

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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PAPA'S PENN INC. D/B/A PAPA JOHN'S  
Respondent,

and

FAST FOOD WORKERS COMMITTEE  
Charging Party.  
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Case No. 29-CA-169864

**CHARGING PARTY FAST FOOD WORKERS COMMITTEE'S  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Alek L. Felstiner  
Levy Ratner, P.C.  
80 Eighth Avenue Floor 8  
New York, NY 10011-5126  
(212) 627-8100  
(212) 627-8182 (fax)  
afelstiner@levyratner.com

## INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Charging Party Fast Food Workers Committee ("Charging Party") hereby submits Exceptions to the Decision of the Administrative Law Judge ("ALJ") in the above-captioned matter dated August 18, 2016.

The ALJ determined that Respondent Papa's Penn, Inc. d/b/a Papa John's ("Respondent") did not discriminate against Jesse Scott ("Scott") in violation of the National Labor Relations Act ("Act"). This ruling was based on a series of conclusions drawn without regard – or even reference – to the relevant legal standards, and in contravention of both those standards and the evidence presented at hearing.

The ALJ's errors include an incorrect analysis of Charging Party's status as a labor organization, dismissal of Scott's protected activity, failure to apply *Wright Line* or analyze Respondent's motivation for discharging Scott, and complete disregard of the General Counsel's refusal-to-rehire claim.

Evidence in the record supports a finding that Respondent discriminated against Scott because of union activity in violation of the Act. Pursuant to Section 102.48(b) of the Board's Rules and Regulations, the Board should find that Respondent violated Sections 8(a)(1) and (3) of the Act and require Respondent to return to the status quo by reinstating Scott, awarding backpay, search-for-work expenses, and other consequential damages, posting a Notice to employees, and ordering any further relief as it may deem appropriate. In the alternative, given the multiplicity of errors in the ALJ's decision, the case should be remanded to an ALJ for consideration of all relevant evidence and application of the correct legal tests.

## EXCEPTIONS

Number	Page	Exception
1	3:38-3:42	The ALJ failed to apply the correct standard in determining that Charging Party is not a labor organization within the meaning of the Act.
2	3:45-4:9	The ALJ disregarded Scott’s union activity and ignored evidence of concerted activity.
3	4:10-4:24	The ALJ failed to analyze employer motivation as required under <i>Wright Line</i> and its progeny.
4	N/A	The ALJ Neglected to Address the General Counsel’s Claim that Respondent Violated the Act by Refusing to Rehire Scott.

## ARGUMENT

<b>Exception 1</b>	<b>3:38-3:42</b>	<b>The ALJ failed to apply the correct standard in determining that Charging Party is not a labor organization within the meaning of the Act.</b>
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Under Section 2(5) of the Act, a labor organization is “any organization of any kind... in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5). Under this broad definition, the Board requires only that employees participate and that the organization “deal[s] with employers” concerning terms and conditions of work. The phrase “dealing with employers” is not limited to collective bargaining. *See NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211-13 (1959).

Here, the record is replete with evidence that Charging Party is a labor organization under the Act. As the ALJ observed in his decision, Charging Party sends organizers to fast food stores, including Respondent’s, to discuss employment issues with workers. Charging Party advocates for higher wages and recruits employees to participate in demonstrations throughout New York state. The ALJ noted that at least three employees from Respondent’s store participated in these

actions. [ALJD 2:6]<sup>1</sup> The ALJ also found that Lisa Delancey, an organizer for Charging Party (a) visited the store in summer 2015 and spoke with employees about employment issues;<sup>2</sup> (b) represented employees in a meeting with management to protest Respondent’s failure to pay minimum wage; (c) represented Scott in a meeting with Respondent’s manager about Scott being removed from the schedule for stealing soda, and; (d) organized a silent action in the store to protest Scott’s discharge. [ALJD 2-3]

These facts found by the ALJ establish conclusively that employees participate in Charging Party’s activities and that Charging Party “deal[s] with employers” on matters of wages and working conditions. In fact, the Board has recently found labor organization status for an organization similar to Charging Party. In *Chipotle Services, LLC*, 363 NLRB No. 37 (2015), the Board determined that Mid-South Organizing Committee, an “association of workers employed in the retail fast food and related industries,” is a labor organization within the meaning of the Act. Slip op. at 3. The organization satisfied the test because, like Charging Party, it seeks to “unite fast food workers in an effort to improve wages and working conditions,” “meets with employers on behalf of employees in an effort to resolve grievances,” and “conducts large scale demonstrations seeking higher wages for fast food workers.” *Id.*

The ALJ did not apply the established test. Instead he focused only on whether Charging Party “has ever actually represented employees for the purpose of collective bargaining.” [ALJD 1, 2:17, 3:39] This is inconsistent with the language of the Act and the relevant case law.

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<sup>1</sup> The ALJ’s decision is described herein as “ALJD \_\_\_.”

<sup>2</sup> Though not mentioned in the ALJ’s decision, testimony at hearing revealed that these meetings concerned pay rates, breaks, workplace injuries, and other issues relating to the store. Tr. 22:18; 55:5.

Although the ALJ stated that Charging Party’s “status as a labor organization is not really critical to this case,” the decision itself belies that assertion. Having found that Charging Party was not a labor organization, the ALJ never addressed whether Scott exercised his Section 7 right to “form, join, or assist in a labor organization,” 29 U.S.C. § 157, *i.e.*, whether Scott engaged in union activity. Instead the ALJ confined his discussion to Scott’s other concerted activities, which he found to be minimal.<sup>3</sup> It is clear from the language of the decision that the ALJ’s later conclusions on employer motivation were heavily influenced by his assessment of Scott’s protected conduct as minimal. [ALJD 4] Essentially the ALJ decided that Scott’s protected activity was too minimal to “plausibly” be the reason for the discharge. [ALJD 4] Yet in making this judgment the ALJ disregarded much of Scott’s actual protected conduct, including Scott’s involvement with Charging Party. The faulty chain of logic began with the ALJ’s doubt as to whether Charging Party qualifies as a labor organization, and thus Charging Party’s status was indeed “critical to this case.”

<b>Exception 2</b>	<b>3:45-4:9</b>	<b>The ALJ disregarded Scott’s union activity and ignored evidence of concerted activity.</b>
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As noted above, there was ample evidence of union activity on Scott’s part, which the ALJ disregarded because he had already (erroneously) concluded that Charging Party was not a labor organization. Disregarding Scott’s union activity constituted a second error born from the first. [ALJD 3:42]

The ALJ also ignored testimony describing instances in which Scott engaged in “other concerted activity.” 29 U.S.C. § 157. Scott testified that in January 2016 he “rallied with a bunch of [his] coworkers and discussed the issue” of minimum wage rates, after which point they called

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<sup>3</sup> That characterization was contrary to the evidence (see Exception 2).

Ms. Delancey to the store. The employee group met with Ms. Delancey to describe the problem and then took it together to store management. [Tr. 24-25]<sup>4</sup>

This activity is self-evidently protected under Section 7. *See Chipotle Services*, 363 NLRB No. 37, slip op. at 12 (2015) (“it is axiomatic that discussing terms and conditions of employment with coworkers lies at the very heart of protected Section 7 activity”) (citing *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007)). But the ALJ described it as “much ado about nothing inasmuch as the company promptly complied with the minimum wage law and almost immediately paid its employees the difference.” [ALJD 3:49] The ALJ also downplayed Scott’s role. According to the ALJ, Scott was merely “present when Delancey got into an argument with [store owner] Morace about the increase in the minimum wage law,” but not “particularly involved beyond being present.” Elsewhere the ALJ characterized Scott as “happen[ing] to witness an argument about minimum wages.” [ALJD 3-4] The ALJ’s description bears no resemblance to the evidence at hearing. [Tr. 24-25]

In addition, Scott attended demonstrations in support of the “Fight for 15,” a campaign to raise the minimum wage for New York fast food workers. [Tr. 63] His participation qualifies as protected, concerted activity even if the demonstrations did not occur on Respondent’s premises. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (holding that Section 7 covers employee efforts “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship,” including “administrative and judicial forums” and “appeals to legislators to protect their interests as employees”).

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<sup>4</sup> Scott’s coworker, John Mason, corroborated this account. *See* Tr. 78-79.

The ALJ implied that these demonstrations could not constitute protected activity because they did not occur at Respondent’s store and thus “had nothing to do with Respondent.” [ALJD 2:15, 3:6] To the contrary, these demonstrations were in support of Charging Party’s campaign to raise wages at Respondent’s store and other fast food restaurants in New York.

It was error to disregard and minimize Scott’s protected conduct, even if the ALJ never reached a definitive finding on protected activity. As noted above, the ALJ’s insufficient analysis of protected activity bled over into his conclusions with respect to employer motivation.<sup>5</sup>

<b>Exception 3</b>	<b>4:10-4:24</b>	<b>The ALJ failed to analyze employer motivation as required under <i>Wright Line</i> and its progeny.</b>
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Under *Wright Line*, 251 NLRB 1083 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), the General Counsel establishes a violation of the Act by showing that an employee engaged in protected activity, the employer had knowledge of the activity, and the employer’s hostility to the activity “contributed to” its decision to take adverse action. Upon making out this “prima facie” case, the burden shifts to the employer to prove that it would have taken the same action absent the protected activity. 251 NLRB at 1089. A pretextual justification dooms the employer’s defense. *Advoserv of New Jersey Inc.*, 363 NLRB No. 143 (2016).

“Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company’s expressed hostility towards unionization combined with knowledge of the employees’ union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company’s deviation from past practices in implementing the discharge; and

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<sup>5</sup> Ignoring Scott’s concerted activities also matters because such activities would place him within the Act’s protection even if Charging Party were not a labor organization.

proximity in time between the employees' union activities and their discharge." *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005) (quoting *W.F. Bolin Co. v. NLRB*, 70 F. 3d 863, 871 (6th Cir. 1995)).

All the circumstances described above were present in this case. First, the evidence established that after becoming aware of employees' association with Charging Party, Respondent's representatives refused to speak with Ms. Delancey, on multiple occasions, insisted she leave, and called the police on her. [Tr. 59-60; 65-66] Scott's coworker John Mason also testified that Respondent's general manager, Juan Otero, interrupted a discussion about Charging Party's organization efforts to warn the employees that they would be fired and that Ms. Delancey could do nothing to save their jobs. [Tr. 89:11] This implied threat, couched as friendly advice, is further indication of Respondent's "expressed hostility." Otero went on to describe Charging Party, Scott, and Delancey as a "danger" to Respondent's team. [Tr. 45] All these expressions of hostility support a finding that Respondent's animus contributed to the discharge.

Second, witnesses' descriptions of the incident are inconsistent with the proffered reason for the discharge, namely, the supposed threat to safety posed by Scott. All witnesses testified that the confrontation between Scott and Otero on February 12, 2016, was a verbal argument with no physical threats. Owner Jean Morace testified that "there was no fight, there was a conversation, argument." [Tr. 117] Otero testified that Scott cursed and banged on the table. [Tr. 132] Scott's coworker, John Mason, who witnessed the incident, testified that Scott and Otero were "screaming at each other," but that there was no physical violence or threat. [Tr. 86]

Third, Respondent's actions after the incident are inconsistent with its asserted safety rationale. Apparently the incident was of little enough concern to Morace that he chose not to

save the surveillance footage, even though he could have. [Tr. 116]. He suggested that the arrival of the police was sufficient proof of what happened, but it was Respondent that called the police. [Tr. 117] The fact that police arrived, per Respondent's request, does not convert Scott's behavior into a safety threat. Meanwhile, Otero felt comfortable enough around Scott to receive him in the store a week later and meet with him behind closed doors. [Tr. 45]

Fourth, Morace's testimony suggests that Respondent subjected Scott to disparate treatment due to his protected conduct. In his testimony Morace referenced regular disciplinary issues, which he normally addressed by personal conversation with employees – including, in past circumstances, with Scott. [Tr. 118] There was no evidence of any other employee being disciplined or discharged for getting into an argument, or for any other conduct similar to Scott's. Respondent terminated Scott after Scott began engaging in protected activity.

Finally, even under Respondent's version of the facts, Scott's discharge represented a deviation from past practices. Respondent claims that Scott had a history of similar incidents, or emotional outbursts. No evidence was presented as to these alleged prior incidents, apart from third-hand hearsay allegations. [Tr. 117] But even if such incidents occurred, Respondent conceded that it never disciplined Scott for this conduct. [Tr. 47, 117] It was only after Scott began associating with Ms. Delancey and engaging in other protected activity that Respondent fired him.<sup>6</sup>

Without addressing any of this evidence or analyzing the General Counsel's claims, the ALJ dismissed it all, simply stating that he "[couldn't] imagine" it, or it was "totally implausible." [ALJD 4] Needless to say, the test under *Wright Line* is not whether an ALJ can

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<sup>6</sup> Temporal proximity is also present in this case. Apart from the strike, which occurred in November 2015, all the protected activity occurred in January 2016, in the weeks leading up to the February 12, 2016 discharge.

imagine that an employer’s animus contributed to the adverse employment decision, nor whether such motivation seems plausible. *Wright Line* and its progeny require the ALJ to analyze employer motivation, Respondent’s purported rationale for firing Scott, and the General Counsel’s evidence of pretext. Failure to do so was error.

<b>Exception 4</b>	<b>N/A</b>	<b>The ALJ Neglected to Address the General Counsel’s Claim that Respondent Violated the Act by Refusing to Rehire Scott</b>
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The General Counsel pleaded in the Complaint and argued at the hearing that Respondent violated the Act by refusing to rehire Scott.<sup>7</sup> In making this claim the General Counsel relied on a statement made by Otero in a meeting a week after the discharge. Scott asked to come back to work and Otero stated that Respondent would not rehire him because he had brought Charging Party’s representative into the store. [Tr. 45] Otero denied making this statement. [Tr. 135]

The ALJ declined to reach a decision as to whether Otero made the statement or not, though he noted that Otero testified credibly. Instead, he opined: “Even if Otero did say that he was refusing to rehire Scott because Scott brought Delancey into the store, this would have referred to the demonstration that she led in the store’s premises during the week after Scott had been discharged. It therefore cannot be asserted that this event had anything to do with Scott’s discharge.” [ALJD 4, n.2]

This explanation by the ALJ reveals two related errors. First, the ALJ erred by completely ignoring the refusal-to-rehire claim, focusing only on whether the protected conduct “had anything to do with Scott’s discharge.” *Id.* The refusal-to-rehire claim was properly pleaded and argued, but the ALJ did not consider it. Second, the ALJ erred by adopting an alternative

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<sup>7</sup> See Complaint ¶ 7; Tr. 8:1.

explanation that had no evidentiary support and that, if true, would still constitute a violation of the Act.

The ALJ's conclusion as to what the statement "would have referred to" runs directly contrary to the testimony given at hearing about the statement. Per Scott, Otero said: "You brung that woman into the store and she's having conversations with my employees. You know, why is she talking to my workers. She's holding meetings almost every Friday. It bothers me and it bothers Morace." [Tr. 45:7] The references to "conversations with my employees" and "meetings almost every Friday" make clear that Otero was not discussing Scott's involvement in the silent action that occurred post-discharge, but rather Scott's involvement in Charging Party's general organizing efforts. If Otero did make the statement as described, it would have been strong evidence that Respondent refused to rehire Scott because of his protected conduct. The ALJ ignored this.

Perhaps more important, a refusal to rehire Scott because of his involvement in the post-discharge silent action *would still violate the Act*. The silent action was protected conduct, and any involvement by Scott would be protected too.<sup>8</sup> Thus the alternative explanation adopted by the ALJ still would not save or excuse Respondent.

## CONCLUSION

For the reasons stated above, the Board should order the Respondent to return to the status quo by reinstating Scott, awarding backpay and search-for-work expenses, posting a Notice to employees, and ordering any further relief as it may deem appropriate. In the

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<sup>8</sup> It bears noting that the Respondent did not argue, and the ALJ did not analyze, whether Scott lost the protection of the Act under *Atlantic Steel*, 245 NLRB 814 (1979).

alternative, given the multiplicity of errors in the ALJ's decision, the case should be remanded to an ALJ for consideration of all relevant evidence and application of the correct legal tests.

Dated: October 13, 2016  
New York, New York

LEVY RATNER, P.C.



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By: Alek L. Felstiner  
Attorneys for Fast Food Workers Committee  
80 Eighth Avenue Floor 8  
New York, New York 10011  
(212) 627-8100  
(212) 627-8182 (fax)  
afelstiner@levyratner.com

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, in accordance with NLRB Rules & Regulations §102.114(i), on this 13th day of October, 2016, a copy of the foregoing Charging Party Fast Food Workers Committee's Exceptions to the Administrative Law Judge's Decision and Order in Case No. 29-CA-169864 was electronically filed and was sent to counsel for Respondent and counsel for the General Counsel, as set forth below:

By fax:  
Jean Morace  
*Respondent*  
516-208-4323

By electronic mail  
Kimberly Walters  
NLRB Region 29  
Kimberly.Walters@nlrb.gov

LEVY RATNER, P.C.



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By: Alek L. Felstiner  
Attorneys for Fast Food Workers Committee  
80 Eighth Avenue, Floor 8  
New York, NY 10011  
afelstiner@levyratner.com