

A. The Employer's History of Closing Plants and Redistributing Their Work to Its Other Plants

The Employer, as shown through the declarations of its (b) (6), (b) (7)(C) _____), as well as a range of documentary evidence, has an established practice of closing down and shifting furniture production among its plants when it decides they are not sufficiently profitable and to maintain competitive market advantages. The Employer asserts that its decision to close Colton in late August 2016 was consistent with this practice.

Prior to 2002, all of the Employer's domestic upholstered furniture was supported at its cut-and-sew operation in Mississippi.³ In 2002, the Employer opened a cut-and-sew operation in China at its Wanvog plant, i.e., Wanvog Kushan Furniture, Ltd. The Employer then began downsizing its Mississippi cut-and-sew operation in part because labor costs in China were significantly lower. In 2005, the Employer completely shut down its cut-and-sew operation in the U.S.⁴

Beginning in 2008, the Employer also shifted furniture production from its Wanvog plant in China to its Wanek plants in Vietnam, i.e., Wanek Furniture, Ltd.⁵ In June 2008, realizing that other furniture manufacturers were opening new plants in Vietnam instead of China and that it would have to do the same if it wished to remain competitive, the Employer began operations in Vietnam by opening its initial plant, Wanek. At first, Wanek only produced cut-and-sew kits, as it was unable to produce wooden or upholstered furniture because it did not have a large enough manufacturing footprint. As the Employer increased production at its Wanek plants in Vietnam, it diverted work from its Wanvog plant in China and reduced production and workforce at the latter.

³ A cut-and-sew operation produces kits comprised of fabric that has been cut and sewn in specific dimensions and that is later fit over stationary and motion furniture frames produced at the Employer's other plants in the U.S.

⁴ The Employer claims that the employees at the Mississippi cut-and-sew operation were neither unionized nor attempting to unionize.

⁵ Although the Employer has three Wanek plants in Vietnam, for the most part we refer to them in this memorandum as one production location.

B. The Employer Makes Significant Capital Investments in the Upholstery Operation at its Vietnam Plants

In April 2013, the Employer's (b) (6), (b) (7)(C) stated in an email that Wanek was developing upholstery operations as Wanvog (in China) had done, and indicated a rush to get upholstered furniture produced at Wanek. In 2014, the Employer's third plant in Vietnam, Wanek 3, came online. The Employer decided to begin substantial capital investments in the Wanek plants to expand its manufacturing footprint, concluding that Wanek had the potential to provide upholstered furniture to the U.S. at low costs because of factors like cheap labor, cheap land, and room to grow. In 2014, the Employer invested (b) (4) in Wanek. In May-June and September 2015, the Employer's (b) (6), (b) (7)(C), took business trips to Asia where (b) (6) discovered that the Employer was and would be facing serious and increasing pricing disadvantages from Asian competitors. In 2015, the Employer made another capital investment of (b) (4) in Wanek, and another (b) (4) in 2016. The Employer currently employs only about (b) (4) employees at Wanvog, which is down from (b) (4) employees in 2012. In contrast, the Employer's workforce at its Wanek plants has increased from (b) (4) in 2012 to approximately (b) (4) currently. In making these capital investments, the Employer expected the resulting expansion and production of its Vietnam plants to affect its U.S. plants. Although it had not determined exactly how, it believed that largely because of shipping costs, the West Coast would be the area most affected by increased production at its Vietnam plants.

C. The Organizing Campaign at Colton, and Rumors of Its Continuation After the Election Loss

In late August 2014, Carpenters Local 721 ("the Union") began an organizing campaign at the Employer's Colton facility. The Employer responded to the campaign by hiring a labor consulting firm, holding captive-audience speeches, and committing numerous unfair labor practices, including making threats that the plant would close and the work relocated if the employees selected the Union. The Region investigated ULP charges filed by the Union, finding several charges to be meritorious, including threats by the Owner to close the facility and relocate the work. The Employer settled those charges by agreeing to, among other remedies, a notice reading.⁶

⁶ The Union filed previous charges in Cases 31-CA-142668, 148096, 148097, 148099, 148316, 149759, 150393, and 153119 regarding various allegations of surveillance, coercive statements, retaliation, discipline, discharge, and changes to terms and conditions of employment that occurred during the organizing campaign that began in late August 2014. While several charges and allegations were dismissed for lack of

In November 2015, the Board conducted an election at the Colton facility. The employees choose not to be represented by the Union. Since the election, the Union has made no attempt to continue its organizing efforts at Colton. Beginning in December 2015, rumors that the employees were still interested in Union representation began circulating at the plant. Subsequently, managers at Colton continued the anti-Union meetings they had held with supervisors before the November election. Managers asked supervisors to report on any Union activity by their employees and to not let Union supporters “get away with anything.” The managers stressed to supervisors, “believe me, if the Union comes in, the company is going to go.”

In April or June 2016, the rumors of continued employee interest in organizing again circulated at Colton, and one (b) (6), (b) (7)(C) noted that (b) (6) was told by a (b) (6), (b) (7)(C) that plant management was alarmed at these increased rumors of Union activity, although there was no observation of any actual employee Union activity. Also in June and July 2016, the Employer’s (b) (6), (b) (7)(C) held pizza parties for supervisors to celebrate the Colton facility breaking company production records. At one of these parties, Colton’s (b) (6), (b) (7)(C) stated that the plant was the Employer’s number one production facility.

D. In July 2016, the Employer Decides to Close Colton

The Employer states that in December 2015, it began seriously considering closing the Colton manufacturing facility based on the economic advantages of manufacturing the items produced at Colton in its Asian facilities, i.e., Wanek and Wanvog. In support of this assertion, the Employer provided a December 22, 2015 email from the (b) (6), (b) (7)(C) to its (b) (6), (b) (7)(C) seeking information regarding the types of furniture being produced at Colton, a cost analysis of producing the furniture at Wanek or Wanvog, and a breakdown of which of those styles made sense for Wanek or Wanvog to produce and ship; and a December 23, 2015 email from the (b) (6), (b) (7)(C) to an Ashley employee, listing products to switch from Colton production to Wanvog, and listing items that Colton was currently making and requesting Wanvog to do pricing on producing those items. The Employer also provided evidence of spreadsheets reflecting these analyses, including some detailing which items from Colton had a high probability of being successfully produced at lower prices in Wanek and Wanvog, and which products did not.

merit, others were found to have merit and resulted in the bilateral settlement noted above.

On April 19, 2016, the (b) (6), (b) (7)(C) emailed the (b) (6), (b) (7)(C) regarding (b) (6), (b) (7)(C) “recommendation with respect to [Wanvog], [the Wanek] manufacturing operation in Vietnam, and Ashley’s manufacturing (upholstery and bedding) plant in California.” In that email, (b) (6) concluded that closing the Colton facility would save the Employer (b) (4) annually, which was greater than the cost of shutting Colton down. On July 21, in an email back to the (b) (6), (b) (7)(C), the (b) (6), (b) (7)(C) concurred that the Colton facility should be closed. In that email, the (b) (6), (b) (7)(C) noted that the projected savings figure of (b) (4) should be lowered to (b) (4) in the first year due to the need to pay WARN Act benefits to the laid off Colton employees. The email also set out how the (b) (6), (b) (7)(C) was to go about closing the facility. There was no mention of Union activity in the emails. The Employer asserts that the decision was made solely by the (b) (6), (b) (7)(C) and the (b) (6), (b) (7)(C), and that neither of those officials had any knowledge of the rumors of renewed Union activity at Colton.

E. The Employer’s Executive Summary Explaining the Decision to Close Colton

On August 12, 2016, the (b) (6), (b) (7)(C) emailed the (b) (6), (b) (7)(C) a detailed Executive Summary regarding the closure decision. The summary compared the actual performance of three of the Employer’s domestic facilities, specifically, (i) Ecrú, Mississippi, (ii) Ripley, Mississippi, and (iii) Colton for the month of April 2016 to a simulated performance for the same month where Colton’s production would be replaced by Wanek in Vietnam and the two Mississippi locations. The comparison started by listing the actual total sales figures for April 2016 from the three domestic facilities (Ecrú, Ripley, and Colton), i.e., their overall “gross margin,” which was (b) (4) or (b) (4) of Employer’s total net sales, which was (b) (4). In the simulation portion of the summary, where Colton’s production was replaced by the Vietnam and two Mississippi facilities, the new total “gross margin” was (b) (4) or (b) (4) of total net sales. That projected figure represented a margin improvement of (b) (4) for April 2016, or (b) (4) for an entire year. This increased return from cost savings was projected to increase and continue annually.

F. In Late August 2016, the Employer Closes Colton

On about August 25, 2016, the Colton employees received a letter from the Employer directing them to report to one of three locations, specifically, San Bernardino, Riverside, or Fontana, California, where the Employer announced that it would be closing its production facility at Colton effective immediately. At the San Bernardino and Riverside locations, the Employer informed the assembled employees that the plant would close on that day. It also told them where to pick up their final paychecks. Employees who had been directed to the Fontana location were retained, but of the (b) (4) total employees at Colton, approximately 854 were immediately laid off. Two Colton (b) (6), (b) (7)(C) who attended the meeting at Riverside encountered

another (b) (6), (b) (7)(C) who was the (b) (6), (b) (7)(C) ⁷ The (b) (6), (b) (7)(C) stated (b) (6), (b) (7)(C) had reported Union activity to (b) (6), (b) (7)(C), who responded that the (b) (6), (b) (7)(C) would close the plant down because of the Union activity.

G. Recent Developments the Employer Relies on for the Timing of the Closure Decision

The Employer relied on several developments in 2015 and 2016 to explain why the economic reasons were so compelling to close Colton in late August 2016. The Employer's production capacity in Wanek sufficiently had increased so that it could take advantage of lower labor costs and operating expenses at those plants. In early 2015, Wanek 3 began making upholstered furniture of the same type produced at Colton and the Employer's other U.S. facilities.⁸ Labor costs in Vietnam are much lower compared to those in the U.S., particularly in California. The Employer claims that the wage rate for production employees is (b) (4) per hour at Wanek, while it is (b) (4) per hour at Colton. The Employer further points to a California law implemented at the end of 2014 requiring employers to pay incentive-based production employees extra for rest periods, the new California sick leave law that went into effect in July 2015 (which cost the Employer an additional (b) (4) per year), the 2016 increase of the minimum wage in California, and the anticipated additional increase of the state minimum wage to \$15 per hour as new costs that made operating at Colton less profitable than in the past. The Employer states that its operating expenses were also much lower at Wanek in comparison to Colton. It further states that while operating expenses at Colton were rising, Wanek in particular was increasing its operating efficiencies, resulting in the cost of products produced at Wanek being significantly cheaper than the cost of products produced at Colton.⁹

⁷ The evidence does not conclusively establish that the (b) (6), (b) (7)(C) was a (b) (6), (b) (7)(C)

⁸ As noted earlier regarding an April 2013 email from the Employer's (b) (6), (b) (7)(C), the Employer's documentary evidence shows that it had been planning since 2013 to produce upholstered furniture at Wanek, but those plants needed time to develop their capacity to do so.

⁹ The spreadsheets the Employer provided with this information suggest that the operating costs of Wanvog (China) were significantly lower than those of Colton. The financial scenarios provided by the Employer also indicate that Wanek (Vietnam) also had significantly lower operating costs, evidenced by the lower operating expenses per unit found throughout the financial scenarios.

By late August 2016, when the Employer closed Colton, it was producing (b) (4) units per week at that location. At the same time, Wanek (Vietnam) only produced (b) (4) units per week. In order to close Colton and maintain its production level, the Employer would have to take advantage of what it calls the “excess production capacity” of its other domestic facilities. The Employer became aware of its domestic “excess production capacity” in January or February 2016. The Employer determines excess capacity by conducting studies called “Workcenter Load Profiles” for each of its U.S. plants. These reports are run on an ongoing basis. The studies are supplemented with personal inspections and conferences between each plant manager to reach a conclusion on excess capacity or lack thereof. These studies confirmed that the Employer’s excess capacity at its other domestic facilities was sufficient to replace Colton’s production.

The Employer also notes that a significant decrease in shipping costs between May 2015 and April 2016 made it much cheaper to produce furniture at Wanek or Wanvog and ship it to the Colton distribution center, as opposed to producing furniture at Colton. The Employer’s evidence established that beginning in May 2015, shipping costs started a significant downward trend, in part because of low gas and oil prices. By April 2016, the cost of shipping a container from Vietnam to Colton was (b) (4), down from a high of (b) (4) per container a year earlier. Also, a new method of packing furniture in shipping containers discovered in 2015 allowed the Employer to ship more furniture per container, further lowering the shipping cost per item.

The Employer also points to the increase in the value of the dollar as compared to the Vietnamese currency in 2015 to explain why it became much more profitable to produce in Vietnam and ship to the U.S. In that time period, the value of the Vietnamese dong dropped 6% as against the dollar, meaning that the Employer would benefit from a corresponding drop in all of its expenses in Vietnam.

H. The Employer’s Response to the Current Unfair Labor Practice Charge

On October 5, 2016, the Union filed the current charge. Beginning on January 26, 2017, the Employer provided the Region with Excel sheets documenting 36 different financial scenarios it ran from December 2015 through April 2016. The Employer asserts that it looked at all possible alternatives prior to the decision to cease production at Colton, including looking to see if any of the Employer’s other U.S. manufacturing facilities could manufacture products for resale on the West Coast at the same or lower price than the Employer’s Asian competitors. During the ULP investigation, the Employer provided the Region with 55,000 pages of documentary evidence, including numerous documents presenting economic scenarios that support its assertion that it closed Colton for legitimate business reasons.

ACTION

We conclude, in agreement with the Region, that although the General Counsel can satisfy his initial burden under *Wright Line* of showing that Union animus was a motivating factor in the Employer's decision to close the Colton plant, the Employer will be able to satisfy its rebuttal burden of showing that it would have taken the same action even in the absence of any Union activity. Thus, the Region should dismiss the charge, absent withdrawal.

The Board applies the analytical framework set out in *Wright Line*¹⁰ to determine whether an employer's adverse employment action was unlawfully motivated by its employees' union or protected concerted activities, as opposed to legitimate business reasons.¹¹ To establish a violation, the General Counsel has the initial burden of showing that the employees' union or protected concerted activities were "a motivating factor" for the employer's adverse action against them.¹² To satisfy this initial burden, the General Counsel must show that the employees were engaged in union or protected concerted activities, the employer had knowledge of those activities, and the employer exhibited animus or hostility toward those activities.¹³ The employer's animus or discriminatory motive may be established by, among other things, the timing of the adverse action in relation to the employees' protected conduct and the presence of other unfair labor practices or anti-union statements.¹⁴ Once the General Counsel makes that initial showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the employees' protected activities.¹⁵ Here, the General Counsel can satisfy his initial burden of showing that the Employer had an anti-

¹⁰ 251 NLRB at 1089. *See also Lucky Cab Co.*, 360 NLRB 271, 273-74 (2014).

¹¹ *See, e.g., Lucky Cab Co.*, 360 NLRB at 273-74.

¹² 251 NLRB at 1089.

¹³ *See, e.g., Lucky Cab Co.*, 360 NLRB at 273-74.

¹⁴ *See Wright Line*, 251 NLRB at 1090-91 (relying on timing of discharge, employer's general hostility toward employee's union activities, and pretextual explanations given for the discharge as support for finding discriminatory motivation); *Lucky Cab Co.*, 360 NLRB at 273-74.

¹⁵ *Wright Line*, 251 NLRB at 1089.

Union motive for closing Colton. However, the Employer has provided sufficient evidence establishing its rebuttal burden.

A. The General Counsel Can Satisfy His Initial Burden under *Wright Line*

We conclude that there is a strong case that the Employer was motivated by Union animus in closing the Colton plant. Initially, the Employer's belief based on rumors at the plant that employees at Colton remained interested in unionization satisfies the first element of the General Counsel's initial burden. Although plant managers and supervisors apparently were aware only of "rumors" of Colton employees attempting to resume the organizing campaign in late 2015 and early 2016, the Employer's mistaken belief that its employees were actually engaged in Union activity is sufficient to support a violation.¹⁶

Second, there is sufficient evidence to establish that the Employer had knowledge of these pro-Union rumors. Although the (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), who actually made the decision in July 2016 to close Colton, claim that they were unaware of the rumors of a renewed Union campaign in late 2015 and early 2016, an employer's knowledge of its employees' protected concerted activities and animus toward those activities "may be inferred by the Board from the record as a whole."¹⁷ Here, Colton's

¹⁶ See, e.g., *United States Service Industries*, 314 NLRB 30, 31 (1994) ("[A]ctions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity."), enforced, 80 F.3d 558 (D.C. Cir. 1996) (unpublished table decision); *Metropolitan Orthopedic Assn.*, 237 NLRB 427, 427 n.3 (1978) ("The discharge of 4 employees in a unit of 13 employees because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act").

¹⁷ See, e.g., *Circle K Corp.*, 173 NLRB 713, 714-15 (1968) (inferring employer knowledge of its employees' organizing activities from circumstantial evidence, including the employer receiving an unopened registered letter from the union, a zone supervisor visiting the store at the same time and discussing the union with the store manager, a non-activist employee discussing the union with the store manager, and the store manager subsequently telling this employee that the area division manager had discussed the union with him); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123-24 (2002) (finding employer had knowledge of two discriminatees' union activity where another driver told supervisor that the employees had attended a meeting with a union representative and that they wanted to unionize to secure benefits, and one

(b) (6), (b) (7)(C), who was (b) (6), (b) (7)(C) at the facility and frequently spoke with the (b) (6), (b) (7)(C), was directing the ongoing anti-Union campaign at the plant. The circumstantial evidence that the (b) (6), (b) (7)(C), who was continuing to have the plant supervisors engage in surveillance and otherwise suppress pro-Union sentiment, directly reported to (b) (6), (b) (7)(C) is sufficient to support the reasonable inference that the (b) (6), (b) (7)(C) knew of the rumors of continued Union activity.¹⁸

Finally, there is substantial evidence establishing the Employer's anti-Union motive for closing Colton. Because an employer rarely admits unlawful discrimination, the Board may base a finding of discriminatory motivation on such circumstantial evidence as the timing of the action,¹⁹ an employer's demonstrated anti-union bias, and the contemporaneous commission of other unfair labor practices.²⁰ Here, the timing of the closure reinforces the notion that "but for" the rumors of renewed Union activity after the November 2015 election loss, the Employer would not have closed Colton. Thus, the Employer in describing its decision to close Colton noted that it only started serious consideration of doing so in December 2015 immediately after the Union election. And the final decision to close came in July 2016, during a post-election period in which rumors of renewed Union activity began to alarm the plant managers. The precipitous nature of the closure announcement also supports the conclusion that the Employer closed Colton in retaliation for the employees' perceived ongoing interest in Union representation.

Additional evidence of the Employer's anti-Union motive comes from its prior unfair labor practices in response to the Union's organizing campaign and continued unlawful surveillance and anti-Union statements from managers and supervisors. After the Union began its organizing campaign in August 2014, the Employer

discriminatee previously had spoken to the supervisor about his desire for benefits), *affirmed mem.*, 71 Fed. Appx. 441 (5th Cir. 2003).

¹⁸ See, e.g., *Delchamps, Inc.*, 330 NLRB 1310, 1316 (2000) ("the evidence also reflects that it was more likely, than not, that [the employer's president] knew, through [the plant manager who reported directly to him] . . . that the other ice plant employees . . . stood behind . . . the [u]nion.").

¹⁹ See, e.g., *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action."); *KAG-West, LLC*, 362 NLRB No. 121, slip op. at 2 & n.5 (June 16, 2015).

²⁰ See, e.g., *Luck Cab Co.*, 360 NLRB at 274.

engaged in a strident anti-Union response, including making unlawful threats of plant closure. In late December 2015, having just come through one Union campaign, (b) (6), (b) (7)(C) at Colton, including the plant's (b) (6), (b) (7)(C), attempted to nip the rumored Union campaign in the bud. Managers held daily or weekly meetings with supervisors where they told them to monitor and report employee Union activity, and to not let Union supporters "get away with anything." Moreover, (b) (6), (b) (7)(C) at Colton have testified that (b) (6), (b) (7)(C)²¹ (b) (6), (b) (7)(C) told them that the (b) (6), (b) (7)(C) was going to close down the facility because of the employees' renewed Union activities. In sum, there is significant evidence that Union animus was a motivating factor behind the Employer's closure decision.

B. The Employer Can Satisfy Its Rebuttal Burden Under *Wright Line*

We further agree with the Region that, despite the preceding analysis, the Employer can establish that it would have closed Colton even in the absence of any Union activity because of the substantial cost savings it would obtain from the closure. Even when the General Counsel satisfies his initial burden under *Wright Line*, the Board will dismiss a Section 8(a)(3) allegation where the employer establishes that legitimate business reasons would have compelled the adverse personnel action, such as the closure of a facility.²² Although an employer may not be experiencing dire financial problems, it may reorganize its operations by closing a facility and relocating the work because "[r]eduction of costs and retention of market position are ingredients of profitability."²³

²¹ It is unclear whether (b) (6), (b) (7)(C) was also (b) (6), (b) (7)(C) at Colton.

²² See, e.g., *El Paso Electric Co.*, 355 NLRB 428, 428, 447 (2010) (despite General Counsel satisfying his initial burden, employer would have closed customer service office based on financial study it prepared showing greatest cost savings would result from closing office, which was physically inadequate, and opening private pay stations), *enforced*, 681 F.3d 651 (5th Cir. 2012); *Nu-Skin International*, 320 NLRB 385, 385, 404-05 (1995) (concluding that employer would have closed its Atlanta facility and relocated work even absent any union activities because "it did so in order to save more than \$300,000 per month and more than \$4.5 million per year" where the employer suffered from decreasing product demand and its new state-of-the-art facility benefited from production efficiencies).

²³ *DeSoto, Inc.*, 278 NLRB 788, 804-05 (1986) (finding that despite the employer's sound financial status, it did not violate Section 8(a)(3) by closing a paint production facility and relocating that work to its other plants to lower its operating costs by taking advantage of excess production capacities at the other plants; employer relied

Here, the Employer's evidence establishes that it would have closed Colton for legitimate business reasons. The Employer has shown that its closure decision was motivated by the financial analysis it conducted showing that, based on several factors that had emerged in 2015 and 2016, it would save about (b) (4) a year from closing Colton and relocating work to its other facilities. Initially, the Employer has demonstrated that it maintains a highly flexible business model designed to maximize profitability by ceasing or reducing production at its less profitable plants and shifting that production to other locations on an ongoing basis. Toward that end, it continuously and closely monitors the profitability of each of its plants in comparison to their sister facilities and outside competitors and uses that information to shift production to the most profitable locations. For example, before 2002 the Employer's domestic upholstered furniture production was supported by its cut-and-sew operation in Mississippi. But the Employer then began downsizing that operation and transferring the work to its China plant (Wanvog) to take advantage of lower labor costs in China. Similarly, in June 2008, realizing that other furniture manufacturers were opening new plants in Vietnam instead of China and that it would have to do the same to remain competitive, the Employer opened its first plant in Vietnam (Wanek). By fall 2014, the Employer had opened two plants in Vietnam and was in the process of purchasing and opening a third. During this same time, the Employer was significantly reducing the number of employees at its China plant from (b) (4) to (b) (4). The Employer then made capital investments of (b) (4) million in its three Vietnam plants from 2014 to 2016, realizing that its increased production from those plants would most likely benefit its business on the West Coast of the United States.

The Employer followed this practice when it considered the costs and benefits of closing Colton in light of new developments in 2015 and 2016.²⁴ In early 2015, the Employer finally began producing upholstered furniture in Vietnam (at Wanek 3) of the same type as that produced at Colton. It had been pursuing that production capability at its Vietnam plants since 2013, well before any Union activity at Colton or any evidence of anti-Union animus at the Colton plant. Indeed, in an April 2013 email, the Employer's (b) (6), (b) (7)(C) stated that Wanek was developing upholstery operations as Wanvog (in China) had done, and indicated a rush to get upholstered furniture produced at Wanek. It is undisputed that the Employer's labor

on economic studies it had prepared to assess its operations in light of increasing raw material costs and market pressure not to increase prices).

²⁴ See *DeSoto, Inc.*, 278 NLRB at 805 (finding employer had met its rebuttal burden under *Wright Line* where "[t]he record as a whole demonstrates the [e]mployer's continuing program of cost analysis").

costs in Vietnam, where the hourly wage rate is (b) (4), were significantly lower than in California, where the hourly wage rate is (b) (4). Even though the Employer maintained an employee complement of over (b) (4) employees in Vietnam in comparison to (b) (4) at Colton, the vast difference in wage rates resulted in considerably lower labor costs in Vietnam. The Employer's financial reports also showed that its per-item production costs at its Vietnam plants were lower in comparison to those at Colton. Indeed, while operating expenses at Colton were rising, the Employer was experiencing operating efficiencies at its Vietnam plants that resulted in even greater savings.

In contrast to the cost savings it could benefit from at Wanek 3, the Employer considered the additional labor costs of producing furniture in California. For instance, the Employer took into consideration a California law implemented in late 2014 requiring employers to pay incentive-based production employees extra for rest periods, a new California sick leave law that went into effect in July 2015 (which cost the Employer an additional (b) (4) per year), the 2016 increase of the minimum wage in California, and the anticipated additional increase in the minimum wage over the next five years to \$15 per hour.

Additionally, although the Employer's Wanek 3 plant in Vietnam lacked the same production capacity as Colton (Wanek 3 could produce (b) (4) units per week, while Colton had produced (b) (4) units per week), in January or February 2016, the Employer learned of the excess production capacity at its other U.S. plants. Thus, as set forth in the Employer's Executive Summary, the Employer projected that it could fully replace Colton's production by transferring that work to Wanek 3 and its plants in Ecrú and Ripley, Mississippi, and benefit from lower operating costs.

The Employer also took into consideration external factors that made producing upholstered furniture at Wanek 3 in Vietnam more cost effective than doing so at Colton. For instance, the cost of shipping manufactured furniture from Vietnam to California had significantly decreased from (b) (4) per shipping container in 2015 to (b) (4) per container by April 2016. This was due to lower oil and gas prices in 2015-16 and recently discovered methods for packing more pieces of furniture into a single container. Because shipping costs from Vietnam to California were much lower than from Vietnam to the Employer's other U.S. plants, shutting down Colton made the most sense in terms of operating expenses. Similarly, the Employer factored in the increased value of the dollar in 2015 in comparison to the Vietnamese currency. At that time, the Vietnamese currency dropped 6% against the dollar, meaning that the Employer would benefit from a corresponding drop in all of its expenses in Vietnam.

The financial analysis set out in the emails between its (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) in April and July 2016, as well as in the Executive Summary that the Employer prepared in mid-August 2016, show that it took all of the foregoing cost and

production factors into consideration in making its decision to close Colton. In the Executive Summary, the Employer compared its actual gross margin for April 2016 to what it projected that margin would have been had Colton's production been replaced by Wanek 3 and its two Mississippi facilities. The Employer projected that the latter scenario would have saved it (b) (4) for the month of April 2016, and over (b) (4) for an entire year. There is no evidence showing that the financial analyses in either the Employer's emails regarding Colton's closure or in the Executive Summary were flawed.²⁵ Moreover, all of the Employer's documentary evidence shows that it was focused solely on the legitimate business aims of cost reduction and market retention when considering whether to close Colton.²⁶

In sum, the evidence demonstrates that the Employer's decision to close Colton was consistent with its historic business model of maximizing profitability by shifting production to plants where it has the lowest production costs. Dating back to April 2013, prior to any Union activity at Colton, the Employer's emails show that it planned on developing the ability to produce upholstered furniture at its Vietnam plants. When it achieved that capability in 2015, it had the opportunity to take advantage of the significantly lower labor and production costs in Vietnam. That coincided with the ability to exploit other favorable economic conditions based on producing upholstered furniture at Wanek, including decreased shipping costs, a favorable exchange rate, and cost efficiencies from previously underutilized production capacities at its other U.S. plants. As a result, the Employer's financial analysis in its 2016 emails and Executive Summary, which made no reference to Union activity, projected saving over (b) (4) annually from closing Colton and producing upholstered furniture at Wanek and its other plants. At the same time, the Employer already had incurred and projected further increased costs from continuing to operate Colton due to new state employment regulations. Thus, despite the evidence the General Counsel can rely on to establish his initial burden under *Wright Line*, the foregoing factors show that the Employer would have closed Colton even in the absence of any Union activity.

²⁵ See *El Paso Electric Co.*, 355 NLRB at 447 (finding employer had met its rebuttal burden under *Wright Line* where its financial study showed that closing a customer service location would save the employer the most money in comparison to other options; the ALJ specifically noted, "[t]here is no evidence that the [employer's] financial study was flawed").

²⁶ See *DeSoto, Inc.*, 278 NLRB at 805 (in finding the employer closed one of its facilities for legitimate business reasons, the ALJ noted "all the evidence, especially documentary, focused on cost reduction and savings," and that the employer's lack of focus on profitability did not undercut its legitimate concerns).

Accordingly, based on the preceding analysis, the Region should dismiss the charge, absent withdrawal.

/s/
J.L.S.

ADV.31-CA-185659.Response.Ashley. (b) (6), (b) (7)(C)