

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ELECTROLUX HOME PRODUCTS, INC.

and

Case **15-CA-206187**

J'VADA MASON, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

I. HISTORY OF THE CASE..... 1

II. OVERVIEW 1

III. ISSUES PRESENTED BY RESPONDENT’S EXCEPTIONS3

IV. FACTS3

 A. The Organizing Campaigns 3

 B. Mason’s Union Activities 4

 C. Supervisor Fair Becomes Mason's Supervisor 7

 D. The Events of April 28, 2017 10

 E. Respondent's Investigation and Decision to Discharge Mason 15

 F. Evidence of Disparate Treatment and Pretext in Connection with
Mason's Termination 19

V. LEGAL ANALYSIS 23

 A. The Judge properly determined that Respondent had knowledge
of Mason's Union activities.
(Exceptions 3-4 and 54-60) 24

 B. The Judge properly found that Respondent harbored animus
toward Mason's Union activities.
(Exceptions 34, 46, 49, 51-53 and 61-65) 27

 C. The Judge did not inappropriately substitute his own judgment
for that of Respondent's management.
(Exceptions 9-14, 18, 28-29, 32-33, 43-44 and 47) 31

 D. The Judge's credibility determinations should not be disturbed.
(Exceptions 25, 30-31, 34, 43, 45-46 and 58) 33

VI. CONCLUSION 35

TABLE OF AUTHORITIES

<i>Braun Electric Company</i> , 324 NLRB 1 (1997)	27
<i>Bruce Packing Co.</i> , 357 NLRB 1084 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015)	24
<i>East End Bus Lines, Inc.</i> , 366 NLRB No. 180 (Aug. 27, 2018)	29, 30
<i>Kitsap Tenant Support Services, Inc.</i> , 366 NLRB No. 98 (May 31, 2018)	23, 24
<i>Libertyville Toyota</i> , 360 NLRB 1298 (2014), enfd. 801 F.3d 767 (7 th Cir. 2015)	23
<i>Montgomery Ward & Co.</i> , 316 NLRB 1248 (1995), enfd. 97 F.3d 1448 (4 th Cir. 1996)	24
<i>National Dance Institute--New Mexico, Inc.</i> , 364 NLRB No. 35 (2016)	27
<i>Ozburn-Hessey Logistics, LLC</i> , 366 NLRB No. 177 (Aug. 27, 2018)	26, 27
<i>Pro-Tec Fire Services</i> , 351 NLRB 52 (2007)	31
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.3d 362 (3d Cir. 1951)	33
<i>Stoody Company</i> , 312 NLRB 1175 (1993)	27
<i>Turnbull Cone Baking v. NLRB</i> , 778 F.2d 297 (6 th Cir. 1985), cert. denied 476 U.S. 1159 (1986)	27
<i>Wright Line</i> , 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1 st Cir. 1981), cert. denied 455 U.S. 989 (1982)	23

I. HISTORY OF THE CASE

The Charging Party in this matter, J'Vada Mason, filed an unfair labor practice charge on September 14, 2017 challenging her termination by Respondent on May 5, 2017. Following an investigation, the Region determined that Mason's charge, as amended, had merit.

A Complaint and Notice of Hearing issued on December 20, 2017 (GCX 1[e]),¹ which alleged that Mason was unlawfully discharged in retaliation for her union and other protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act. Respondent's Answer was filed on January 3, 2018 (GCX 1[g]). On May 7, 8 and 9, 2018, a hearing was held before Administrative Law Judge (ALJ) Arthur J. Amchan in Memphis, Tennessee. Judge Amchan's Decision and Order (ALJD) issued on July 2, 2018 (JD-42-18).

II. OVERVIEW

Respondent is a home appliance manufacturer with a facility it has operated in Memphis, Tennessee since 2013. Respondent's Memphis facility employs approximately 700 hourly production and maintenance employees involved in the manufacture and assembly of residential ovens. These employees are currently represented by the International Brotherhood of Electrical Workers (IBEW) Local 474 (hereinafter the Union) following two successive organizing campaigns which spanned a period from early 2014 through about October 2016. A first election was conducted about May 2015, which the Union lost by a significant margin. Thereafter, a second campaign began almost immediately and culminated in an election conducted on September 27, 2016, which the Union won.

¹ "GCX" and "RX" references are to the numbered exhibits of the General Counsel, or Respondent, respectively. Transcript references are denoted by "Tr." followed by the page number(s). References to "ALJD" are to the pages and lines of the Decision of the Administrative Law Judge (ALJ) as follows: ALJD page(s):line(s).

The Charging Party and discriminatee in this case is J'Vada Mason. Mason worked for Respondent as a Materials Team Lead from 2013 until her discharge on May 5, 2017. Mason was a capable and conscientious employee who loved her job and took it seriously. Mason was also an outspoken employee who was not reluctant to address workplace issues of concern to her and her co-workers.

Mason was also an open and vocal Union supporter during the organizing campaigns and she was a member of the Union's contract negotiation committee up to the date of her discharge. Mason's willingness to strongly support the newly certified Union made her a target for retaliation by her supervisors and management.

About early April 2017, Mason complained to the Union and Respondent's contract negotiation committee about her immediate supervisor, John Chris Fair, after Fair told her that he would lie about his subordinate employees, including Mason, if necessary to avoid being held responsible for workplace errors or deficiencies.

Mason was terminated for alleged insubordination on April 28, 2017. The credible evidence pertaining to that day, however, demonstrates that Mason performed her job conscientiously and to the best of her ability. She immediately addressed issues that could have resulted in down-time on her line. She also did her best to get specific tasks accomplished despite the absence of both bulk drivers who normally support her assigned assembly line (Line 2) on that day.

It is undisputed that on April 28, Mason was instructed by Fair to bring pallets of microwave ovens to Line 2. It is also undisputed that this work required the use of a forklift, equipment that was not available to Mason. Mason's response to Fair that she could not carry out his instruction was not defiance or willful insubordination, but was simply a statement

reflecting reality – she did not have the necessary equipment to accomplish the directive she was given. Fair then took this opportunity to falsely claim that Mason conducted herself in an insubordinate manner on that day. Following a superficial and skewed investigation, Mason was terminated for this pretextual reason.

The record evidence demonstrates that Mason was unlawfully terminated on May 5, 2017 in retaliation for her Union activities in violation of Section 8(a)(1) and 8(a)(3) of the Act.

III. ISSUES PRESENTED BY RESPONDENT’S EXCEPTIONS

1. Whether the Judge properly determined that Respondent had knowledge of Mason's Union activities (Exceptions 3-4 and 54-60).
2. Whether the Judge properly found that Respondent harbored animus toward Mason's Union activities (Exceptions 34, 46, 49, 51-53 and 61-65).
3. Whether the Judge inappropriately substituted his judgment for that of Respondent’s management (Exceptions 9-14, 18, 28-29, 32-33, 43-44 and 47).
4. Whether the Judge erred in discrediting aspects of Diana Jarrett’s testimony (Exceptions 25, 30-31, 34, 43, 45-46 and 58).

IV. FACTS

A. The Organizing Campaigns

The evidence is undisputed that certain of Respondent’s employees, including Stanley Reese and J’Vada Mason, in conjunction with the Union, engaged in two successive organizing campaigns over a period of nearly three years ending in October 2016. In each campaign the voting unit consisted of Respondent’s approximately 700 to 750 hourly production and maintenance employees. The first election was held about May 15, 2015, which the Union lost.

Following the first election, however, employees continued to wear their Union insignia at work and to solicit authorization cards to support the filing of another representation petition following the expiration of the one-year election bar (Tr. 65, 140).

During the months preceding the second election the Respondent engaged in a vigorous anti-union campaign which included streaming anti-union messages on the video monitors in Respondent's cafeteria/break room (Tr. 67, 141). Respondent also engaged in unlawful interrogations, discipline and discharges of employees during this period. Stanley Reese, one of the primary employee organizers during both campaigns, testified that he was ejected from Respondent's premises around April 2016, when he was outside the facility handbilling and distributing authorization cards following the end of his shift. Reese reported this to the Union and he also filed an unfair labor practice charge challenging Respondent's conduct (Tr. 48, 67-69).

Union organizer Noel Sherman and Reese also testified that about July 2016, Respondent recorded employees while they were handbilling outside the facility. About August 2016, Respondent's supervisors and agents unlawfully removed Union campaign literature from employee break rooms and bathrooms. Unfair labor practice charges were filed, which were resolved by an informal settlement agreement (GCX 3; Tr. 46-49, 67-69).

A second election was conducted on September 27, 2016, which the Union won. A Certification of Representative issued on October 5, 2016 (GCX 20).

B. Mason's Union Activities

Mason was a team lead in the materials department. As a materials team lead, Mason coordinated the work of several pickers and material handlers who supported the assembly work performed on Line 2, where several models of electric single wall ovens were produced. Some members of Mason's team, such as the bulk drivers who operated forklifts, were also assigned to support Line 1, where several models of electric double wall ovens were produced. James Allen was the materials team lead for Line 1.

The materials teams were responsible for delivering and replenishing parts needed on the assembly lines in accordance with the production schedule. This work includes delivering and staging palletized “bulk parts” such as glass for oven doors, microwave units, and also smaller items such as clocks and panels needed for specific oven models (Tr. 60). The materials department also replenishes common parts, such as brackets, fasteners and wire harnesses, on an as needed basis.

Mason supported the Union organizing efforts during both campaigns by handbilling, distributing authorization cards and wearing Union t-shirts and buttons (Tr. 140). Mason testified that she grew up in a union household. Her father worked at a Kellogg facility in Memphis and was an active member of the union representing the hourly employees at that facility (Tr. 134-135). Mason also worked for unionized companies prior to being hired by Respondent (Tr. 135).

Mason testified that during the first organizing campaign she spoke to then Human Resources (HR) Director Terry Thomas about the pay disparity among the team leads in various departments. Specifically, Mason pointed out that the increase in pay for a team lead in the materials department was smaller than the pay differential between team leads and hourly employees in other departments. Thomas assured her that he would look into the issue (Tr. 136-137).

Shortly before the first election, Mason was unexpectedly summoned to a conference room for a meeting with Thomas, who was present with one or two other hourly employees. Thomas interrogated Mason about her Union sympathies and requested that she advise her co-workers to vote against the Union and give Respondent a chance to address issues of concern to

employees. Thomas also promised Mason that he would remedy the pay disparity for materials department team leads if she persuaded her co-workers not to vote for the Union (Tr. 138-140).²

In September 2016, Mason attended a captive audience meeting that Respondent conducted as part of its opposition to the organizing campaign. The meeting was led by Plant Manager Sebastian Gulka and a manager from Respondent's headquarters that Mason knew only as "Matt." About 80 hourly employees attended this meeting. Mason sat in the front row (Tr. 142-143). During this meeting the managers made misleading statements about the hardships endured by Kellogg employees during a recent labor dispute that involved a strike and/or lock-out (Tr. 143-144). Mason raised her hand to be allowed to speak and offer corrections about the Kellogg labor dispute, but the meeting adjourned without permitting employee questions or comments. As employees were starting to leave the meeting room, Mason spoke up and challenged the statements managers had made about the Kellogg labor dispute. Matt began yelling at Mason to shut up and stood in front of Mason with his face about 12 inches away from hers (Tr. 145-146). Employees began yelling for Matt to let her talk and when Mason finished her comments, many employees applauded in support (Tr. 142-146).³

After the Union won the election held in late September 2016, Mason attended a steward training seminar and she also served on the Union's contract negotiation committee (Tr. 157; GCX 22). The parties began bargaining about January 24, 2017 (Tr. 22, 159). Generally, the bargaining committees met for three consecutive days, Tuesday through Thursday, every three to four weeks (Tr. 23, 158-159).

² This issue was never addressed by Respondent. In an email to several of Respondent's managers sent in August 2016, Mason again raised issue of pay disparities among team leads in the materials department compared to other departments, as that matter continued to be of concern to Mason (GCX 10; 146-147).

³ Respondent never disputed Mason's testimony about this captive audience meeting.

Mason testified that once the Union won the election, her previously cordial relationship with Materials Manager Larry McClendon became more distant (Tr. 148, 158).

C. Supervisor Fair Becomes Mason's Supervisor

During the fall of 2016, McClendon told Mason that he was hiring someone he knew from church to be a new supervisor (Tr. 154). This new supervisor was John Chris Fair.

After Fair started working as a material department supervisor in late 2016, Mason heard from other employees that McClendon and Fair were related in that their wives are cousins (Tr. 155). Mason recalled overhearing McClendon and Fair talking about being at "Momma's house" for a holiday gathering, which she took as confirmation that the rumor was true (Tr. 155).

Mason testified about Fair's shortcomings as a material department supervisor. Specifically, he never bothered to introduce himself to the employees who work for him and he was resistant to learning how to perform the various duties of his job, which required the team leads to handle some of his tasks, such as ordering parts, for him (Tr. 155-156). Mason also testified that Fair would assign tasks to male employees, such as Kyle Smith, and the men would simply refuse to follow Fair's instruction. In response, Fair would assign another employee (usually a female) to perform the task instead.

About March 2017, McClendon complained to Mason that managers were getting "chewed out" as a consequence of issues being discussed in bargaining sessions (Tr. 162).

Mason testified that about March 2017, when she returned from being out for several days to attend contract negotiations, she had several notes left on her desk by assembly employees on Line 2 requesting her help (Tr. 162-163). When Mason spoke to these employees she learned that assembly team leads had started maintaining bathroom logs, requiring employees to sign in and out when they visited the restroom. Employees were told that if they

went to the restroom too often, or they were gone for more than five minutes, they would be required to produce medical documentation to the team lead. Mason walked up and down Line 2 and found one such log being openly displayed by Assembly Lead Tiffany Broadnax. Mason told Broadnax that this log was improper and a violation of employee privacy. Broadnax protested that the log had been approved by Sylvia Jennings, a non-unit training agent, and also John Collins, the Line 2 assembly supervisor, who was not at work on that day (Tr. 162-166).

Later that same day, Mason observed Operations Manager Jason Parson at Line 2 and she approached where Parson was standing and alerted him to the bathroom log hanging in Broadnax's work area. Parson asked what that was and Mason explained that bathroom logs were now being maintained (Tr. 166-167). As Parson was instructing Broadnax "to take that mess down," McClendon and Fair joined the group (Tr. 167). Mason testified that as she walked away with McClendon and Fair, some of the assembly employees started clapping, applauding Mason's intervention (Tr. 167).

As they walked to Mason's work area, Fair commented that Parson was angry and he asked Mason who she thought would "take the hit" for the bathroom log. Mason replied that since Collins was out that day, he would deny knowing about it, so it would likely be the team lead. Fair then stated, "I don't blame them, because if my job is on the line, I lie on you too" (Tr. 169-170). Mason, stunned by Fair's comment, asked him to repeat himself. At that point Fair put his hands on her desk and looked Mason in the eyes and stated, "If my job is on the line, I'm going to lie on you" (Tr. 170). Mason looked over at McClendon, who was standing next to Fair, and McClendon just dropped his head and did not say anything. Mason testified that she replied to Fair, "Well, since I know that – since you are bold enough to tell me that you are going to lie on me, just know that I am going to tell the truth on you from now on" (Tr. 169).

When the parties had their next bargaining sessions around early April 2017, Mason reported Fair's threat to the Union's lead negotiator, Randy Middleton. At the lunch break that day, Middleton requested a sidebar conversation with Respondent's bargaining team.⁴ Mason reported to Respondent's negotiating team what Fair had said to her on the day the bathroom logs were discovered. Erika Robey, Respondent's Labor Relations Manager, asked Mason to come to HR to provide a statement about this incident (Tr. 24, 169-171).

Mason testified that on the Friday after they finished that round of negotiations, she went to HR to meet with Robey, but was told that Robey had gone home due to illness. The following week, Mason went to HR where she met with Robey and HR Manager Diana Jarrett in a conference room. Mason recounted the threat Fair made to her following the discovery of the bathroom logs, while Jarrett took notes (Tr. 171). Before the meeting ended Mason was told to let HR know if Fair gave her any duties that he does not normally give her, because they did not want him retaliating against Mason (Tr. 172). Mason never heard anything further about her complaint.

HR Manager Jarrett denied that there was ever a meeting she attended in the HR offices with Robey and Mason in which Mason provided an account about Fair's threats to lie about work issues (Tr. 466). Jarrett indicated that she and Robey discussed Mason's complaints (Tr. 453, 465).⁵

Jarrett testified that about late March, she saw Mason at the facility and Mason reported to her that Fair had threatened to lie about work issues (Tr. 453). Jarrett told Mason she would look into the matter (Tr. 454).

⁴ Respondent's lead negotiator was attorney Jonathan Pearson. The rest of the bargaining team included Tim O'Rourke (Assoc. General Counsel), David Smith (VP of HR), Ted Shield (Senior HR Director), Erika Robey (Labor Relations Manager), Jason Parson (Operations Manager) and Jason Rush (Controller) (Tr. 22, 157).

⁵ Robey no longer worked for Respondent at the time of the hearing and was not called as a witness.

Jarrett claims that she called McClendon and asked him about the incident and told him that she needed a statement from Fair (Tr. 454).⁶ Jarrett testified that she determined that this incident did not warrant a formal investigation (Tr. 474).

D. The Events of April 28, 2017

Mason testified that when she reported to work on Friday, April 28, 2017, McClendon and Fair were standing at her desk just after 6:00 a.m. They told her that both bulk drivers that service Lines 1 and 2 (Dana Bennett and Kenneth Ward) were out that day. McClendon stated that he was going to see if he could find someone to fill in. Fair walked off as well, presumably to do the same thing (Tr. 179-180). Mason turned on her computer, checked her email and turned her radio on. Mason testified that she had a brief exchange with Line 2 assembly supervisor John Collins, who asked her who the bulk drivers were for that day. Mason replied that she did not know and suggested he call Fair to find out (Tr. 195).⁷

Mason immediately got a radio call from assembly lead Tiffany Broadnax, who told her that she did not have the correct parts for the next order that was scheduled to run. It appeared that the wrong clocks and panels had been delivered to Broadnax's zone a day or so earlier and she had just discovered the error (Tr. 179, 181).

Mason recognized that this type of error could result in the line going down, so she got the part numbers from Broadnax and found a tug near her work area which she used to pick the correct parts for Broadnax. At about 6:45 a.m, while she was picking those parts, Fair approached Mason and told her that he needed her to take microwaves to the line. Mason

⁶ Jarrett gave conflicting testimony about whether she spoke to Fair about this incident or if she only reviewed a statement he had written (Tr. 473-474). Fair denied being aware of any inquiry into the statement he made to Mason following the discovery of the bathroom logs (Tr. 362-363). Curiously, Fair testified that he first learned about Mason's accusation *from Jarrett around the time of Mason's discharge* (Tr. 362). Jarrett never disputed this testimony by Fair.

⁷ Mason denied that Collins ever asked her to get any parts that morning (Tr. 195-196). Collins did not testify at the hearing.

explained to Fair that she was getting correct parts for Broadnax and trying to get them to her as soon as possible to avoid down-time. Fair responded that he would go and find someone to take the microwaves to the line and walked off (Tr. 179-183). Mason testified that microwaves were not scheduled to run on Line 2 for another four hours (Tr. 182).

As Mason was about to deliver the requested parts to Broadnax, she encountered Fair again, who told her that Gerren Powell (also known as “G”), a bulk driver who normally works on Line 4 (also known as the BADO Line) would be one of the replacement drivers for that day (Tr. 183-184). When Mason delivered the parts to Broadnax, she informed Mason of additional parts that she needed as soon as possible (Tr. 184). Mason got those part numbers from Broadnax and was on her way back to the north supermarket on the tug when she heard assembly team leads from both Lines 1 and 2 calling Powell in quick succession requesting bulk parts for their lines. Powell took the call for Line 1 and when he got the call from a Line 2 assembly team lead just after that, he told the Line 2 lead that he was assisting Line 1. The Line 2 assembly team lead then told Powell over the radio that the bulk drivers he was replacing (Bennett and Ward) support both lines (Tr. 184).

While Mason was picking the additional parts needed by Broadnax, she observed Powell drive his lift down a warehouse aisle close to her location. She overheard Powell making the following angry outburst to himself as he drove past, “They got me fucked up. I’m not going to do both lines. They are not going to work the shit out of me. I’ll clock out of this motherfucker and take my ass to the house” (Tr. 184).

Mason then heard Powell summon Fair on the radio and tell him that he needed to see Fair at the end of Line 4. Mason then observed Powell and Fair speaking to each other at that location. She could see that Powell appeared upset and animated as he spoke, shaking his head

and gesturing with his arms (Tr. 184-186). The only piece of the conversation that Mason could hear was Powell stating to Fair, “I ain’t doing it” (Tr. 185). Fair admitted that Powell complained to him about being assigned to assist with Lines 1 and 2 on that day, but denied that Powell refused to perform any work (Tr. 351-352).

A short time after this, Mason hears Candyce Cox, an assembly employee who was acting team lead that day, call Fair on the radio. From where Mason was picking parts she could see Fair sitting at his desk. Mason observed Fair walk over to Cox, speak to her and walk away (Tr. 185-186). Cox then called Mason on the radio. Mason asked Cox who told her to call and she replied that Fair told her to. Cox needed bulk parts that required a forklift. Mason, who no longer had the tugger, took the part numbers from Cox and told her that she (Mason) was walking. She told Cox to call Powell, as he was the bulk driver for Line 2 for that day. Mason heard Cox try to reach Powell over the radio and she never heard Powell answer (Tr. 186-187). Mason testified that she never saw Powell or heard him on the radio frequency for Line 2 during the rest of that morning (Tr. 188-189).

Mason then encountered Rakea Connelly, a receiving department employee driving a forklift, and she was able to persuade Connelly to assist her by getting the bulk parts Cox needed and dropping them off at the end of Line 2 (Tr. 187-188). Mason subsequently confirmed with Mike Shaffer, a tug driver on her team, that the bulk parts Cox needed had been delivered by Connelly and Shaffer had moved the materials to Cox’s work area using a pallet jack (Tr. 188, 198).

Mason recalls that at this point in the morning, Fair informed her that John Weaver⁸ would be assisting Powell as the second bulk driver supporting Lines 1 and 2 (Tr. 189-190).

⁸ Weaver normally worked on Mason’s team as a picker (Tr. 191).

Mason returned to her desk where she checked the production schedule for changes and was preparing to reload work orders into the pickers' radio frequency (RF) guns (Tr. 189). As she was at her desk, Fair and the Line 1 assembly supervisor, Hamza Huqq, approached her. Fair tells her, "I need you to take microwaves to the line." Mason responds that there are two bulk drivers now and she did not have the resources to take microwaves to the line since she did not have a lift (Tr. 190-192). Mason suggested that Fair check with forklift drivers in the corrugate area, as they might have a lift available if there is no trailer parked at the dock door. Fair replied that those guys do not work for him. Mason then asks Fair if all Respondent's employees aren't part of the same team. At that point Huqq speaks up in a forceful tone of voice and tells Mason that his line needs to run. Mason clarifies that she is not the materials lead for Line 1; that she is assigned to support Line 2 (Tr. 192-193). Huqq stated that he needed his glass and Mason reiterates that she is not Line 1's contact for materials. Mason, confused by Huqq's statements, observed that he was getting angry. She admits that she walked away from Fair and Huqq before she got angry herself (Tr. 193-194).

Mason testified that she never heard Fair or any assembly team lead contact a bulk driver to request that microwaves be brought to Line 2 that morning (Tr. 196). Mason and Fair consistently testified that Fair never instructed her to contact a bulk driver; instead he told her on two occasions that *she was to bring the microwaves to the line* (Tr. 196-198, 333, 360).

Mason testified that Line 2 stopped production that morning at about 10:00 or 10:15 a.m. for reasons unrelated to microwaves (Tr. 197). The down-time was caused by the lack of boxes and the oven models needing microwaves were never run on that day (GCX 6 at 2). Fair acknowledged that both Lines 1 and 2 were down by 10:30 a.m. that morning due to a lack of boxes (Tr. 334, 363).

Fair's testimony about the events of April 28, was unclear and at times contradictory based on his poor recollection.⁹ Fair testified that he first instructed Mason to bring microwaves to Line 2 at about 6:15 a.m. that morning (Tr. 304-305).¹⁰ He then asked her a second time when she was picking parts for Broadnax at about 6:50 a.m. Fair testified that on both occasions she responded by stating that she was not getting on a lift (Tr. 304, 307, 355-356). Fair then testified that his third instruction to Mason to get microwaves for Line 2 occurred no later than 7:30 a.m. that morning when he and Huqq approached Mason at her work area (Tr. 366).¹¹ However, Fair recalled that microwaves were delivered to the line by 7:30 a.m. that morning (Tr. 354). Fair could not explain why, in the presence of Huqq, he continued to direct Mason get microwaves to the line when those items had been or were being delivered by a bulk driver as this conversation was taking place (Tr. 354-355). Fair admitted that at the time of the exchange involving Mason, Huqq and himself, he knew that Weaver was delivering glass to Line 1 (Tr. 329). Fair testified that he informed Huqq that Weaver was getting what Line 1 needed (Tr. 366).¹² Fair could not explain why Huqq was complaining to Mason that Line 1 needed glass during the conversation (Tr. 329).

Fair testified that Line 2 assembly supervisor John Collins instructed Mason to bring microwaves to the line early that morning but he could not provide a clear explanation as to how and when Collins gave this directive to Mason (Tr. 305-306, 359).¹³

⁹ Fair's testimony reflects numerous responses of "I don't remember" (Tr. 308, 310, 312, 313, 315, 316, 318, 319, 326, 328, 329, 331, 337, 340, 341, 348, 350, 356, 358, 359, 363, 366).

¹⁰ Mason testified that the first time Fair instructed her to get microwaves that morning was at about 6:45 a.m. when she was on a tugger in the warehouse picking the correct parts that Broadnax needed (Tr. 182).

¹¹ Fair's written statement dated April 28, indicates that this exchange took place at 7:45 a.m. (GCX 11). Huqq testified that Fair summoned him over to Mason's work area (apparently to witness his conversation with Mason) and that Fair instructed Mason to bring microwaves to Line 1 (Tr. 396-397).

¹² Huqq denied that Fair ever told him that the parts he needed were being delivered to Line 1 by employees other than Mason (Tr. 398, 415-416).

¹³ Collins was never called as a witness, nor is there record evidence that he was not available or no longer employed by Respondent at the time of the hearing.

Fair also testified that he was aware that acting assembly lead Candyce Cox requested Mason assist her in getting bulk parts and that those parts were delivered to Cox that morning (Tr. 331-332). Fair also admitted that Cox may have radioed Powell requesting these parts and he never responded (Tr. 330).

Fair disputed that Broadnax had an urgent need for clocks and harnesses that morning and that her belief that she did not have the correct parts on hand for the models scheduled to run next was incorrect (Tr. 320, 352-353). Apart from Fair's testimony, Respondent failed to adduce any probative evidence to substantiate that contention.

As to the availability of an extra forklift on the day in question, Fair testified that he was not aware that Sykerra Walker's usual piece of equipment, a cherry picker, was not operational on April 28 and she used one of the bulk driver's forklifts instead. Thus, Fair mistakenly believed that there was an extra lift available for Mason to use on the morning of April 28, 2017 (Tr. 351, 364).

E. Respondent's Investigation and Decision to Discharge Mason

HR Manager Jarrett testified that as she was driving to work on Friday, April 28, she received a call from Fair, who reported to her that he needed Mason's assistance that morning and she was refusing to help him out. Jarrett instructed Fair to obtain statements in preparation for a discussion of the matter after she arrived to work (Tr. 446). Fair prepared his own written statement and obtained brief written statements from Huqq, Collins and Cox (GCX 11). Fair did not ask Mason to prepare a statement at the time these other witnesses were asked.

Just before noon on April 28, Mason was told by Fair that she needed to be at a meeting at 12 in one of the conference rooms (Tr. 199). When Mason saw that her calendar did not show any scheduled meetings, she got Shop Steward Stanley Reese to accompany her to the meeting.

An investigatory interview of Mason was conducted by Jarrett. The testimony is confused and inconsistent in terms of who was present at this meeting. Mason testified that she was present with Reese and others present were Jarrett, Robey, McClendon and Fair. Mason and Reese testified that neither Collins nor Huqq were present in this meeting (Tr. 200). Jarrett recalled Collins and Huqq were present in addition to the others (Tr. 446, 477).¹⁴ Fair was never asked to name everyone present in this meeting and in his testimony he only identified Mason and Jarrett being present (Tr. 318).¹⁵

Mason and Reese testified that Jarrett took notes throughout the meeting (Tr. 76, 205-206). Jarrett denied that she took notes and claimed that Robey was the one taking notes (Tr. 477).¹⁶

Mason and Reese testified that during the investigative interview, Mason repeatedly asserted that she never refused any instruction from Fair, but only informed him that she was not able to bring microwaves to the line because she did not have a forklift necessary to do the work (Tr. 74-75, 205). Reese testified that it seemed like Jarrett and the other managers did not want to hear what Mason had to say (Tr. 74).

Jarrett testified that she did not recall Mason stating in the meeting that she did not have a forklift on that day (Tr. 486). Jarrett admitted that during the interview she assumed that since two bulk drivers were absent that day, Mason had ready access to a forklift (Tr. 447, 486-487).¹⁷ Jarrett further admitted that she did not recall being aware from the meeting discussion that

¹⁴ Huqq testified that he recalled being present in a meeting in which Mason was asked questions. He could not recall whether Jarrett or Roberts conducted the meeting. Huqq was also certain that Reese was not present (Tr. 422-425).

¹⁵ Fair also testified that he did not recall what questions were asked or anything Mason said at the meeting (Tr. 318-319).

¹⁶ The notes of the investigative interview were never produced by Respondent pursuant to subpoena (GCX 21). Jarrett presented inconsistent and confusing testimony as to whether she ever had a copy of Robey's notes and why these notes were not part of the record of the investigation (Tr. 477-479).

¹⁷ Fair also repeatedly admitted that he mistakenly believed a forklift was idle that day and available for Mason to use (Tr. 349, 351, 364).

Weaver and Powell had been asked to support Lines 1 and 2 as replacement bulk drivers on that day (Tr. 481-485, 487).

Jarrett also admitted in her hearing testimony that she had a mistaken impression that Cox did not get the parts that she requested from Mason that morning (Tr. 487-491). Jarrett further claimed that Collins told her during the investigative interview that the parts requested by Broadnax were not needed immediately, as Broadnax had advised Mason (Tr. 489). There is no evidence that Broadnax was questioned in this investigation, nor did Respondent offer evidence that Mason was told by Fair or Collins that the need for microwave ovens was more urgent than Broadnax's request. Jarrett testified that she had determined that on April 28, 2017, Mason refused to comply with Huqq's request that she bring microwaves to his line (Line 1) even though both Fair and Huqq denied that such a request was made (Tr. 366, 397, 450, 494-495).¹⁸

Finally, Mason admits that during the investigative interview she declined to provide a written statement. Mason's refusal was based in part on the observation by Mason and Reese that Jarrett was taking copious notes (Tr. 205-206). Mason further explained in her testimony that Respondent's form for employee statements does not provide sufficient space for a lengthy, detailed statement.¹⁹ Mason testified that if she was to provide a statement, she would need time to take it home and prepare a full comprehensive account.

Upon the conclusion of the investigative interview, Mason returned to work and continued to work her normal schedule and duties for the rest of that day and through the following week. When asked to explain why Mason was not immediately suspended pending investigation, Jarrett referenced an agreement between the Union and Respondent pertaining to

¹⁸ Mason also denied that she ever received a work instruction from Huqq on April 28, 2017 (Tr. 193).

¹⁹ Respondent's Employee Statement form appears at pages 2-4 of GCX 11.

employee discipline which she claimed permitted immediate suspensions only when the misconduct involved threats of violence, weapons or drugs (Tr. 444; RX 6).

Jarrett testified that she met with then HR Director Leola Roberts and recommended that Mason be terminated (Tr. 450). The discharge recommendation was then vetted through Pearson, Smith and O'Rourke (Tr. 372-373, 452).

About May 1, Pearson sent an email to Union Business Manager Paul Shaffer in which he notified Shaffer that Respondent was considering terminating Mason following an investigation (Tr. 33). Pearson's email included the witness statements that had been obtained during the investigation (GCX 11). Upon reviewing the statements, Shaffer noticed that there was no statement from Mason. He contacted Mason and recommended to her that she submit a statement detailing her account of the incident (Tr. 36, 213-214). Shaffer testified that he spoke to Pearson and protested the plan to discharge Mason, arguing that no discipline harsher than a suspension was warranted (Tr. 35).

After speaking with Shaffer, Mason prepared a detailed statement which she emailed to Shaffer on the evening of May 3 and to Jarrett on the morning of May 4, 2017 (GCXs 2, 6).

On the morning of May 5, 2017, Mason went to the HR offices to inquire about what time her scheduled leave for the second half of that day would begin (Tr. 216). While she was in the HR offices, Roberts saw Mason and told her that they needed to discuss the results of the investigation. Mason summoned Reese to accompany her to the meeting. In a conference room Roberts met with Mason and Reese. Mason testified that Robey, McClendon, Fair, Collins and Huqq were also present (Tr. 216). According to Robey's notes, the meeting started at 10:55 a.m. and was finished by 11:03 a.m. (RX 3). Roberts told Mason that she was being discharged for insubordination. Mason was angry and walked out of the conference room. In the lobby area of

the HR offices she received a separation notice from Roberts. Mason then told Roberts that she'd be hearing from Mason's attorney, as this was clear case of retaliation (Tr. 217).

Patricia Lytle, a tug operator on Mason's team, testified that on May 5, employees learned that Mason had been terminated when they returned from lunch (Tr. 119). Lytle observed Fair and James Allen (materials team lead for Line 1) celebrate by giving each other a "high-five" hand slap while Fair said to Allen, "she's gone" (Tr. 120).

Jarrett testified that that she never read Mason's statement prior to when Mason was fired (Tr. 494). Roberts, who implemented the discharge decision on the morning of May 5, never mentioned that she saw or considered Mason's statement. Robey's detailed notes of the meeting do not reveal any reference to Mason's written statement or any acknowledgment that it was considered (RX 3).

F. Evidence of Disparate Treatment and Pretext in Connection with Mason's Termination

Respondent's handbook contains a four-step progressive disciplinary policy in which step one is a documented verbal counseling, step two is to a written warning, step three is a final warning and suspension, and finally, the fourth step is termination (GCX 12 at 49). "Insubordination (i.e. refusing to follow legitimate instructions of a superior directly related to performance of one's job)" is specified as prohibited conduct (GCX 12 at 51). Respondent generally considers earlier discipline to be "active" for purposes of progression for a period of one year.

Mason's work history shows that she received a verbal counseling on January 12, 2017 for an allegedly erroneous inventory transaction that occurred more than one month earlier, December 5, 2016 (GCX 8). In response to Mason's alleged insubordination on April 28, Respondent skipped all intermediate progressive steps and imposed termination (GCX 5).

Counsel for the General Counsel introduced documentary evidence showing that Respondent does not normally treat insubordinate conduct so harshly. Carey Taylor was discharged by Respondent about February 25, 2016, for insubordinate conduct in which Taylor, over the course of several days, repeatedly and deliberately refused to complete “movement sheet” documentation (GCX 13 at 4). Respondent’s position statement to the NLRB addressing Taylor’s disciplinary history acknowledges that Taylor engaged in a “pattern of insubordination” from the time he was hired in December 2013 (GCX 13 at 2). In March 2014, Taylor received verbal counseling discipline for playing music on his cell phone during work time. Taylor had been insubordinate by refusing to give his cell phone to his supervisor, and he had been previously counseled for the same misconduct (GCX 13 at 2 and attached Exhibit C). In January 2015, Taylor was issued another verbal warning for insubordination toward his supervisor on multiple occasions. Taylor was also issued a five-day suspension about February 11, 2016, for alleged insubordination in leaving a mandatory meeting without permission (GCX 13 at 3-4). This suspension was determined to be unlawful by the Region 15 and is reflected in the informal settlement agreement introduced into evidence at the hearing (GCX 3).²⁰

Lonneshia Craft was issued a five-day suspension about May 1, 2018 for an incident occurring about March 26, 2018 when she failed to perform tasks assigned to her by her supervisor (GCX 14).

Shanika Handy was issued formal discipline on December 21, 2015 for insubordinate conduct and job abandonment on two separate occasions, December 14 and 19, 2015. On each date Handy was assigned to a work area by her supervisor, but later left that work area without her supervisor’s permission. While the precise level of discipline is not evident from the

²⁰ Taylor’s discharge is not reflected in the informal settlement agreement as it was not determined to be unlawful by the Region.

document, its references to the need for improved performance and the possibility of future discipline demonstrate that it was less than termination (GCX 15).

Lakelia Davis was terminated about December 12, 2016 for gross insubordination when she was approached by an auditor on November 23, 2016 and she refused to answer the auditor's questions, cursed the auditor and drove away from the auditor on a forklift (Tr. 458; GCX 16 at 1-2). Davis' disciplinary history shows that she received a five-day disciplinary suspension in early November 2016 for failure to follow instructions concerning required inventory transactions on September 30, 2016 (GCX 16 at 3-4). Prior to that, on September 8, 2016, Davis received warning discipline when, on September 2, she disregarded her supervisor's repeated instructions to stop texting and using her cell phone while she was operating a motorized piece of equipment (truck) in the warehouse. She protested the supervisor's instructions in an angry tone of voice before driving off from the supervisor (GCX 16 at 5-6).

Keith Dotson was issued five-day suspension discipline in November 2016 for refusing his supervisor's work instruction on November 9, 2016, stating, "I just did not want to do it" (GCX 17 at 1-2). Dotson received prior warning discipline for insubordination in July 2014 for repeatedly defying his supervisor's instruction to take his lunch at a different time from his co-worker (GCX 17 at 3).

Renita Leath was issued verbal counseling discipline on January 12, 2017 for refusing to perform her job on January 4, because she believed that she was entitled to a break at that time. Leath's insubordinate conduct caused 15 minutes of down time on the press equipment she was assigned to operate (GCX 18).

William James was issued five-day suspension discipline in July 2016 when, on June 22, he was instructed by his supervisor to relieve another press operator and he refused to do so (GCX 19 at 1-2).

Mason testified that she was not aware of any employees who have been terminated for insubordination. Mason and Patricia Lytle testified about other instances in which employees refused to comply with work instructions given by Fair, and no discipline to the employee resulted.²¹ Lytle testified that about March or April of 2017, the materials team for Line 2 was short-handed because one of the tug operators (Brian Oliver) had been fired for poor attendance. Fair asked Lytle to help cover the work that Oliver used to perform in addition to her normal duties. Lytle knew that Fair had also instructed Kyle Smith to assist, but Smith refused to do so. Lytle informed Fair multiple times on that day that Smith was not helping. Fair confirmed to Lytle that he had instructed Fair to assist her. Lytle testified that she never received any assistance from Smith on that day and it did not appear that there were any disciplinary consequences to Smith (Tr. 116-118).

Lytle recalled a second incident that also took place about March or April 2017. On this occasion, she heard Fair on the radio giving a work instruction to materials team lead James Allen. She recalled that Allen responded, "I am not doing it. I have other stuff to do" (Tr. 118-119).

Mason testified about an incident involving Kyle Smith that took place around March or April 2017. Mason testified that Mike Shaffer, a new tug operator on her team,²² was still being trained in his new position. Fair instructed Smith to assist Shaffer in delivering parts because

²¹ Respondent never introduced any disciplinary records for the employees Mason and Lytle referenced in their testimony to demonstrate that discipline had in fact issued over the incidents they testified about.

²² Mason testified that Shaffer had been transferred on to her team to replace Brian Oliver, who had been fired for poor attendance (Tr. 173-175).

Shaffer was not yet familiar with all the drop-off points (Tr. 175-177). Smith responded to Fair in a loud voice that he wasn't doing shit, he was not going to help because he had his own work to do and he was tired because he has a second job, then he walked off away from where Fair and Mason were standing (Tr. 175-176, 218). Mason asked Fair if he was going to let Smith disrespect him like that. Fair replied that he wanted to fire him, but Smith had a baby on the way (Tr. 176-177).

Mason also testified that she believed that on April 28, 2017, bulk driver Gerren Powell had refused Fair's instruction to assist with Lines 1 and 2 (Tr. 184-189, 218).

V. **Legal Analysis**²³

In cases where an employer's motivation for a personnel action is in issue, the Board utilizes the test outlined in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). To establish a violation under *Wright Line*, the General Counsel bears the initial burden of showing that the employee's Section 7 activity was a motivating or substantial factor in the adverse employment action. The three elements required to support such a showing are: (1) the employee engaged in union and/or other protected concerted activity; (2) the employer had knowledge of that activity; and (3) the animus on the part of the employer. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (May 31, 2018). If these elements are met, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or other protected concerted activity. See, e.g., *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir 2015). The employer will not sustain its burden merely by establishing that it had a legitimate reason for its action; rather, it must

²³ Respondent's Brief in Support of Exceptions contains no argument advocating the following exceptions: 1-2, 5-8, 15-17, 19-24, 26-27, 35-42, 48, 50 and 66-68.

demonstrate that it would have taken the same action in the absence of the protected conduct. *Kitsap Tenant Support Services*, supra, citing *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015).

Where, as here, the Judge determines that Respondent's proffered reason is pretextual, there is, in effect, no valid justification to weigh against the evidence of discriminatory motivation (ALJD 9:24-27).

A. The Judge properly determined that Respondent had knowledge of Mason's Union activities. (Exceptions 3-4 and 54-60.)

The hearing record provides abundant uncontroverted evidence that Mason engaged in Union activities during the second organizing campaign and as a member of the Union bargaining committee in the months leading up to her sudden discharge. By misstating the law, the evidence, and the Judge's findings, Respondent argues that that the Judge erred in concluding that the decision-makers who discharged Mason possessed the requisite knowledge of her Union activities. Respondent's argument is inaccurate and unconvincing. It should be rejected.

It is well settled that inferences of knowledge may be drawn from circumstantial evidence as well as direct evidence. Such circumstantial evidence includes "(1) the timing of the alleged discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996).

Respondent erroneously claims that the Judge concluded that Respondent's decision-makers in this case were limited solely to Leola Roberts and Diana Jarrett, when that is a clear misreading of the decision (ALJD 9-10). Jarrett testified that her report recommending that Mason be discharged was submitted to Respondent's attorney Jonathan Pearson for review and "processing" (Tr. 452). Roberts acknowledged that Respondent's in-house counsel (Tim

O'Rourke) and its Vice President Human Resources (David Smith) also participated in the review of the proposed discharge (Tr. 327-373). The foregoing evidence supports the Judge's finding that Respondent's decision-makers included Pearson, O'Rourke and Smith (all members of the bargaining committee), in addition to Roberts and Jarrett (ALJD 9:40-41). The Judge properly inferred that Robey also played a role in the deliberations leading to Mason's termination (ALJD 10:11-23).²⁴

It is uncontroverted that Pearson, Smith and O'Rourke were members of Respondent's contract negotiation team and that they were present when Mason reported Fair's threat to Respondent's bargaining committee in a sidebar discussion around early April 2018, just weeks before Mason was discharged. Robey, who worked closely with Roberts and Jarrett, was also present for this sidebar.²⁵

The evidence also shows that Smith served as interim Human Resources Director at the Memphis facility at the time of Mason's confrontation with Plant Manager Gulka and the manager she knew only as "Matt" during a large captive audience meeting held in September 2016, shortly before the second election (Tr. 142-146). Although it is not clear from the record which other members of management were present for this heated exchange (or learned of it after the fact) it is reasonable to infer that Smith, as HR Director, was aware of this confrontation between Mason and the managers conducting the meeting.

Respondent, building on its invalid assertion that Roberts and Jarrett were the sole decision-makers, also claims that the Judge erred in imputing to them knowledge of Mason's Union activities in connection with her participation in contract negotiations (Exceptions 57, 59).

²⁴ This inference is supported by evidence that Robey participated in the April 28 investigatory meeting with Mason and that she took notes at this meeting which Respondent failed to produce; and that Robey worked closely with Roberts and Jarrett on a daily basis.

²⁵ The unchallenged testimony of Mason and Shaffer establishes that Robey expressed concern about the incident Mason had reported and believed that it warranted further review by Human Resources (Tr. 24, 169-171).

No such error was committed. It is well established that the Board will impute a manager's or supervisor's knowledge of an employee's union activities to the decision-maker "unless the employer affirmatively establishes a basis for negating such imputation." *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 2 fn 9 (Aug. 27, 2018). Here, Respondent failed to adduce any evidence calculated to show that imputing such knowledge was improper.

Likewise, Respondent argues in its Brief in Support of Exceptions (at p. 25) that Plant Manager Gulka's knowledge of Mason's Union activities could not be imputed to Roberts or Jarrett because there is no record evidence that Gulka was plant manager at the time of Mason's discharge in May 2017. This contention is simply incorrect as Respondent's answer admits the complaint allegation relating to Gulka's status as Plant Manager (GCX 1(e) at 2 and 1(g) at 2) and Respondent never modified this admission at the hearing. Consequently, Gulka's knowledge of Mason's Union activities was properly imputed to the decision-makers who determined that Mason should be discharged.

The key players in Mason's discharge, specifically, Jarrett, McClendon and Fair, were employed by Respondent during the latter part of 2016 and through the date of Mason's discharge in May 2017. Jarrett testified that she has been a HR manager for Respondent at the Memphis facility since March 2016. This period includes the entire second organizing campaign. It also includes the entire time frame in which all the unfair labor practices reflected in the informal settlement agreement (GCX 3)²⁶ were committed, with the sole exception of the suspension of Carey Taylor, which took place in February 2016 (GCX 13).

Finally, the compelling evidence of Respondent's disparate treatment in discharging Mason provides further support for the inference that Respondent knew of Mason's Union

²⁶ This informal settlement agreement remedies unfair labor practice conduct that was specifically directed toward two pro-Union employees (Stanley Reese and Jocko Williams) both of whom later joined the Union's bargaining committee (GCX 22).

activities. *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 6-7. In sum, there is ample evidentiary support for the Judge's determination that Respondent's managers who participated in the decision to discharge Mason possessed the requisite knowledge of Mason's Union activities during the second election campaign and thereafter as a member of the Union's contract negotiation committee.

B. The Judge properly found that Respondent harbored animus toward Mason's Union activities. (Exceptions 34, 46, 49, 51-53 and 61-65.)

With regard to animus and motivation, rarely does an employer provide a "smoking gun." For this reason, circumstantial evidence is sufficient to prove the unlawful motive element of retaliatory acts alleged to violate Section 8(a)(3). *Turnbull Cone Baking v. NLRB*, 778 F.2d 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986). Unlawful motivation may be established by evidence which includes, among other things, (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, (4) the disparate treatment of the discriminatee(s), (5) departure from past practice, and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. *National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016). Employer conduct which reflects hostility toward protected activities may be relied on as evidence of animus, even if that conduct is not itself unlawful. See *Braun Electric Company*, 324 NLRB 1 (1997); *Stoody Company*, 312 NLRB 1175, 1181-82 (1993).

Just prior to the second election in September 2016, Mason challenged Plant Manager Gulka and another manager ("Matt") when she refused to be silent at the end of a large captive audience meeting and loudly corrected the managers' statements about unionized employees at the Memphis Kellogg facility. Employees applauded Mason's courage in demanding to be

heard, even as Matt got to within one foot of her face, yelling at her to shut up (Tr. 142-146). This dramatic evidence, which was never disputed by Respondent, supports an inference that Respondent harbored animus toward Mason for her conduct in this meeting.

In about March 2017, shortly before Mason's discharge, McClendon complained to Mason that work issues discussed during bargaining sessions were causing management to get "chewed out" (Tr. 162). Around this same time, Mason intervened when bathroom logs were unlawfully imposed on the Line 2 assembly employees²⁷ and she promptly and effectively put an end to the practice the same day that she learned about the logs (Tr. 162-167). Of course, this advocacy by Mason is what prompted Fair to threaten Mason, in the presence of McClendon, that if his shortcomings as a supervisor were ever exposed, he would lie about the situation in order to save his job. Rather than being intimidated by Fair's threat, Mason assured Fair that now that she knew he was willing to lie on her, she would be sure to tell the truth about him (Tr. 169).

Mason was concerned enough about Fair's threat that she brought it to the attention of the Union's chief negotiator at the next bargaining sessions held in early April 2017. The bargaining committees had a sidebar meeting in which Mason described Fair's threat to members of Respondent's negotiating team. Robey instructed Mason to follow up with her when they returned to the facility so that Mason could provide HR with an account of Fair's threat (Tr. 24, 169-171).

Mason testified that the following week she met with Robey and Jarrett in a conference room. Mason recounted the threat Fair made to her following the discovery of the bathroom logs (Tr. 171). Before the meeting ended Mason was warned to let HR know if Fair gave her any

²⁷ The unilateral imposition of such logs during February or March 2017 is clearly violative of Section 8(a)(5) as this constituted a mandatory subject of bargaining.

duties that he does not normally give her, because they did not want him retaliating against Mason (Tr. 172). This warning foreshadowed the events of April 28, in which Mason was wrongfully accused of insubordination by Fair.

On April 28, Fair and McClendon seized on this chaotic morning to accuse Mason of refusing work orders given to her by Fair. They provided inaccurate and incomplete information to Jarrett, who conducted a superficial and skewed investigation of the matter.

Jarrett's testimony clearly establishes that she did not have an accurate understanding of essential facts at the time she recommended to HR Director Roberts that Mason be discharged for insubordination (ALJD 5:30-40; Tr. 450). Jarrett testified that she had determined that on April 28, Mason refused to comply with Huqq's request that she bring microwaves to his line (Line 1) even though both Fair and Huqq denied that such a request was made (Tr. 366, 397, 494-495). The Judge properly considered Jarrett's discredited testimony as evidence of animus and pretext (ALJD 10:33-40). See *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 10 (Aug. 27, 2018).

The hearing record contains compelling evidence of disparate treatment which the Judge correctly relied on to support an inference of animus. Respondent never effectively challenged the General Counsel's evidence demonstrating that Respondent does not routinely discharge employees for insubordinate conduct. Jarrett's limited testimony about one comparator, Lakelia Davis, served to strengthen the General Counsel's case by showing that Davis engaged in conduct that was more egregious than anything Mason was accused of (Tr. 458-459; GCX 16).

Respondent now attempts to belatedly challenge the evidence of disparate treatment. First, it complains that the Judge could not adequately assess the evidence pertaining to other employees disciplined for insubordination because the General Counsel's disparity evidence fails

to include information about the Union activity, or lack thereof, for each comparator. It is submitted that this contention must be rejected. In response to the General Counsel's proffered disparity evidence, it would have been appropriate for Respondent to show that some or all of the comparator employees engaged in known Union activities comparable to Mason, which supports a finding that something other than Union activity explains the difference in their treatment. The fact that Respondent failed to adduce such evidence does not render the evidence of disparate treatment deficient in any respect.

Respondent unsuccessfully attempts to weaken the disparity evidence by discounting evidence pertaining to comparators who were not part of the materials department or who were not team leads, like Mason. These arguments were properly rejected by the Judge (ALJD 9 fn 18). Respondent introduced no documentary evidence or credited testimony to support its claims that team leads and/or materials department employees are in fact subject to different disciplinary standards for insubordination than the rest of the workforce. The failure to substantiate such claims weighs against Respondent. See *East End Bus Lines*, slip op. at 13 fn 36.

The General Counsel's case included evidence of other unfair labor practices as well as evidence of other conduct consistent with anti-Union animus. During the months preceding the second election the Employer engaged in a vigorous anti-Union campaign which included streaming anti-Union messages on the video monitors in Respondent's cafeteria/break room (Tr. 67, 141). Respondent also engaged in unlawful interrogations, discipline and discharges of employees during this period. Stanley Reese, one of the primary employee organizers during both campaigns, testified that he was ejected from Respondent's premises around April 2016, when he was outside the facility handbilling and distributing authorization cards following the

end of his shift (Tr. 47-48, 67-70.). Reese reported this to the Union and an unfair labor practice charge was filed challenging Respondent's conduct.

Union organizer Noel Sherman and Reese also testified that about July 2016, Respondent recorded employees while they were handbilling outside the facility. About August 2016, Respondent's supervisors and agents unlawfully removed Union campaign literature from employee break rooms and bathrooms. Unfair labor practice charges were filed, which were resolved by an informal settlement agreement (GCX 3; Tr. 46-49, 67-69).

As the foregoing demonstrates, strong circumstantial evidence supports the Judge's determination that Respondent's discharge of Mason was motivated by anti-Union animus. Thus, Respondent's exceptions to the Judges' finding of animus and discriminatory motive should be rejected

C. The Judge did not inappropriately substitute his own judgment for that of Respondent's management. (Exceptions 9-14, 18, 28-29, 32-33, 43-44 and 47.)

Respondent argues that the Judge inappropriately substituted his own judgment for that of Respondent in assessing the seriousness of Mason's alleged misconduct. Specifically, Respondent argues that the Judge should have accepted Respondent's determination that Mason's alleged misconduct was disruptive of Respondent's operations, as claimed by Jarrett, and that it warranted discharge. In pressing this argument, Respondent admits that no production downtime resulted from Mason's actions, but claims that she was simply lucky in that regard (Brief at p. 46).

The case relied on by Respondent to support its argument, *Pro-Tec Fire Services*, 351 NLRB 52 (2007), is clearly distinguishable from this case based on the strong evidence of

disparate treatment and other evidence supporting an inference of unlawful motive that is present here and was not present in *Pro-Tec*.

The Judge properly discredited Jarrett's conclusory, uncorroborated assertion that Mason's conduct on April 28 disrupted operations (ALJD 6:34-41; Tr. 451). The witness statements obtained on April 28 made no reference to any negative impact on production (GCX 11). In addition, the Judge accurately observed that Mason was permitted to return to work after the investigative interview concluded on April 28 and she worked without incident the following week until her discharge on May 5, 2017. It is difficult for Respondent to reconcile the fact that Jarrett did not consider Mason's alleged insubordination sufficiently egregious or disruptive to warrant an immediate suspension pending investigation (Tr. 444), but serious enough to be cause for termination, especially when Mason had not reached that level under Respondent's progressive discipline policy.²⁸ The evidence adduced at trial strongly supports an inference that Respondent used this chaotic morning as an opportunity to get rid of Mason, a strong Union adherent who had demonstrated her willingness to openly challenge and criticize her supervisors and managers.

It is submitted that the Judge did not inappropriately substitute his judgment for that of Respondent's management, but instead, carefully weighed the evidence presented and concluded that Respondent's stark departure from its practice of issuing progressive discipline to employees accused of insubordination was evidence that Respondent was motivated to retaliate against Mason because of her Union activities.

²⁸ As argued in the next section, *infra*, Respondent's interim agreement with the Union pertaining to employee discipline would not have prevented Respondent from immediately suspending Mason if it had determined that her insubordination constituted serious misconduct (RX 6).

D. The Judge's credibility determinations should not be disturbed. (Exceptions 25, 30-31, 34, 43, 45-46 and 58.)

Respondent excepts to the Judge's determination that Jarrett was not a credible witness. It is well settled that the Board will not overrule a Judge's credibility resolutions unless the clear preponderance of the evidence demonstrates that those resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). Respondent is unable to meet that standard here.

Respondent excepts to the Judge's reference to the fact that Jarrett prepared an employee counseling form which was never presented to Mason (Exception 25). Jarrett testified that it was not Respondent's practice to issue this form to an employee to be terminated and it was simply documentation for the record (Tr. 492-493). This testimony, however, was not corroborated by former HR Director Leola Roberts, who also testified for Respondent. Respondent's failure to obtain corroboration of this assertion provided a proper basis for it to be deemed unreliable by the Judge.

Jarrett also testified that Mason was not immediately suspended on April 28 because she did not pose a "harmful threat" to anyone (Tr. 495). She also referenced the parties' interim agreement for employee discipline, which permitted immediate suspension when an employee's conduct involved "workplace violence, weapons, drugs, *and other serious violations*" (emphasis added) (Tr. 444-445; RX 6). Jarrett's interpretation of the interim agreement as not allowing for the immediate suspension of Mason was not corroborated by Roberts, nor is it consistent with the plain meaning of the pertinent language in the agreement.²⁹ Thus, the Judge was not required to credit this assertion by Jarrett.

²⁹ Huqq testified that HR had the authority to immediately suspend an employee if it believed such action was warranted (Tr. 429-430).

In other areas where Jarrett was not credited, it was because her testimony was factually inaccurate, conclusory and/or skewed to support Respondent. The best example of this is Jarrett's account of her recommendation to Roberts that Mason should be terminated because of her failure to fulfill the needs of Line 1 (ALJD 5:30-40). The Judge correctly notes that Mason never had responsibilities for Line 1 and Fair never claimed that Mason was instructed to do anything relating to Line 1. Thus, Jarrett's testimony was properly rejected as factually inaccurate and inconsistent with the testimony of Fair (ALJD 6:4-7).

Respondent also excepts to the Judge's finding that Jarrett did not credibly explain why Mason's alleged insubordination warranted discharge while the insubordinate behavior of other employees did not (Exception 34). The Judge's finding in this regard must be sustained. With the exception of a brief reference to Lakelia Davis (Tr. 457-459; GCX 16) Jarrett never mentioned the disparity evidence offered by the General Counsel during the course of her testimony. Even when testifying about Davis, Jarrett never addressed whether she believed that Davis' conduct was comparable to that of Mason's and if not, why not. The simplest answer to Respondent's exception is that the Judge properly determined that Jarrett failed to provide a credible explanation of the apparent disparate treatment of Mason because she in fact never addressed the disparity evidence offered by the General Counsel, let alone explain why it should be discounted.

A close reading of Jarrett's testimony reveals that she was a patently incredible and biased witness and the Judge properly declined to rely on her testimony.

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018 a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was electronically filed via E-Filing with the NLRB Office of the Executive Secretary.

I further certify that on September 14, 2018, a copy of the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was served by email on the following:

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