UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EYM KING OF MISSOURI, LLC D/B/A BURGER KING®,	§	
RESPONDENT,	§	
AND	§	**NOS.: 14-CA-188832**
WORKER'S ORGANIZING COMMITTEE,- KANSAS CITY,	§	
CHARGING PARTY.	§	

EYM'S ANSWERING BRIEF IN OPPOSITION TO THE GENERAL COUNSEL'S EXCEPTIONS

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ATTORNEYS FOR RESPONDENT

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INTRODUCTION

The lone allegation made in the *Complaint* this case was that on November 28, 2016, the manager of EYM's 47th Street restaurant in Kansas City allegedly violated § 8(a)(1) of the ACT by supposedly making threatening and coercive statements to a *group* of "employee<u>s</u>"—plural. GC Ex. 1-E (¶¶ 5 and 6). Yet, the General Counsel relied at the hearing on the testimony of a single former employee who supposedly had first-hand knowledge of the alleged "threats"—testimony which was (1) internally *inconsistent*; (2) *uncorroborated* by testimony from any of the other allegedly "threatened" employees; and (3) *contradicted* by other credible evidence. As aptly stated by the Administrative Law Judge ("ALJ"): "This is a 'he-said-she-said situation" (ALJD p. 7, line 4) between two witnesses who purportedly had first-hand knowledge of the allegedly "threatening" conversation, *i.e.*, between the lone former employee upon whom the General Counsel relied to support the allegation, and the restaurant manager, who emphatically denied the allegation.

After hearing all of the testimony and based "[o]n the entire record, including my observation of the demeanor of the witnesses,"[1] the ALJ made appropriate credibility assessments and determined, *inter alia*:

- The former employee and the manager "appeared equally credible on the issue of whether [the manager] made threatening statements."[2]
- "Neither was superior to the other in terms of their demeanor."[3]
- The General Counsel bore the burden of proof.[4]
- "[T]he General Counsel failed to establish that [the former employee] was a more credible witness than [the manager]."[5]
- The General Counsel failed to call as witnesses—or to *explain* the failure to call as witnesses—*any* of at least *four* other employees who (according to the lone, testifying former employee) were present when the threatening statements were supposedly made and who, presumably, could have provided first-hand corroborating testimony.[6] Thus, an adverse inference towards the General Counsel's case was warranted.[7]
- "Even if a judge decides not to draw an adverse inference, the failure of the General Counsel to call identified corroborating witnesses may be a consideration in the judge's determination of whether the General Counsel's case has been significantly weakened, and thus a factor which leads to a finding that the General Counsel has failed to meet the burden of proof."[8]

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[1] ALJD p. 1.

[2] *Id.*, p. 5, lines 6-7.

[3] *Id.*, p. 5, line 7.

[4] Conspicuously absent from the General Counsel's brief is any acknowledgement or even mention of the allocation of the burden of proof.

[5] *Id.*, p. 6, lines 9-10.

[6] *Id.*, p. 6, lines 10-26.

[7] Astonishingly, the General Counsel's brief fails to even *mention* these critical facts.

[8] Another key basis of the ALJ's decision which the General Counsel made no effort whatsoever to address in his brief.

Accordingly, the ALJ properly concluded "the General Counsel failed to meet its burden of proof" and recommended dismissal of the *Complaint*.[9]

By exceptions, the General Counsel now improperly asks the Board to substitute different factual and credibility determinations for those of the ALJ. The exceptions are without merit, should be rejected, and the ALJ's findings and conclusions should be adopted by the Board.

THE APPLICABLE LAW AND THE BURDEN OF PROOF

"[T]he basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, *i.e.*, whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question was actually intimidated." *Multi-Ad Services*, 331 N.L.R.B. 1226, 1227-1228 (2000), *enforced*, 255 F.3d 363 (7th Cir. 2001). Thus, neither the motivation behind a supervisor's remarks, their actual effect, nor an employee's subjective interpretation of a supervisor's statements is relevant in evaluating the *legal import* of a supervisor's statement. *E.g.*, *Miller Elec. Pump & Plumbing*, 334 N.L.R.B. 824, 825 (2001); *Joy Recovery Tech. Corp.*, 320 NLRB 356, 365 (1995), *enforced*, 134 F.3d 1307 (7th Cir. 1998); *Miami Syst. Corp.*, 320 N.L.R.B. 71, n. 4 (1995), *enforced in relevant part*, 111 F.3d 1284 (6th Cir. 1997).

In this case, however, the issue is not the *legal import* of the statements allegedly made; but, the factual question of *whether the alleged statements were made at all*. *See* ALJD p. 4, lines 38-39 ("The relevant inquiry is whether [the manager] made the alleged threatening statements."). "The difficulty here for

[9] ALJD p. 7, lines 9-10.

the General Counsel is not the law, but the facts." *Interbake Foods,* 2013 WL 4715677 (N.L.R.B. Div. of Judges Aug. 30, 2013), *adopted*, 2013 WL 5872060 (N.L.R.B. Oct. 29, 2013).

The General Counsel bears the burden of proof by a preponderance of the evidence. *E.g.*, *Bates Paving & Sealing, Inc.*, 364 N.L.R.B. 46 (2016); *Blue Flash Express*, 109 N.L.R.B. 591, 591-592 (1954).[10]

STATEMENT OF THE CASE

A. THE ALLEGATION:

The *Complaint* alleged (GC Ex. 1-E (¶ 5)) that on November 28, 2016, Wendell Toombs, the manager of EYM's 47th Street Burger King® in Kansas City, "threatened" a group of employees with termination if they participated in a one-day intermittent work stoppage which the Worker's Organizing Committee of Kansas City had planned for the next day and supposedly told them he would falsify the reasons for termination.

B. KHADIJAH BROWN:

To meet his burden of proof, the General Counsel relied on *one* witness who supposedly had first-hand knowledge of the alleged violation, former employee Khadijah Brown. She claimed (Tr. pp. 10-11, p. 16):

- to have allegedly been present at the restaurant sometime after 2:00 p.m. on the afternoon of Monday, November 28, 2016;[11]
- while allegedly on duty and supposedly shortly after her shift had started;

[10] During the hearing, the General Counsel patently misstated the allocation of the burden of proof *See* Tr. p. 63/lines 8-11.

[11] As of November 28, 2016, Brown was a recently hired employee-in-training and was seven months pregnant. Tr. pp. 9, 18-19, 42.

- at that time to have participated in a purported conversation with Toombs, and four other employees who—according to Brown—were also on duty that afternoon (*id.*, pp. 19-21), Quashae Roper, Joshlin Woodard, Laneqwa Williams, and Shyaine Hughes;[12] and

- that Toombs supposedly threatened to fire any probationary employees who went on strike the next day and would wait until a week or so after the employees' returned to work before effecting the terminations.

C. WENDELL TOOMBS' ADAMANT DENIAL:

Toombs directly, forcefully, and unequivocally denied having the alleged conversation with Brown or making the statements attributed to him by Brown. Tr. p. 33/line 25 to p. 34/line 5:

> Q. You heard the witness who was in here before give her rendition of the conversation she claims to have had with you, correct?
>
> A. Absolutely.
>
> Q. Okay. Did you have that conversation with her?
>
> A. Absolutely not.

Tr. p. 57/lines 8-21:

> Q. [D]id you threaten any employee with discipline?
>
> A. Absolutely not.
>
> Q. All right, did you tell them that they could be terminated if they haven't been there for ninety days?
>
> A. No.
>
> Q. Did you tell them that you would wait to terminate them until some later point and would falsify the reasons?
>
> A. No.

---

[12] Brown provided no specifics whatsoever regarding the *circumstances* of the alleged conversation, *i.e.*, *where* in the restaurant the "meeting" or conversation supposedly took place, what the employees were allegedly *doing* at the time since—according to Brown—all five of them were on duty and on the clock, *etc.*

Q. Did you make any of the supposed threats that the first witness who testified here today claimed that you did?

A. Absolutely not.[13]

ARGUMENT

I.

BASED ON ENTIRELY APPROPRIATE FACTUAL FINDINGS AND CREDIBILITY DETERMINATIONS, THE ALJ PROPERLY DETERMINED THAT THE GENERAL COUNSEL FAILED TO MEET HIS BURDEN OF PROOF.

The General Counsel contends (*Brief*, p. 5) that, "[b]ecause this charge centers on the contents of a conversation, any disputes about what did and did not occur can only be resolved by assessing witness credibility[,]" then assails the ALJ's assessments of credibility and asks the Board to substitute its own, different credibility determinations.[14] The General Counsel's contentions are without merit.

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[13] Toombs acknowledged having had a brief, insignificant conversation with *other* employees on the *morning* of November 28th, completely different from the conversation alleged by Brown—a conversation which, as a matter of law, would not constitute a violation of § 8(a)(1). *See* Tr. p. 34/line 17 to p. 36/line 11; p. 48/lines 1-5. There is extremely high employee turnover at the restaurant (Tr. p. 54/line 22 to p. 55/line 5) and Toombs' conversation with the other employees that morning was at the time so insignificant in Toombs' mind that Toombs understandably could not recall which employees may have participated in that brief conversation eight months earlier. *Id.*, p. 35/lines 7-17.

[14] The General Counsel contends (*Brief*, p. 6) "the ALJ should have considered the record as a whole and the reasonable inferences and inherent probabilities that can be drawn from that record," not just rely upon the credibility and demeanor of the witnesses, and then criticized the ALJ for allegedly not doing so. However, the ALJ expressly stated that her decision was based "*[o]n the entire record* <u>*including*</u> my observation of the demeanor of the witnesses[.]" ALJD p. 1

A. APPLICABLE LAW:

It is established policy of the Board not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence establishes that they are incorrect. *E.g.*, *Standard Dry Wall Prod.*, 91 NLRB 544 (1950), enforced, 188 F.2d 362 (3d Cir. 1951). "As basic as any other Board principle is that an administrative law judge's credibility findings are entitled to great deference and the Board should not overrule such findings unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect." *Renal Care of Buffalo, Inc. & Commc'n Workers of Am.*, 347 NLRB 1284, 1288 (2006). Here, the General Counsel has failed to demonstrate that the ALJ's findings and credibility determinations are erroneous.

B. BROWN'S TESTIMONY WAS INTERNALLY *INCONSISTENT* AND *INCREDIBLE*:

It is undisputed that the alleged violation of the ACT is supposed to have occurred on ***Monday***, November 28, 2016. Yet, Brown's testimony was thoroughly inconsistent, confusing, contradictory, and incredible regarding when she supposedly worked and whether she was even present at the restaurant on Monday, November 28th.

1. Inconsistencies Regarding "Monday" Work:

Initially, Brown claimed she was at work and on duty on Monday, November 28th, when the "threatening" statements were supposedly made. Tr. pp. 10-11.

However, when asked *by the General Counsel* about her work schedule, Brown claimed she worked from 2:00 p.m. to 10:00 p.m. every day except Sun-

days, when she claimed she worked from 11:00 a.m. to 6:00 p.m. (*id.*, p. 73/lines 9-13)—*a total of 55 hours per week*![15]

But, upon further questioning *by the General Counsel*, Brown testified that *Mondays* were her normal "scheduled days *off*." *Id.*, p. 73/lines 17-19:

Q. BY MS. PROCTOR: And did you have scheduled days off?

A. *Monday, I think—Mondays—I think I was taking Mondays off, I think.*

On cross-examination, Brown *reiterated* that Monday was her regular day off. *Id.*, p. 75/lines 17-19 (emphasis added):

Q. And I just want to make sure I heard you correctly. You said Monday was your regular day off, correct?

A. *Yeah, Monday.*

Once the import of the witness' answers registered with the General Counsel, the General Counsel sought *through the use of leading questions* to have the witness reverse course yet again. *Id.*, p. 75/line 23 to p. 76/line 3:

Q. BY MS. PROCTOR: Ms. Brown, were you always off on Monday or did you work some Mondays?

A. Some Mondays, yeah.

Q. And just to be clear, did you work on Monday, November 28th?

A. Yes.[16, 17]

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[15] The mere contention that an employee-*trainee* (and one who was seven months pregnant, at that) would be allocated (and while seven months pregnant would have the physical capacity to work) that many hours per week more than strains credulity, particularly when compared to the number of hours other regular employees were scheduled. *See* R. Ex. 1. By Brown's account, she would have been scheduled to work more hours—including substantial overtime—than any other rank-and-file employee. *Id.*

[16] The ability of the witness to remember which Monday—her "scheduled day off"—if any, which she allegedly nevertheless worked in November also stretches credulity since, by her own admission (Tr. p. 9/lines 21-23) she was not hired until "[t]he middle of November."

2. Inconsistencies Regarding "the Schedule":

Brown initially affirmatively testified she would not have been at work on Monday, November 28th, unless she had been on the *schedule* to work. *Id.*, p. 16/lines 2-4:

> Q. And you wouldn't come to work unless you were on the schedule, true?
>
> A. Yes.

However, on re-direct—again, *in response to leading questions*—Brown claimed she "really didn't have a schedule." *Id.*, p. 18/lines 13-18:

> Q. And Mr. Ross mentioned something about schedules. Were trainees always slotted in on the schedule? Did you have time that you reported for training?
>
> A. We really didn't have a schedule, like you—you know, you knew your shift that you came to work on. We really didn't have a schedule there yet.[18]

. . . footnote continued from previous page:

[17] "The use of leading questions during direct examination, even if it escapes the attention of the opposite counsel, will dilute or diminish the credibility of a witness, which may prove fatal to the questioner's case—because it will ultimately not escape the judge's attention." *Pac. Coast Sightseeing Tours & Charters, Inc.*, 2017 WL 1046361, at 1 (N.L.R.B. Div. of Judges Mar. 17, 2017), *adopted*, 365 NLRB No. 131 (Sept. 18, 2017). *See also*, *e.g.*, *H.C. Thomson*, 230 N.L.R.B. 808, 809 n. 2 (1977) (answers to leading questions on direct examination not entitled to credence: "Since both these answers were in response to leading questions under direct examination, we accord minimal weight to them and view them as little more than [the] attorney's testimony in favor of his client's position."); *Soltech, Inc.*, 306 N.L.R.B. 269, 270 (1992) ("[S]ome testimony elicited in response to leading questions has little probative weight because it amounts to mere agreement with statements by counsel rather than persuasive testimony by the witness[.]").

[18] Brown—again, in response to leading questions—went so far as to claim that no schedules ever existed and none were used at the restaurant. Tr. p. 74/lines 8-18. The contention was contradicted by Toombs' testimony and by R. Ex. 1.

Brown's contention she "really didn't have a schedule" was, of course, completely inconsistent with her contention *she was regularly scheduled* to work every day from 2:00 p.m. to 10:00 p.m. (except Mondays—her "scheduled" day off), and except for Sundays, when she was allegedly regularly scheduled to work from 11:00 a.m. until 6:00 p.m. *Id.*, p. 73/lines 9-13 and lines 17-19.

Additionally, Brown testified the other four employees who supposedly participated in the alleged conversation with Toombs would have been on the *schedule* for November 28th. *Id.*, p. 20/line 14 to p. 21/line 1 (emphasis added):

> Q. BY MR. ROSS: And when you claimed to have been having this conversation with the other four employees, was Roper working that day?
>
> A. Yes.
>
> Q. Okay. Was Joshlin working that day?
>
> A. Yes.
>
> Q. Okay. Was Hughes working that day?
>
> A. Yes.
>
> Q. And was Williams working that day?
>
> A. Yes.
>
> Q. *So we would expect to <u>see</u> all four of them on the schedule for that day, correct?*
>
> A. *Yes.*[19]

[19] Additionally, by Brown's own testimony, several of the other individuals allegedly "threatened" were longer term, non-probationary employees. Tr. p.11/lines 8-9; p. 19/line 19 to p. 20/line 10.

C. BROWN'S TESTIMONY WAS *UNCORROBORATED*:

The most glaring gap in the General Counsel's case—one upon which the ALJ expressly relied in reaching her decision and which the General Counsel studiously avoided even mentioning the exceptions or his brief—is the General Counsel's failure to call as witnesses *any* of the other four individuals who Brown claims were present during Brown's purported conversation with Toombs. *See* Tr. p. 17/lines 11-15:

> Q. So if what you are saying is true about the conversation you claimed to have had with Mr. Toombs, all four of those people could be witnesses to corroborate you, correct?
>
> A. Yes.

But, the General Counsel did not even *attempt to offer any explanation whatsoever for the failure to call* any of the other four alleged participants. "[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Int'l Automated Machines*, 285 N.L.R.B. 1122, 1123 (1987), *enforced*, 861 F.2d 720 (6th Cir. 1988). *See Spurlino Materials, LLC*, 357 N.L.R.B. No. 126, slip op. at 12–13 (2011) (General Counsel's failure to call fellow strikers who witnessed striker's conversation with supervisor warranted adverse inference that their testimony would not have supported striker's version of the conversation).

Additionally, irrespective of whether an *adverse inference* should be drawn, the failure of the General Counsel to call identified corroborating witnesses has *independent significance which significantly weakens the General Counsel's case*, further undermines Brown's credibility, and usually leads to a finding that the General Counsel has failed to meet the burden of proof. *See Stabilus, Inc.*, 355 N.L.R.B. 836, 841 n. 19 (2010) ("The lack of corroboration from Lockridge weakens the General Counsel's case."); *C & S Distrib.*, 321 N.L.R.B.

404, 404 n. 2 (1996) (failure to call a potentially corroborative witness may be considered in determining whether the General Counsel has established a violation by a preponderance of the evidence), *citing Queen of the Valley Hosp.*, 316 N.L.R.B. 721, 721 n. 1 (1995). As explained in an ALJ opinion recently adopted by the Board, *Harbor Rail Services Co.*, 2017 WL 1548283, n. 11 (N.L.R.B. Div. of Judges Apr. 28, 2017), *adopted*, 2017 WL 2544505 (N.L.R.B. June 9, 2017):

> There were at least four other employees present for this confrontation, but none were called to testify. Although either party could have called these witnesses,[20] the General Counsel has the ultimate burden of proof regarding the allegations, and this was a critical confrontation in proving whether Schultz was discharged in violation of Sec. 8(a)(1) of the Act. Although the Board has held an adverse inference cannot be drawn based upon the failure to call a neutral employee witness, the failure to call a potentially corroborating witness may be considered in deciding credibility and, in certain circumstances, in determining whether a violation has been established. *See Port Printing Ad & Specialties*, 344 N.L.R.B. 354, 357 fn. 9 (2005); *C&S Distributors*, [*supra*]; and *Queen of The Valley Hospital*, [*supra*]. As stated below, I have several concerns regarding the veracity of Schultz' testimony, and the General Counsel's failure to call any of these other witnesses means his dubious testimony is unsupported.

In this case, the ALJ made virtually identical findings. ALJD p. 6, lines 10-47:

> Moreover, the General Counsel failed to produce corroborating witnesses to overcome the deficits with Brown's testimony and overall demeanor. A party's failure to explain why it did not call the favorable witness

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[20] Although it is always *theoretically* true that either party may call a witness to testify, in this case the alleged participants in the supposed conversation with Toombs had never been identified or disclosed to Respondent before Brown testified at the hearing. Thus, as a *practical* matter *only* the General Counsel—who had investigated the allegations, taken statements from the witnesses, and filed the *Complaint*—knew the identity of the "corroborating" witnesses and had the ability to issue subpoenas to them in advance of the hearing.

> may support drawing an adverse inference. *See Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). Ultimately, however, the judge has discretion to decide whether an adverse inference is warranted when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party. . . . In the case at issue, Roper, Woodward, Williams, and Hughes could have been assumed to be favorably disposed towards the General Counsel's case. If called by the General Counsel, one or more of the 4 witnesses might have supported in whole or in part Brown's version of the November 28 conversation with Toombs and who was present to hear him make the alleged statements.
>
> Even if a judge decides not to draw an adverse inference, the failure of the General Counsel to call identified corroborating witnesses may be a consideration in the judge's determination of whether the General Counsel's case has been significantly weakened, and thus a factor which leads to a finding that the General Counsel has failed to meet the burden of proof. *See Stabilus, Inc.*, [*supra*] ("The lack of corroboration from Lockridge weakens the General Counsel's case."). The Board has consistently held that the judge may consider the General Counsel's failure to call a potentially corroborating witness in deciding whether a violation of the Act has occurred. *See C & S Distrib.*, [*supra*] ("a judge may properly consider the failure to call an identified, potentially corroborating witness … as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred."); citing *Queen of the Valley Hospital*, [*supra*] (same).
>
> The General Counsel has the ultimate burden of proof. In the matter at hand, it is the General Counsel's responsibility to prove by a preponderance of the evidence that Toombs made the threatening statements attributed to him by Brown. Since I previously found that based on their comparative demeanor, neither Toombs nor Brown was superior; it was incumbent upon the General Counsel to produce alternate persuasive evidence. For example, the General Counsel could have produced any of the employees that Brown testified were present when Toombs allegedly made the threatening statements or any other corroborating evidence.

The General Counsel did not file any exceptions to these portions of the ALJ's decision and is, therefore, bound by them. These findings of the ALJ alone warrant rejection of the General Counsel's exceptions and adoption of the

ALJ's decision.[21] *See also McCarthy Law Plc*, 2017 WL 2859913 (N.L.R.B. Div. of Judges June 30, 2017) ("There was no explanation for failure to call Schade, Hippensteel, or Bennett. In agreement with Respondent, it is found that failure to call these potentially corroborating witnesses weakens the General Counsel's case."), *adopted*, 2017 WL 3491880 (N.L.R.B. Aug. 14, 2017); *U.S. Postal Serv.*, 2017 WL 2263163 (N.L.R.B. Div. of Judges May 19, 2017) ("[T]he failure to call a potentially corroborating witness may be considered in deciding credibility and, in certain circumstances, in determining whether a violation has been established. . . . I find that General Counsel's failure to call either of these witnesses to corroborate Freeman's version of events further undermines his credibility regarding his alleged exchange with Delgado. In light of the foregoing, I do not find that Delgado threatened Freeman with discharge . . ."); *In Re Case Corp.*, 2001 WL 1635475 (N.L.R.B. Div. of Judges Dec. 14, 2001) ("Lack of corroboration has significance altogether independent from any adverse inference that might, then, be drawn in particular situations.").[22]

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[21] In what can only be described as the height of chutzpah, the General Counsel contends "the record overwhelmingly supports Ms. Brown's testimony" (*Brief*, p. 10) because, *inter alia*, "*Respondent provided no witnesses who could in any way corroborate Mr. Toomb's version of events*." *Id.*, p. 11 (emphasis added). The General Counsel's contention stands the allocation of the burden of proof on its head. The *General Counsel* bore the burden of proof and the *General Counsel* failed to call or offer any explanation for not calling to testify any of four witnesses who could (if Brown's testimony was accurate) corroborate that testimony.

[22] The General Counsel's only attempt at "corroboration" was the second-hand claim of a paid union organizer that sometime on the afternoon of November 28, Brown and Williams—neither of whom were on the schedule to work that day—allegedly "wanted to know if they could be fired for going on strike." Tr. p. 22/line 21 to p. 23/line 9. The Union organizer was not present during the alleged conversation between Brown and Toombs and his testimony is also contradicted by the fact neither Brown nor Williams was scheduled to work on November 28th. R. Ex. 1. Furthermore, the Union organizer's recita-

Footnote continued on next page . . . .

D. BROWN'S TESTIMONY WAS *CONTRADICTED* BY OTHER CREDIBLE EVIDENCE:

1. The Work Schedule:

The work schedule for the week which included Monday, November 28, 2016 (R. Ex. 1) was admitted without objection. Tr. p. 37/lines 12-16. It directly contradicts numerous assertions of Brown, including:

- Whereas, Brown claimed the conversation with Toombs occurred on the afternoon of Monday, November 28th and she would not have been at work unless she had been on the schedule to work (*id.*, p. 16/lines 2-4), Brown was not scheduled to work on November 28th.

- Whereas Brown claimed that the other four individuals who purportedly participated in the alleged conversation were Roper, Woodard, Williams, and Hughes—none of whom were called as witnesses—and that they were on duty, *three of the four were not scheduled to work at all* on November 28, 2016, and Woodard *was not scheduled to start work until 5:00 p.m. that day—hours after Brown claims the conversation occurred*![23] *See* R. Ex. 2.

- Whereas Brown claimed her "regular" work schedule was from 2:00 p.m. to 10:00 p.m. every day except Sundays (when Brown claimed she worked from 11:00 a.m. to 6:00 p.m. (*id.*, p. 73/lines 9-13)), she was not on the schedule to work *at all* that week.[24]

. . . footnote continued from previous page:

tion of Brown's rendition of her alleged conversation with Toombs supposedly given to the Union organizer by Brown was hearsay within hearsay. As the ALJ correctly noted, ALJD p. 6, line 47 to p. 7, line 4:

> While the General Counsel argues that Al-Haj corroborated Brown's version of events, the evidence indicates otherwise. Al-Haj simply testified to what Brown told him. He was not actually present when the conversation involving several employees and Toombs occurred so he has no first-hand knowledge of what was said.

[23] And hours after Toombs would have normally left the restaurant at 2:00 in the afternoon.

[24] Toombs testified that the reason Brown was not on the schedule for the week encompassing November 28th was because Brown—who Toombs had hired earlier in November despite knowing Brown was pregnant—had been experiencing complications because of her pregnancy. Tr. pp. 41-43, p. 51. In "rebuttal," Brown did not deny that she experienced complications during her

Footnote continued on next page . . . .

2. Wendell Toombs:

a. Vehement Denial:

As previously detailed, Toombs directly, emphatically, and unequivocally denied Brown's accusations.

b. Other Contradictions of Brown:

In addition to denying the specific allegations made against him, Toombs also credibly contradicted other assertions made by Brown.

- Whereas Brown claimed the purported conversation with Toombs took place sometime after she supposedly started work at 2:00 p.m., Toombs normally completed his shift and left the restaurant by 2:00 p.m. Tr. p. 40, p. 48. The ALJ affirmatively found "Toombs normally arrived to work at 4:30am or 5am and left at 2pm or 3pm." ALJD p. 2, n. 4. The General Counsel did not except to that finding.

- Whereas Brown claims Roper was one of the individuals who participated in the alleged conversation with Toombs, Roper wasn't even working at the restaurant on November 28th as she had been transferred to another restaurant. *Id.*, p. 43, pp. 51-52.

E. INHERENT UNLIKELIHOOD OF BROWN'S ACCUSATIONS:

Although an employer's *motive* in *making* an allegedly coercive statement is not an element of a § 8(a)(1) violation, where, as here, the employer *denies making* the statements alleged, the *absence* of any evidence of discriminatory animus or other alleged violations is probative on the issue of whether the alleged statements were ever *made*. That is, a lack of any evidence of anti-union animus by Toombs or of any unlawful discipline by him has a tendency in logic to make the existence of a fact of consequence to determination of this case—*i.e.*,

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. . . footnote continued from previous page:

pregnancy, only that she had not "*miss[ed]* any days off work due to [her] pregnancy." Tr. 73/lines 5-8. Brown's contention that she never <u>*missed*</u> a day when she was <u>*scheduled*</u> to work is a *non sequitur*. It does nothing to address or contradict Toombs' testimony that he did not <u>*schedule*</u> Brown to work the week of November 28th.

whether Toombs *made* the alleged statements—more or less probable. *See Fed. R. Evid.* 401 (defining relevance as "(a) . . . any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). Simply put, does the presence or absence of anti-union bias by Toombs make it more or less probable that Toombs would have threatened to discharge striking employees? Is someone who harbors an anti-union bias more likely to make a threat than someone who has no such bias? Conversely, is someone who holds no such animus less likely to have made a threat than someone who has such animus? The answers, of course, are self-evident. *See*, *e.g.*, *Westwood Health Care Center*, 330 N.L.R.B. 935, 940 n. 17 (2000) (in evaluating whether an 8(a)(1) violation occurred, the "full context" of events should be considered).[25]

Here, the evidence is undisputed:

- *None* of the *thirteen* employees who participated in the November 29, 2016, strike (*see* R. Ex. 2) were disciplined in any way. Tr. p. 7/lines 5-6 ("General Counsel does not allege that anyone was disciplined or discharged[.]"); p. 13/lines 17-19; p. 36/lines 13-18; p. 39/lines 3-15.

- Toombs had been the manager of the 47th Street restaurant since September 2016 (Tr. p. 39/lines 19-21) and long term employee Rahman Sallee—who has worked at the restaurant throughout Toombs' entire tenure as manager—had never seen or heard Toombs threaten workers in any way. *Id.*, pp. 69-70.

- Toombs has amicably worked with unions and in collective bargaining situations for more than 30 years. *Id.*, p. 30/line 10 to p. 30/line 17.

- In particular, there is no evidence whatsoever of any other unfair labor practice charge against Toombs. This is particularly telling given the Union's affinity for filing unfair labor practice charges at every opportunity

[25] The General Counsel acknowledges that "context" is important in evaluating allegations of supposedly threatening behavior under §8(a)(1). *Brief*, pp. 4 and 5.

against the previous franchisee, Strategic, and initially against the previous restaurant manager in *NLRB v. EYM King of Missouri, LLC*, 2016 WL 3457655 (N.L.R.B. June 23, 2016), *enforced*, 2017 WL 2672669 (8th Cir. June 21, 2017) and *NLRB v. EYM King of Missouri, LLC*, 2017 WL 371015 (N.L.R.B. Jan. 24, 2017), *pet. enforcement pending* (the "prior EYM Missouri litigation"). Surely, if Toombs had allegedly committed any other unfair labor practice the Union would have readily pounced on the opportunity to file another unfair labor practice charge.

In fact, Toombs testified without contradiction that at each of the restaurants he had managed for EYM he has freely, openly *enabled* employees to speak with the Union representative when the representative came on site. *Id.*, p. 5/lines 5-22:

> Q. BY MR. ROSS: Before the day of the strike, did you ever hear any employees in the restaurant discussing the strike or union activity?
>
> A. Yes.
>
> Q. Okay. How many times, approximately?
>
> A. I probably heard it a couple of times, but only one time where I was close enough to them to actually hear them talking about it.
>
> Q. Okay. And did you interrupt them at all?
>
> A. No, not at all. I usually send—I usually send them to the guy—they actually come in into the restaurant, sometimes stand at the counter, talk to the people, and I say, "Hey, if you want to go talk to the guy, you can go talk to him." I actually give them permission to walk away, give them five or ten minutes, and if they want to use it as their break time, sometimes they step outside, or whatever, I have done it—I done it when I was over at Main, and I've done it with employees at 47th Street.[26]

In sum, as the ALJ properly found, Toombs was at least equally credible with Brown's inconsistent, uncorroborated, and contradicted testimony. Given that the General Counsel bore the burden of proof—including the burden of

[26] None of this testimony was disputed by the Union organizer or by Brown and the Union organizer admitted he was frequently at the restaurant. Tr. p. 26/lines 11-17.

proving credibility—the General Counsel failed to meet either burden. *See Unique Pers. Consult. Inc.*, 2015 WL 3440190 (N.L.R.B. Div. of Judges May 28, 2015) (*citing Central Nat. Gottesman*, 303 N.L.R.B. 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 N.L.R.B. at 591-592 (same), *questioned on other grounds*, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997)); *Stahl Specialty Co.*, 2013 WL 5671093, n. 21 (N.L.R.B. Div. of Judges Sept. 30, 2013) (same).

The situation in this case is analytically identical to *Interbake Foods*, *supra*. In fact, with the substitution of "Toombs" and "Brown" for the names of the supervisor and employee involved in *Interbake*, the ALJ's analysis in *Interbake* could well have been written for this case:

> As with all alleged violations of Section 8(a)(1), the General Counsel bears the burden of proof. *See Blue Flash Express*, [*supra*] (the General Counsel has burden of proving unlawful threats by preponderance of the evidence). Regarding any legal issues, I agree with the General Counsel's theories. If [Toombs] made the statement reported by [Brown], it was an obvious threat of the most severe type. . . .
>
> The difficulty here for the General Counsel is not the law, but the facts. [Brown's] and [Toombs'] accounts are essentially a wash. . . . In such circumstances, the party bearing the burden of proof has failed to carry that burden. *See American, Inc.*, 342 N.L.R.B.768 (2004) (party with burden loses where judge found "no basis for choosing the testimony of one witness over the other").

For identical reasons here, the General Counsel has failed to carry his burden of proving a violation of § 8(a)(1) by a preponderance of the evidence. *See Taylor Motors, Inc. & Am. Fed'n of Gov't Emp.*, 365 NLRB No. 21 (N.L.R.B. Mar. 13, 2017) ("Again, if the evidence regarding whether Williams made the threat is in equipoise, the General Counsel failed to sustain his burden[.]").

II.

THE GENERAL COUNSEL'S REMAINING CONTENTIONS—SPECIFICALLY EXCEPTIONS 2 AND 4—ARE WITHOUT MERIT.

A. EXCEPTION NO. 2:

The General Counsel contends the ALJ erred by not making an express "credibility ruling" regarding R. Ex. 1—the work schedule for the restaurant encompassing the week which included Monday, November 28, 2016. The contention is without merit for a number of reasons.

First, the General Counsel completely mischaracterizes the purpose for which the exhibit was offered and its significance in the hearing and in the ALJ's decision. The General Counsel repeatedly erroneously contends that the work schedule was the lynchpin of EYM's case "upon which Toombs based his recollection of November 28, 2016." Exception No. 2; *Brief*, p. 4 ("Toombs's recollection of the November 28, 2016 conversation was based on Respondent's Exhibit 1."). That is absolutely not true.

- The primary purpose and evidentiary significance of R. Ex. 1 was to *impeach Brown*. As previously detailed, above, Brown made numerous assertions regarding the schedule, *e.g.*, when she and the other four purported witnesses were scheduled to work, Mondays were her day off, she worked "every day," *etc*.

- Second, contrary to the General Counsel's contention, Toombs did *not* rely on R. Ex. 1 in any manner for his emphatic, pointed denials of Brown's accusations. Tr. p. 33/line 25 to p. 34/line 5; p. 57/lines 8-21.

Second, to the extent a party seeks additional factual findings not contained in an ALJ's decision, the Board normally will decline to address the request where the requested finding is immaterial to the outcome of the case. *See*, *e.g.*, *Consolidated Communications*, 360 NLRB No. 140, n. 2 (July 3, 2014) ("We find it unnecessary to pass on the Union's exception to the judge's failure to find that the Respondent lacked an honest belief that the disciplined em-

ployees engaged in serious misconduct because such a determination would not affect the outcome."); *Kingsbury, Inc. and Kingsbury Shop Employees Ass'n*, 355 NLRB No. 195 (2010) ("[W]e find it unnecessary to the pass on the GC's exception to the judge's failure to find that the Respondent's termination of Landis also violated Sec. 8(a)(3)."). Here, the ALJ expressly found (ALJD p. 4, line 35 to p. 5, line 2; emphasis added):

> I find that R. Exh. 1 has minimal evidentiary value because: (1) the complaint alleges that the Respondent, through Toombs, made threatening comments to several of its employees. Toombs admits he heard a group of employees discussing the November 29 strike and asked them questions about it. *The relevant inquiry is whether he made the alleged threatening statements*. Brown accused Toombs of making the statements and I was able to credit her testimony that she was at the restaurant during the period in question, *independent of R. Exh. 1*.

Thus, Exception No. 2 is immaterial and need not even be reached. It was for the ALJ to evaluate, as she did, the probative value to accord R. Ex. 1 and the General Counsel's many vociferous attacks on the document.

B. EXCEPTION NO. 4:

Finally, the General Counsel contends the ALJ erred by failing to give conclusive weight to Brown's rendition of a second conversation she claims to have had later on November 28, 2016, with Roper (a shift manager) and McFadden (a manager trainee), in which Brown claims Roper and McFadden supposedly admitted that "Toombs was trying to scare employees so they would not go on strike." *Brief*, p. 3. This exception, likewise, is without merit.

Specifically, just like the allegations against Toombs in the *Complaint*, the General Counsel's argument rests on the equivocal and questionable credibility of Brown. Brown's self-serving, wholly uncorroborated contentions regarding an alleged conversation she claims to have had with Roper and McFadden were

entitled to no more credibility than her self-serving contentions regarding the conversation she claims to have had with Toombs. In this regard:

- As the ALJ correctly noted, "The best evidence would have been Roper's and, or McFadden's testimonies; and the General Counsel provided no reason for failing to call them to testify about the substance of the conversation." ALJD p. 4, n. 9. On this basis alone, the ALJ was wholly within her discretion in choosing to give Brown's testimony no weight.[27]

- Brown's claims regarding this supposed conversation was also inconsistent with and contradicted by the fact that Roper was not on the schedule (R. Ex. 1) *on November 28th, or any day that week*.

CONCLUSIONS AND REQUESTED RELIEF

For all of the foregoing reasons, all of the exceptions should be overruled and the decision of the ALJ to dismiss the Complaint should be adopted.

Respectfully submitted,

/s/ John L. Ross
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[27] As the General Counsel concedes (*Brief*, p. 6), as the trier of fact, the ALJ was free to accept or reject none, some, or all of Brown's testimony, citing *NLRB v. Universal Camera Corp.*, 179 F. 2d 749 (2nd Cir. 1950).

[28] Board Certified in Labor & Employment Law and Civil Trial Law by the Texas Board of Legal Specialization.

CERTIFICATE OF SERVICE

I certify that on the 9th day of November, 2017, a copy of the foregoing document was served by email and certified mail, return receipt requested, on:

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I further certify that on the 31st day of July, 2017, a copy of the foregoing document was served by email and certified mail, return receipt requested, on:

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/s/ John L. Ross
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