UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BODEGA LATINA CORPORATION **Case 21-CA-183276**
d/b/a EL SUPER

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 324

BODEGA LATINA'S REPLY TO THE UNION'S ANSWERING BRIEF

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INTRODUCTION

Given the overlap in the issues the Union and Counsel for the General Counsel address in their Answering Briefs, Bodega Latina addresses the *Wright Line* issues in this Reply and the other issues in its Reply to the CGC's Answering Brief. As a preliminary matter, the Union takes issue with the number of exceptions Bodega Latina filed, claiming they go beyond "address[ing] prejudicial error in the trial process." [Union Br. 1.] The number of exceptions Bodega Latina filed mirrors the number of factual and legal errors in the ALJ's decision. As described in Bodega Latina's exceptions, the ALJ made a number of erroneous legal and factual conclusions. The factual errors ranged from minor inaccuracies to significant oversights that affected the outcome of the case, such as the difference between a vacation payout and paid time off. Indeed, even the Union complains about the ALJ's factual inaccuracies in its exception noting that the ALJ erroneously referred to the CBA as "ratified." [Union's Exception No. 1.]

Contrary to the Union's assertions in its Answering Brief (at 1), Board law does not limit the exceptions process to addressing only "prejudicial error." *See* R&R § 102.45(a)(1)(ii), (f). In fact, the Board must support its factual findings with "substantial evidence," otherwise the federal courts of appeal will not enforce the Board's ruling. *See, e.g.*, *Arc Bridges, Inc. v. NLRB*, 861 F.3d 193, 194 (DC Cir. 2017) ("We do not defer, however, when the Board fails adequately to explain why it has rejected the arguments for a different understanding of the evidence."); *Lucas v. NLRB*, 333 F.3d 927, 931 (9th Cir. 2003) ("Substantial evidence means 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"). Moreover, the ALJ's decisions caused prejudicial error, as Bodega Latina describes in its briefs.

I. BODEGA LATINA RATIONALLY TREATED BELTRAN'S REQUEST AS A PAYOUT REQUEST.

A. The ALJ Erred In Equating A Payout Request With A Paid-Time-Off Request.

Many of the Union's and CGC's arguments suffer from the same fatal flaw as the ALJ's decision: They assume that no difference exists between a request for *paid time off* and a request for a *vacation payout* despite the undisputed evidence to the contrary. Like the ALJ, the Union and the CGC fail to accurately articulate Bodega Latina's evidence on the issue. The Union claims that Bodega Latina described "different ways in which paid *time off* can be requested." [Union Br. 9 (emphasis added).]. The CGC claims (at 9) that the ALJ resolved this issue, citing the ALJ's Decision at page 4, footnote 6 where the ALJ wrote: "Respondent tries to distinguish between a *time-off* request that is either unpaid or paid *using other than vacation pay* or involve [*sic*] medical leave on the one hand, and *time-off* requests *seeking pay using unused vacation hours* as Beltran requested on March 22 as described below." (Emphasis added.) Those descriptions mischaracterize Bodega Latina's undisputed evidence.[1]

Bodega Latina did not offer and explain different types of *time off* requests. As detailed in its Brief in Support of Exceptions (at 6-10), Bodega Latina offered and described the difference between *paid time off requests* (a request to take time off and receive pay for the time) and *requests for vacation payouts* (a request to cash out accrued, unused vacation time irrespective of time off). If the ALJ cannot accurately articulate the Company's evidence, his decision necessarily "fails adequately to explain why it has rejected the arguments for a different understanding of the evidence." *Arc Bridges*, 861 F.3d at 194.

As to what the record shows, the Union cites nothing to contradict Bodega Latina's evidence on how vacation payout requests work. For her part, the CGC cites a few lines of out-

[1] Confusing issues further, the Union claims that the FMLA and CFRA required Bodega Latina to *pay* Beltran during her medical leave. [CGC Br. 1, 6.] That statement is an inaccurate attempt to suggest the Company's actions violated other laws. Neither the FMLA nor CFRA requires *paid* leave. And there is no dispute Bodega Latina permitted Beltran to take as much time off as she needed and returned her to her same job afterward.

of-context testimony to support her conclusion that no difference existed between a paid time off request and a vacation payout. [CGC Br. 9.] Taking the entire line of questioning into view, the testimony makes clear that Bodega Latina handles vacation payouts quite differently from paid time off requests:

> Q Santillan. Okay. So it would be either Mr. Santillan or corporate counsel who ultimately decides to approve an employee's request for paid time off?
> A Not for -- ***not for paid time off; for a payout, a vacation payout***.
> Q I'm sorry. What is a vacation pay -- payout then?
> A ***A vacation payout is*** similar to ***– it's what Ms. Beltran was requesting***.
> Q I guess, can you clarify why that considered a -- a payout versus a vacation time-off request?
> A So a vacation request is when they give the 30-day notice. They request that, they go to the store director, then the store director sends it to payroll, and they process it with payroll. Now***, a payout, when they're requesting to be paid when they're not on vacation***, it's a process from the store to payroll to the VP of HR or corporate counsel to get it approved.
> Q So if they're -- if it's not within the 30-day, I guess, notice that employees are required to give, then you guys call it a payout?
> A Yes.

[Tr. 259:11-260:6 (emphasis added).] The CGC cites the last question-and-answer as if that conclusively establishes that Bodega Latina treated payout requests and paid-time-off request the same. But that vague, confusing question establishes nothing. The CGC assumes the "it's" refers to a paid-time-off request; but the "it's" refers to a "request to be paid when they're not on vacation," since that was the last concept about which the witness testified. In contrast to the response to the vague, leading question, the witness unequivocally testified in response to an open-ended question that a "payout" is "when they're requesting to be paid when they're not on vacation." The undisputed evidence shows that unusual scenario prompts a different process within the Company.

The different process for those types of requests makes sense. A paid time off policy is not an ATM machine where employees can freely cash out accrued, unused vacation at any time.

B. Beltran Requested A Vacation Payout, Not Paid Time Off; The ALJ Failed To Address The Substantial Contrary Evidence.

Neither the CGC nor the Union explain how the ALJ could properly ignore the weight of evidence indicating that Beltran did not submit a paid-time-off request on March 22. Indeed, the Union goes so far as to claim that is "undisputed" or "uncontroverted" that Beltran requested paid time off on March 22. [CGC Br. 6, 8-9.] The *only* evidence that Beltran submitted a paid time off form on March 22 was her own self-serving and internally inconsistent testimony. That testimony stood against the weight of the following evidence:

- Assistant Store Director Miguel Ruiz testified that Beltran did not request paid time off on March 22, and no party disputes Ruiz's presence when Beltran purportedly made the request. [Tr. 19:9-22:19, 178:12-179:24.]
- Union business agent Jose Perez did not mention a prior paid time off request when he emailed HR Manager Angelica Lima on March 28 to ask for money for Beltran's "financial difficulties." [GC Ex. 4.]
- Perez did not testify that Beltran mentioned a paid time off request when Beltran called him on March 27 or 28. [Tr. 42:20-24 (Beltran wanted to "get her vacation pay").] At trial he didn't remember whether Beltran mentioned it, and he did not testify that Beltran mentioned a paid time off request in his Board affidavit. [Tr. 72:13-21, 75:22-76:3.] He also continually referred to her request in terms of a request for money, and only money, just like a request for a vacation payout. [Tr. at 46:23-25 (referring to "our request to get her paid her vacation hours"); 51:6 ("when [Beltran] requested to be paid").]
- In all of the communications related to Beltran's payout request, no one ever mentioned a prior paid time off request. [*See, e.g.*, GC Exs. 4, 5, 6.] The first time Bodega Latina heard such a request existed was at trial. [Tr. 20:24-25.]

- The Company found no paid time off request form in its files.[2]
- Beltran told conflicting stories about a purported March 25 or 26 phone call with Store Director Jose Luna where Luna purportedly denied her request and another call that same day with Perez where the "HR department" agreed to *grant* Beltran's request. [ALJ Dec. 12.] No HR Representative was responsible for Beltran's store at the time, Perez did not testify to the March 25 or 26 phone call at all (even on rebuttal), Beltran did not testify to the phone call on direct, and Beltran did not even remember the phone call until Bodega Latina cross-examined her with her prior inconsistent statement (before the ALJ prohibited further cross examination).

The ALJ could not properly credit Beltran's testimony based on her demeanor alone against the weight of that evidence. *See Springfield Day Nursery*, 362 NLRB No. 30, *4 (2015); *Commercial Workers Local 56*, 316 NLRB 182, 182 (1995); *Vernon Mfg. Co.*, 219 NLRB 622, 622 (1975); *see also Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011), *enfd.* 498 Fed App'x 45 (DC Cir. 2012).

Even accepting Beltran's version of events on March 22, the CGC and the Union presented no evidence that Lima or General Counsel Joe Angulo knew that Beltran submitted a purported paid-time-off form. The evidence shows that Lima and Angulo knew only about Perez's March 28 email requests and the communications thereafter, none of which mention a

[2] The Union argues that the Board should give little weight to the fact that no paid time off requests exists because the Company "lost the doctor's note." [Union Br. 10-11.] Not true. The Company responded to the Union's and CGC's subpoenas. When information came to light at trial suggesting that there may have been more responsive documents, Bodega Latina immediately brought the issue to the ALJ's attention. [Tr. 199:22-208:2.] Within hours, the Company produced the additional documents, *including the doctor's note*. [Tr. 280:3-281:3.] Despite that additional search effort, the purported time off form never surfaced. Furthermore, the Union does not explain why not one person ever mentioned a paid time off request form until Beltran (and only Beltran) testified to its existence at trial.

prior paid time off request. Given that undisputed evidence, Lima and Angulo reasonably treated Beltran's request for money to help with "financial difficulties" as a payout request.

C. Substantial Evidence Does Not Support A Finding That Luna Possessed Authority To Approve Paid Time Off Requests Or Vacation Payouts.

The CGC and the Union merely restate the ALJ's conclusion that Store Director Luna had authority to approve paid-time-off requests or vacation payout requests without addressing the substantial evidence to the contrary. The undisputed evidence shows that Luna lacked that authority. He could approve requests for *time off* for scheduling purposes at the store, but the payment portion indisputably required approval from the payroll department. Indeed, Luna lacked even the basic information required to approve such requests because he did not have access to vacation accruals. [Tr. 225:8-15.] No evidence contradicts that, and both Beltran and Perez testified that they did not know who possessed authority to approve such requests.

The CGC points to evidence that the Store Director signed off on paid time off request forms, but fails to address the facts that Luna then forwarded the forms for "approval" from the payroll department and that the payroll department then reviewed and signed off on the forms as "approved." The CGC notes that "[n]owhere does the form state that the paid-time-off request needs to be approved by the VP of Human Resources or Respondent's legal counsel." [CGC Br. 11.] But this is irrelevant; the VP of HR or the general counsel does not approve *paid time off* requests but rather *vacation payouts*. [Tr. 259:11-15.] And none of the forms in GC Exhibits 9 and 10 related to a vacation payout request.

The CGC further claims that Luna's March 29 email to Lima regarding Beltran's payout request shows he had authority to approve paid-time-off requests. But Luna's email shows the contrary. If Luna possessed authority, he simply could have written "I already denied this."

Instead, he sought to have input where he otherwise had none. And as Lima testified, she did not discuss this email with Angulo when he made the decision regarding the vacation payout.[3]

II. BELTRAN SUFFERED NO ADVERSE EMPLOYMENT ACTION.

The CGC and Union, like the ALJ, would prefer to view the facts of this case in a vacuum as if the April 8 settlement payout never occurred. But Bodega Latina's decision on Beltran's vacation payout request hinged on the settlement payment that occurred within days of Beltran's request for money (and only money), and the fact that honoring Beltran's request for 40 hours of vacation pay would have required the Company to completely recalculate the settlement payment. The CGC argues that the Board should ignore the April 8 settlement payment because "the settlement payouts were separate and apart." [CGC Br. 13.] But several pages later, the CGC admits that "the allegations in this case are closely related to the" settlement and that the issues are "inextricably tied" because they both involve vacation pay issues. [*Id.* at 37-37.] As the CGC admits, the settlement payment is "inextricably tied" to Bodega Latina's decision on Beltran's request for money, and "inextricably tied" to resolving Beltran's request for money. The Board cannot entertain hypotheticals as to what would have happened if Bodega Latina did not make the settlement payment days after Beltran's request for money.

The Union argues that Beltran suffered an adverse employment action because Bodega Latina should have paid Beltran both the settlement amount on April 8 and an additional amount she requested in a vacation payout. [Union Br. 19.] That argument ignores the facts that Beltran asked for money and Bodega Latina paid her money (more than she requested). Indeed, after April 8 when Beltran received the payment, she did not raise the issue again until the Union got

[3] The Union claims that Bodega Latina did not identify the decision-maker with respect to Beltran's payout request. [Union Br. 15-16.] But Lima testified that Angulo made the decision. [Tr. 239:1-10, 243:17-25.] And Bodega Latina repeated in its post-trial briefing and in its Brief in Support of Exceptions that Angulo made the decision.

involved and sought to use Beltran's grievance as leverage in settling other employees' grievances. [Tr. 242:9-19, 253:3-10; 254:2-22.]

Notably, the Union and the CGC do not attempt to address the six cases Bodega Latina cited to show that as a matter of law an adverse employment action did not occur here. The CGC cites one case of her own, *Exelon Generation*. [CGC Br. 14.] But in that case (where the Board did not specifically analyze the adverse action element), the employer required employees to use accrued paid time off that that they did not want to use, depriving them of their pre-existing right to take unpaid time off. The employer thus diminished the employee's benefits. Here, no such facts exist. Beltran requested time off; Bodega Latina granted her all requested time off and returned her to work when ready. Beltran requested money to deal with "financial difficulties" and Bodega Latina paid her money.

The CGC argues that *American Federation of Musicians* does not apply because "the facts here show that a Union supporter was impacted." [*Id.*] But the CGC cites no evidence in support of that assertion. No evidence shows Beltran suffered an impact where she received all the time off she requested and received money in response to her complaints of "financial difficulties." Beltran said nothing about the issue again until months later when her Union representative needed additional leverage in other employees' grievances. "The Board's rising case load and the problems involved in handling it could be alleviated if cases of this type were not processed." *Am. Fed'n of Musicians, Local 76*, 202 NLRB 620, 621 (1973).

III. NO EVIDENCE SHOWS THAT THE DECISION-MAKER KNEW ABOUT BELTRAN'S PROTECTED ACTIVITIES OR HELD ANIMUS TOWARD THEM.

No evidence shows that the decision-maker, General Counsel Angulo, knew about Beltran's protected activities; neither the Union nor the CGC dispute that fact. The Union however claims that "the Company failed to produce any evidence to show that Mr. Angulo himself was not motivated or influenced by Union animus or Jose Luna's anti-union plea in the March 29 Email." [Union Br. 17.] But the Union misses the uncontroverted evidence that Lima

did not discuss Beltran's union activities with Angulo. [Tr. 238:17-25.] Moreover, the CGC bore the burden to show Angulo held animus, and the CGC produced no evidence on that front.

As to generalized animus, the parties agree that Beltran openly supported the union and that she last engaged in protected activity two months before she went on leave (in January 2016). Thus, under *Snap-On* and *Tex-Tan*, the ALJ could not establish animus based on timing. The CGC argues that "in those cases, the timing between the protected activity and adverse employment action was too remote in time." [CGC Br. 18.] But just as in *Snap-On*, two months elapsed between Beltran's protected activity and the allegedly adverse action. In *Tex-Tan*, three months' time sufficiently dissipated the direct connection. The CGC further argues that those cases did not involve direct evidence of union animus. [CGC Br. 18.] Not so. In *Tex-Tan*, the government presented evidence that the employer questioned the alleged discriminatee about her participation in a grievance three months before the alleged adverse employment action.

In any event, the Board should overrule the line of cases holding that generalized animus suffices under *Wright Line*. The CGC and the Union do not argue otherwise. The CGC simply reiterates that the ALJ found the required nexus through the March 29 email. [CGC Br. 18-19.] But the CGC presented no evidence to connect the March 29 email to the decision-maker. Thus, as a matter of law, the CGC failed to show a connection.

IV. THE ALJ ERRED BY REJECTING BODEGA LATINA'S LEGITIMATE BUSINESS REASON AND BY FINDING DISPARATE TREATMENT.

Bodega Latina decided not to separately pay out Beltran 40 hours' worth of vacation in response to her March 28 request because it was about to (and did) pay her 72.27 hours' worth of vacation pay on April 8. Bodega Latina determined that the payment would address her request for money because of "financial difficulties." And Bodega Latina could not otherwise pay Beltran a week's worth (40 hours) of vacation pay without recalculating the entire settlement payment because Beltran had only 22 hours of accrued vacation time left over. In this unique situation involving an unusual vacation payout request and a settlement coinciding in time, Bodega Latina made a legitimate business decision, and would have made the same decision

regardless of Beltran's union activities. *See, e.g.*, *W.R. Case & Sons Cutlery Co.*, 307 NLRB 1457, 1464 (1992) ("[I]t is not for the Board to second-guess such business judgments."); *Mini-Indus., Inc.*, 255 NLRB 995, 1004 (1981) (rejecting arguments that employer could have made different employment decisions; "it is not within the Board's competence to second guess Respondent's business judgment regarding the manner in which it dealt with its employees").

The Union claims that the Board should disbelieve Bodega Latina's legitimate business reason for not granting Beltran additional vacation money because Bodega Latina could have paid Beltran the leftover 22 hours. [Union Br. 19.] The Union ignores that Beltran asked for *one week's worth* of vacation pay—not 22 hours. The CGC claims Bodega Latina could have granted Beltran's 40-hour payout request without complicating the settlement because it granted other employees' paid-time-off requests during a similar period, pointing to GC Exhibits 9 and 10. [CGC Br. 23.] But the CGC presented no evidence that any employee in GC Exhibits 9 or 10 received settlement money or of how much additional unused vacation time those employees had left over after the settlement payment. Significantly, GC Exhibits 9 and 10 do not contain a single example of an employee who received a "partial approval" like the partial approval Beltran claims Bodega Latina should have granted her.[4]

Finally, the CGC repeats the ALJ's findings that Bodega Latina offered "shifting explanations," but the CGC does not respond to Bodega Latina's points that (a) it did not offer the explanations the ALJ attributes to it; (b) its factual positions remain consistent with the sole justification for not payment the additional vacation payout: the April 8 settlement. [CGC Br. 24.] Thus, the Union and the CGC do not offer a cure for the errors in the ALJ's reasoning.

[4] The CGC claims that Luna approved a paid-time-off request "even though the requesting employee had not yet accrued the vacation hours the employee was requesting," citing page 7 of GC Exhibit 9. [CGC Br. 11.] But that document shows that the employee had vacation hours as of the date of the vacation. In contrast, Beltran requested 40 hours of vacation pay for the week she already took off when she had only 22 hours available that week. No evidence demonstrates Bodega Latina granted partial approvals or advanced vacation pay.

For the foregoing reasons, including those stated in Bodega Latina's Brief in Support of Exceptions and Reply to the CGC's Answering Brief, Bodega Latina requests that the Board dismiss the pertinent Complaint allegations or modify the ALJ's Order accordingly.

DATED this 4th day of April, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies that I filed an electronic copy of the foregoing via the Board's electronic filing service on April 4, 2018, to:

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The undersigned certifies that I served a copy of the foregoing via email on April 4, 2018, to:

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