UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 251 (Rhode Island Hospital)	:	
and	:	Case: 01-CB-172600
MICHAEL S. BEARSE, an Individual	:	

RESPONDENT'S POST-HEARING BRIEF

Pursuant to §102.42 of the Board Rules, Respondent International Brotherhood of Teamsters, Local 251 ["the Union" or "the Respondent"] respectfully submits this post-hearing brief.

Introduction

This case is about a union's right to protect its membership from unfair and improper electioneering by an employee colluding with management, and a union's right to investigate the cover-up of such collusion. The evidence presented at the March 1, 2017 hearing establishes that the Union did not violate §§ 8(b)(2) or 8(b)(1)(A) by acting within these legitimate rights.

The Counsel for General Counsel's ["General Counsel"] misplaced theory is that the Union discriminated against Kelly McNally ["McNally"] based, essentially, on three facts: 1) McNally was a political opponent of Brook Reeves ["Reeves"], 2) Reeves criticized McNally during the campaign, and 3) Reeves reported McNally's improper electioneering to management. This legal theory should be rejected outright, as it would mean that a union candidate could *never* report improper electioneering by an opponent without liability under §§ 8(b)(2) or 8(b)(1)(A). The use of heated campaign speech as evidence of anti-union animus should also be rejected outright, as this speech is protected by § 8(c) of the National Labor Relations Act ["the Act"], and sanctioning such speech would have a chilling effect on protected concerted activity.

Subject Index

Table of Authorities…….……..3

Facts 5

Summary of Argument 6

Argument 9

I. The Union Did Not Violate §§ 8(b)(2) or 8(b)(1)(A) by Reporting McNally's Conduct to RIH 9

A. The General Counsel Failed to Prove that the Union "Caused or Attempted to Cause" RIH to Discriminate Against McNally 10

B. Applying the Wright Line Framework, the General Counsel Failed to Prove a Violation of §§ 8(b)(2) or 8(b)(1)(A) 17

1. General Counsel Failed to Establish a Prima Facie Case Because McNally's Candidacy in Internal Elections Was Not a Motivating Factor in Reeves' Investigation 17

2. The Union Would Have Reported McNally Even if She was Not a Political Opponent 24

C. Applying the Duty of Fair Representation Framework, the General Counsel Failed to Prove a Violation of §§ 8(b)(2) or 8(b)(1)(A) 25

II. Reeves Was Not Acting in her Capacity as a Union Official With Respect to the Print Shop Incident and its Aftermath……...27

III. The Complaint Should Be Deferred to the Grievance Settlement……29

IV. The Complaint is Not Sufficiently Related to the Initial Charge……..30

V. The OES and IBT Decisions are Inadmissible…….….32

Conclusion 34

Table of Authorities

Cases

Able Bldg. Maint. Co. & Carlos Serrano, 349 NLRB 408, 411 (2007)……..10, 12-13, 15-16

Acklin Stamping, 351 NLRB No. 90, 1263 (2007). ……..……..……..……..25

Amoco Chemicalfchocolate Bayou & Paper, 351 NLRB 614, 640 (2007) ……..……..24

Caravan Knight Facilities Management, 362 NLRB No. 196, at *5 (2015) (*reversed on other grounds, Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Nat'l Labor Relations Bd.*, 844 F.3d 590 (6th Cir. 2016)). ……..……..……..……25

Cardiovascular Consultants of Nevada, 1996 WL 33321683 (1996) ……..……..32

Carpenters (AFL-CIO) Local 1102 (Planet Corp.), 144 NLRB 798, 801 (1963) ……..26

Emergency One, Inc., 306 NLRB 800, 809 (1992) ……..……..……..……32-33

Good Samaritan Med. Ctr., 361 NLRB No. 145 (2014) ……..……..……... 9, 11

Graphic Communications Local 1-M (Bang Printing), 337 NLRB No. 100, 673 (NLRB Div. J., 2002) ……..……..……..……..……..……..……..…..…25-26

Hod Carriers Local 341 (Alaska Associated General Contractors), 146 NLRB 1358, 1371 (1964) ……..……..……..……..……..……..……..…..…10

Laborers Local 158 (Contractors of Pennsylvania), 280 NLRB 1100 (1986) …….9-12

Local 471, Rochester Regional Joint Board, Workers United (Sidexho, Inc.), 359 NLRB 1538, 1539–40 (2013) ……..……..……..……..……..……..……..……30

Manno Electric, 321 NLRB 278, 280 fn. 12 (1996) ……..……..……..…….10

Nat'l Ass'n of Letter Carriers, Branch 44, 2011 WL 1229767 (NLRB Div. J., 2011).……8, 14-16

Nickles Bakery of Indiana, 296 NLRB 927, 927-928 (1989) ……..……..……..31

NLRB v. Brown, 380 U.S. 278, 289 (1965) ……..……..……..……..……..21

N.L.R.B. v. Int'l Longshoremen's & Warehousemen's Union, Local 10, 283 F.2d 558, 563-64 (9th Cir. 1960) ……..……..……..……..……..……..……..27

NLRB v. Teamsters Local 815, 290 F.2d 99, 104 (2d Cir. 1961) ……..……..…….28

Philadelphia Typographical Union 2 (Triangle Publications), 189 NLRB 829 (1971) ……..26

Redd-I, Inc., 290 NLRB 1115, 1116 (1988) ……..……..……..…….....30

Teamsters General Local Union No. 200, 357 NLRB 1844, 1852 (2011) ……..……20

Teamsters, Local Union No. 886, 229 NLRB 832, 835 (1977) ……..……..……27-29

Wright Line, 251 NLRB 1083 (1980) ……..……..……..……..……3,10

Secondary Sources

Fed. Lab. Law: NLRB Prac. § 7:29, "Burdens of proof—Proof of union discrimination" (2017). ……..……..……..……..……..……..……..……3

Facts

On February 9, 2016, the Rhode Island Hospital ["RIH"] print shop produced campaign flyers for the 251 Strong slate of candidates in the Teamsters Union delegate election. Tr. Vol. II, 307:19 – 309:19; 383:8 – 383:14. That day, slate member McNally received a box of approximately one thousand (1,000) campaign flyers (and another box of taxi vouchers) from print shop assistant Nicole Deleo ["Deleo"], and set out back to her job in the emergency department. Tr. Vol. II, 310:16 – 311:3.

On her way, Carl Chicoine ["Chicoine"] noticed McNally attempting to conceal the boxes. Tr. Vol. III, 587:4 – 588:3. Chicoine notified Reeves. *Id.* Reeves suspected that print shop manager Mario Luis ["Luis"] was printing for 251 Strong, and reported the incident to Union President Paul Santos ["Santos"], who reported it to Human Resources. Tr. Vol. II, 237:6-17; 588:1 – 588:6. Human Resources Vice President Lou Sperling checked with Luis, who falsely denied printing the flyers, and instead claimed he gave McNally prescription paper, offering to produce a requisition. Tr. Vol. II, 360:12 – 361:25. Sperling consulted McNally, who falsely denied that the boxes contained campaign flyers. Tr. Vol. II, 244:10 – 244:18.

Luis' excuse and McNally's denial were untruthful. Both Luis and Deleo testified at trial that the print shop printed campaign flyers at McNally's request. Tr. Vol. II, 307:19 – 309:19; 383:8 – 383:14. Sperling failed to fully investigate the 'prescription paper' cover-up, and instead told Santos and Reeves no flyers were printed. Tr. Vol. II, 238:17 – 239:14. For the next nine (9) days, neither Santos nor Reeves raised the issue further. Tr. Vol. III, 588:5 – 588:22.

On February 18, during an unrelated meeting, Sperling gave the prescription paper requisition to Tony Suazo ["Suazo"] and Gary Dasilva ["Dasilva"], who gave it to Reeves the following day. Tr. Vol. II, 390:7 – 393:5; Vol. III, 588:20 – 589:7. Reeves was immediately

suspicious of a cover-up because she knew that RIH no longer used prescription paper, the requisition was irregular and the price for the paper seemed exorbitant. Tr. Vol. III, 589:17 – 591:18. On February 23, she consulted Emergency Department manager Lindsay MacKeever ["MacKeever"], who confirmed the Department and McNally would have no need for prescription paper. Tr. Vol. II, 420:11 – 421:16; *see also* Respondent's Exh. G; Respondent's Exh. H. Astonishingly, the prescription paper McNally claimed to have delivered to the Emergency Department went mysteriously missing. Tr. Vol. I, 93:2 – 93:3.

On February 23, Reeves, now convinced, wrote an email to RIH management to complain that Sperling and Luis were engaged in a cover-up and to demand a thorough investigation. *See* General Counsel's Exh. 25. In a reply letter dated February 26 but not received until March 3, RIH attorney Anthony Rizzotti ["Rizzotti"] replied that after a "thorough investigation" RIH "could not confirm "that the print shop produced campaign flyers for 251 Strong, and offered an invoice which he said proved an independent print shop printed the "Zuckerman flyers," even though no one had mentioned them previously. Tr. Vol. III, 606:14 – 607:15; Respondent's Exh. J.

On March 1, Sperling issued a "Corrective Action" to McNally over mishandling of prescription paper. General Counsel's Exh. 5. On March 7, Union grievances were filed contesting the discipline. General Counsel's Exh. 6. On August 3, McNally, RIH and the Union agreed to a final settlement reducing the Corrective Action to a three (3) day suspension and expunging any record of the discipline effective March 8, 2017. General Counsel's Exh. 7.

Summary of Argument

Respondent did not violate Section 8(b)(1)(a) or 8(b)(2) of the Act because it *did not fail to represent McNally or cause the Employer to discipline her*. To the contrary, Reeves was

justifiably suspicious, and ultimately correct, that McNally and Luis printed 251 Strong campaign literature and covered it up. Reeves had the right to pursue this inquiry. The resulting discipline to McNally was proximately caused by her own dishonesty and the Employer's (Luis') clumsy cover-up.

Reeves was trying to expose the cover-up. She never wanted or intended any disciplinary action against McNally. No witness testified that she ever explicitly or implicitly requested any discipline for McNally. When, according to former Business Agent Ed Carreiro, others expressed a desire to to harm McNally, *Reeves did not join in.* Tr. Vol. II, 303:14 – 303:18. During a later conversation with a reporter, when she was assured that their communications would remain confidential, *Reeves never expressed any desire to harm McNally and in fact expressed that RIH was targeting McNally as "a scapegoat." See* General Counsel's Exh. 30. When McNally wrote an email to upper management on February 23, she concluded with a plea for a fair investigation that would *expose the cover-up*. *See* General Counsel's Exh. 25.

Reeves had no reason to believe that her initial inquiry would lead to discipline for McNally. Opposition candidates routinely complained to management about improper electioneering, including campaigning by outsiders, campaigning on patient floors, and campaigning on work time, without resulting discipline. Tr. Vol. II, 259:14 – 260:2; 465:8 – 465:25; 469:25 – 470:24; 471:22 – 472:6; 472:7 – 472:25. And plainly, Reeves could not know that McNally would come up with the prescription paper explanation, or that it was 'misplaced.' If McNally had not come up with this unlikely and implausible excuse (as opposed to something plausible, like taxi vouchers) the matter would have been dropped.

Nor could Reeves know that, after receiving the requisition and phony explanation, pursuing a justifiable inquiry would lead to McNally's discipline. There is no written rule or

regulation regarding placement of supplies, and McNally had a clean work record with no prior discipline for failing to follow procedures. Tr. Vol. II, 248:17 – 249:5; 276:17 – 277:1.

More importantly, Brooke Reeve's well-founded belief that RIH was covering up improper support for 251 Strong cannot be the basis for a violation of §§ 8(b)(1)(A) and 8(b)(2) *as a matter of law*. *See Nat'l Ass'n of Letter Carriers, Branch 44*, 2011 WL 1229767 (NLRB Div. J., 2011) (holding that reporting supervisor misconduct, which incidentally includes a description of employee misconduct, does not allow an inference that the union caused or attempted to cause the employee's discharge). Electioneering, including calling attention to RIH misconduct and publicizing possible misconduct by her opponent, cannot support an inference of improper conduct without turning Section 7 on its head and disregarding Section 8(c), which protects this speech. *Reeves could not properly assert her claim of employer misconduct without discrediting the prescription paper pretext*.

Because McNally lied about the prescription paper and she and Luis covered up the lie, it cannot be seriously argued that Reeves caused the discipline. It is on McNally that her excuse was implausible at best, plainly false at worst. Either way, sticking to the prescription paper story is what caused RIH to issue the Corrective Action to McNally.

Setting aside McNally's lie and the cover-up, Reeves' conduct did not 'cause' the discipline. McNally barred the Union from the disciplinary investigation, the disciplinary action, and the grievance procedure (except for Carreiro); she personally negotiated and insisted on the grievance settlement, waiving back pay, even though the Union would have arbitrated. *See* Tr. Vol. I, 190:17 – 191:4; Vol. III, 511:15 – 514:8; General Counsel's Exh. 5; General Counsel's Exh. 7. McNally caused the harm – three (3) day's back pay – she now charges to the Union.

Finally, General Counsel overlooks that Reeves was acting in her capacity as a candidate, not a Union representative, and General Counsel's complaint exceeds the scope of the Charge

General Counsel's fatal flaw is her contention that Reeves retaliated against McNally by causing RIH to discipline her for action that *Reeves specifically denied McNally committed.* Put another way, General Counsel seeks to hold Reeves responsible for the consequences of McNally's lie and a cover-up – the unforeseeable collateral effect of Reeves' justifiable and ultimately justified complaint that the RIH print shop was committing misconduct. The Complaint should therefore be dismissed.

Argument

I. The Union Did Not Violate §§ 8(b)(2) or 8(b)(1)(A) by Reporting McNally's Conduct to RIH

The Union did not violate §§ 8(b)(2) or 8(b)(1)(A) because the Union did not cause RIH to discipline Ms. McNally and did not fail to represent her. Sections 8(b)(1)(A) and (2) of Act provide that it is unlawful "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 … or (2) to cause or attempt to cause an employer to discriminate against an employee in violation of [section 8(a)(3)]." Section 8(a)(3) provides that it is unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…"

The Board has employed a four-part analysis to determine whether a violation of §§ 8(b)(2) and 8(b)(1)(A) has occurred in 'request for discipline' cases. The General Counsel must first establish that a union, in fact, "caused or attempted to cause" the employer to discriminate against a union member. *See Good Samaritan Med. Ctr.*, 361 NLRB No. 145 (2014); *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100 (1986). If the General Counsel makes this preliminary showing, the General Counsel must then establish that 2) the Union's

conduct violated the duty of fair representation framework, or that 3) the Union's conduct violated the *Wright Line* framework. *Good Samaritan Med. Ctr.*, 361 NLRB No. 145; *Wright Line*, 251 NLRB 1083 (1980). The Board may choose to apply either framework. *Good Samaritan Med. Ctr.*, 361 NLRB No. 145; *Fed. Lab. Law: NLRB Prac.* § 7:29, "Burdens of proof—Proof of union discrimination" (2017).

The General Counsel has failed to prove that the Union violated §§ 8(b)(2) and 8(b)(1)(A). The General Counsel did not establish that the Union "caused or attempted to cause" RIH to discriminate against Ms. McNally, and the Union's conduct with respect to Ms. McNally did not violate the *Wright Line* framework or the duty of fair representation framework.

A. The General Counsel Failed to Prove that the Union "Caused or Attempted to Cause" RIH to Discriminate Against McNally

The General Counsel failed to prove that the Union caused or attempted to cause RIH to discriminate against McNally because the General Counsel did not establish that the Union requested that McNally receive discipline. An essential element of a violation of Section 8(b)(2) is causation: whether the union in fact "cause[d] or attempt[ed] to cause" discrimination. *Able Bldg. Maint. Co. & Carlos Serrano*, 349 NLRB 408, 411 (2007). Causation is demonstrated by direct evidence that a union made a written or verbal request of an employer to discipline a union employee, or where evidence supports a reasonable inference that the union, in fact, made such a request. *See id.*

General Counsel's burden is one of persuasion and not merely production. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). "[C]onjecture, suspicion, speculation and surmise" are inadequate to carry the burden of proof." *Hod Carriers Local 341 (Alaska Associated General Contractors)*, 146 NLRB 1358, 1371 (1964). "[I]t is not sufficient that an employer's

conduct might please the union." *Good Samaritan Med. Ctr.*, 361 NLRB No. 145 (Dec. 16, 2014).

The General Counsel failed to prove through direct evidence that Reeves or Santos requested RIH to discipline McNally, and the admissible evidence established at the hearing does not support a reasonable inference that any such request was made.

1. The General Counsel Failed to Prove that Reeves Requested RIH to Discipline McNally

a. Political Rivalry as Evidence of a "Request"

First, the General Counsel may not simply argue that "a general atmosphere of tension created by intraunion politics" supports a reasonable inference that Reeves actually requested McNally's discipline, as this theory has been rejected by the Board:

> Contrary to the judge, we find the evidence falls short of establishing that in 1981 DiGeronimo requested the adverse job actions taken by Worthy Brothers against Stamets. *There is no admissible evidence establishing that DiGeronimo expressly demanded Worthy Brother's actions*. Nor does the record contain any admissible evidence which could be construed as a request for such discriminatory action. Knowledge of political dissension within the Respondent may well have been the genesis of McIntyre's stated concern that [the employer] would have problems with the Respondent if it retained [the charging party] in Harrisburg. But *a general atmosphere of tension created by intraunion politics is not sufficient to support a reasonable inference that DiGeronimo requested Worthy Brother's actions. There being insufficient basis to establish the requisite causal nexus between the Respondent and Worthy Brother's adverse job actions against Stamets, we find the General Counsel failed to make out the 8(b)(2) violation alleged*. Accordingly, we shall dismiss the allegation that the Respondent sought to have Worthy Brothers lay off Stamets, and later deny him employment.

Laborers Local 158 (Contractors of Pennsylvania), 1986 WL 54001, at *1 (*emphasis added*). Both the Union and the General Counsel agree that Reeves and McNally did not have an amiable relationship, and it was no secret that the two were bitter political rivals. *See generally* Tr. Vol. I, 130:22 – 134:21. But the General Counsel may not rely on this "general atmosphere of tension created by intraunion politics" to support an inference that Reeves, in fact, requested McNally's

be disciplined. *See Laborers Local 158 (Contractors of Pennsylvania)*, 1986 WL 54001, at *1 The General Counsel must carry his burden through other evidence.

b. Reeves' Initial Meeting with Sperling

The General Counsel failed to prove that Reeves requested Sperling to discipline McNally. Sperling testified that Reeves brought the campaign fliers issue to his attention, either on February 9 or soon thereafter:

> Brook Reeves came to me and told me that someone had observed Kelley McNally taking boxes out of the print shop, and then either later that day or the next day they had seen Kelley passing out campaign literature in our cafeteria, which by the way she also said that it was on work time and would not have been proper if it were, and asked me to look into it.

Tr. Vol. II, 237:6 – 237:17. Sperling testified that the Union's "sole target of concern" was both McNally and Luis, and that the Union wanted him to "investigate and take appropriate action, *whatever that might be*." Tr. Vol. II, 255:22 – 256:20 (emphasis added). This account is contradicted by the testimony of Santos and Reeves, who testified that Santos met with Sperling, not Reeves. Tr. Vol. III, 504:1 – 504:22; 588:4 – 18. But even if Sperling's account is credited in full, the General Counsel has not established that Reeves requested McNally's discipline, because *Sperling definitively testified that Reeves never asked him to impose any discipline on Ms. McNally*. Tr. Vol. II, 255:22 – 256:20.

Sperling's testimony also does not support a reasonable inference that Reeves requested McNally's discipline. The Board has refused to find a "request" for employer action where the Union simply made the employer aware of employee misconduct. In *Able Building Maintenance Company*, the Board held:

> The credited evidence reflects that in the context of discussing [Serrano's misconduct] [with management], [the Union] said only, "It's up to you." There is no reasonable basis upon which to find an inference of an attempt to cause

> discharge from this statement. Standing alone, the statement "[I]t's up to you" would most reasonably be understood literally; that is, the Union wants no involvement in ABMC's decision. Moreover, discharge was not a foreseeable consequence of the labor organization's communication, "[I]t's up to you." Serrano's discharge was not a foreseeable consequence of telling [management] that it is up to him whether to allow Serrano to work at two jobs for ABMC. Taken in context, I conclude that a preponderance of the credible evidence does not establish that the Union attempted to cause the discharge of Serrano.

349 NLRB at 411-12. Similarly, Sperling's testimony does not support a reasonable inference that Reeves requested McNally's testimony because Reeves had no reason to believe that reporting McNally's improper electioneering to Sperling would result in any discipline. *See id.* As both Sperling and Santos testified, Sperling has never disciplined an employee for improper electioneering. Tr. Vol. II, 260:7 – 260:120; 475:14 – 476:1. The similarities between the statement in *Able Building Maintenance Company* and the statements in this case are striking. 349 NLRB at 411-12. Accordingly, just as the Board in *Able Building Maintenance Company* found that the statement "[I]t's up to you" was insufficient to infer a request for discipline, the Judge should find that the statement "investigate and take appropriate action, *whatever that might be*" is insufficient to infer a request for discipline. *See id.*

c. Reeves' Meeting with McKeever and Second Meeting with Sperling

The General Counsel failed to prove that Reeves requested McKeever to discipline McNally. When Reeves met with McKeever on February 19, 2016, Reeves showed her the print shop requisition, General Counsel's Exh. 3. *See* Tr. Vol. II, 439:4 – 439: 9. According to McKeever, Reeves stated that the Emergency Department cost center was being used inappropriately and asked whether the prescription paper story was plausible. *Id*. Crucially, however, McKeever had *no recollection* that Reeves actually requested, in any way, that McNally be disciplined. Tr. Vol. II, 426:16 – 426:22.

General Counsel also did not prove that Reeves requested McNally's discipline when she met with Sperling a second time. Although Reeves testified that she brought her concerns about the prescription paper to Sperling and insisted he look into it, *see* Tr. Vol. III, 593:11 – 594:9, Sperling testified that Reeves never asked him to impose any discipline on Ms. McNally. Tr. Vol. II, 255:22 – 256:20.

Reporting the prescription paper cover-up story to McKeever and demanding an investigation from Sperling does not support a reasonable inference that Reeves requested McNally's discipline. The Board has held that reporting supervisor misconduct, which incidentally includes a description of employee misconduct, does not allow a reasonable inference that the union requested the employee's discharge. *Nat'l Ass'n of Letter Carriers, Branch 44*, 2011 WL 1229767 (NLRB Div. J., 2011). In *National Association of Letter Carriers*, the Board held that a union did not "request" an employee's discipline by reporting a supervisor's failure to manage that employee's violent behavior. *Id.* The Judge reasoned:

> …Fortgang not only made no explicit request that Turcotte be disciplined, but, as was discussed above, was not shown to have made any non-explicit communication designed to induce discipline. Rather her complaint was that [the supervisor] had failed to exercise supervisory authority in a meaningful way to address the antagonism between Turcotte and his co-workers. There are any number of appropriate actions the Employer could have taken to try to remedy that situation without resorting to disciplinary action against Turcotte.

Id. The exact same reasoning applies here: Reeves was reporting the misconduct of a supervisor, Mario Luis, who admitted at trial that he was maintaining a cover up. Tr. Vol. II, 362:11 – 363:22. Just as the Judge in *National Ass'n of Letter Carriers* found that reporting an employee's violent behavior was incidental to reporting the supervisor's failure to supervise the employee, McNally's involvement in the cover-up was incidental to Mario's misconduct in creating the cover-up. *See* 2011 WL 1229767. There were "any number of appropriate actions

the Employer could have taken to try to remedy that situation without resorting to disciplinary action" against McNally. *See id.* Reporting and discussing the cover-up with McKeever and Sperling does not support a reasonable inference that Reeves in fact requested, and therefore caused, McNally's discipline.

d. Email to Van Bree and Riley

Finally, the General Counsel failed to prove that Reeves requested RIH to discipline McNally via her email to Van Bree and Riley on February 23, 2016. Not only does this email lack any request that McNally be disciplined, the email actually requests that Luis be disciplined and that the Hospital admit its wrongdoing. *See* General Counsel's Exh. 3. The final sentence of the letter states, "Does Lou [Sperling] hate the New Union so much that he would let the hospital take a direct hit with the department of health than to discipline a manager ad [sic] admit to this wrong doing?" *Id.* This email does not provide direct evidence that Reeves requested McNally's discipline, as no such request is contained in the email. *See id.* And as was discussed previously, simply reporting McNally's misconduct, or the misconduct of Luis, does not support a reasonable inference of a disciplinary request under Board precedent. *See Nat'l Ass'n of Letter Carriers*, 2011 WL 1229767, at *1; *Able Bldg. Maint. Co.*, 349 NLRB at 411-12.

2. The General Counsel Failed to Prove that Santos Requested RIH to Discipline McNally

The General Counsel did not offer any evidence that directly, or by reasonable inference, establishes Santos requested RIH to discipline McNally. Sperling testified that, when Sperling spoke with Santos in early February regarding the incident, Santos did not request that McNally be disciplined or even mention her name. Tr. Vol. II, 238:23 – 239:11. As there is no evidence in the record to even indicate that Santos requested McNally's discipline, and no allegation in the

complaint that Santos did so, *see* General Counsel's Exh. 1, the General Counsel can satisfy her burden only by establishing that Reeves made such a request.

3. McNally's Discipline was Not a Reasonably Foreseeable Consequence of Reeves' Conduct

The Union expects that the General Counsel will argue that, although there is no evidence that Reeves in fact requested McNally's discipline, such discipline was a reasonably foreseeable consequence of Reeves' conduct. That is not the legal standard: Board precedent requires evidence of—or at least an inference of—a verbal or written request by the Union for the employee's discipline to establish causation. *See Able Bldg. Maint. Co. & Carlos Serrano*, 349 NLRB at 411; *Nat'l Ass'n of Letter Carriers, Branch 44*, 2011 WL 1229767. However, even if the "reasonably foreseeable" standard is accepted for causation, the evidence presented does not establish that McNally's discipline *for mishandling prescription paper* was a reasonably foreseeable consequence of reporting the print shop's improper electioneering to RIH, or of insisting that the subsequent cover-up be investigated.

The chain of events that ended with McNally's discipline contained several completely unforeseeable events. Borrowing from a common-law tort analysis, these intervening causes are sufficient to conclude that McNally's ultimate discipline for mishandling prescription paper was not foreseeable to Reeves. First, Mario made the decision to give the prescription paper requisition to Sperling, intentionally deceiving RIH. Tr. Vol. II, 362:11 – 363:22. Then, McNally chose to go along with this cover-up, instead of admitting that she had indeed printed campaign flyers. *See* Tr. Vol. II, 244:10 – 244:18. Both of these events were necessary "but-for" causes of McNally's ultimate discipline for mishandling prescription paper, and both were utterly unforeseeable to Reeves when she spoke with Sperling. What's more, Sperling himself testified that the hospital's policy on securing prescription paper was lax and unclear, making

McNally's discipline even less likely. *See* Tr. Vol. II, 248:17 – 249:5; 276:17 – 277:1. The General Counsel has thus not established that McNally's discipline was reasonably foreseeable to Reeves.

B. Applying the Wright Line Framework, the General Counsel Failed to Prove a Violation of §§ 8(b)(2) or 8(b)(1)(A)

The General Counsel failed to establish that the Union violated §§ 8(b)(2) or 8(b)(1)(A) under the *Wright Line* framework. Under *Wright Line*, the General Counsel must establish "(1) that the employee/union member engaged in protected concerted activity; (2) the employer/union has knowledge of that activity; and (3) animus or hostility toward this activity was a motivating factor in the employer/union's decision to take the adverse action in question against the employee/union member." *Teamsters General Local Union No. 200,* 357 NLRB 1844, 1852 (2011). If the General Counsel makes this prima facie showing, "…the burden of persuasion shifts to the employer/union to show that it would have taken the same action even in the absence of the protected activity." *Id.*

In this case, General Counsel failed to make an initial showing under *Wright Line*. Additionally, the Union established through the testimony of Sperling and Santos that the Union would have reported improper electioneering to RIH regardless of who committed the electioneering misconduct.

1. General Counsel Failed to Establish a Prima Facie Case Because McNally's Candidacy in Internal Elections Was Not a Motivating Factor in Reeves' Investigation

General Counsel conflates evidence of a contested delegate election with evidence of animus. This reasoning violates section 8(c) of the Act, disserves Reeves' section 7 right to campaign, and ignores the overwhelming evidence that McNally's candidacy was a condition, not a cause of Reeves' inquiry. Instead, the evidence shows that Reeves initially raised the

McNally print shop incident based on a good faith belief that Luis was printing campaign flyers for 251 Strong, and that, after February 18, Reeves pursued the investigation based on a good faith belief that the prescription paper excuse was part of a cover-up.

a. Reeves' Emails

The Union submits that the most reliable evidence available of Reeves' mental state in early 2016 is the written communications from early 2016. This includes the email that Reeves sent to Ms. Riley and Ms. Van Bree on February 23, 2016, General Counsel's Exh. 25, and an email chain that Reeves exchanged with a reporter in March of 2016, General Counsel's Exh. 30.

Reeves' main focus in the email to Riley and Van Bree was Luis and RIH, not the McNally. *See* General Counsel's Exh. 23. The final sentence of the letter states, "Does Lou [Sperling] hate the New Union so much that he would let the hospital take a direct hit with the department of health than to discipline a manager ad admit to this wrong doing?" *See id*. Not only does this email lack any request that McNally be disciplined, the email clearly requests that *Mario Luis* be disciplined, and that the hospital admit any wrongdoing. *See id.*

Reeves' main focus in her emails to the reporter was again the behavior of RIH, not McNally. *See* General Counsel's Exh. 30. On March 3, Brooke stated in an email "Just seems like one big cover up." General Counsel's Exh. 30 at 2. She went on to state:

> *I guess they put Ms. McNally on suspension this week. I feel like they are using her as a sacrificial lamb.* She has now filed election charges against me accusing me of trying to get her fired. *All I'm trying to do is to prove that one of the stories the hospital is saying is a lie*…Either they printed the flyers and made up the story about the RX paper, or there is RX paper missing.

Id. at 9. Reeves had no reason to be deceptive in this communication: she expressly asked that she remain anonymous and she had no reason to think that the email would ever be read by any third parties. *Id.* at 9. This communication, close in time to the allegedly discriminatory

conduct, provides clear evidence that Reeves was motivated by a desire to end RIH's election misconduct and subsequent cover-up, not by a desire to get McNally disciplined.

b. The Basis for Reeves' Good-Faith Belief in Improper Electioneering and a Cover-Up

A review of the evidence indicates that Reeves had a reasonable basis for her belief that the print shop printed campaign flyers, and that Luis was attempting a cover-up:

- Chicoine told Reeves that he saw McNally leaving the print shop with two boxes, and that, when McNally saw Chicoine, she attempted to conceal what she was carrying. Tr. Vol. II, 587:4 – 588:3.

- According to Sperling, Reeves stated that on the same day or the day after McNally was seen leaving the print shop, McNally was seen passing out campaign materials in the RIH cafeteria. Tr. Vol. II, 237:6 – 237:17.[1]

- Reeves had previously received reports that McNally was picking up materials from the RIH print shop. Tr. Vol. III, 588:1 – 588:3.

- When Suazo gave Reeves the prescription paper requisition on February 19, Reeves knew that the hospital had switched to a digital prescription system and the price ($140.00) seemed high for two reams of paper. Tr. Vol. III, 589:17 - 591:18; *see* General Counsel's Exh. 2.

- Sperling initially told Reeves that he would produce receipts from a print shop in East Providence, but then told her he would produce receipts from a shop in Fall River. Tr. Vol. III, 598:6 – 599:17.

- Reeves received a letter on March 3, 2016 from Hospital Attorney Rizotti, with an attached invoice, stating that the Hospital's investigation was concluded. According to Rizotti, the invoice from Express Printing for a campaign flyer indicated "…that the so-called Zuckerman flyers were printed there" and not in the RIH print shop. Respondent's Exh. J. However, the attached invoice was dated February 15, 2016—*six days after Reeves was seen with boxes coming out of the print shop*. *Id.*[2]

[1] Respondents note that, although this statement could be deemed hearsay, it may still be used to show Reeves' then-existing state of mind.

[2] Respondents further note that General Counsel's Exhibit 4 shows that Sperling possessed more than one invoice from Express Printing, and yet sent only one invoice to the Union via the Rizotti letter, further indicating the cursory nature of the investigation and the insufficient level of information provided to the Union throughout. *See* General Counsel's Exh. 4.

Taken altogether, this evidence demonstrates that Reeves had a reasonable factual basis for demanding a proper investigation to determine whether improper electioneering had occurred. The evidence further demonstrates a reasonable factual basis for her belief that the Hospital's investigation was inadequate.

c. Testimony of DeLeo and Luis

The testimony of DeLeo and Luis corroborates the Union's position that McNally left the print shop with campaign flyers, and is consistent with Reeves' good-faith belief that such flyers had been printed there. DeLeo, who worked in the print shop, testified that she printed 251 Strong campaign fliers for Reeves at the behest of Luis. Tr. Vol. II, 307:19 – 309:19. DeLeo then saw McNally take the fliers from a shelf and leave the print shop. Tr. Vol. II, 310:16 – 311:3. Luis corroborated this: he told DeLeo to help McNally, without realizing what McNally wanted to print. Tr. Vol. II, 358:16 – 359:5. After Luis spoke with Santos and Sperling, Luis then learned from DeLeo that campaign fliers had indeed been printed. Tr. Vol. II, 361:17 – 362:2. What's more, *Luis testified that he spoke with McNally afterwards and McNally confirmed that she had printed campaign flyers.* Tr. Vol. II, 383:8 – 383:14. Needless to say, the testimony of both Luis and DeLeo entirely contradicts McNally's testimony and significantly impugns her credibility. But it is also consistent with Reeves' suspicion in early February that McNally had in fact printed campaign flyers.

d. Testimony of McKeever

McKeever's testimony is also consistent with the fact that, after February 18, Reeves was motivated by a good faith and reasonable belief that the prescription paper story was concocted. As McKeever testified, the Emergency Department did not typically use prescription paper, even for out-of-state patients. Tr. Vol. II, 420:11 – 421:16; *see also* Respondent's Exh. G;

Respondent's Exh. H. If a unit secretary like McNally needed to obtain a prescription pad or prescription paper, then the secretary could have obtained one from the Assistant Clinical Manager's office with a security officer—there was simply no need to go to the print shop. Tr. Vol. II, 430:17 – 431:8. The testimony of McKeever again demonstrates that Reeves' suspicious were well founded, and ultimately correct.

e. Representation of McNally After the January 2014 Election

The Union's effective representation of McNally in multiple instances, and after it was clear that McNally was a political opponent, further indicates that the Union did not intend to cause any discipline. It is settled law that the ALJ may consider Reeves' and Respondents' supportive conduct toward McNally – notwithstanding their political disagreements – as evidence they were not motivated by improper animus. *NLRB v. Brown*, 380 U.S. 278, 289 (1965) (citing the company's "more than amicable" relationship with union in finding insufficient evidence that company was motivated by union animus). First, the Union represented McNally in a disciplinary meeting in early 2014. Tr. Vol. II, 396:20 – 398:7. The matter was resolved and McNally had no complaints about the Union's representation of her. Tr. Vol. II, 398:8 – 398:12. In late 2016, Suazo testified that the Union represented McNally in regards to an email that McNally sent to her supervisor, which the hospital felt was inappropriate. Tr. Vol. II, 398:17 – 399:14. Again, the matter was resolved and McNally had no complaints—McNally in fact contacted Santos to thank him for the Union's representation. Tr. Vol. II, 398:17 – 399:14; Vol. III, 518:14 – 518:22. This representation of McNally after the 2014 election indicates that the Union was willing to effectively represent its political opponents, and in fact did so.

f. The Group Text Message and "Twofiftyone Wrong" Facebook Posts

The group text messages from Carreiro's phone do not demonstrate that McNally's candidacy was a motivating factor in the decision of Reeves to report McNally's electioneering misconduct. *See* General Counsel's Exhibit 23. First, the text messages are from May and June of an unspecified year. *Id.* One therefore cannot be certain these messages are from the same time period as the allegedly discriminatory conduct, which occurred in February and March of 2016. The messages show that Mike Simone, a Union organizer, told Brooke to "Attack *them* fucking hard! All bets are off?" *Id.* (emphasis added). But the context of the messages shows they were related to the campaign against 251 Strong in general, not McNally. The messages in no way specifically relate to McNally, and there is nothing to indicate that the word "attack" was referring to anything besides a normal, political attack on another candidate's qualifications.

The "Twofiftyone Wrong" Facebook Posts likewise prove only that the United Action slate engaged in a heated campaign, and that the author of the page believed that the prescription paper story was a cover up. *See* General Counsel's Exh. 21. The posts do not threaten unlawful retaliation against 251 Strong, in fact the posts specifically contemplate *voting* as a means of taking action against 251 Strong. *See* General Counsel's Exh. 21 ("That's why I'm voting for United Action! I don't want a union that sleeps with the enemy!"). These messages and Facebook posts are entirely consistent with the Union's position that Reeves reported the improper electioneering *because it was improper*—not because McNally, a candidate, was the one to commit the conduct.[3]

[3] The General Counsel is expected to argue that Reeves' anti-union animus is demonstrated by the testimony of Carreiro, regarding a conversation in the Union hall. However, this testimony is unreliable hearsay, and does not establish any motive on the part of Reeves or Santos. Tr. Vol II, 295:2 – 297:7. Paul Santos was not present at the time, according to Carreiro's own testimony. Tr. Vol II, 295:6 – 295:16. And on cross-examination, Carreiro admitted that he did not recall Reeves saying *anything* in response to the alleged encouragement. Tr. Vol II, 303:14 – 303:18 ("No I don't recall what she said. I

g. Choosing Not to File an Election Protest

The General Counsel is expected argue that the Union's animus towards McNally is evidenced by her failure to file an election protest regarding McNally's improper electioneering. However, the unrefuted testimony of Sperling and Santos indicates that the standard method of resolving electioneering disputes at RIH was to report such complaints to Sperling, who dealt with the situations in a non-disciplinary manner. *See* Tr. Vol II, 259:14 – 260:2; 465:8 – 465:25; 469:25 – 470:24; 472:7 – 472:25. Sperling testified that union members previously reported two instances of improper electioneering to him. Tr. Vol II, 259:14 – 260:2. Santos corroborated that bringing such complaints to management was indeed the standard practice. Tr. Vol II, 465:8 – 465:25; 469:25 – 470:24; 472:7 – 472:25. Just because filing an election protest was one available option to Reeves, does not mean that she waived her right to resolve such disputes directly with Sperling. Her choice not to file an election protest is not indicative of animus towards McNally, as the custom at RIH was to resolve such disputes with Sperling through non-disciplinary means.

---

don't."). Counsel for the charging party asked Mr. Carreiro if Brook ever "indicate[d]…in any way that she was not agreeing with the sentiment that she should go after Kelley McNally," to which Carreiro replied "no." Tr. Vol II, 304:6 – 304:11. Crucially, however, the burden of proof is on General Counsel to affirmatively establish motive.

Mr. Carreiro is also biased. Carreiro was part of the United Action slate that included Mr. Santos, but was then demoted by the administration from business agent to assistant business agent. Tr. Vol II, 298:5 – 299:25. Upset at this demotion, the 251 Strong slate then recruited them for their own slate. *Id.* Since he lost his job as a business agent, Mr. Carreiro has been working under the table at a night club. *Id.* He therefore has an interest in assisting allies of the 251 Strong slate and opposing members of the United Action slate.

Mr. Carreiro's testimony is therefore not probative of the mental state of either Mr. Santos or Ms. Reeves, and should not be credited by the Judge.

2. *The Union Would Have Reported McNally Even if She was Not a Political Opponent*

Even if General Counsel satisfies his initial burden under *Wright Line*, the evidence shows that Reeves would have taken the same action with respect to Ms. McNally in the absence of her protected concerted activity. At the second step of *Wright Line*, the Board determines whether a union would have acted similarly in the absence of protected activity by examining evidence of how a union treated other employees who committed similar misconduct. *BP Amoco Chemicalfchocolate Bayou & Paper*, 351 NLRB 614, 640 (2007). The testimony of Sperling and Santos regarding past instances of improper election activity indicates that the Union's response to Ms. McNally would have been the same even if she was not a political opponent.

Sperling testified that it was not unusual for union members to report improper electioneering to the RIH human resources department. Tr. Vol. I, 259:14 – 260:2. Sperling testified that union members previously reported two instances of improper electioneering: once when a member was campaigning on a patient floor, and once when a non-employee was campaigning on hospital property. Tr. Vol II, 259:14 – 260:2. This testimony was corroborated by Santos, who testified it was not at all uncommon for candidate slates to bring electioneering complaints directly to Mr. Sperling. Tr. Vol II, 465:8 – 465:25; 469:25 – 470:24; 472:7 – 472:25. Indeed, members of the Union reported to a separate employer, UPS, that a UPS supervisor was improperly aiding the 251 Strong slate. Tr. Vol II, 471:22 – 472:6.

This unrefuted testimony indicates that *the standard method of resolving electioneering disputes at RIH was to report such complaints to Sperling*. This shows by a preponderance of the evidence that the Union would have reported improper electioneering by any union member, regardless of whether they were an opposing candidate. Reeves would have demanded a

thorough investigation if *anyone* had transported campaign materials *from the print shop* and then claimed they were unnecessary, overpriced, prescription paper. There can be no doubt that, if Reeves suspected Luis printed campaign flyers, she was shown a phony requisition, and the claimed innocuous paper turned up mysteriously missing, she would have investigated a cover-up *no matter how they were transported or who transported them.*

C. Applying the Duty of Fair Representation Framework, the General Counsel Failed to Prove a Violation of §§ 8(b)(2) or 8(b)(1)(A)

The General Counsel has also failed to prove that the Union violated §§ 8(b)(2) or 8(b)(1)(A) under the duty of fair representation framework, because demanding a thorough investigation into improper electioneering and the subsequent cover-up was necessary "to the effective performance of [the Union's] function of representing its constituency." Under a duty of fair representation analysis, whenever a labor organization interferes with an employee's employment status, there is a rebuttable presumption that the union acted unlawfully. *Acklin Stamping*, 351 NLRB No. 90, 1263 (2007); *Graphic Communications Local 1-M (Bang Printing)*, 337 NLRB No. 100, 673 (NLRB Div. J., 2002). A union, however, may rebut this presumption by showing that its actions were "done in good faith, based on rational considerations, and were linked in some way to its need to effectively represent its constituency as a whole." *Caravan Knight Facilities Management*, 362 NLRB No. 196, at *5 (2015) (*reversed on other grounds, Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Nat'l Labor Relations Bd.*, 844 F.3d 590 (6th Cir. 2016)).

Reporting improper electioneering and the subsequent cover-up was necessary to the Union's function of representing all members of Local 251. The Board has recognized that unions have a legitimate and important interest in reporting employer

misconduct to management, even where such reports result in discipline to union members. *See Carpenters (AFL-CIO) Local 1102 (Planet Corp.)*, 144 NLRB 798, 801 (1963). In *Carpenters (AFL-CIO) Local 1102 (Planet Corp.)*, the Board held a union did not violate the Act where a member had conspired with employer to violate the terms of a collective bargaining agreement, and the union sought the member's discharge. *Id*. Collusion of this type is inherently destructive to the collective bargaining process. *See id.* Just as the union in *Planet Corp.* had a vital interest in protecting collective bargaining agreement terms, the Union in this case had a vital interest in protecting the fair election rules at RIH.

The Board has also recognized that unions have a legitimate and important interest in reporting union member misconduct that harms the union's membership as a whole. *See Graphic Commc'ns Int'l Union, Local 1-M*, 337 NLRB at 673 (recognizing that unions have a legitimate interest in reporting to an employer genuine instances of sexual harassment by union member); *Philadelphia Typographical Union 2 (Triangle Publications)*, 189 NLRB 829 (1971) (holding union did not violate the Act by seeking discharge of union member who embezzled union funds). According to the Board, reporting such harmful conduct is clearly in the interests of a union's membership generally, even if such reports necessarily result in discipline to an individual member. *See Graphic Commc'ns Int'l Union*, 337 NLRB at 673. The same reasoning applies here: McNally's improper electioneering harmed the entire membership of the Respondent Union by tainting the election process, and the Union had a legitimate and vital interest in ensuring that this misconduct did not continue. *See id.*

II. Reeves Was Not Acting in her Capacity as a Union Official With Respect to the Print Shop Incident and its Aftermath

Assuming, *arguendo*, it is determined that Reeves intended to cause McNally's discipline, the Union is not liable for this act because Reeves was not acting in her capacity as a union official. A union is liable for the acts of its officers only if the union officer acts with actual, inherent or apparent authority. *N.L.R.B. v. Int'l Longshoremen's & Warehousemen's Union, Local 10*, 283 F.2d 558, 563-64 (9th Cir. 1960); *see also Teamsters, Local Union No. 886*, 229 NLRB 832, 835 (1977). An officer has actual authority to commit a certain act if the union, through a collective bargaining agreement, a union's bylaws or an actual statement, expressly authorizes the act. *See Teamsters, Local Union No. 886*, 229 NLRB at 835. An officer has implied authority if the union's express grant of authority, in a document or through a statement, necessarily implies the authority to commit the act in question. *N.L.R.B. v. Int'l Longshoremen's & Warehousemen's Union, Local 10*, 283 F.2d at 564. Finally, an officer has apparent authority if the union's conduct, reasonably interpreted, causes an employer to believe that the union consents to have the act done on its behalf by the union officer purporting to act for the union. *Teamsters, Local Union No. 886*, 229 NLRB at 835. The key inquiry in all three situations is not whether the union officer's actions reasonably indicated to the employer that the officer had authority to act on behalf of the union. *Id.* (citing Restatement (Second), *Agency* §27 (1958)). Rather, the inquiry is whether *the union's* actions reasonably indicated to the employer that the officer had such authority. *Id.* (citing Restatement (Second) *Agency* §27 (1958)).

General Counsel cannot establish that Reeves reported McNally's misconduct with actual or implied authority to do so as a Union official. Article 11, Section 5 of the relevant collective bargaining agreement states that "A Union Steward or Liaison may investigate and adjust the grievance of an employee after notification to his/her supervisor. Such activity, including the

submission and discussion of grievances in the grievance procedure, will be limited to reasonable times during working hours." Respondent's Exh. A, pg. 11. This language did not grant Reeves the authority to investigate McNally's electioneering misconduct or the subsequent cover-up, nor did it imply such authority. The Board has previously held that union stewards do not act with the union's authority when discussing matters of internal union politics. *See Teamsters, Local Union No. 886*, 229 NLRB at 835; *see also NLRB v. Teamsters Local 815,* 290 F.2d 99, 104 (2d Cir. 1961) ("[A] union is not responsible for every act of a shop steward, simply by virtue of his position. If he acts only as an individual rather than within the authority the union has conferred, the union is absolved."). In *Teamsters, Local Union No. 886*, an employee alleged that his union violated § 8(b)(1)(A) of the Act where a steward told the employee that if he did not withdraw an election protest, "[y]ou're going to fool around and throw this [Union] into a receivership….[i]f you should get fired there will be no one [to] back you." *Id.* The Board held that the Union was not responsible for this statement, reasoning that:

> *…one must ask by what writings or conduct did Respondent manifest to third parties that Siers was authorized to act in the area in which he undertook to act. General Counsel points to no conduct other than the fact that Siers was a steward,* and the only writing he relies on is that which sets forth the duties of a steward. These duties are spelled out in Respondent's bylaws and repeated in the collective-bargaining agreement and, in brief, consist of nothing more that the duty to investigate and process grievances. Nothing in the delegation of authority to stewards in those areas manifests to third parties a delegation of authority to act in the area in which Siers chose to act.
> *In effect, General Counsel is arguing that Siers had real authority to act as he did, that such conduct was within the general area in which stewards are authorized to act. I do not agree. Stewards are frequently limited or specific agents as contrasted, for example, with business agents.* In this case, the bylaws of Respondent and the collective-bargaining agreement clearly delineate the duties of stewards, and members of Respondent and employees of Lee Way were on notice of the extent of the stewards' duties and authority. *In my judgment, such duties did not confer authority on Siers to act as he did.*

Id. (emphasis added).

Under this precedent, General Counsel cannot rely simply on the fact that Reeves was a liaison to establish that she was acting on behalf of the Union. This is particularly true where, Reeves' used her *personal* email account to contact Riley and Van Bree and clearly stated at the beginning of the email, "I am writing you today as not only a candidate on the United Action delegate slate but also [as] a concerned employee of Rhode Island Hospital." General Counsel's Exh. 25. Just as the General Counsel in *Teamsters, Local Union No. 886* showed no conduct of *the union* indicating that the steward had authority to act regarding internal union politics, the General Counsel in this case has shown no conduct of the Respondent that indicated Reeves had authority to act regarding union politics. *See Teamsters, Local Union No. 886*, 229 NLRB at 835. Therefore, the Respondent may not be held liable for the actions of Reeves.

III. The Complaint Should Be Deferred to the Grievance Settlement

The Complaint should be dismissed because the parties reached a settlement of the underlying disciplinary action regarding McNally. Indeed, it is ironic that McNally is now claiming that the Union caused her harm due to the terms of the settlement, as McNally negotiated the settlement on her own. *See* Tr. Vol. I, 190:17 – 191:4; Vol. III, 511:15 – 514:8; General Counsel's Exh. 7. Santos testified that, had the Union (other than Carreiro) been allowed to participate in the grievance process, it would have taken the grievance to arbitration if McNally had requested it. *See* Tr. Vol. III, Vol. III, 511:15 – 514:8. Regardless, because the Union and McNally reached a settlement regarding "all…issues, and legal matters of employment for Kelly McNally," the Board should defer to the parties' agreement. *See* General Counsel's Exh. 7.

> The Board will defer to a settlement agreement if its standards for deferral to an arbitration award have been met. *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) (applying the principles set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp*., 268 NLRB 573 (1984)), review denied sub nom. *Mahon v. NLRB*,

> 808 F.2d 1342 (9th Cir. 1987). One factor the Board considers is whether the unfair labor practice issue was considered by the parties to the settlement. That test is satisfied *1540 if the contractual issue is factually parallel to the unfair labor practice issue, and the parties were generally aware of the facts relevant to resolving the unfair labor practice. *Postal Service*, 300 NLRB 196, 198 (1990)

Local 471, Rochester Regional Joint Board, Workers United (Sidexho, Inc.), 359 NLRB 1538, 1539–40, at *3 (2013).

The Board should defer to the settlement agreement signed by McNally, RIH and the Union, in which all parties "…agree[d] to settle in full all outstanding issues pertaining to Kelly McNally, Unit Secretary Emergency Department." *See* General Counsel's Exh. 7. When the agreement was signed in August 2016, both the Union and McNally were generally aware of the facts relevant to this unfair labor practice charge: that McNally had indeed printed campaign flyers at the print shop, and that Reeves and Santos had discussed this electioneering misconduct with Sperling. And although the agreement does not discuss the §8(b)(2) and §8(b)(1)(A) unfair labor practice issues, the document does state "This agreement resolves all grievances, issues, *and legal matters of employment* for Kelly McNally at Rhode Island Hospital." *See* General Counsel's Exh. 7 (emphasis added). Therefore, the Board should defer to the mutual agreement signed by both the Union and McNally, resolving all matters related to Kelly McNally at RIH.

IV. The Complaint is Not Sufficiently Related to the Initial Charge

The Complaint should be dismissed because the claims made in the complaint are not sufficiently related to the claims made in the initial charge. General Counsel "…may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge and (b) occurred within six months before the filing of the charge." *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988). In evaluating whether allegations are "closely related," the Board considers 1) whether the untimely allegation involves the same legal theory as the timely charge,

2) whether the untimely allegation arises from the same factual circumstances or sequence of events as the timely charge, and 3) whether the respondent would raise the same or similar defenses to both allegations." *Nickles Bakery of Indiana*, 296 NLRB 927, 927-928 (1989). The initial charge, filed on March 22, 2016, states that the basis for the charge was:

> On or about February 23, 2016, and on various dates thereafter, the Union , through its representatives and agents, discriminated against its member, Kelly McNally, a declared candidate for Convention delegate on the "251 Strong Slate" opposed by the Union's incumbent officers, by allowing its Representative to pressure the Employer, Rhode Island hospital, to undertake disciplinary/corrective action against McNally to impair her candidacy and that of her Slate.

General Counsel's Exh. 1. The Complaint filed on September 14, 2016 states:

> Since about February 9, 2016, Respondent, by Reeves, has requested that the Employer investigate Unit employee McNally for allegedly having campaign material printed in the Employer's print shop and mishandling prescription paper…[and] has conducted an investigation into McNally's alleged conduct…

The difference in legal theories between the two is stark. The theory of the initial charge was that Reeves discriminated against McNally by "putting pressure" on RIH to discipline McNally. In contrast, the legal theory of the complaint is that Reeves discriminated against McNally because she "requested that the Employer investigate" McNally and because Reeves conducted her own investigation into McNally's conduct. These differing legal theories each merit different defenses, a key concern in the Board's "closely related" test. *See Nickles Bakery of Indiana*, 296 NLRB at 927-928. For example, on the second step of the duty of fair representation analysis, the Union does not assert that "putting pressure" on RIH to discipline McNally is necessary to the Union's effective representation of its membership as a whole. The Union does assert, however, that requesting an investigation into improper electioneering is necessary to the Union's effective representation of its membership as a whole. *See* Section I(C), *supra*.

Because of this difference in legal theories between the charge and the complaint, the Respondent requests that the complaint be dismissed.

V. The OES and IBT Decisions are Inadmissible

The Teamsters Office of Election Supervisors and internal tribunal decisions are inadmissible hearsay – evidence offered by out of court declarants for the truth of the matter asserted. Where the Board has allowed such evidence, it has considered (in the context of arbitration) whether:

> (1) The arbitral proceedings are fair and regular; (2) all parties must have agreed to be bound; (3) the arbitral decision must not be repugnant to the policies of the Act; (4) the contractual issue before the arbitrator must be factually parallel to the unfair labor practice issue; and (5) the arbitrator must have been presented generally with the facts relevant to resolving the unfair labor practice. *Dennison National Co.*, 296 NLRB 169 (1989); *Teledyne Industries*, 300 NLRB 780 (1990).

Emergency One, Inc., 306 NLRB 800, 809 (1992). Thus, where the proffered decision considers a collateral issue, no deference is warranted.

> Applying the same rationale to the referee's decision, I conclude that deferral here would not be appropriate since the statutory issue was not presented to or decided by the referee. The referee stated that the issue presented was whether the employee had been discharged for just cause. To determine this issue the referee did not need to consider, and apparently did not consider, the facts necessary to establish a violation of Sec. 8(a)(3) of the Act. The decision merely states that because Wood's denials are credited, just cause has not been established. The referee's decision concerns only one issue relevant to this case, the defense for the discharge, but is silent as to the motivation for Respondent's conduct, the crucial element of an 8(a)(3) case. Accordingly, I find that the unemployment compensation issue was not parallel to the unfair labor practice issue. Although some of the facts were presented to the referee, the referee did not decide the statutory issue. I, therefore, shall not defer to the decision of the referee.

Id. In sum, where the issue before the other tribunal is different, the burden of proof is different, credibility is a factor, opposing testimony was not offered, and the rules of evidence were not shown to apply, the decision is inadmissible hearsay. *Cardiovascular Consultants of Nevada*, 1996 WL 33321683 (1996) (citing *Emergency One*, 306 NLRB at 804, n.7). This Board

precedent indicates that the OES and IBT decisions are inadmissible hearsay and should not be admitted nor given any deference.

The testimony shows that the proceedings of the internal Teamsters tribunals were not "fair and regular." *See Emergency One*, 306 NLRB at 809. Santos testified that at the first appeal of the Local Executive Board's decision, to Joint Council 10, no witnesses were sworn, no attorneys were present, the rules of evidence did not apply and neither side could issue subpoenas. Tr. Vol. III, 489:20 – 490:5. The next level of appeal, the General Executive Board of the International, did not conduct a hearing at all. Tr. Vol. III, 493:13 – 493:19. And at the Office of Election Supervisors proceedings, no hearing was conducted, no witnesses testified under oath and no briefs were permitted for either side. Tr. Vol. III, 494:4 – 496:1. Additionally, the Executive Board of the Joint Council and the General Executive Board of the International both supported the same international candidates that 251 Strong supported, and opposed the international candidates that 251 United Action supported. Tr. Vol. III, 492:10 – 494:6. The internal tribunals are therefore not "impartial."

The remaining factors of the Board's analysis in *Emergency One, Inc.* also counsel against the admission of the IBT and OBS decisions. *See* 306 NLRB at 809. First, no evidence was presented at trial to indicate that all parties agreed to be bound by these decisions. *See id.* And second, the IBT and OES tribunals were not "presented generally with the facts relevant to resolving the unfair labor practice": the crucial testimony of Mario Luis and Nicole Deleo was never presented to the Teamsters tribunals, as the internal tribunals did not provide a hearing or subpoena power,. *See* General Counsel's Exh. 11; Exh. 19. Without this crucial evidence, which substantiated the claim that McNally did engage in improper electioneering and that a supervisor did engage in a cover-up, the IBT and OES tribunals could not make a full

determination of the rights and liabilities of the parties. For these reasons, the OES and IBT decisions are inadmissible hearsay and should not be admitted, nor given any deference.

Conclusion

This case is about a union's right to protect its membership from unfair and improper electioneering by a union member colluding with management, and a union's right to investigate the cover-up of such collusion. The evidence presented at the March 1, 2017 hearing establishes that the Union did not violate §§ 8(b)(2) or 8(b)(1)(A) by acting within these legitimate rights. Holding otherwise would mean a union candidate could not report illegal electioneering by an opponent without fear of liability under §§ 8(b)(2) and 8(b)(1)(A).

McNally lied, and her lie caused the harm that she now attributes to the Union. For the foregoing reasons, the Union respectfully requests that the complaint be dismissed.

Respectfully submitted,
On behalf of the Union,
By their attorney,

/s/ Marc Gursky
Marc B. Gursky, Esq. #2818
Gursky|Wiens Attorneys at Law
420 Scrabbletown Road, Ste. C
North Kingstown, RI 02852
Telephone: (401) 294-4700
Facsimile: (401) 294-4702
Email: mgursky@rilaborlaw.com

CERTIFICATION

I hereby certify that a true copy of the foregoing document was filed electronically and sent via electronic mail to the following on this 14th day of April, 2017:

Elizabeth A. Vorro
Counsel for the General Counsel
National Labor Relations Board
Region 01
Thomas P. O'Neill Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222

Michael Bearse
51 Emerson Rd
East Walpole, MA 02032-1350
msbearse@comcast.net

/s/ Colby Jackson