB No. 33 (2001); *Jewel Bakery, Inc*., 268 NLRB 1326 (1984).

B. The ALJ Erred by Failing to Find that Discriminatee Trevor Greenidge Engaged in Protected Concerted Activity

1. The Wright Line Test

Under the traditional *Wright Line* test, General Counsel has the initial burden of persuasion to establish that Greenidge's protected concerted activity was a motivating factor for his discharge. *Wright Line, Inc., 251* NLRB *1083 (1980),* approved in *NLRB v. Transportation Management Corp., 462* U.S. *393, 399-403 (1983).* The General Counsel meets this initial burden by showing: 1) that Greenidge was engaged in protected concerted activity, 2) that the employer had knowledge of that activity; and 3) that the employer harbored animus towards Greenidge's protected activity. *See, e.g. Lee Builders, Inc*., 345 NLRB 348, 349 (2005); *Willamette Industries, Inc*., 341 NLRB 560, 562, 563 (2004); *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004).

Once General Counsel makes a *prima facie* showing sufficient to support the inference that protected concerted conduct was a motivating factor in Greenidge's discharge, the burden of persuasion shifts to Respondent to prove that it would have taken the same adverse employment action in the absence of Greenidge's comment about the group tip and the events that ensued. Respondent cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade by a preponderance of the evidence that the

action would have taken place even absent the protected conduct. *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995) (citing *Roure Bertrand Dupont*, Inc., 271 NLRB 443 (1984)); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

This two-part *Wright Line* test applies in dual-motive cases where the employer's proffered explanation for its adverse action has at least some merit and in pretext cases, where employer's asserted reasons are found to be false. *See, e.g., Frank Black Mechanical Services, Inc.*, 271 NLRB 1302, 1302 fn. 2 (1984); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enf'd. 705 NLRB 799 (6th Cir. 1982); *Wright Line*, 251 NLRB at 1083, fn. 4. *Yesterday's Children, Inc.*, 321 NLRB 766, 768 (1996) (*citing Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)). If an employer fails to satisfy its burden of persuasion, a violation of the Act should be found. *Id.*

It is undisputed that Greenidge expressed his concern about the group tip he and his fellow skycaps might receive *in front* of his supervisor and fellow skycaps, that Greenidge's comment motivated his supervisor to intercede with customers on behalf of the skycaps and that Greenidge and fellow skycaps were discharged in part for Greenidge's comment. While these facts satisfy all parts of the *Wright Line* test, the ALJ cut the test short based on his erroneous opinion that Greenidge did not engage in protected concerted activity.

2. "Protected Concerted Activity" Standard

Employee activity is protected under Section 7 of the Act when it is both concerted and for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). The concept of "mutual aid or protection" focuses on the *goal* of concerted activity and considers whether the involved employee or employees seek to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Both the "concerted" element

and the "mutual aid or protection" element are analyzed under an objective standard. *Fresh & Easy*, 361 NLRB at *3. Although these elements are closely related, they are analytically distinct. *Id. See also Summit Health Care Association d/b/a Summit Regional Medical Center*, 357 NLRB 1614 (2011).

As mentioned above, it is undisputed that Greenidge made his comment about the group tip *in front* of his supervisor and fellow skycaps and that based on this comment, the skycap supervisor interceded with customers on behalf of the skycaps. Respondent's discharge documents and emails between Respondent and customers show clearly that Respondent understood that Greenidge and his fellow skycaps acted in concert to address a group concern about the tip they would receive. There is no question that Greenidge's comment was directly related to wages and work assignment, both critical terms and conditions of employment. The ALJ's decision that Greenidge acted on his own behalf toward a personal goal unrelated to his workplace controverts reality.

3. The ALJ Erred By Failing To Apply The Board's Structured Analysis Of What Constitutes Protected Concerted Activity And By Conflating The "Analytically Distinct" Elements Of "Concerted" And "For The Purposes Of Mutual Aid And Protection

The question of whether employee activity is "for mutual aid and protection" is a separate question than whether the activity was "concerted." In the Board's view, "it is important to keep that question analytically distinct from the questions of whether it was also concerted and, if it was both concerted and for mutual aid and protection, whether it was nevertheless unprotected because it involved misconduct." *Summit Health Care Association d/b/a Summit Regional Medical Center*, 357 NLRB 1614, 1615 (2011).

Ignoring this proper analytical structure, which was set forth clearly in General Counsel's brief, the ALJ reached legal and factual conclusions without explain why or how.

First, the ALJ did not conduct a substantive legal analysis of whether Greenidge engaged in "concerted" activity. Rather than dealing with the nuances of fact and law, the ALJ made a conclusory finding that Greenidge did not engage other skycaps and so was "an offhand gripe about his [personal] belief that the soccer players were poor tippers." [ALJD 6:45-49]. The ALJ ignores undisputed facts that Greenidge made the statement in front of other skycaps and his supervisor, that Greenidge's comment prompted the skycap supervisor to intercede on behalf of the *group* of skycaps, and its customers believed that the skycaps acted in concert. Second, the ALJ blatantly confuses the "concerted" question with the "mutual aid and protection" question. He states, "I also do not think that Greenidge's comment can be construed as concerted activity because it did not relate to the skycap's [sic] wages, hours, or other terms and conditions of employment." [ALJD 7:1-3]. In fact, "wages, hours, or other terms and conditions of employment" go to the question of whether Greenidge acted for the purpose of "mutual aid and protection" and not whether he acted concertedly.

C. The ALJ Erred By Failing To Find That Greenidge's Comments About The Skycaps' Group Tip Was For The "Purpose Of Mutual Aid Or Protection"

1. The ALJ Erred By Finding That Skycap Tips Were Not Related to Terms and Conditions of Employment

The Board is clear that "there is no more vital term and condition of employment than one's wages" and employee complaints in this regard concern "mutual aid and protection." *Northfield Urgent Care LLC*, 358 NLRB 70, 80 (2012). *See also Parexel Int'l*, 356 NLRB No. 82, slip op. at 3 (2011); *Triana Industries*, 245 NLRB 1258, 1258 (1979). Tips, like wages, are directly connected to terms and conditions of employment. *See Fairmont Hotel Co.*, 230 NLRB 874, 878 (1977) (finding that complaints to management about tip arrangements "were topics of common

interest and concern to all rank and file employees….because they directly related to the amount of their pay, procedures for setting the amount, and the time of payment."); *Skyline Lodge, Inc. d/b/a Edward's Rest. & Lounge & Phyllis Delaney*, 305 NLRB 1097, 1098 (1992) (finding that employees' complaints about alleged cheating over amounts of tips received concerned "matters directly affect[ing] their earnings" and were thus protected).

Skycap witnesses Greenidge and Boodram testified that they relied heavily on the income they derived from customer tips to bring their hourly wages about the minimum wage. [Tr. 31, 104]. Despite this undisputed testimony, the ALJ found that the skycaps' tips – that composed the majority of their earnings – were unrelated to their wages, hours, or other terms and conditions of employment.

This unbelievable finding is based on erroneous conclusions and assumptions. First, the ALJ found that Greenidge earned the "minimum wage for tipped employees." [ALJD 2:11-12]. In fact, the record contains no evidence that skycaps earned a "minimum wage for tipped employees" and skycap witnesses Greenidge and Boodram testified that their hourly wage was *less than* minimum wage. [Tr. 31, 104]. General Counsel urged the ALJ to take judicial notice of a New York Attorney General's investigation that concluded that Respondent's skycaps earned less than the legal minimum wage between 2008 and 2014. [Tr. 87-89; GC Exh. 100, 101]. The ALJ ignored this fact.

Second, the ALJ found that skycap tips were unrelated to the terms and conditions because Respondent does not pay tips directly to the skycaps. [ALJD 7:7-12]. To the contrary, skycap Boodram testified that Respondent supervisor Crawford, and <u>not</u> a customer, presented him with the $83.00 tip to distribute among skycaps. [Tr. 45]. Even in circumstances where customers do

tender tips directly to the skycaps, Respondent is legally responsible to ensure that skycaps earn the minimum hourly wage required by state and federal wage and hour laws.

2. The ALJ Erred By Relying Two Inapposite Cases – Waters of Orchard Park[7] and Metro Transport – To Find that Greenidge's Comment about Group Tips Was Not For The "Purpose Of Mutual Aid or Protection"

The ALJ relied upon two inapposite cases – *Orchard Park Health Care d/b/a Waters of Orchard Park*, 341 NLRB 642 (2004) and *Metro Transport LLC d/b/a Metropolitan Transportation Services*, 351 NLRB 657, 661-62 (2007) – to found his decision that Greenidge's comment did not constitute protected concerted activity. As alluded to above, it is not completely clear whether the ALJ applied these cases to the "concerted" element, the "mutual aid and protection" element or both. However, it must be observed that both cases involved analyses of "mutual aid and protection" and that these analyses have little if anything to do with the instant case.

In *Waters of Orchard Park*, the Board declined to find that two employees who reported to New York State that their patients were experiencing excessive heat were engaged in protected activity. 341 NLRB at 644. Because the employee reports focused on the quality of patient care and did not invoke a term or condition of their employment, the majority found that the employees did not act for the purpose of "other mutual aid or protection." Id. at 644. (ALJD 5:45-48). The concurrence pointed out that the employees explicitly testified that their "***sole*** motive was to act in the interest of their patients." Id. at 645 (ALJD 6:1-2).

In *Metro Transport LLC*, the Board declined to find that a group of mechanics who protested the discharge of a supervisor were engaged in protected activity. 351 NLRB at 661-62. The majority there relied on a unique three-part test that the Board designed to deal specifically

[7] The ALJ erroneously referred to this case as *Waters Orchard Park*.

with the question of whether employees' "concerted activity to protest the discharge of a supervisor … may be 'protected,' provided the identity of the supervisor is directly related to terms and conditions of employment." Id. at 661. Finding that the evidence did not show that the supervisor's identity and capability had a direct impact on the mechanics' own job interests, the majority concluded that the group protest was not protected. Id. at 662.

The ALJ's reliance on *Waters of Orchard Park* and *Metro Transport LLC* is misguided. Each of these decisions explicitly points out that its respective record contained no evidence that the subject of the employees' activity was connected to their terms and conditions of employment. Here, the opposite is true. The instant record contains ample evidence that there was a direct and immediate relationship between the tips earned by Respondent's skycaps – which constitute the lion's share of skycap wages – and the work that they were assigned to do. Every minute that skycaps spent assisting the soccer team with its equipment was a minute that they were not available to earn tips by assisting individual passengers with their bags. Greenidge testified about that in 2012, he and other skycaps were similarly directed to perform a "special job" for Lufthansa Airlines. There, skycaps were required to transport over sixty (60) pieces of baggage from the curb through security. The job took them away from their normal curbside post for over two hours. The fact that they received no tip for the job meant that the only wage that they earned for those two hours was their subminimum hourly wage.

D. The ALJ Erred By Failing To Find That Greenidge Engaged In Concerted Activity

As mentioned above, the ALJ's conclusion that Greenidge did not engage in concerted activity lacks factual accuracy and substantive analysis. In addition to ignoring several critical

and undisputed facts, the ALJD contains no meaningful mention or discussion of current Board precedent regarding what activities constitute "concerted" activities.

1. The ALJ Erred By Ignoring Seminal Board Law That Speaks To Concerted Activity

Employees engage in concerted activity when the employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882, 887 (1986) (*quoting Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964)). The object of inducing group action need not be express and the activity of a single employee is *as much* concerted activity as ordinary group activity when that single employee solicits support of fellow employees in topics of mutual aid and protection. *Cent. States Se. & Sw. Areas, Health & Welfare & Pension Funds & Local 743, Int'l Bhd. of Teamsters*, 362 NLRB No. 155 (2015); *Leslies Poolmart, Inc. & Keith Cunningham*, 362 NLRB No. 184 (2015). The Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees, because such spontaneous complaints are "an essential primary [step] to the inducement of group action." *Whittaker Corp*., 289 NLRB 933, 933-34 (1988), *citing Jeannette Corp. v. NLRB*, 532 F.2d 916, 918, 919) (3d Cir. 1976).

The circumstances surrounding Greenidge's comment demand the conclusion that he implicitly and explicitly sought group action. Greenidge's concerns about group tips resemble closely spontaneous and unilateral employee comments that the Board has found to be protected. E.g. *Whittaker*, 289 NLRB at 933-34. (an employee's spontaneous and unilateral

comment in a group setting "implicitly elicited support from his fellow employees" and fell within the scope of protected concerted activity contemplated by *Meyers II*.)

Further, Greenidge expressed his concern about tips in a group setting, as he made his comment in the presence of his coworkers and Crawford. *See Whittaker*, 289 NLRB at 934 ("*Particularly* in a group-meeting context, a concerted objective may be inferred from the circumstances." (emphasis added)); *Caval Tool Division, Chromalloy Gas Turbine Corp*., 331 NLRB 858, 863 (2000), enfd., 262 F.3d 184 (2d. Cir. 2001). The fact that Boodram does not recall the comments is of no import because both Respondent's own documents and Respondent's witnesses acknowledge in *no uncertain terms* that Greenidge raised concerns about group tips in the presence of his coworkers and supervisor.

Finally, consistent with Board holdings that plural pronouns like "we" and "us" evidence concerted activity, Greenidge framed his concerns as a collective dissatisfaction with a group tip. See e.g. *Worldmark by Wyndham*, 356 NLRB No. 104, slip. op. at 2 (Mar. 2, 2011) ("the concerted nature of an employee's protest may (but need not) be revealed by evidence that the employee used terms like 'us' or 'we' when voicing complaints, even when the employee has not solicited coworkers' views before-hand."); *Whittaker*, 289 NLRB at 934 (employee "phrased his remarks not as a personal complaint, but in terms of 'us' and 'we,'" and thus "implicitly elicited support from his fellow employees.").

The foregoing analysis, which was set forth clearly in General Counsel's brief, was blatantly ignored by the ALJ. With a broad brush, he glossed over the settled jurisprudence to reach his unfounded conclusion that Greenidge's statement was no more than an "offhand gripe about his belief that French soccer players were poor tippers."

2. The ALJ Relied On An Erroneous Reading of *NLRB v. Adams Delivery Services*, 623

F.2d 96 (9th Cir. 1980) To Find That Greenidge's Comment About Group Tips Was Not Concerted

Rather than rely on the Board's seminal law described above, the ALJ cited a 9th Circuit decision for the proposition that "activity by a single individual for that person's own personal benefit is not construed as concerted activity." *NLRB v. Adams Delivery Services*, 623 F.2d 96 (9th Cir. 1980). The ALJ incorrectly characterized that decision to say that an individual employee's "gripes" about overtime was not concerted activity. In fact, the Court of Appeals found that the employee's personal concerns about overtime *were* concerted because they related to a contractually-guaranteed employment right, even where the employee was not motivated by an intent to enforce a provision of the collective bargaining agreement. *Id*. at 100.

3. The ALJ Erred By Failing To Find That Greenidge's Comment About The Skycaps' Group Tip Was Inherently Concerted

The Board has long considered discussions about wages to be "inherently concerted" because they are by nature such essential first steps to the inducement of group action. *See e.g. Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992) (same), *enfd. mem*. 977 F.2d 528 (6th Cir. 1992); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (discussions about work schedules inherently concerted), *enf. denied in pert. part* 81 F.3d 209 (D.C. Cir. 1996). As discussed above, the skycaps' tips were a critical part of their wages. Accordingly, the ALJ erred by failing to find that Greenidge's comment about the group tip was inherently concerted.

4. The ALJ Erred By Ignoring Uncontroverted Evidence That Respondent's Skycap Supervisor Cebon Crawford Was Present When Greenidge Raised Concerns About The Skycaps' Group Tip And That Greenidge's Comment Prompted Crawford To Intervene On The Skycaps' Behalf

The ALJ erroneously ignored the controverted evidence that Respondent supervisor Crawford was present when Greenidge made his comment about group tips. [ALJD 2:16-18]. This finding ignores undisputed record evidence that Crawford was present when Greenidge said, "We did a similar job a year prior and we didn't receive a tip for it." It further ignored that upon hearing Greenidge's comment, Crawford was prompted to intercede on the skycaps' behalf. [Tr. 34, 75].

Glossing over these important facts, the ALJ provided no context for his finding that Crawford did communicate to customers that skycaps "did not want to take the equipment because they did not think that they would get a big enough tip." [ALJD 2:30-33, emphasis added]. The ALJ reached this erroneous conclusion, committing reversible error, by improperly substituting his own belief in the place of credible, probative record evidence.

5. The ALJ Erred By Ignoring Uncontroverted Evidence That Respondent Believed That Greenidge And His Fellow Skycaps Acted In Concert To Address Their Common Concern About Tips

In finding that Greenidge did not incite or induce group action when he expressed concern about the skycaps' group tip, the ALJ narrowly focused on what he believed Greenidge actually intended in making his comment about the group tips. [ALJD 5:45-49]. However, regardless of Greenidge's subjective intention, the proper legal inquiry asks whether *Respondent* believed that Greenidge engaged in concerted activity. *See 200 E. 81st Rest. Corp.*, 362 NLRB No. 152 (2015) *Parexel International*, 356 NLRB No. 82, slip op. at 6 (2011) ("an adverse action against an employee based on the employer's belief that the employee engaged in protected concerted activity is unlawful even if the belief was mistaken and the employee did not in fact engage in such activity."); *Metropolitan Orthopedic Associates, PC*, 237 NLRB 427 (1978); *Henning & Cheadle, Inc.*, 212 NLRB 776 (1974).

The ALJ ignored the uncontroverted evidence that Respondent believed that Greenidge and his fellow skycaps acted in concert to address their common concern about tips. Both Roeder and Fitzgerald testified that they understood that the skycaps expressed their concerns about the amount of tip they would receive *as a group*. Neither knew who Greenidge was at the time of incident and neither testify to any knowledge that Greenidge – or an individual skycap – actually raised the concern. [Tr. 170, 182]. Every single email about the incident between Respondent and its customers, including Fitzgerald, states that the skycaps acted *as a group*, and not one of these emails makes any mention of Greenidge as an individual. [ALJD 3:7 – 5:44]. *See e.g*. Jt. Exh. 1 pp. 2, Fitzgerald email to Respondent managers ("…at this point Crawford was explaining to [Roeder] that the skycaps don't want to handle [the job] because of the large quantity of bags and a small tip."). Further, Respondent discharged all four skycaps at the same time because of "some conversion [sic] about no tip or small tip for the job." [GC Exh. 8, p. 2]. In no uncertain terms, the discharge documents attribute this conversation *to the group of skycaps* and not to Greenidge. [Jt. Exh. 2, 5 p. 3].

The ALJ was similarly clear that Respondent believed that the skycaps acted in concert to address their common concern about tips when he found the following:

- [Respondent's] supervisor, Crawford, told [Roeder] that the skycaps did not want to take the equipment because they did not think that they would get a big enough tip. [ALJD 2:30-33]
- It is also clear that [the skycaps'] refusal was based on the belief that the soccer team would not be generous in their tips. [ALJD 2:33-34]

It is uncontroverted that Respondent believed that Greenidge engaged in concerted activity. It is also uncontroverted that the ALJ improperly ignored this belief in finding that Greenidge did not engage in concerted activity.

6. The ALJ Erred By Characterizing Greenidge's Comment As An Offhand Gripe

The ALJ erred by finding that Greenidge's comment was "simply an offhand gripe about his belief that French soccer players were poor tippers." [ALJD 5:45-49]. In limited circumstances where an employee raises purely individual or personal complaints, the Board has found employee statements about terms and conditions to be "mere gripes" rather than concerted activity deserving of the Act's protection. For example, in *Tampa Tribune*, the Board found that an employee who raised personal concerns about his employer's criticism of his work and about his employer's favoritism was engaged in "mere griping" because there was no evidence that the employee "was raising this issue on behalf of his coworkers." 346 NLRB 369 (2006).

None of these circumstances are present in the instant case. Whatever Greenidge's subjective intention was in expressing his concerns about group tips, the evidence is clear that Respondent understood it to be more than a personal "gripe" of Greenidge's. As discussed above, Greenidge's comment prompted the skycap supervisor to intercede on behalf of the *group* of skycaps and from that point on until now, Respondent, its customers and even the ALJ ALJ characterized the concern about tips as a *group* concern.

E. The ALJ Erred By Characterizing Skycaps' Concerns About Tips As A "Dispute" With Respondent's Customers And Not With Respondent

The ALJ found that Greenidge's comments about tipping did not relate to a dispute with the Respondent but instead with its customers:

> The fact is that if there was any dispute in this case, it was not between the employees and the Respondent….a comment about about the poor tipping habits of French soccer players was not and could not be addressed by the skycap's employer as this was not within Alstate's control. [ALJD 7:11-14].

Here again, the ALJ substitutes his opinion for the actual facts and relevant legal principles. He ignores the facts that the Respondent, as the employing entity, set all terms and conditions of employment for skycaps, including tip arrangements and made the ultimate decision to discharge the skycaps. Further, there can be no question that Respondent, as the skycaps' direct employer, was not privileged to violate the Act even if its customers insisted that it do so and to find otherwise would negate entirely the employees' Section 7 rights. Just as civil rights laws do not permit employers to discriminate against employees based on race even if their customers demand that they do so, the Act does not allow direct employers to discharge employees for exercising their Section 7 rights because their customers take issue with their protected concerted activity. To find otherwise would be a blatant affront to democracy in the workplace. *See e.g*. *MasTec Advanced Technologies*, 357 NLRB No. 17 (July 21, 2011) (finding that MasTec's mass discharge of employees violated Section 7 even though its client DirectTv directed MasTec to discharge the employees; *Dews Construction Corp.*, 231 NLRB 182, 182-83 (1977), *enfd. mem.*, 578 F.2d 1374 (3d Cir. 1978); *Tracer Protection Services, Inc.*, 328 NLRB 734 (1999); *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291 (6th Cir. 1998) (employer was aware of reasons that customer was requesting employee's discharge, and thus employer violated Act by complying), *cert. denied*, 523 U.S. 1123 (1998); *cf. Dews Construction*, 231 NLRB at 182 n.4, *enfd. mem.*, 578 F.2d 1374 ("An employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter's employees because of the union activities of said employees."), *accord NLRB v. Pneu Electric, Inc.*, 309 F.3d 843, 857 (5th Cir. 2002); *Reliant Energy*, 357 NLRB No. 172, slip op. at 2 (Dec. 30, 2011), *enfd. sub. nom.*

F. The ALJ Erred By Failing To Find That Respondent Violated Section 8(a)(1) Of The Act

Based on his finding that Greenidge did not engage in protected concerted activity, the ALJ did not conduct a full *Wright Line* analysis and dismissed General Counsel's allegation that Respondent violated Section 8(a)(1) of Act by discharging Greenidge. For the reasons set forth above, this finding was erroneous. The Board should reverse the administrative law judge and find that Respondent unlawfully discharged Greenidge. The Board should order that he be offered reinstatement to his former position and that he be made whole for any losses suffered as a result of his unlawful discharge.

G. Greenidge Should Be Reimbursed for His Search-for-Work and Work-Related Expenses, in Addition to Being Awarded Backpay and Reinstatement

As a result of Respondent's unfair labor practices, the General Counsel seeks an Order providing the Board's traditional make-whole remedies, including reinstatement and backpay for Greenidge. Additionally, as part of a make-whole remedy, Respondent should be required to reimburse Scott for the search-for-work and work-related expenses resulting from his unlawful discharge.

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 continue working for the employer. *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[8]; the cost of tools or uniforms required by an interim employer[9]; room and board when seeking employment and/or working away from home[10]; contractually required union dues and/or initiation fees, if not previously required while working for Respondent;[11] and/or the cost of moving if required to assume interim employment.[12]

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 W. Texas Utilities Co.,* l09 NLRB 936, 939 n.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 N. Slope Mech.,* 286 NLRB 633, 641 n.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[13],

[8] *D.L. Baker, Inc. ,* 351 NLRB 515, 537 (2007).
[9] *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).
[10] *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).
[11] *Rainbow Coaches,* 280 N LRB 166, 190 (1986).
[12] *Coronet Foods, Inc.*, 322 NLRB 837 (1997).
[13] *In Re Midwestern Pers. Servs., Inc. ,* 346 N LRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

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." *Jackson Hosp. Corp.,* 356 NLRB No. 8 at *3 (Oct. 22, 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 & Serv. Employees Int'l Union, Local 32bj,* 361 NLRB No. 57 at *2 (Sept. 30, 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 (Dept. of Labor Admin. Rev. Bd.) (Feb. 2001), *aff'd Georgia Power Co. v. U.S. 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 . . ." *Don Chavas, LLC,* 361 NLRB No. 10 at *3 (Aug. 8, 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.[14] 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 Jackson Hosp. Corp.,* 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

CONCLUSION

General Counsel submits that on the basis of the entire record, a preponderance of credible evidence supports the allegation of the Complaint that Respondent violated Section 8(a)(1) of the Act by discharging Greenidge in retaliation for engaging in protected concerted activity.

It is respectfully urged that the Board sustain General Counsel's Exceptions in their entirety, reversing the ALJ's findings of fact and conclusions of law as set forth herein, and modifying the ALJ's Order. It is further urged that the Board issue an Order providing that Respondent be required to offer immediate and full reinstatement to Greenidge and to make him whole for any losses suffered by him as a Respondent of Respondent's unlawful

[14] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminateees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.,* 104 NLRB 514, 516 at *2 (1953).

conduct and to remove from his personnel file any references to actions taken by Respondent against him.

General Counsel further requests that Respondent be required to post and mail appropriate notices in which employees are assured of their Section 7 rights and in which Respondent promises to cease and desist from its unlawful conduct, and any other remedy deemed appropriate.

DATED AT Brooklyn, New York, this 29th day of July, 2016

Isl Colleen Pierce Breslin /s/

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