

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

- COSTCO WHOLESALE CORPORATION

Respondent

Case No. 5-CA-169958

- and -

TEAMSTERS LOCAL 592, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Charging Party

**COSTCO WHOLESALE'S REPLY BRIEF IN FURTHER SUPPORT OF
ITS EXCEPTIONS**

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Respondent Costco Wholesale Corporation (“Costco” or the “Respondent”) submits this Reply Brief in Further Support of Its Exceptions in accordance with Section 102.46 of the National Labor Relations Board’s Rules and Regulations.

A. The ALJ abused her discretion in allowing General Counsel to orally amend the Complaint in the middle of the hearing. (Exception 1.)

Counsel for the General Counsel (“General Counsel”) claims that he discovered the additional violation of Section 8(a)(1) when he received documents in response to his trial subpoena “sometime during the evening of October 6, 2016.” (Opp. Br. at 6; Tr. 116:2-6.) General Counsel chose to wait in the weeds until the last witness was cross-examined at the hearing on October 11, 2016 to spring the violation on Respondent. General Counsel does not deny this and does not address it in his Opposition Brief.

R&R 102.17 states that amendments to the Complaint may be made “upon such terms as may be deemed just.” General Counsel’s conduct in deliberately holding back his amendment until the last witness was testifying prevents him from meeting this burden.

We acknowledge that the ALJ has “wide discretion” to grant or deny a motion to amend but the Board has made clear that the ALJ should consider: (1) whether there was surprise or lack of notice; (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *See Rogan Bros. Sanitation, Inc.* 362 NLRB No. 61, slip op. at 3 n. 8, enf’d. 651 Fed. Appx. 34 (2d Cir. 2016); *Stagehands Referral Service*, 347 NLRB 1167, 1171 (2006). ALJ Dawson paid lip service to these factors. General Counsel’s Opposition Brief spuriously argues that the evidence

supporting the amendment first came up during Cibellis' cross examination, because the document discovered by General Counsel days earlier was not *offered* into *evidence*. (Opp. Br. at 9-10 [emphasis added].) Just because General Counsel chose not to admit the document produced on October 6th into evidence, does not excuse the delay and does not make the amendment "just." This conduct was fatal to the General Counsel in *Stagehands*, where the Board rejected the amendment in part because "General Counsel did not move to amend as soon as the existence of the telephone list came to light, but only after all of the witnesses had testified and respondent had rested." *Id.* at 1172. General Counsel fails to address this in his Opposition Brief, just as ALJ Dawson failed to address it in her Decision. (ALJD 8:10.)

The Opposition Brief relies heavily on the fact that Respondent was given the opportunity but chose not to fully litigate the issue. Again, in *Stagehands*, the Board held that "such an opportunity does not necessarily cure the problem, and the reasons for the delay do not justify waiting until the very end of the hearing." *Id.* The case the parties prepared for and were on notice for was a *Weingarten* violation.

Further, ALJ Dawson erred in not dismissing the amendment under R&R 102.24 when General Counsel's oral motion to amend misstated the underlying legal grounds. General Counsel stated as follows:

Mr. McGlew: It would be, on or about February 8th on or about February 8th, Respondent, by and through Marc Cibellis, at Respondent's facility, told *employees* -- where's the statement -- hold on -- told *employees* after an investigatory meeting that they should not mention that *employees* -- or told an employee that *they* should not mention -- he not have any conversations with anyone else pertaining to this incident.

Counsel would maintain that that conduct described in that particular addition to the complaint would show Respondent has been interfering with, restraining, and coercing *employees* in exercise of *their* rights guaranteed in Section 7 of the Act in violation of 8(a)(1) of the Act.

(Tr. 116:18-117:5.)(Emphasis added.)

General Counsel argues that Respondent misquoted the transcript when it submitted that General Counsel used the term “employees.” As you can see, Respondent did not misquote the transcript. General Counsel only adduced testimony that Cibellis told *one* employee not to discuss the incident with anyone, but now claims that this evidence established an unpled Section 8(a)(1) violation under the *Banner Health System* line of cases.

B. The ALJ erred in allowing General Counsel to orally amend the Complaint to include the untimely and unrelated claim. (Exception 2.)

The Board has held that in determining whether a party is on constructive notice of a violation of the Act, “the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence.” *CAB Associates*, 340 NLRB No. 171 (2003). On the one hand, General Counsel claims that the timely (*Weingarten*) and untimely (*Banner Health System*) Section 8(a)(1) allegations are closely related, but on the other hand completely fails to address the fact that the Region failed to discover the *Banner Health System* violation during its investigation. General Counsel cannot have it both ways. Clearly, based on the fact that the Region was investigating Cibellis’ conduct in interviewing employees, particularly Justin Daniels, it should have

discovered that Cibellis asked Daniels not to discuss the underlying incident with other people.

The ALJ and General Counsel have also both misconstrued the three factors set forth by the Board in *Redd-I Inc.*, 290 NLRB 115, 1116 (1988) [(1) same legal theory; (2) same factual situation; (3) same or similar defenses]. Regarding the first factor, the ALJ erroneously held that the allegations involved the same legal theory. General Counsel argues that since they both involve alleged violations of Section 7 rights, they involve the same legal theory. If the Board accepts this argument, it might as well eliminate the first *Redd-I* factor, since every Section 8(a)(1) violation concerns employees' Section 7 rights. As General Counsel acknowledges, *Weingarten* concerns the employee's right to a union representative, if requested, in certain situations, while *Banner Health Systems* concerns the employee's right to discuss disciplinary investigations with other employees. (Opp. Br. at 12-13.) Critically, however, General Counsel fails to cite any authority that holds that these allegations involve the same legal theory. General Counsel also fails to address the fact that he objected to any mention of the February 8th meeting (the origin of his *Banner Health System* claim) as irrelevant during his case in chief.

Regarding the second factor, the ALJ merely concluded, without citing any relevant authority, that the allegations arose from the same factual circumstances because they both came out of the same investigation into the incident in the tire center. (ALJD 8:32-35; 9:19-20.) General Counsel tries to bolster the ALJ's holding by citing to *Carney Hospital*, 350 NLRB 627, 630-31 (2007), where the Board held that the fact that

both the timely and untimely allegations arose out of the same organizing campaign was insufficient to establish a “close factual relationship.” The Board also found that a mere chronological relationship was insufficient to establish factual relatedness under *Redd-I*. The Board held that the two sets of allegations have to “demonstrate similar conduct during the same time period with a similar object” or there is a causal nexus between the allegations *and* they are part of a chain or progression of events. *Id.* It is submitted that in the case at bar, the untimely claim arose from a different interview and involved completely different facts, so different that General Counsel objected to questions regarding what happened in the other interview as irrelevant.

Finally, regarding the third factor, it appears as if the Board regards this factor as optional, but if the Board does consider the third factor, it is beyond question that Respondent’s defenses to the timely and untimely allegations are completely different. The ALJ acknowledged this and therefore declined to consider the optional third factor, without stating a reason why. (ALJD 9:23-25.) It is submitted that given Respondent’s completely different defenses to the timely and untimely claims, and the fact that *Banner Health Systems* was at the time of the ALJ’s Decision on appeal (and has since been remanded in part to the Board by the D.C. Circuit), the ALJ erred in *not* considering the third factor in *Redd-I*.

C. The ALJ erred in providing an overly broad Order, directing Respondent to cease and desist from “(a) instructing employees not to discuss disciplinary investigations or other terms and conditions of employment with others.” (Exception 3.)

The ALJ’s Order erroneously directs Respondent to cease and desist from “(a) instructing employees not to discuss disciplinary investigations or other terms and conditions of employment with others.” *Banner Health Systems* provides certain circumstances where the employer is entitled to insist on employee confidentiality, such as where “evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up. *Id.* at 2, citing *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011). Thus, the ALJ’s Order goes beyond the Board cases upon which she relies. This potentially puts Respondent in jeopardy even if it has a confidentiality policy that conforms with *Banner Health Systems*. Of course, since General Counsel chose not to inquire as whether Respondent had either a corporate or local policy or practice regarding confidentiality, the record is silent on this issue. In its Opposition Brief, General Counsel merely points out that the ALJ’s Order is “consistent” with prior case law. (Opp. Br. at 16.) This does not address the argument. It does not appear from these cases that the language in the proposed order was challenged by the respondent.

Further, this Order could be interpreted as going beyond the Glen Allen warehouse, because it cryptically orders “Respondent, Costco Wholesale Corporation, Glen Allen, Virginia, its officers, agents, successors, and assigns” to cease and desist. General Counsel did not address this issue in his Opposition Brief.

D. The ALJ misapplied the Board's decisions in *Banner Estrella Medical Center and Hyundai America Shipping Agency*. (Exception 4.)

General Counsel argues in his Opposition Brief that the ALJ did not find that a rule or policy prohibiting employees from discussing ongoing investigations existed. However, the ALJ relied on Board case law striking down employer policies or rules prohibiting such discussions. (ALJD 9:33-40.) In *Banner Health Systems*, the Board held that the employer violated Section 8(a)(1) of the Act by maintaining and applying a *policy* of requesting employees not to discuss on-going *investigations*. In his hurry to amend the complaint, General Counsel did not establish that Costco had any policy in place to that effect, written or verbal. The Board did not address the situation in the case at bar where Justin was told not to discuss the actual incident in the tire center. The Board majority was focused on employers' rules and policies regarding employees discussing on-going investigations and whether the employer had demonstrated "its need for confidentiality." (ALJD 9:34.)

Justin was free to discuss the on-going investigation and clearly discussed the investigation with his father, shop steward Raymond Daniels and Jim Smith, a Union official. General Counsel has clearly not established its burden of proof to establish a Section 8(a)(1) violation, based on this one question and answer from Cibellis. General Counsel chose not to ask Cibellis what he said to other employees, what his policy was regarding confidentiality of investigations, or what Costco's policy or practice was.

E. *Banner Estrella Medical Center* is wrongly decided. (Exception 5.)

General Counsel tries to distinguish *Banner Health System* from the case at bar (Opp. Br. at 18), but the ALJ relied on *Banner Health System* and General Counsel also relied on the case when it made its belated motion to amend the Complaint. The ALJ also concluded that there was an oral promulgation of a rule. As the D.C. Circuit held in *Banner Health System d/b/a Estrella Med. Ctr. v. N.L.R.B.*, 851 F.3d 35 (D.C. Cir. 2017), regarding the Board's holding that the employer maintained an unlawful policy, "even under our deferential standard of review, the Board made unwarranted logical leaps that the evidence cannot fairly support." *Banner Health System*, at *13. In the case at bar, General Counsel did not even attempt to establish that Respondent had an unlawful rule or policy regarding maintaining the confidentiality of investigations. The record evidence only shows that Cibellis told Justin not to discuss the [tire center] incident with anyone.

While the D.C. Circuit did not reach this issue, Respondent submits that since Cibellis' investigation into the conduct in the tire center did not involve NLRA-protected activity, as the manager conducting a good faith investigation, he should be entitled to require Justin not to discuss the incident with anybody. The ALJ also erred in following *Banner Health System's* burden shifting requirement, that the employer, not the General Counsel, has the burden of establishing, but only on a case-by-case basis, that there was a danger of fabrication or cover up, or if witnesses need protection, in order to insist on confidentiality. *Banner Health System*, slip op. at 2. (ALJD 9:36-39.)

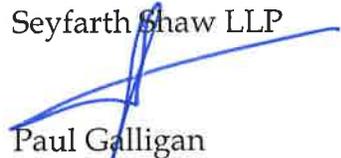
In the context of the ALJ's decision to allow General Counsel to amend the Complaint at the last minute, this requirement is particularly egregious.

CONCLUSION

Based on any of the foregoing exceptions, the ALJ's Decision finding Costco in violation of Section 8(a)(1) due to Cibellis' instruction to one employee not to have any conversations with anyone else pertaining to this incident should be reversed and the Complaint dismissed in its entirety.

Respectfully submitted,

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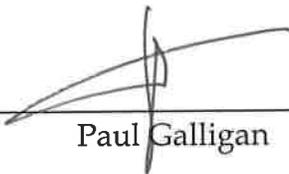
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a true and correct copy of the *Employer's Reply in Further Support of its Exceptions* to be served upon the following parties by e-filing and e-mail this 5th day of May, 2017:

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