UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SYSCO COLUMBIA, LLC	Cases: 10-CA-197586
and	10-CA-197588
	10-CA-203636
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION 509	10-CA-210623

SYSCO COLUMBIA, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE IRA SANDRON'S DECISION AND REQUEST FOR ORAL ARGUMENT

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Mark M. Stubley, Esq.
John T. Merrell, Esq.
The Ogletree Building
300 North Main Street
Greenville, SC 29601
864.271.1300 (phone)
864.235.8806 (fax)

Counsel for Sysco Columbia, LLC

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SYSCO COLUMBIA, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE IRA SANDRON'S DECISION AND REQUEST FOR ORAL ARGUMENT

STATEMENT OF THE CASE

These cases relate to two representation petitions filed by the International Brotherhood of Teamsters Local Union 509 (the "Union" or the "Local") regarding two separate units of employees at Sysco Columbia, LLC ("Sysco Columbia," "Respondent," or the "Company"), the Drivers Petition (covering Delivery Drivers, Shuttle Drivers, and Specialty Drivers in Sysco Columbia's Transportation Department) and the Fleet Maintenance Petition (covering Mechanics and Spotters in Sysco Columbia's Fleet Maintenance Department).[1]

I. The Drivers Petition, Case Number 10-RC-194843

On March 15, 2017, the Union filed a petition for a certification election among drivers employed by Sysco Columbia in Case No. 10-RC-194843. The Region ordered a mixed manual and mail ballot election for the drivers. Employees began voting by mail ballot on April 13, 2017. The manual ballots were cast on April 14, 2017. On April 26, 2017, just one day before the mail ballot

[1] References to the ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. ___:___." References to the hearing transcript are by the letters "Tr." followed by page and line number, e.g., "Tr. ___:___." References to exhibits introduced by the General Counsel are by the letters "GC" followed by exhibit number, e.g., "GC ___". References to exhibits introduced Jointly are by the letter "J" followed by exhibit number, e.g., "J ___." Finally, references to exhibits introduced by Sysco Columbia are by the letters "SC" followed by exhibit number, e.g., "SC ___."

return deadline – two weeks after the manual ballots had been cast – the Union filed an Unfair Labor Practice Charge No. 10-CA-197586, which Region 10 allowed to block the ballot count. Since then, Case No. 10-RC-194843 remains open, but the results of the election remain unknown because the Drivers' ballots are impounded. The Union has filed two charges applicable only to the Drivers:

A. Case 10-CA-197586

In Case 10-CA-197586, the Union initially claimed Sysco Columbia violated the National Labor Relations Act ("Act"), in eight (8) separate allegations.[2]

On August 9, 2017, the Union filed it's First Amended Charge, withdrawing six out of the eight original allegations. The allegations that remained were:

1. Threatening employees with the inevitability of strikes in an effort to discourage employees from supporting the Union.

2. Soliciting employee grievances and implied unspecified remedies to their grievances in an effort to discourage employees from selecting the Union as their collective bargaining representative.

On October 2, 2017, the Union filed its Second Amended Charge, leaving just one vague and overly broad allegation out of the original eight (8). The only allegation that remains in this case is:

- The Employer violated the Act by soliciting employees' grievances and implied unspecified remedies to their grievances in an effort to discourage employees from supporting the Union.

[2] Specifically, this Charge alleged Sysco Columbia violated the Act by: (1) granting employees improved wages, benefits, and/or improved terms and conditions of employment in an effort to discourage employees from supporting the Union; (2) interrogating employees about their union membership, activities, sympathies, and protected concerted activities and the union membership, activities, sympathies, and protected concerted activities of other employees; (3) informing employees that it would be futile for them to select the Union as their collective bargaining representative; (4) threatening employees with a loss of wages, benefits and/or terms and conditions of employment in an effort to discourage employees from supporting the Union; (5) soliciting employee grievances and implied unspecified remedies to their grievances in an effort to discourage employees from selecting the Union as their collective bargaining representative; (6) creating the impression that their union and protected concerted activities were under surveillance; (7) threatening employees with the inevitability of strikes in an effort to discourage employees from supporting the union; and (8) polling employees as to how they were going to vote in the upcoming election for representation.

B. Case 10-CA-203636

On August 3, 2017, the Union filed Unfair Labor Practice Charge No. 10-CA-203636, containing nine (9) alleged violations of the Act.[3]

On October 2, 2017, the Union filed the First Amended Charge, withdrawing the first eight (8) allegations; leaving just one. The only allegation that remains in this case is:

- Within the past six (6) months, the Employer has interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by informing employees that their wages and benefits would be frozen if the Union was selected to represent them.

II. The Fleet Maintenance Petition

On March 29, 2017, the Union filed a representation petition covering Sysco Columbia's Fleet Mechanics and Spotters (Case No. 10-RC-195759). The election was scheduled for April 27, 2017. Here too, the Union filed an Unfair Labor Practice Charge on the eve of the election, effectively blocking voting (Case No. 10-CA-197588). This case remains open, pending the resolution of the Union's charges and review of the Decision and Direction of Election in light of *PCC Structurals*, 365 NLRB No. 160 (Dec. 15, 2017). The Union has filed two charges applicable only to the Fleet Maintenance unit.

[3] The Charge alleged that Sysco Columbia violated the Act by: (1) granting employees improved wages, benefits and/or improved terms and conditions of employment in an effort to discourage employees from supporting the Union, specifically: (a) Transportation Supervisor Travis Cook gave employees white and green "Sysco Operations" hats after a captive-audience "drivers" meeting that was held at the Comfort Inn in Bluffton, South Carolina in March 2017; (b) Transportation Supervisor Travis Cook gave employees "Columbia Operations" hats after a captive-audience "drivers" meeting at Hampton Inn in around Hardeeville, South Carolina in March or April 2017; (c) Sysco Columbia, at its Columbia, South Carolina facility, placed a box of free hats for employees to take in March and/or April 2017; (d) creating lead drivers positions at its Charleston, Greenville, and Hilton Head, South Carolina domiciles during the period of January and March 2017; (e) Operations Vice-President Michael Turner paid for the food for a catered event at the Carolina Ale House in Columbia, South Carolina that was held in or around March or April 2017; and (f) granting employees at its Greenville, SC domicile better wages; (2) promoting employees to lead drivers and Transportation Supervisors to induce employees to reject the Union during the period of January to April 2017; (3) denying the Union access and/or continued access to its Greenville, South Carolina domicile in order to discourage and dissuade employees support for the Union on about April 13, 2017; and (4) informing employees, via DVD, that their wages and benefits would be frozen if the Union was selected to represent them.

A. Case 10-CA-197588

In Case 10-CA-197588, the Union initially claimed Sysco Columbia violated the Act by:

1. Granting employees improved wages, benefits and/or improved terms and conditions of employment in an effort to discourage employees from supporting the Union.
2. Interrogating employees about their Union membership, activities, sympathies, and protected concerted activities of other employees.
3. Threatening employees with a loss of wages, benefits, and/or terms and conditions of employment in an effort to discourage employees from supporting the Union.

On August 9, 2017, the Union filed its First Amended Charge. The Union maintained the first two allegations: (1- granting employees improved wages; and 2- interrogating employees) but replaced the third allegation – threatening employees with loss of wages – with the exact opposite: six (6) new allegations claiming that Sysco Columbia promised *increased* wages and other unspecified benefits.

B. Case 10-CA-203629

The Union filed Charge 10-CA-203629 on August 3, 2017, initially claiming Sysco Columbia violated the Act by:

- Granting employees improved wages, benefits and/or improved terms and conditions of employment in an effort to discourage employees from supporting the Union.
- Promoting employees to induce employees to reject the Union.

On September 29. 2017, the Union fully withdrew this Charge.

III. The Wage Memorandum (10-CA-207359 and 10-CA-210623)

The Union filed 10-CA-207359 on October 4, 2017, which related to both the Drivers and the Fleet Maintenance unit. This Charge alleged Sysco Columbia violated the Act by:

- Informing employees that they will not receive their annual pay raise due to the Union's pending Unfair Labor Practice Charges in order to discourage union activities or membership.

Charge 10-CA-207359 was withdrawn in full on November 9, 2017.

On November 29, 2017, he Union filed 10-CA-210623 claiming that Sysco Columbia violated the Act by:

- Informing employees that they would not be receiving their annual wage adjustment while the Union's petitions and unfair labor practice charges were pending.

IV. Region 10's Consolidation of Cases and the Hearing

On October 27, 2017, the Region issued a Consolidated Complaint. Case Nos. 10-CA-197586 and 10-CA-197588 were originally consolidated with another Charge (No. 10-CA-203636) and were set to be heard on February 26, 2018. Cases 10-CA-197586, 10-CA-197588, 10-CA-203636, and 10-CA-210623 were later consolidated and set for a hearing to commence on March 12, 2018.[4] A hearing was held to address the merits of the Amended Consolidated Complaint ("Complaint") from March 12 through March 16, 2018; from May 21 through May 24; and concluded on June 1, 2018.

The Administrative Law Judge ("ALJ") issued his Decision on August 16, 2018. Sysco Columbia now excepts to the ALJ's Decision, as well as to his findings, rulings, and conclusions on matters presented prior to, during, and after the hearing. As discussed in Sysco Columbia's Exceptions and this supporting Brief, the ALJ exhibited clear bias against the Company and made numerous erroneous findings, rulings and conclusions. For example, the ALJ failed to fairly and properly consider the record evidence and applicable legal precedent, and failed to properly require the General Counsel ("GC") to prove by a preponderance of the evidence the allegations of the Consolidated Complaint. The ALJ's rulings, analyses, findings, conclusions, and proposed

[4] At the hearing, Respondent moved to sever the cases regarding the Drivers from the cases involving the Mechanics, so that it could pursue a settlement of the charges related to the Mechanics. The General Counsel opposed Respondent's motion and the Administrative Law Judge denied the motion.

remedial order are unsupported by the record evidence and controlling legal standards, and contrary to the purposes of the Act. The Decision must be overturned.

QUESTIONS INVOLVED

Despite the lengthy trial and extensive record, the case boils down to seven (7) determinative issues:

1. Did the GC establish by a preponderance of the evidence that Sysco Columbia, by Michael Brawner ("Brawner"), promised its employees increased benefits and improved terms and conditions of employment if they rejected the Union by soliciting employee complaints and grievances? (Complaint, ¶ 7) (Exceptions 1-59).

2. Did the GC establish by a preponderance of the evidence that Jim Fix ("Fix") was a Section 2(11) Supervisor when he had possessed no authority in the interest of Sysco Columbia to use independent judgment in exercising or effectively recommending the twelve (12) indicia required under the National Labor Relations Act ("NLRA" or the "Act")? (Exceptions 1-9; 70-75; 85-86)

3. Did the GC establish by a preponderance of the evidence that Sysco Columbia, by James Fix, (i) told employees that Sysco Columbia would grant them wage increases sooner if they voted against Union representation; (ii) promised its employees increased benefits and improved terms and conditions of employment if employees rejected the Union, by soliciting employee complaints and grievances; (iii) blamed the Union for employees not getting wage increases; (iv) granted benefits to its employees by allowing employees to start parking closer to their work areas; (v) interrogated employees about the impact of Sysco Columbia's promises to gauge employees' level of support for the Union; (vi) suggested that employees rescind the election process; and (vii) threatened that if the Union were voted in, pay would be frozen? (Complaint, ¶ 8(a)-(c)) (Exceptions 1-9; 60-86).

4. Did the GC establish by a preponderance of the evidence that Sysco Columbia, by DVD, threatened employees that employee wages would remain frozen during negotiations if they chose the Union to represent them? (Complaint, ¶ 9) (Exceptions 1-9; 87-97).

5. Did the GC establish by a preponderance of the evidence that Sysco Columbia, by a letter from Almetrice "Kema" Weldon ("Weldon") and Michael Turner ("Turner") unlawfully, informed employees that they would not receive a planned September wage adjustment because the Union filed representation petitions and unfair labor practice charges? (Complaint, ¶ 10) (Exceptions 1-9; 110-114).

6. Did the GC establish by a preponderance of the evidence that Sysco Columbia decreased the benefits of its employees by withholding a September wage adjustment? (Complaint, ¶ 11) (Exceptions 1-9; 92-114).

7. Did the ALJ's Decision, conclusions, and proposed remedies properly consider the record evidence and legal precedent? (Exceptions 1-121).

The undisputed facts and applicable legal authorities require a resounding "no" to each of the questions above.

ARGUMENT

I. REQUEST FOR ORAL ARGUMENT

Sysco Columbia respectfully requests oral argument on its Exceptions. Oral argument will assist the National Labor Relations Board's ("NLRB" or the "Board") understanding of the case in several respects. Due to the volume of the record and the sheer number of allegations and issues presented, oral argument will aid the Board's overall understanding of the case. Further, a number of the ALJ's rulings (*e.g.*, shutting down relevant lines of examination) foreclosed Sysco Columbia from developing a complete record. Oral argument would permit a fuller exposition and dialogue regarding the significance of the excluded evidence.

II. EXCEPTIONS APPLICABLE TO MULTIPLE FINDINGS, RULINGS, AND CONCLUSIONS OF THE ALJ (EXCEPTIONS 1-9)

The ALJ committed numerous errors that unfairly disadvantaged Sysco Columbia, favored the GC and the Union, and tainted almost every aspect of the ALJ's Decision. The breadth and harmful effects of the ALJ's multiple errors are illustrated by the record and the ALJ's own Decision. While exceptions to the ALJ's findings on various Complaint allegations are discussed in the later sections of this Brief, the following overarching errors provide compelling justification to overturn the ALJ's decision.

A. *The ALJ Failed to Adhere to the Federal Rules of Evidence*

Congress directed the Board to conduct unfair labor practice proceedings "in accordance with the rules of evidence applicable in the district courts of the United States." Section 10(b) of the Act, 29 U.S.C. § 160(b). Ignoring that directive, the ALJ did not apply the Federal Rules of Evidence ("FRE") in many instances. One egregious example of the ALJ's disregard for the FRE occurred when he admitted twenty (20) of the GC's exhibits (GC Exhibits 23-42, emails sent or received by Fix) into evidence (over Sysco Columbia's objection) at the end of the hearing, without any authentication (FRE 901), foundation as to relevance (FRE 401), or sponsoring witness (FRE 901(b)(1)). Tr. 1195:6-1196:5. Such wanton disregard for basic rules of evidence is troubling enough in its own right. But the ALJ's reliance on such documents in making findings of fact as to crucial issues in this case (Fix's alleged supervisory status) makes the ALJ's failure to require evidence regarding the context surrounding such documents particularly egregious.

As another glaring example, the ALJ allowed the GC to admit a secret recording of a meeting without requiring the GC to properly authenticate the recording. (Tr. 101:9-105:3; 745:10-746:4). The GC attempted to introduce – through the testimony of several witnesses – an audio recording that an unnamed person allegedly made in a meeting where Brawner spoke, and a transcript of that recording (GC Ex.6.), despite Sysco Columbia's objections, and despite the significant amount of hearing time the GC spent playing the recording and attempting to examine various witnesses regarding the recording. The GC refused to produce or even identify the person who allegedly made this recording, depriving Sysco Columbia of the opportunity to cross-examine the recorder.[5] The GC refused to disclose how the recording was made, who was present, whether it was edited, what was edited, who had access to it, or any other relevant information regarding

[5] The Decision references the "driver who made the recording," which was in error, because there was no evidence regarding the identity of the person who made the recording, including whether it was a Driver. (*See* D. 4:10).

the origins and authenticity of the recording. The GC has never disclosed how the GC came to possess this recording, nor did the GC produce any evidence at all regarding the chain of custody and whether the recording had ever been edited.

Lest the GC argues that the statutory qualification of the NLRB's duty to apply the rules of evidence "so far as practicable" really means that there are no rules, and the GC does not have to lay any foundation for its evidence, *see* The Hearing Officer's Guide:

> *The tape recording must be properly authenticated before its receipt into evidence. Proper authentication requires, in part, proof of chain of custody, further, an explanation of any editing must be provided by someone with knowledge of editing.*

NLRB Hearing Officer's Guide at 150-151 (quoting *Medite of New Mexico Inc.*, 314 NLRB 1145, fn. 7 (1994)).

The first witness the GC attempted to use to "authenticate" the recording – Jonathan Matthew Brewer ("Brewer") – apparently was not even present for the meeting purportedly recorded. The GC argued at the hearing that *East Belden Corp.*, 239 NLRB 776 (1978) and *H&M International Transp.*, 363 NLRB No. 139 (2016) stand for the proposition that an employee who was present when a recording was made can authenticate that recording, even if they did not make it themselves. (Tr. 101:15-102:15).

The ALJ specifically relied upon H*&M International Transportation* in agreeing with the GC that the recording was admissible. However, *East Belden* and *H&M International Transportation* are inapplicable because, under cross-examination, Brewer admitted that he [Brewer] was not at the recorded meeting. (Tr. 162:4-18.) The ALJ erred in finding that Brewer "could not be certain" he was present at the meeting (D. 4:11-12) when Brewer actually *acknowledged* he was not at the meeting that was recorded. (Tr. 161:23-162:18).

In *East Belden*, to authenticate a recording, the GC called as witnesses both the employee who made the recording and another employee who was present when the recording was made. 239 NLRB at 782. In *H&M*, the person who made the recording was not a witness, but the GC presented evidence regarding who made the recording, *evidence establishing a chain of custody from the person who made the recording to the GC*, and elicited testimony from other witnesses who were, in fact, at the recorded meeting, which corroborated the veracity of the recording. 363 NLRA at n. 17. In the instant case, the GC refused to identify who allegedly made the recording, failed/refused to establish any chain of custody between the creator and the GC, did not address the possibility of editing, and failed to call any witness who was actually at the meeting purportedly recorded and could not testify to these matters. None of the authorities cited by the ALJ support the admission and reliance upon this exhibit in the total absence of foundation or authentication.

The evidence necessary to authenticate this recording, to the extent it exists, was known only to the GC. The burden of producing this evidence, *i.e.*, authenticating the recording, was the burden of the GC. Because the burden of producing this evidence rests squarely on the GC and because this evidence is peculiarly within the control of the GC, the only proper course would have been for the ALJ to draw an adverse inference that the GC failed to authenticate the recording because the GC could not authenticate the recording by calling the witness who made the recording. *See NLRB Division of Judges Bench Book at §16-611.5 Failure to Call Witness: Adverse Inference*. Instead, the ALJ erred by: (1) allowing the recording to be played; (2) allowing a transcript of the recording to be admitted; (3) allowing the General Counsel to ask witnesses about the recording, including by asking who had never heard the recording before (like Brawner and Ronn English ("English")) to authenticate the recording; and (4) relying upon the inadmissible

recording in making findings of fact and conclusions of law. (D. 4:6-5:14).[6] Additionally, the ALJ essentially authenticated the document in his Decision by opining as to the identity of voices on the recording, which amounts to the ALJ acting as a fact witness, rather than a finder of fact. (D. 4:16-17; 5:6-7). The ALJ further erred by allowing or relying upon the General Counsel's foray of questioning as a basis to make adverse inferences against Respondent.

The ALJ erred by finding that the Respondent's lack of objection to admission of a transcript of the DVD played in the course of 25th hour meetings had a bearing on the admissibility of the remaining portions of the recording the General Counsel introduced. (D. 4:28-29). At trial, the ALJ requested that counsel for Sysco Columbia compare its own transcript of the DVD against the General Counsel's transcript of the secret recording where the DVD was alleged to have been played, to confirm that the DVD portion of the latter transcript was substantively the same as Sysco Columbia's script of the DVD, and then asked Sysco Columbia to stipulate that the transcripts matched (Tr. 105:21-106:22; 134:19-135:14). To request that Sysco Columbia undergo this process, then suggest that Sysco Columbia's acknowledgement that the DVD script and transcript matched constituted an admission that the remainder of the GC's recording was authentic, was an error and indicative of the ALJ's bias against Sysco Columbia.[7] The ALJ was improperly trying to create a record to support the GC's claim s where the GC could not do it itself.

B. *The ALJ's Credibility Determinations Evidence Clear Bias and Are Not Supported by the Record*

[6] The ALJ also erred in finding that Brawner's and English's inability to recognize what was alleged to be their own voices or others' voices (in an unauthenticated amateur recording that should never have been introduced) was indicative of a lack of credibility. (D. 4:1-3, 18-19, 25-27).

[7] The ALJ further erred by finding that the tape recording generally tracked the scripts that Sysco Columbia used for 25th hour meetings and that Sysco Columbia drivers confirmed that Brawner made "certain statements contained in the tape recording" (D. 4:30-33). The ALJ did not provide record cites for these findings, neither of which are supported by the substantial weight of the record. There were significant variations between the scripts, the alleged recording, and the testimony of the witnesses, and therefore, it was error to use the scripts and witness testimony as a means to justify the admission of the unauthenticated recording.

The Company recognizes that the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), *enfd*. 188 F.2d 362 (3d Cir. 1951). An ALJ's factual findings as a whole must show, however, that the ALJ "implicitly resolve[d]" conflicts created by all the evidence in the record. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982). Critically, while an ALJ may resolve credibility disputes implicitly, rather than explicitly, he only may do so if his "treatment of the evidence is supported by the record *as a whole*." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2d Cir. 1996) (emphasis added). Indeed, as the Supreme Court has instructed, the Board may not make its determination:

> . . . merely on the basis of evidence which in and of itself justifie[s] it, without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn.

See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

Rather, the Board must "take into account whatever in the record fairly detracts from [the] weight" of the ALJ's Decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002), quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951). It is "not good enough" that the record contain some evidence that could conceivably have supported an ALJ's finding. The *Universal Camera* standard is met only if the ALJ discusses, and provides citations to, that evidence. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003), *citing Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) (holding that "the ALJ must minimally articulate his reasons for crediting or rejecting" evidence); *PPG Aerospace Indus., Inc*., 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part); *Fortuna Enters., L.P.*, 354 NLRB 202, 203 (2009) (failure to make detailed factual findings and credibility resolutions resulted in remand of finding of Section 8(a)(1) violation).

The ALJ's Decision, which was in many instances devoid of citations to the record, failed to adequately explain why he resolved almost all of the credibility issues in favor of the General Counsel's witnesses. The ALJ stated that he credited witnesses who allegedly gave more detailed accounts of alleged meetings or conversations (without identifying who those witnesses were) over witnesses who allegedly gave less detailed accounts. He did not acknowledge that some of the witnesses who gave "detailed accounts" had significant credibility issues, like Robert Anderson ("Anderson"), who falsely testified about a crucial exhibit. The ALJ also improperly relied on amorphous concepts of general plausibility when explaining how he came to his conclusions. (D. 5:35-37; 23:23-25, 36-37).[8] Finally, as indication of the ALJ's bias in making credibility determinations, he found that a conversation between John Porter ("Porter") and Brawner took place before the election, despite Porter's *own* admission that it occurred *after* the election. (D. 25-30).

In similar cases, the Board has routinely remanded cases for an ALJ's failure to make critical credibility determinations. *See In Re Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1296 (2009) (the failure to address an allegation, make an express credibility finding regarding certain testimony, or address contrary testimony warranted a remand to the ALJ to make the necessary credibility resolutions and determine whether an 8(a)(1) violation was established); *Saigon Gourmet Rest., Inc.*, 353 NLRB 1063, 1064 (2009) ("Because the judge made no credibility findings resolving the testimonial conflict, we will remand this allegation to the judge."); *PPG*, 353 NLRB at 224; *Fortuna Enters.*, 354 NLRB at 203; *see also Edgewood Nursing Ctr. v. NLRB*, 581 F.2d 363, 365 (3d Cir. 1978); *Sears*, 349 F.3d at 514 (*citing Scivally v. Sullivan*, 966 F.2d

[8] For example, the ALJ speculated that employees would not have raised complaints to Brawner had he not solicited them (*see* D. 23:23-25; 23:36-37), which is not supported by any evidence and is contradicted by the fact that several witnesses testified about their prior friendly relationship with Brawner.

1070, 1076 (7th Cir. 1992) ("ALJ must minimally articulate his reasons for crediting or rejecting" evidence)). Remand to the ALJ would be appropriate given the clear bias. Accordingly the Board should overturn the ALJ's Decision in this case.

C. *The ALJ erred in refusing to allow legitimate questions posed by Sysco Columbia that bear directly on the allegations at issue in this case.*

At trial, the ALJ repeatedly refused to permit counsel for Sysco Columbia to ask any questions about employees' interpretation of allegedly unlawful comments made by Brawner and Fix. The ALJ's rationale was that because the standard for whether comments interfere with employee choice is "an objective standard," questions about employees' interpretation of Brawner's and Fix's comments were irrelevant. (Tr. 364:6-365:8; 505:2-14; 515:18-516:21; 1107:23-1109:7). However, these questions did not seek a subjective statement as to the *impact* of the comments (*i.e.*, whether the comments interfered with employee choice), as in other cases addressing the "objective standard," but rather employees' interpretation of the words, which clearly bears upon how a "reasonable employee" would construe such comments. *Cf. Pine Valley Meats, Inc.*, 255 NLRB 402 (1981) (refusing to consider employee testimony regarding *impact* of employee's unlawful comments). Thus, these questions sought relevant evidence.

Along the same lines, the ALJ held that counsel for Sysco Columbia could not, citing the Complaint, ask a witness whether one of the allegations of the Complaint was true, finding that the question called for a legal conclusion. (Tr. 515:18-23). However, the question posed by Sysco Columbia merely sought to address the factual aspects of the Complaint language and thus was entirely appropriate. *See* Tr. at 515:11-23 (asking GC's witness whether Fix interrogated employees about the impact of the Employer's alleged promises, as alleged in the Complaint). Further, even if Sysco Columbia sought a legal conclusion from a lay witness, which it did not, the ALJ would not be expected or bound to give any weight to the testimony elicited. As such, it

was error – and further indication of the ALJ's bias – for the ALJ to foreclose this line of questioning.

III. EXCEPTIONS APPLICABLE TO THE ALJ'S FINDINGS, RULINGS, AND CONCLUSIONS REGARDING THE SEPTEMBER 25, 2018, MEMORANDUM TO EMPLOYEES AND THE ALLEGED WITHHOLDING OF A WAGE INCREASE (EXCEPTIONS 92 to 114)

A. *Factual Background*

1. Overview of Wage Changes at Sysco Columbia

Discretionary wage adjustments at Sysco Columbia are based on the performance of the Company, market relevant data based on surveys prepared by third parties, changes to the scope of particular positions, and operational changes affecting the employees (such as the implementation of new technology). (Tr. 976:22–978:12). The timing of any discretionary wage increases varies from year to year. Sysco Columbia's fiscal year runs from July 1 to June 30 of each calendar year. (Tr. 940:15-16). Wage adjustments are typically granted in the first half of a fiscal year ("FY") (July-December), but as the record shows, adjustments have occurred during the second half of a fiscal year. Additionally, the record shows that that some years show no adjustments at all.

The history of wage adjustments at Sysco Columbia evidences a highly discretionary process of granting adjustments, one that varies widely from year to year. (Tr. 976:22 – 978:12). As evidenced through Turner's uncontested testimony and the supporting exhibits, the petitioned-for employees do not have any pattern of set increases, or even set criteria for determining eligibility for an increase. (Tr. 77:18-85:17; 949:19-1063:21). Some years, no changes were made to certain employees' pay. In others, entire incentive programs were replaced, certain drivers were moved from incentive plans to hourly rates, lump sum bonuses were given rather than wage increases, and weekly incentives were commenced, replaced or eliminated altogether. Even when

wage increases were granted, they varied between base pay increase and/or individual incentive pay, as supported by exhibits and testimony introduced by Sysco Columbia at trial, which, in turn, are summarized below.

2. History of Discretionary Wage Adjustments for Drivers

There are three classifications of Drivers within Sysco Columbia: Delivery Drivers, Shuttle Drivers and Specialty Drivers. (Tr. 41:11-25).

a) Delivery Drivers

Turner's testimony shows that for the six (6) years prior to FY 2018 (that is, FY 2011 through FY 2017), the various components, amounts, and timing of **Delivery Driver** pay adjustments varied immensely.

Delivery Driver Base Rate Change Timing:

FY Year	Classification	Change	Effective Date	Citation
2011	All Delivery Drivers	Yes	July 4, 2010	Tr. 980:23-25; R. 19
2012	All Delivery Drivers	**No**		Tr. 986:17-23
2013	All Delivery Drivers	**No**		Tr. 1000:15-16
2014	All Delivery Drivers	**No**		Tr. 1002:23-1003:4; R. 25
2014 (April)	Grandfathered Delivery Drivers	Yes Yes	April 2014 April 2014	Tr.1008:4-10, 21-22
	New Delivery Drivers			
2015 (October)	Grandfathered Delivery Drivers	Yes	October 1, 2014	Tr. 1014:4-6; SC 28
	New Delivery Drivers	Yes	October 1, 2014	
2016	All Delivery Drivers	**No**		Tr. 1017:16-1018:3; R. 29
2017	Grandfathered Delivery Drivers	**No**		Tr. 1022:16-19; R. 32
	New Delivery Drivers	Yes		

Delivery Driver Hourly Base Rate Change Amounts:

FY Year	Classification	Change	Amount	Citation
2011	All Delivery Drivers	Yes	$0.65	Tr. 980:23-25; R. 19
2012	All Delivery Drivers	**No**		Tr. 986:17-23
2013	All Delivery Drivers	**No**		Tr. 1000:15-16
2014	All Delivery Drivers	**No**		Tr. 1002:23-1003:4; R. 25
2014 (April)	Grandfathered Delivery Drivers	**No**		Tr.1008:4-10, 21-22
	New Delivery Drivers	Yes	Negative adjustment to $15.00 base rate	
2015 (October)	Grandfathered Delivery Drivers	Yes	$0.45 or 2%	Tr. 1014:4-6; SC 28
	New Delivery Drivers	Yes	$5.00 increase; new base rate of $20.00	
2016	All Delivery Drivers	**No**		Tr. 1017:16-1018:3; R. 29
2017	Grandfathered Delivery Drivers	**No**		Tr. 1022:16-19; R. 32
	New Delivery Drivers	Yes	$1.00	

Delivery Driver Incentive Format/Timing Changes:

FY Year	Classification	Change	Plan	Effective Date	Citation
2011	All Delivery Drivers	**No**	Activity Based Compensation ("ABC") remained		Tr. 980:23-25; R. 19
2012	All Delivery Drivers	Yes	ABC changed to the Driver Incentive Program ("DIP")	July 10, 2011	Tr. 986:14-16
2013	All Delivery Drivers	**No**	DIP		Tr. 1000:15-16
2014	All Delivery Drivers	**No**	DIP		Tr. 1002:23-1003:4
2014 (April)	All Delivery Drivers	Yes	DIP was replaced with DIP Fusion	April 2014	Tr.1007:18-22
2015 (October)	All Delivery Drivers	**No**	DIP Fusion		Tr. 1014:21-1015:4; SC 28.
2016	All Delivery Drivers	**No**	DIP Fusion		Tr. 1017:16-1018:3
2017	All Delivery Drivers	**No**	DIP Fusion		Tr. 1023:18-20

Delivery Driver ABC, DIP, and DIP Fusion Incentive Compensation Changes:

FY Year	Classification	Change	Amount/What	Citation
2011	All Delivery Drivers	**No**		Tr. 980:23-25
2012	All Delivery Drivers	Yes	-decrease as result	Tr. 705:10-706:4
2013	All Delivery Drivers	**No**		Tr. 1000:15-16
2014	All Delivery Drivers	Yes	1.5% increase	Tr. 1002:23-1003:4
2014 (April)	All Delivery Drivers	Yes	Grid rate became $27.00	Tr.1008:1-10
2015	All Delivery Drivers	**No**		Tr. 1014:21-1015:4
2016	All Delivery Drivers	**No**		Tr. 1017:16-1018:3
2017	All Delivery Drivers	Yes	Grid Rate Increase by $0.30	Tr. 1022:16-19

Delivery Driver Other Compensation Changes:

FY Year	Classification	Change	Amount/What	Citation
2011	All Delivery Drivers	**No**		R. 19
2012	All Delivery Drivers	Yes	Eligibility to $35.00 weekly STS Incentive	Tr. 987:2-5
2013	All Delivery Drivers	Yes	Did away with STS Incentive; introduced $60.00 weekly DriveCam incentive	Tr. 997:17-998:25
2014	All Delivery Drivers	**No**		Tr. 1002:1-1003:25
2014 (April)	All Delivery Drivers	Yes	DriveCam weekly incentive was eliminated	Tr. 1008:11-13
2015	All Delivery Drivers	**No**		Tr. 1014:21-1015:4
2016	All Delivery Drivers	Yes	One-time $1,000 lump sum check	Tr. 1019:3-8
2017	All Delivery Drivers	Yes	$500 Annual Safety Bonus	Tr. 1022:22-23

b) Shuttle Drivers

Turner's testimony shows that for the six (6) years prior to FY 2018 (that is, FY 2011 through FY 2017), the various components, amounts, and timing of **Shuttle Driver** pay adjustments varied immensely.

Shuttle Driver Base/Hourly Rate Change Timing:

FY Year	Classification	Change	Effective Date	Citation
2011	Shuttle Drivers	Yes	July 4, 2010	Tr. 985:7-12
2012	Shuttle Drivers	**No**		Tr. 991:13-996:5
2013	Shuttle Drivers	**No**		Tr. 1000:17-21
2014	Shuttle Drivers	**No**		Tr. 1005:3-25
2014 (April)	Shuttle Drivers	Yes	April 2014	Tr. 1009:14-17
2015	Shuttle Drivers	Yes	October 1, 2014	Tr. 1016:19-1017:2
2016	Shuttle Drivers	Yes	September 2015	Tr. 1020:8
2017	Shuttle Drivers	Yes		Tr. 1022:20-21

Shuttle Driver Base/Hourly Rate Changes Amounts:

FY Year	Classification	Change	Amount	Citation
2011	Shuttle Drivers	Yes	$0.66	Tr. 983:10-14
2012	Shuttle Drivers	**No**		Tr. 992:12-993:5
2013	Shuttle Drivers	**No**		Tr. 1001:17-21
2014	Shuttle Drivers	**No**		Tr. 1005:3-25
2014 (April)	Shuttle Drivers	Yes	Moved to hourly rate only; $23.20	Tr. 1009:14-17
2015	Shuttle Drivers	Yes	$0.35	Tr. 1016:19-1017:2
2016	Shuttle Drivers	Yes	$0.47	Tr. 1020.8
2017	Shuttle Drivers	Yes	$0.25	Tr.1022:20-21

Shuttle Driver Incentive Format/Timing Changes:

FY Year	Classification	Change	Plan	Effective Date	Citation
2011	Shuttle Drivers	**No**	ABC		Tr. 983:10-14
2012	Shuttle Drivers	Yes	DIP	July 10, 2011	Tr. 992:12-993:5
2013	Shuttle Drivers	**No**	DIP		Tr. 1001
2014	Shuttle Drivers	**No**	DIP		Tr. 1005:3-25
2014 (April)	Shuttle Drivers	Yes	Hourly	April 2013	Tr. 1009:14-17
2015	Shuttle Drivers	**No**	Hourly		Tr. 1016-1017
2016	Shuttle Drivers	**No**	Hourly		Tr. 1020
2017	Shuttle Drivers	**No**	Hourly		Tr. 1022:20-21

Shuttle Driver ABC, DIP, and DIP Fusion Incentive Compensation Changes:

FY Year	Classification	Change	Amount/What	Citation
2011	Shuttle Drivers	**No**		Tr. 983:10-14
2012	Shuttle Drivers	**No**		Tr. 992:12-993:5
2013	Shuttle Drivers	**No**		Tr. 1001:17-21
2014	Shuttle Drivers	Yes	1.5% increase	Tr. 1005:3-25
2014 (April)	Shuttle Drivers	Yes	Became hourly	Tr. 1009:14-17
2015	Shuttle Drivers	N/A		
2016	Shuttle Drivers	N/A		
2017	Shuttle Drivers	N/A		

Shuttle Driver Other Compensation Changes:

FY Year	Classification	Change	Amount/What	Citation
2011	Shuttle Drivers	**No**		R. 20
2012	Shuttle Drivers	Yes	Eligibility to $35.00 weekly STS Incentive	Tr. 992:12-993:5
2013	Shuttle Drivers	Yes	Eliminated STS Incentive; introduced $60.00 weekly DriveCam incentive	Tr. 1001:10-16
2014	Shuttle Drivers	Yes	DriveCam weekly incentive was eliminated	Tr. 1008:11-13
2015	Shuttle Drivers	**No**		Tr. 1016:19-1017:2
2016	Shuttle Drivers	**No**		Tr. 1020:8
2017	Shuttle Drivers	**No**		Tr. 1022:20-21

c) Specialty Drivers

In 2013, Sysco Columbia added Fish-Van Driver positions, which are now referred to as Specialty Drivers. (Tr. 1006:6-10). Turner's testimony shows that for the four (4) years prior to FY 2018 (that is, FY 2013 through FY 2017), the various components, amounts, and timing of **Specialty Driver** pay adjustments varied immensely.

Specialty Driver Base/Hourly Rate Timing:

FY Year	Classification	Change	Effective Date	Citation
2011	Specialty Drivers	N/A		
2012	Specialty Drivers	N/A		
2013	Specialty Drivers	Yes	Created	Tr. 1006:6-10
2014	Specialty Drivers	Yes		Tr. 1006:10-12
2015	Specialty Drivers	Yes		Tr. 1021:8-10
2016	Specialty Drivers	Yes		Tr. 1021:21-22
2017	Specialty Drivers	Yes		R. 32

Specialty Driver Base/Hourly Rate Changes Amount:

FY Year	Classification	Change	Amount	Citation
2011	Specialty Drivers	N/A		
2012	Specialty Drivers	N/A		
2013	Specialty Drivers	Yes	Created position at $12.00 an hour	Tr. 1006:9-10
2014	Specialty Driver	Yes	5% increase; $3.00/hr additional for those with Class A CDL licensure when performing work in a larger vehicle	Tr. 1006:10-16
2015	Specialty Drivers			
2016	Specialty Drivers	Yes	$0.47 or 2%	Tr. 1021:21-22
2017	Specialty Drivers	Yes	$0.25	R. 32

Specialty Driver Other Compensation Changes:

FY Year	Classification	Change	Amount/What	Citation
2011	Specialty Drivers	N/A		
2012	Specialty Drivers	N/A		
2013	Specialty Drivers	**No**		
2014	Specialty Drivers	Yes	$3.00 hour pay increase for employees with a Class A CDL License. Only applicable when performing on a truck requiring such licensure	Tr. 1006:12-16
2015	Specialty Driver	**No**		
2016	Specialty Drivers	**No**		
2017	Specialty Drivers	**No**		

3. History of Wage Adjustments for Fleet Maintenance

a) Mechanics (All Grade Levels)

Turner's testimony shows that for the six (6) years prior to FY 2018 (that is, FY 2011 through FY 2017), the various components, amounts and timing of **Mechanic** pay adjustments varied immensely.

Mechanics Base/Hourly Rate Change Timing:

FY Year	Classification	Change	Effective Date	Citation
2011	All Mechanics	Yes	July 4, 2010	R. 33
2012	All Mechanics	Yes	July 10. 2011	R. 34
2013	All Mechanics	Yes	July 8, 2012	R. 35
2014	All Mechanics	Yes	July 2013	Tr. 1036:13-18; R. 36
2015	All Mechanics	Yes	August 31, 2014	R. 37
2016	All Mechanics	Yes		Tr. 1043:13-1044:7
2017	All Mechanics	Yes		R. 39

Mechanics Base/Hourly Rate Change Amounts:

FY Year	Classification	Change	Amount	Citation
2011	All Mechanics	Yes	$0.55 to $0.80	R. 33
2012	All Mechanics	Yes	$0.55 to $0.75	R. 34
2013	All Mechanics	Yes	$0.40 to $0.55	Tr: 1033:22-1034:6; R. 35
2014	All Mechanics	Yes	$0.23 to $0.39	Tr:1036:13-18; R. 36
2015	All Mechanics	Yes	$0.23 to $0.33	R. 37
2016	All Mechanics/ Technicians	Yes	2.5% increase	R. 38
2017	Fleet Technician IIs (Journeymen) and one Fleet Technician III (Master)	Yes	2% increase	R. 39
	Remaining Fleet Technician III (Master)		1.5% increase	

Mechanics Other Compensation Changes:

FY Year	Classification	Change	Amount/What	Citation
2011	All Mechanics	Yes	Eligible for attendance bonus	Tr. 1028:5-10
2012	All Mechanics	Yes	Eligible for attendance bonus	Tr. 1032:3-7
2013	All Mechanics	Yes	Eligible for attendance bonus	Tr. 1034:1-6
2014	All Mechanics	Yes	Eligible for attendance bonus	Tr. 1036:13-18
2015	All Mechanics	Yes	Eligible for attendance bonus	Tr. 1040:5-1041:5
2016	All Mechanics	Yes	Attendance bonus eliminated	Tr. 1046:1-2
2017	All Mechanics	N/A		

b) Spotters

Spotters Base/Hourly Rate Change Timing:

FY Year	Classification	Change	Effective Date	Citation
2011	Spotters	Yes	July 4, 2010	R. 33
2012	Spotters	Yes	July 10. 2011	R. 34
2013	Spotters	Yes	July 8, 2012	R. 35
2014	Spotters	Yes	July 2013	Tr. 1036:13-18; R. 36
2015	Spotters	Yes	August 31, 2014	R. 37
2016	Spotters/ Maintenance Utility Worker	Yes		Tr. 1043:13-1044:7
2017	Spotters/ Maintenance Utility Worker	Yes		R. 39

Spotters Base/Hourly Rate Change Amounts:

FY Year	Classification	Change	Amount	Citation
2011	Spotters	Yes	$0.50	R. 33
2012	Spotters	Yes	$0.45	R. 34
2013	Spotters	Yes	$0.29	Tr: 1033:22-1034:6; R. 35
2014	Spotters	Yes	$0.22	Tr:1036:13-18; R. 36
2015	Spotters	Yes	$0.22	R. 37
2016	Spotters/Maintenance Utility Worker	Yes	2% increase	R. 38
2017	Spotters/Maintenance Utility Workers	Yes	1.5%	R. 39

Spotters Other Compensation Changes:

FY Year	Classification	Change	Amount/What	Citation
2011	Spotter	Yes	Eligible for attendance bonus	Tr. 1028:5-10
2012	Spotter	Yes	Eligible for attendance bonus	Tr. 1032:3-7
2013	Spotter	Yes	Eligible for attendance bonus	Tr. 1034:1-6
2014	Spotter	Yes	Eligible for attendance bonus	Tr. 1036:13-18
2015	Spotter	Yes	Eligible for attendance bonus	Tr. 1040:5-1041:5
2016	Spotter	Yes	Attendance bonus eliminated	Tr. 1046:1-2
2017	Spotter	N/A		

B. *The September 25, 2017, Memo*

In September 2017, in response to questions raised by employees about possible wage adjustments, Sysco Columbia issued a memorandum explaining the situation to employees ("the September Memo"). (Tr. 82:18-83:13) (GC 3). That memoradum stated in part that: (a) "federal law requires that a company maintain wages and benefits at the status quo until the petition is resolved through an election, withdrawn by the union, or dismissed;" (b) "we cannot legally make any discretionary adjustments to wages until the union's petitions are resolved;" (c) "Teamsters' filing of unfair labor practice claims against the company effectively blocked the Driver and Mechanics elections;" and (d) "[t]here can be no changes to wages, benefits or other terms of employment while this process continues." (GC 3).

At no point in the hearing did the GC attempt to glean Sysco Columbia's motivation in issuing the memorandum. Instead, and apparently in reliance on the ALJ's observation as to the same, the GC appeared content to allow the September Memo to "speak for itself." (Tr. 82:8-85:22). Indeed, so did the ALJ, both in the hearing and in his Decision. While not in any way, shape or fashion reluctant to ask questions of witnesses on other issues (*See, e.g.,* Tr. 1-1225), the ALJ did not ever inquire as to the Company's motivation with the letter. Nor did the General Counsel ask such questions, even after calling Turner to the stand two times and, with that added to cross, having a total of three opportunities to examine Turner on the issue. (Tr. 33:22-86:16; 638:4-646:19; 1051:19-1063:21).

C. *The Relevant Law*

1. Administrative Law Principles

It is black letter administrative law that the record in any unfair labor practice proceeding must factually support an ALJ's decision, including the "findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper

disposition of the case." 29 C.F.R. § 102.45(a). It is also true that the Board has the authority to review *de novo* the record at the hearing, the ALJ's Decision, the exceptions thereto, and supporting briefs when addressing exceptions raised by a party to an ALJ's Decision and recommended order - and then to decide the matter. 29 C.F.R. § 102.48(b). The ALJ's Decision on the wage issue in this matter fails spectacularly under these standards, especially the ALJ's findings of fact and conclusion of law that an 8(a)(3) violation occurred – a failure that demands a Board reversal.

2. Section 8(a)(3) As Applied To An Alleged Withholding Of A Wage Adjustment

Contrary to the ALJ's assertion and apparent misunderstanding of the binding legal principles (D. 25:22-32; 26:1-9), *Wright Line*, 251 NLRB 1083 (1980), provides the applicable standard for analyzing whether the withholding of a wage adjustment violates Section 8(a)(3). *Advanced Life Systems*, 364 NLRB No. 117 at p. 2 (2016), *enf. denied in relevant, Advanced Life Sys. v. N.L.R.B.*, 898 F.3d 38 (D.C. Cir. 2018). Under *Wright Line*, the General Counsel must prove three *prima facie* elements to state a claim: and only then does shift burdens of proof to an employer: (1) a showing of union activity by the employees, (2) employer knowledge of that activity, and (3) union animus on the part of the employer. 364 NLRB No. 117 at p. 2.

Critical to this case, an ALJ can base a finding of animus on an employer's failure to continue making standard or set wage adjustments. *Advanced Life Sys.*, 898 F.3d at 47. (*citing NLRB v. Katz*, 369 U.S. 736 (1962)). To prove animus in this manner, however, an ALJ must first reasonably find that the wage adjustments at issue "present a recognizable pattern establishing who will receive a raise, when it will occur, and how much that raise will be." *Id*. Otherwise, "the essential predicate of the General Counsel's claim—that [the employer] had the type of well-established and automatic practice of paying fixed amounts at predetermined intervals that would allow continued payment without violating [the Act]—is missing." *Id.*; *see also NLRB v.*

Aluminum Casting & Eng'g Co., 230 F.3d 286, 290 (7th Cir. 2000) ("A critical factual question underlies this part of the Board's case: did [the employer] have an established practice of granting annual across-the-board wage increases at the time the Union began its organizing campaign . . . ?").

Conversely, an ALJ cannot support a finding of animus with contemporaneous statements that violate Section 8(a)(1) based on fine, hair-splitting interpretations of what employees may reasonably infer or not infer. If the Board permitted this, an ALJ could bootstrap statements potentially violating Section 8(a)(1) based on an employee's interpretation, but not on any specific evidence of animus by the employer, to find discriminatory animus by the employer. Such a speculative leap of inference is not proper. *See Advanced Life Sys.*, 898 F.3d at 48-49 (Statements violating Section 8(a)(1) based on employee interpretation of why an employer failed to adjust wages "cannot be bootstrapped into evidence of actual discriminatory intent [by an employer] given the confusing questions of legality surrounding [the employer's] ability (or not) to continue such payments.").

3. Section 8(a)(1), As Applied To An Alleged Withholding Of A Wage Adjustment and a Related and Allegedly Unlawful Communication on Wages

During the critical period in any representation election, an employer is required to maintain the status quo with respect to wages, benefits, and other terms and conditions of employment. Indeed, as a general rule, an employer's legal duty in deciding whether to grant or withhold a benefit while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. *See R. Dakin & Co.*, 284 NLRB 98 (1987), cited in *United Airlines Servs. Corp. Employer Support Servs., Inc.*, 290 NLRB 954 (1988) (*quoting Reds Express*, 268 NLRB 1154, 1155 (1984)). A similar status quo requirement exists after a representation-case vote in favor of union representation occurs because "an employer that chooses

unilaterally to change its employees' terms and conditions of employment between the time of an election and the time of certification does so at its own peril, if the union is ultimately certified." *Overnite Transp. Co.,* 335 NLRB 372 (2001), *citing Mike O'Connor Chevrolet*, 209 NLRB 701 (1974) (*rev'd and rem on other grounds*, 512 F.2d 684 (8th Cir. 1975)). In addition, "the duty to bargain, at least in the sense of a prohibition on unilateral changes, attaches as of the election date." *Celotex Corp.,* 259 NLRB 1186, 1193 (1982).

An 8(a)(1) - and similarly an 8(a)(5) - violation will occur if an already planned event (i.e. wage increase) or a "standard" or "established" practice exists (i.e. part of the status quo) and the employer fails to implement or follow the standard practice. *Katz*, 369 U.S. 736; *E.I. du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012). However, without such a status quo, the absence of a wage adjustment cannot constitute in any logical way an unlawful "withholding of a benefit." *Katz*, 369 U.S. 745.[9]

Recognizing the conundrum, the Board has established a standard for an employer to avoid a Section 8(a)(1) finding from *announcing* the withholding of a wage increase. Even where an employer has planned wage or benefit adjustments (which was not the case here), the Board has held that it is lawful for the employer to delay such changes pending the resolution of the petition. An employer does not violate the Act when it explains to employees that: (1) benefit adjustments are only being suspended to avoid improperly influencing employees regarding their support for the union; and (2) that adjustments will resume after the petition is resolved. *See Sam's Club*, 349 NLRB 1007 (2007) (Board reversed the ALJ's findings because the employer explained the law under the Act and expressed that such adjustments were going to occur after the vote); *Noah's Bay*

[9] Respondent outlines here applicable and analogous 8(a)(5) principles because one of its arguments for issuing the September Memo is the possible bargaining obligation on Respondent with respect to the driver's unit. *See* Section 2 below. Even absent that section's argument, Respondent asserts that the Board's status quo principles (both static and dynamic) in Section 8(a)(5) and 8(a)(1) cases all evolve from *Katz*, and thus are strongly persuasive by analogy.

Area Bagels, LLC, 331 NLRB 188, 189 (2000) ("[W]hile an employer is not permitted to tell employees that it is withholding benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation will be deferred until after the election."). This is precisely what Sysco Columbia did in this case.

IV. THE ALJ ERRED IN FINDING THAT SYSCO COLUMBIA WITHHELD WAGE ADJUSTMENTS FROM EMPLOYEES IN VIOLATION OF SECTION 8(A)(3) AND (1) (EXCEPTIONS 92 to 114)

A. *The ALJ's findings with respect to wage adjustments were erroneous and not supported by the record because Sysco Columbia did not have a set practice of granting annual increases* (Exceptions 92-103, 107, 109-114)

The ALJ's factual findings and failure to consider other facts in this matter are replete with error, compounded due to the dispositive nature of the facts involved. The ALJ asserts, without any rational basis in the record, various findings that he then uses to conclude Sysco Columbia violated the Act. The ALJ first states that Turner testified that in years past, across-the-board increases were given by the Company's Southeast Division based on the Company's performance the previous year and compensation paid by competitors in the market. (D. 15:31-34). The ALJ's statement is false.

Instead, a close review of Turner's testimony, Turner being the only witness testifying with any significance to the Company's pay practices and history and whose testimony was uncontested, clearly demonstrates that Sysco Columbia never had annual "across the board" raises. Indeed, any wage adjustments were: (1) never automatic; (2) never set as to timing; (3) never set to the amount; (4) never set to the form; and (5) in some years, simply did not occur. Indeed, the facts in the record indicate clearly that any wage adjustments for the relevant employees, especially for the three classifications of drivers, were never "automatic," "typical," "fairly consistent," or "normal." The ALJ blatantly ignored the uncontested record evidence of numerous components

of employee pay and varying types and levels of changes thereto that existed for employee pay since FY 2011 at Sysco Columbia.

Nor was any FY 2018 wage adjustment ever "planned" or decided to be granted in the "normal course of business," notwithstanding the ALJ's reliance on the September Memo.[10] Moreover, the September Memo speaks for itself and provides the valid business justifications for the Company's decision to delay any wage adjustments, justifications that the ALJ found to be non-existent. Numerous employees asked about wage adjustments, and Sysco Columbia wanted to update the employees on what was occurring and it was complying with legal obligations. These conclusions are clearly supported in the Statement of Facts above and the transcript, especially at the citation locations accompanying the Respondent's Exceptions.

B. *Sysco Columbia considered wage adjustments as part of the status quo.*

Similarly, as evidence of the Respondent's attempts to follow the law, Respondent presented uncontested evidence at trial, once again through Turner, that it maintained status quo when set pay practices were clear. Specifically, during the critical period, the Respondent has adjusted and will continue to adjust delivery driver pay pursuant to the stop reclassification process. (Tr. 799:20-24; 904:1-25; 940:19-21; 963:19-964:10; 1054:24-1055:9; 1056:18-1057:4). In addition, Sysco Columbia has adjusted, and will continue to adjust, mechanic pay based on those employees' respective abilities to obtain additional certifications. (Tr. 1043:13-1044:7; 1046:1-2; 1048:17–1049:8; 1055:20-1056:17).

C. *Wright Line is applicable to this case*

The standard applied by the ALJ in this matter is nearly incomprehensible. As an initial matter, the ALJ asserts, without any reasoned analysis, that *Wright Line* is not applicable. Other

[10] Significantly, the September Memo only says the wage adjustments "typically" occur in September; nowhere does it say they were "planned" for September 2017. (*See* GC 3.)

than citing to cases for the proposition that an 8(a)(3) violation exists if an 8(a)(1) exists over a withheld wage increase while employees await a union election, the ALJ merely defers to the General Counsel's failure to assert *Wright Line* as the standard, ignoring the fact that Respondent correctly proffered that analysis for this case in its post-hearing brief. Indeed, under Section 8(a)(3), an employer's motivation is the *sine qua non* of a violation. This holds true when an employer withholds wage adjustments out of concern for violating Section 8 of the Act. *See Advanced Life Systems*, 364 NLRB No. 117 at p.2.

After first stating that *Wright Line* does not apply, the ALJ then, in effect, applied a hybrid *Wright Line* analysis by requiring Respondent to bear the burden of proving that wage adjustments would have been withheld even if the Union was not in the picture. Missing whatsoever is any appropriate analysis from the ALJ, or any proof from the General Counsel, of Sysco Columbia's animus, as the GC was required by Wright Line to prove.

1. Given the absence of proof of animus, the ALJ erred in finding that a Section 8(a)(3) violation exists.

Although never addressing the animus requirement directly in his Decision, the ALJ does make some findings of fact, though erroneous, that one might attempt to argue as supporting unfounded and unsupported Company animus. (*See e.g.* D. 25:8-10). None of these findings can survive a close review by the Board and, as such, cannot support a finding of animus.

a) Contrary to the ALJ's finding, no "established practice" of annual wage adjustments exists.

When evaluating the lawfulness of an employer's withholding of a wage adjustment when faced with union activity, one can infer animus from an employer's failure to continue making standard or set wage adjustments. *Advanced Life Sys.,* 898 F.3d 38 (*citing Katz*). Indeed, one circuit court has held that the critical and initial question in such cases is whether an employer has

"an established practice of granting annual across-the-board wage increases at the time the Union began its organizing campaign." *Aluminum Casting,* 230 F.3d at 290.

The ALJ here found that Respondent had an established practice of granting annual, across-the-board, wage increases. There is no record evidence to support the absurd finding. In fact, the record evidence overwhelmingly proves the contrary. One need merely review again Respondent's Statement of Facts and Argument with respect to the ALJ's findings, both *supra* in this brief¸ to then reject the ALJ's finding of animus based on a patently unproven, in fact, a patently *non-existent* "established practice" by Respondent with respect to wage adjustments.

b) Contrary to the ALJ's findings of fact and conclusions of law, the September Memo does not prove animus.

In the hearing transcript, the ALJ clearly stated his opinion that Respondent's September Memo "speaks for itself." (Tr. 82:10-16). Then, with nothing more, the ALJ finds erroneously that the memo was retaliatory (D. 25:8-10).

Remarkably, the case directly relied upon by the ALJ to find that the withholding of a wage adjustment during the critical period of a union campaign is an 8(a)(3) violation, *SNE Enterprises, Inc.,* 347 NLRB 472, 472 (2015), supports the Respondent's interpretation of the September Memo and not the ALJ's findings and conclusions. In that case, a posting by the employer addressed the employer's decision, expressly saying, "A wage increase was scheduled to be announced and implemented the end of this week." *Id.* at 480. That fact, combined with many other facts indicating a very specific, already planned increase, led the Board to find an 8(a)(3) violation. *Id.*

The message to employees in *SNE Enterprises* is factually and legally different from than the Respondent's September Memo. The relevant communication from Sysco Columbia's Memo was, "We have had several associates ask about wage adjustments that would typically be made in September. We appreciate your inquiries and understand the concerns expressed by some."

(GC Ex. 3). Even adding the comment that the existence of the blocking unfair labor practice charges would delay resolution of the union petitions does not support a finding of animus; the language used in no way "blamed" the Union. Instead, the September Memo shows Sysco Columbia attempting to explain to employees the legal process and next steps, all within Sysco Columbia's section 8(c) rights.

c) Even if the September Memorandum violated Section 8(a)(1), it is an error of law to find animus from within such Memo.

Even if the Memorandum did violate 8(a)(1) (which is denied), the ALJ's reliance upon the Memorandum to support a finding of animus is inappropriate due to the reasons for the letter and the dangers of incorrectly applying Section 8(a)(1) principles to "presume" animus from a document found to violate the Act because a "reasonable" employee may interpret it as coercive.

The D.C. Circuit, in its recent 2018 Decision in *Advanced Life Systems*, provides a very appropriate standard for the interplay of Sections 8(a)(1) and 8(a)(3) in the factual circumstances faced by the ALJ. 898 F.3d 38. Specifically, the court outlined a two-part analysis. First, the essential predicate in these types of wage adjustment disputes is that the alleged "established practice" of wage adjustments must be a well-established and automatic practice of paying fixed amounts at predetermined intervals. *Id*. at 47. Second, an employer's statement that the existence of a union petition and legal issues surrounding the same for not granting a wage adjustment may indeed violate 8(a)(1), but is not enough to prove the requisite animus necessary for an 8(a)(3) violation.

The court's reasoning is sound; it preserves the ability to balance the different concerns raised in scenarios where wage adjustments are allegedly a routine practice, and then withheld in violation of Section 8(a)(3) and related employer statements also allegedly violating Section 8(a)(1). This proper balancing occurs by recognizing that communications about an employer's

decision not to adjust wages based on legal concerns during a status quo period are analyzed from the perspective of the reasonable employee, where an employer's motivation is irrelevant.

d) The FY 2018 wage adjustment received by warehouse employees is irrelevant to the issue at hand and any reliance on the same to find animus would be error.

The ALJ attempts to use the existence of the wages received by warehouse employees to distinguish *Advanced Life Systems*. That attempt, however, puts the "cart before the horse" when one analyzes for animus. Under *Wright Line*, what occurred to other employees, that is, to other comparators, only becomes relevant to the employer proving its *Wright Line* burden if animus *has already been found.* Reliance on the existence of alleged comparators to demonstrate animus before animus has been found is a classic application of circular reasoning.[11] The existence of alleged warehouse pay raise is not relevant to any analysis for employer animus.

2. The ALJ failed to properly consider or follow Respondent's Supplemental Authority

In its post-hearing brief, the Respondent argued that the unique circumstances of this case, that is, where the driver election is complete, but with ballots impounded, give Respondent even more legal justification for not granting FY 2017 wage adjustments for drivers. This argument aligns Respondent in the nearly exact same posture as the employer in *Advanced Life Systems*: the drivers may have voted for union representation, which would mean that an 8(a)(5) obligation exists now. Respondent, just like the employer in *Advanced Life Systems*, is in a "damned if you do, damned if you don't" scenario.[12] Notwithstanding Sysco Columbia's conundrum, the ALJ did

[11] Any assertion by the ALJ that the pay adjustment received by warehouse employees in FY 2018 establishes a valid comparator is error. General Counsel failed to introduce any evidence to suggest that warehouse pay and driver and fleet maintenance pay bear any relation to each other. Moreover, the General Counsel presented no evidence on any pay change history for warehouse employees. Thus, on the record, no comparator analysis is even possible.

[12] The ALJ failed to consider *E.I. du Pont de Nemours*, 364 NLRB No. 113 (August 26, 2016) ("*DuPont*"), overturned by *Raytheon Network Centric Sy*., 365 NLRB No. 161 (Dec. 15, 2017). As of September 2017, when Sysco Columbia informed employees of the status of a "typical" (not planned and purely discretionary) September wage adjustment,

not address this argument at all in his decision. Instead, he gave weight to only one side of Respondent's conundrum – the mere possibility of a re-run election for drivers was enough for the ALJ to, erroneously, ignore *Wright Line*. (D. 25:28-32).

D. *Respondent's September Memo Did Not Violate 8(a)(1).*

Even if one assumes a recurring September wage adjustment existed and was withheld (which is denied), Sysco Columbia's actions were lawful in the context of the two existing RC petitions.[13] The September Memo properly responded to employee questions with the law, which is that during campaigns, a company must follow the NLRA and cannot make discretionary changes. Moreover, Sysco Columbia stated two times in the September Memo that any delay to discretionary wage adjustments would be resolved once the RC cases for both Drivers and Fleet Maintenance employees concluded. Therefore, the September Memo, on its face, does not imply an absence of retroactivity and conversely states the opposite – that retroactivity may or may not occur, "may" being the operative concept because no "pattern" of raises for Sysco Columbia exists, either in amounts or timing.[14]

A close review of the September Memo can lead to only one conclusion – everything stated therein is factually and legally accurate. The September Memo specifically states: (a) "federal law requires that a company maintain wages and benefits at the status quo until the petition is resolved

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(Tr. 82:18-22) (GC 3), *DuPont* was the law, the law that placed Sysco Columbia at peril for any Driver pay changes. Specifically, under the aspect of the *DuPont* standard relevant to the law on September 25, 2017, the date of the September Memo, the Board had held "that bargaining would always be required, in the absence of a [collective bargaining agreement], in every case where the employer's actions involved some type of 'discretion' " and regardless of any past employer practice. *Raytheon*, 365 NLRB No. 161 at p.1 (describing the relevant holding in *DuPont*).

[13] In good faith, one really cannot assume such because the September Memo never said such discretionary adjustments to wages were being withheld, much less that a planned September increase even existed.

[14] We note that in the context of this case, "retroactivity" is not related to a discrete and planned wage adjustment amount Sysco Columbia would have given or even an established past practice of wage adjustments. Instead, it would only apply to Sysco Columbia's practice of possibly giving – and, perhaps, possibly not giving- wage adjustments to certain employees. Closely related to this concept is the General Counsel's erroneous argument at the hearing for "full back-pay" retroactive to September 2017. There is no set wage adjustment to order.

through an election, withdrawn by the union, or dismissed;" (b) "we cannot legally make any discretionary adjustments to wages until the union's petitions are resolved;" (c) "Teamsters' filing of unfair labor practice claims against the company effectively blocked the Driver and Mechanics elections;" and (d) "[t]here can be no changes to wages, benefits or other terms of employment while this process continues." (GC Ex. 3). The letter clearly illustrates the Company's efforts to comply with the Act and ensures that it was not later charged with unfair labor practice charges for providing discretionary wages during the critical period or in derogation of the Union's right as the Drivers' bargaining representative.

As such, both Section 8(c) of the Act and the First Amendment to the United States Constitution provide protection to Sysco Columbia from any governmental burden or prohibition for the statements made in the September Memo. Under Section 8(c), "the expressing of any views, argument, or opinion, or the dissemination thereof, whether written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of a benefit." 29 U.S.C. §158(c). Sysco Columbia has done nothing more than exercise those statutory rights under Section 8(c) in this matter. Furthermore, the Constitution applies with equal vigor to statements made by commercial enterprises as to those made by individuals. Thus, to interpret the Act so expansively as to prohibit truthful, non-threatening recitations of exactly how the law operates surely must infringe upon the free speech right granted to employers by the First Amendment, notwithstanding any interpretation or application of Sections 8(a)(1) and 8(c) urged by the General Counsel in this matter to the contrary.

In addition, the NLRB has recognized that employers do face a dilemma in a union campaign if a planned wage adjustment is set to occur in the critical period. This recognition has

led to the development of what amounts to a "safe harbor" for employers who wish to avoid the possibility of looking like they want to interfere with employee free choice by either granting or withholding a wage increase after the petition and prior to the vote.

Even where an employer has planned wage or benefit adjustments (which was not the case here), the Board has held that it is lawful for the employer to delay such changes pending the resolution of the petitions. An employer does not violate the act when it explains to employees that: (1) benefits adjustments are only being suspended to avoid improperly influencing employees regarding their support for the union; and (2) that benefits adjustments will resume after the petition is resolved. See *Sam's Club*, *supra* (Board reversed the ALJ's findings because the employer explained the law under the Act and expressed that such adjustments were going to occur after the vote); *Noah's Bay Area Bagels, LLC*, *supra* ("[W]hile an employer is not permitted to tell employees that it is withholding benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees" that implementation will be deferred until after the election).

A close review of the September Memo lines neatly up with the above standard. First, the letter correctly states that the Company cannot provide such increases because of the unjust and unfair impact it may have on the Union and its petitions. Second, as clearly stated in the letter, the "discretionary adjustments to wages" were paused "until the union's petitions are resolved." The Company could not make it any clearer that the discretionary benefits could be distributed in the future. Just as the Board found in *Sam's Club*, an employer who informs its employees of the legal issues and the need to put off the discretionary wage adjustments until the NLRB issues a decision is perfectly legal. At the hearing, General Counsel did not have a shred of evidence or testimony to support a contention that the Company did not plan to provide such discretionary wages once

the legal issues have been resolved. Because Sysco Columbia satisfied the *Sam's Club* elements, the September Memo is not a violation with respect to either the Drivers or the Fleet Maintenance employees.

V. EXCEPTIONS APPLICABLE TO THE ALJ'S FINDINGS, RULINGS, AND CONCLUSIONS WITH RESPECT TO CLAIMS INVOLVING BRAWNER (Exceptions 10-59)

A. *The ALJ erred in holding that Brawner had the authority to effect the promises alleged or that employees would interpret Brawner as having such authority*.

As an initial matter, the ALJ erred in finding that any employee would reasonably construe Brawner's alleged comments as representing a promise made on behalf of Sysco Columbia. (D. 21:33-41). Brawner works for Sysco Corporation as the Market President for the Southeast. (Tr. 723:14-16).[15] He has not worked for Sysco Columbia since 2012, and some witnesses testified they did not know him prior to the campaign. (Tr. 351:5-19; 658:21-23; 726:1-2). He spends the majority of his time working in Atlanta. (Tr. 725:1-2). It is undisputed that he has no authority to hire, fire, set wages, set benefits, or make day-to-day decisions on behalf of Sysco Columbia. (Tr. 803:21-804:5; 804:18-23). His responsibility is making sure best business practices are shared among the eleven (11) operating companies for which he is responsible, essentially behaving like "a consultant when they need something." (Tr. 723:20-25; 804:9-17). If he believes processes and best practices are not being adhered to by an operating company within his footprint, he has the ability to "influence" the operating company. (Tr. 820:22-821:1). Because Brawner did not have any authority to decide or change employees' terms and conditions of employment, no employee would reasonably construe any of Brawner's alleged comments as a promise that Sysco Columbia would make improvements to their terms and conditions of employment. Additionally, the ALJ

[15] Respondent excepts to the ALJ's characterization of Sysco Columbia's "corporate structure," including the characterization of Sysco Columbia as "reporting to Sysco Southeast." (D. 21:36-38). There is no evidence to establish a "corporate structure," nor was there evidence presented to suggest "Sysco Southeast" is an actual entity.

erred by holding that Brawner's statements reasonably gave employees the impression that he could influence management decisions relating to their wages, in light of the lack of evidence that he had any authority to do so. The ALJ erred in making the leap from "influence" to "promise change" without any evidentiary or legal basis.

B. *The ALJ erred in failing to hold that Brawner's statements were free speech protected under Section 8(c) of the Act*

The Complaint in this case alleged that Brawner "by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment, if the employees rejected the Union." (Amended Complaint at ¶ 7). The ALJ held that Brawner solicited grievances and/or promised improved terms and conditions of employment by asking employees to "give [him] 12 months" to "fix things" at Sysco Columbia during employee meetings. (D. 19:9-12). The GC also contended that Brawner solicited employee grievances in telephone conversations and one-on-one meetings. These allegations were beyond the scope of the Complaint and improperly considered by the ALJ. Even if these allegations were true, which is denied, the ALJ erred in finding that these comments rose to the level of a violation of the Act. (D. 22:1-24:3).

Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." With respect to solicitation of grievances, "[i]t is…well-established that it is not the solicitation of grievances itself that violates the Act, but rather the employer's explicit or implicit promise to remedy the solicited grievances that impresses upon employees the notion that union representation is unnecessary." *Wal-Mart Stores*, 340 NLRB 637, 640 (2003). The Board has recognized that "generalized

expressions of an employer's desire to make things better have long been held to be within the limits of campaign propaganda." *MacDonald Machinery Co.*, 335 NLRB 319, 319 (2001).[16]

Pleas for "a year" or "more time" to address employee issues have repeatedly been found lawful by the Board, *as long as they are not accompanied by a promise of specific improvements*. *See Noah's New York Bagels, Inc*., 324 NLRB 266 (1997) (employer did not violate the Act by telling employees that the filing of the petition indicated the supervisory team had "messed up" and telling employees: "Please vote to give us a second chance *to show what we can do*. If we don't meet your expectations, the Teamsters will be there—they'll be just as happy to take your dues and initiation fees later as they are now," because "Respondent did not make any specific promise that any particular matter would be improved.") (emphasis added); *National Micronetics, Inc*., 277 NLRB 993 (1985) (company vice president did not violate the Act by asking employees to give him "more time" and a "second chance to *see if they could make things better*" where "[t]he statements do not promise that anything in particular will happen," but instead indicate "a general desire to make things better") (emphasis added); *Keeler Brass Co*., 301 NLRB 769 (1991) (no violation of the Act where company president told employees: "Be fair to me *and give me the opportunity to prove myself*. If I let you down, under the law, the UAW can petition for a new election in one year, and they can campaign throughout that period if they want to.") (emphasis added); *Purple Communications, Inc.*, 361 NLRB No. 1050 (2014) (Company CEO/President did not violate the Act by stating: "[i]f given an opportunity over the next 12 months *[to] evaluate whether, you know, conditions in their mind relative to what is controllable versus that which is*

[16] As the cases cited herein show, the ALJ's legal conclusion that "statements found to be lawful are not in the context of solicitation of grievances or complaints" – a statement for which he does not cite any authority – is not an accurate statement of the law. (*See* D. 22:30-31). Likewise, although the ALJ held that Brawner's communications with employees were "highly out of the ordinary" (D. 23:14-17), he did not cite any authority to show that this alleged fact – which is not supported by the record – has a bearing upon any issue involved in the case.

not controllable has improved or has not improved and you could always address a Union situation 12 months later. But give us an opportunity to bridge that divide," where employer did not make any promises of specific improvements) (emphasis added); *Peerless of America, Inc*., 198 NLRB 982 (1972) (Company official did not violate the Act by telling employees the facility had a bright future "if employees would give them six months *to get everything ironed out*.") (emphasis added); *Newbury Eggs, Inc*., 357 NLRB 2191 (2011) (holding employer did not violate the Act by asking employees to "give me one more chance…."); *Blue Diamond*, No. 20-CA-34199, 2009 WL 2923261 (NLRB Div. of Judges Sept. 8, 2009) (holding GC was "grasping at straws" by arguing that company solicited grievances when the Company's General Manager asked employees "to give me a *year to deal with the issues that you've told me about*," where "[t]here certainly was no promise to resolve any particular grievance….")(emphasis added).[17]

Many witnesses did not support the allegation that Brawner asked for more time "to fix things," as the ALJ held. (Tr. 605:17-22; 610:4-8; 682:10-15; 743:5-9; 756:20-24; 758:2-5; 845:25-846:10; 846:12-847:6). Additionally, even if the substantial weight of the record supported that finding, Brawner's alleged comments were merely "generalized expressions of an employer's desire to make things better" like the comments repeatedly held lawful by the Board in the cases cited above. Because Brawner never explicitly or implicitly promised specific improvements to

[17] The ALJ held that "[s]ome employee witnesses testified that Brawner stated he would look into improving pay, supervision, and other benefits." However, only two employees testified that Brawner said he would "look into" certain complaints they raised during meetings. One of those was Perisee, who had significant credibility issues. *See* Tr. at 260:2-5 (testifying, contrary to other witnesses, that Brawner guaranteed shuttle drivers 40 hours per week). The other was Shanning. The overwhelming majority of witnesses did not support this testimony. Even if Brawner had made such comments, it would not violate the Act. *New Process Co*., 290 NLRB 704, 738 (1988) (employer did not violate Act when "in response to an employee's complaints, told the employee that if she had such problems, she should call him on the phone and they would look into it."); *Purple Communications*, 361 NLRB No. 126 (employer did not violate Act by asking for "12 months to improve communications and work with employees to address their concerns" and telling employees he was "looking into" certain issues raised by employees, where the employer did not make any promises of specific improvements). Therefore, the ALJ erred by crediting the testimony of two employees over the vast majority of other witnesses, and further erred by finding that such comments violated the Act.

employees' terms and conditions of employment, Sysco Columbia cannot be held to have violated the Act.

C. *The ALJ's conclusions that Brawner solicited grievances and promised improvements to terms and conditions of employment are not supported by the credible evidence of record.*

No witness testified that Brawner promised employees any increase in wages or benefits during the union campaign. Instead, virtually every witness, including the overwhelming majority of the GC's witnesses, admitted that Brawner never promised any improvements whatsoever to terms and conditions of employment. (*See* Tr. 165:4:12; 206:9-18; 244:14-22; 285:25-286:3; 324:15-325:7; 362:5-17; 501:12-25; 716:22-717:10; 847:13-16; 856:13-25; 870:13-871:15; 1084:1-5; 1085:13-1086:11; 1220:2-6). Travis Gates, one of the General Counsel's witnesses, acknowledged that Brawner expressly told employees he could not promise them anything. (Tr. 338:11-21). Similarly, another of the GC's witnesses, Brewer, said Brawner told employees that adjustments to their pay were "a [Sysco Columbia's] corporate decision" and that "there's nothing I can handle as far as that goes." (Tr. 181:24-182:3). Therefore, even if Brawner requested 12 months to "fix" the Company, "make it right," or "make it better," and these comments could be regarded as "soliciting grievances," which is denied, it would not violate the Act.[18]

Only one witness claimed that Brawner promised any specific changes that would have a significant impact on drivers' terms and conditions of employment, and that witness's testimony was not credible. Joe Perisee ("Perisee"), a shuttle driver in the Hilton Head domicile yard, claimed that Brawner said "we can do that" when a driver asked if the Company could guarantee

[18] Many witnesses admitted that Brawner never asked them to identify grievances. (Tr. at 174:15-20; 847:15-16; 856:22-25; 859:4-9; 882:12-16). Simply asking if employees "have any questions," as a small number of employees testified Brawner did, is not an unlawful solicitation of grievances. *Curwood, Inc.*, 339 NLRB 1137, 1140 (2003) (holding that employer asking whether employees have any questions was not an unlawful solicitation of grievances, where the question was clearly intended to refer to questions about the election process and about the employer's views concerning unionization); *New Process Co.*, 290 NLRB 704, 738 (1988) (employer did not violate the Act by asking employees if they had any questions).

shuttle drivers a 40-hour workweek. (Tr. 260:2-5). However, the driver who asked Brawner that question (Todd Shanning ("Shanning")), as well as the other shuttle driver in the Hilton Head domicile yard (Rodney Mayers ("Mayers")), both credibly testified that Brawner never promised to give shuttle drivers 40 hours per week. (*See* Tr. 1069:17-1070:11; 1213:20-1214:20).[19]

Perisee also claimed that Brawner told Drivers the Company was working on a new incentive pay plan for route drivers. (Tr. 265:66). Shanning confirmed that Brawner referenced a new incentive pay plan during a meeting, but clarified that he did so after Shanning brought it up and that Brawner said "Sysco, as *a whole company nationwide*, is looking at that." (Tr. 1214:23-1215:4). Referring to the incentive plan as being something Sysco Corporation, a parent company, and a separate legal entity, was already examining nationwide is not an unlawful promise. *See TNT Logistics North America, Inc*., 345 NLRB 290, 292 (2005) (supervisor's comment to employee that wages were in the process of being negotiated with the employer's customer "could not reasonably be construed as either an express or implicit promise to remedy [the employee's] pay complaints if he did not vote for the Union").[20]

The ALJ's Decision erroneously failed to acknowledge or give weight to the overwhelming evidence that Brawner never promised any specific improvements to wages or benefits. Instead, the ALJ erred by holding it was not material whether Brawner's statements were connected to specific employee concerns, which is contrary to the law. In support of this conclusion, the ALJ

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[19] The ALJ erred by finding, without citing any record evidence, that Mayers had "limited recall" of meetings where Brawner spoke, which is unsupported by the record. (D. 7:1-5) (Tr. 1064:1-1076:2).

[20] After being shown his confidential witness affidavit to refresh his recollection, one witness, Josh Taylor, testified about certain vague statements by Brawner about requiring supervisors to work out of the Columbia facility ("all it takes is one call to fix that") and about how he "could bring back employee banquets to Myrtle Beach." (Tr. 666:3-10; 675:4-6). These vague statements about what Brawner "could" do simply do not rise to the level of an unlawful promise. *See Rupp Forge Co*., 201 NLRB 393, 403 (1973) (holding that employer's promise to throw a party if the Company won the election did not violate the Act insofar as it was not "a promise of a benefit that is significant or has any significant impact upon an employee exercising his rights under Section 7 of the Act, or in voting a free choice as to a collective-bargaining representative or not."

cited *Auto Nation*, 360 NLRB 1298 (2014) and *Purple Communications*, 361 NLRB 575 (2014), both of which are inapposite. In *Auto Nation*, the Board held that a representative of the employer violated the Act by telling employees that it was "absolutely possible" for the company's pay plan to be updated without a union and the company would be "definite[ly] willing[] to consider making adjustments" to employees' pay. *Auto Nation* at 1299. Likewise, in *Purple Communications*, the employer violated the Act by acknowledging productivity standards might have been raised too high and saying he was looking into productivity standards as part of an ongoing "recalibrating." *Purple Communications* at 576-578. The Board noted that the comments were "directly linked to the recently increased productivity standards, which were a central campaign issue." *Id*. at 577-78. In these cases, the employer's statements, although they did not promise any specific action, were clearly connected to specific employee concerns. In the present case, on the other hand, there is no evidence that Brawner's generalized statements about a desire to make things better were linked to any specific employee concerns. Moreover, the company communicated that driver pay and benefits were already highly competitive and better than those under certain union contracts.

Several witnesses testified about Brawner comparing Sysco Columbia employees' wages and benefits with the wages and benefits at unionized Sysco operating companies, which provides necessary context for Brawner's comments. Many employee witnesses recalled Brawner comparing their existing wages and benefits to the wages and benefits received by Sysco Atlanta employees. (Tr. 156:24-157:2; 249:11-14; 268:3-18; 324:20-22; 1096:1-18) (*See also* SC 5 at 2-3, 13). Patrick Windham ("Windham") also testified that Brawner sent him a document comparing wages at Sysco Southeast Florida to wages at Sysco Columbia and noting "Sysco Columbia drivers still make significantly more than SE Florida drivers and have no obligations to pay union dues…." (Tr. 357:19-21) (GC Ex. 10). Along the same lines, Sysco Columbia sent its employees

communications discussing the risk that employees could end up with lower wages and fewer benefits through the collective bargaining process. (SC 42). Clearly, the thrust of Sysco Columbia's communications to its employees, including Brawner's comments, was that their current wages and benefits were *better* than the wages and benefits of union-represented employees and that they could possibly lose some of their existing wages and benefits through the collective bargaining process, not that Sysco Columbia intended to *improve* their existing terms and conditions of employment. The ALJ erred in disregarding this evidence.

Many witnesses acknowledged that Brawner talked about restoring a "family atmosphere" to the Company during his meetings with employees. (Tr. 170:13-19; 334:20-24; 855:8-23; 880:13-15; 1084:4-7; 1109:15-24; 1218:21-1219:8). Brawner admitted that he "made mention to the fact that I could have an influence on relationships, making sure that we maintained the family environment that had always been at Sysco Columbia. (Tr. 742:2-4). Other witnesses testified that Brawner referenced restoring the "balance" between Sales and Transportation, because the Company had become too sales-driven. (Tr. 170:6-15; 708:7-10; 1208:16-22).[21] None of these comments contain any promise of a benefit. Further, they provide needed context for Brawner's request that employees "give him 12 months." Contrary to the ALJ's holding, his request was clearly *not* for 12 months to make improvements to terms and conditions of employment, which Sysco Columbia contended were already favorable, but rather to restore a family atmosphere and the operational "balance" between Sales and Transportation. Brawner testified that "when things are out of balance [between sales and the rest of the company] it can be very expensive for the company." (Tr. 738:11-16).

[21] As Brawner noted, having Sales drive the Company resulted in more frequent deliveries to customers, which is a "process issue" inconsistent with Sysco's operational best practices. (Tr. at 826:8-827:9).

As the testimony and case law cited above shows, Brawner did not make any unlawful promises or unlawfully solicit grievances. At most, his vague requests for "12 months" were a generalized expression of a desire to make things better and consistent with operational best practices, which is well within the bounds of acceptable speech under Section 8(c). Therefore, the ALJ erred in finding that Brawner's comments violated the Act.

D. *The ALJ erred in making credibility determinations involving the Brawner allegations that were contrary to the substantial weight of the record.*

In addressing the allegations involving Brawner, the ALJ made credibility findings adverse to Sysco Columbia that were contrary to the substantial weight of the record. For example, the ALJ held Brawner was repeatedly vague or evasive because he could not recall certain statements attributed to him (D. 5:22-25), while also acknowledging in a separate section of the Decision "the inevitable and understandable inability of witnesses to recall with precision everything that was said." (D. 3:37-39). The ALJ appeared to use this principle as grounds to discredit Brawner because of his inability to remember precise details, while simultaneously crediting testimony of certain of the GC's witnesses who had a similar inability to recall details, which was error.[22] The ALJ also erred in disregarding Brawner's credible denial of statements attributable to him and inability to recall other statements attributed to him, many of which were alleged by witnesses with serious credibility issues, like Anderson. (D. 10:32-35). The ALJ further erred by not considering the fact that Brawner had been in far more meetings with employees in Columbia, Myrtle Beach, Greenville, Augusta, Hilton Head, and Charleston than the employees at these locations at issue in the case, and there were no allegations of unlawful statements in these meetings.

[22] Similarly, the ALJ found that Brawner was not credible because he did not specifically address each alleged conversation with the many witnesses the GC called to testify about alleged phone and one-on-one conversations with him (D. 5:31-33), which is not supported by the law or the record evidence.

The ALJ also found that English was evasive and defensive (D. 5:15-19), which was contrary to the record. As an example, the ALJ found that English's testimony should be discounted because he "flippantly" testified that his own voice sounded like "the comedian Ron White." (D. 4:22-24). However, a review of the transcript reveals that English was not testifying about his own voice, but about what was alleged by the General Counsel to be Brawner's voice. (Tr. 622:7-13). Indeed, there is no record evidence to establish a foundation as to why the ALJ could fairly expect English to recognize Brawner's voice (as compared to his numerous other clients) from a meeting that allegedly occurred a year earlier. Again, the ALJ erred in allowing the GC to go on the foray to authenticate a recording and then make adverse inferences against Respondent.

E. *The ALJ erred in holding that Brawner violated the Act in phone conversations and one-on-one conversations with employees.*

The week before the hearing in this case commenced, the GC moved to amend its Complaint to allege that Brawner violated the Act by soliciting grievances "[a]bout early April 2017, by telephone." As an initial matter, the ALJ erred in permitting the amendment of the Complaint to encompass telephone conversations. The GC had ample opportunity to raise these allegations in the Complaint, but neglected to do so until the eve of trial.[23] Although the new allegations involved Brawner, they dealt with one-on-one phone conversations that were not closely related to the allegations of the Complaint, which dealt with group meetings and in-person meetings at Sysco Columbia domicile yards. The GC clearly sat on these allegations until the eve of trial, without any legitimate reason for doing so. Therefore, the ALJ should not have permitted the amendment.

[23] As evidence that the GC had no excuse for not amending the Complaint to raise the telephone allegations, the GC showed witness Josh Taylor an affidavit from July 17, 2017, discussing his allegedly unlawful phone conversations with Brawner. (Tr. 665:10-11; 675:20-676:4).

Even assuming it was proper for the ALJ to grant the General Counsel's requested amendment, the ALJ erred in finding that Brawner's alleged comments violated the Act. At trial, the General Counsel presented three witnesses who claimed to have spoken with Brawner by telephone. None of their testimony establishes a violation of the Act.

Porter testified about a call where Brawner asked about how he was doing and "how [he] felt about what was going on as far as the Union and where we stood with Sysco." (Tr. 192:1-4.) Innocuous and casual inquiries like these simply do not rise to the level of a violation of the Act. *See Mission City Prod. Corp*., 206 NLRB 280, 282 (1973) (holding employer did not violate Act by asking employee his "feelings" towards the Union, noting: "Before inquiries as to union membership and statements by employers can be held to be unfair labor practices, they must be shown to have some relation to the coercion or restraint of the employees in their right of self-organization. Infrequent, isolated, sporadic, and innocuous inquiries of a few employees, as here, standing alone, do not constitute interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act.") *See also Rossmore House*, 269 NLRB 1176 (1984) (holding that interrogation is not unlawful where circumstances indicate it is non-coercive in nature.) Further, Porter admitted that this conversation took place a few weeks *after the election* and did not have anything to do with the votes cast in the election. (Tr. 207:2-210:22). Therefore, even if this allegation was true, and even if such an innocuous inquiry would rise to the level of "solicitation of grievances," which is denied, this conversation would not have coerced or restrained Porter in his right of self-organization.

Despite Porter's clear testimony that the conversation occurred after the election – which was confirmed by Porter's confidential witness affidavit – the ALJ erroneously held that the

conversation likely occurred prior to the election, a conclusion that is unsupported by any record evidence. (D. 6:25-30) (Tr. 192:1-4; 207:2-210:22). This was in error.

Windham testified that he had two phone conversations with Brawner. The first occurred after a fellow driver asked him to call Brawner. (Tr. 351:17-24). During the first call, Windham claimed "the gist of the conversation" was that Brawner said "he would do what he could to make things better for us if we had any problems." (Tr. 354:1-8). Windham admitted he "wouldn't go with exact words because [he] can't recall exact words." *Id*. Windham also recalls that Brawner "may have said something about along the lines of we'd build as a team." (Tr. 354:18-21). As noted above, the Board has recognized that "generalized expressions of an employer's desire to make things better have long been held to be within the limits of campaign propaganda." *MacDonald Machinery Co.*, 335 NLRB 319, 319 (2001). Therefore, Brawner's alleged comments did not violate the Act.

Windham testified that on another occasion, Brawner called him and "let[] him know that he wanted to check on us in the Florence yard." (Tr. 355:22-24). Windham responded by telling Brawner they were good in Florence and telling Brawner to "let us know if we could do anything." (Tr. 356:2-4). Brawner thanked Windham, and that was the end of the conversation. (Tr. 356:5-7). Windham acknowledged that Brawner did not specifically identify any particular terms and conditions of employment he sought to improve and never mentioned any specific benefits in their conversations. (Tr. 362:13-17; 363:12-15). Again, such innocuous comments do not rise to the level of solicitation of grievances.

Finally, Josh Taylor ("Taylor") testified he had a phone conversation in April 2017 with Brawner in which Brawner told him about a union contract in South Florida where employees were receiving a pay increase, a signing bonus, and Teamsters insurance, which Brawner allegedly

contended was cheaper than Sysco's insurance. (Tr. 676:5-22, 677:16-21).[24] Taylor's testimony was not credible insofar as he appeared to allege that Brawner was extolling the benefits enjoyed by union employees in South Florida, which would have been completely inconsistent with Sysco Columbia's message to employees in the campaign. For example, Brawner sent to employees a flyer showing that Sysco Columbia's wages were *better than* the wages at Sysco Southeast Florida, along with a message that Sysco Southeast Florida "opted to maintain the Sysco 401K & Sysco's healthcare benefits and will pay Union Dues for those benefits you already enjoy." (GC 10). It defies logic to suggest Brawner would sing the praises of a union contract in a conversation with an employee. Accordingly, the ALJ erred in crediting Taylor's testimony over Brawner's. Additionally, even if Taylor's allegations were true, factual statements like the ones alleged by Taylor do not violate the Act. *See Sheraton Plaza La Reina Hotel*, 269 NLRB 716, 718 (1984) (holding employer did not violate Act by truthful statement that union contracts in the area did not provide the sick leave benefits enjoyed by the employer's employees). Taylor admits that Brawner did not say or suggest to Taylor that what happened at the South Florida location would happen at Sysco Columbia. (Tr. 689:11-14).

The GC also alleged at trial that Brawner violated the Act in one-on-one conversations with employees. The ALJ erred in permitting testimony about one-on-one conversations that were not described in the Complaint, and in relying upon such testimony in making his Decision.[25]

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[24] The ALJ permitted Taylor – one of the GC's own witnesses – to be questioned as a 611(c) "adverse" or "hostile" witness by the GC, based on Taylor's status as a 2(11) supervisor at the time of trial. However, there was nothing in the record – other than Taylor's status as a supervisor, which was based on a promotion that occurred well after the allegations about which he testified – to suggest that he would be adverse or hostile to the GC. This erroneous ruling permitted the GC to repeatedly lead its own witness, who had consistently cooperated with the GC's investigation, including by executing a confidential NLRB witness affidavit. (Tr. 664:6-8).

[25] In particular, there were no allegations regarding one-on-one conversations at Sysco Columbia's main facility in the Complaint, which only reference conversations occurring in the conference room at Sysco Columbia's facility and at certain domicile yards. Therefore, the ALJ should not have permitted or relied upon testimony regarding alleged one-on-one conversations between Brawner and Fix, Nuttry, or Anderson.

Only four witnesses testified about one-on-one conversations with Brawner, and all of them acknowledged that Brawner did not promise any improvements to wages or benefits. None of their testimony established a violation of the Act, and many of those witnesses were not credible at trial.[26] Contrary to the ALJ's finding that none of these witnesses made any efforts to exaggerate their testimony, there were clear credibility issues involved in their testimony (for example, Anderson's false testimony regarding a document he alleged he was shown by Fix, discussed extensively throughout this brief, and Taylor's claim that Brawner told him Sysco Southeast Florida had better benefits, discussed above).

Carlos Nuttry ("Nuttry") claimed he discussed "insurance coverage…and certain numbers" with Brawner in a one-on-one meeting in an office in the fleet shop. (Tr. 379:12-14). He said Brawner assured him that "you know, things would get better." (Tr. 379:14-15). Nuttry could not testify regarding what Brawner actually said during this meeting because he "started to tune out a lot of stuff," as he "was kind of getting aggravated at that point." (Tr. 380:6-11). Nuttry's vague testimony – even if true – would not establish a violation of the Act. Further, because of Nuttry's admission that he "tuned out" much of his conversation with Brawner, it was error for the ALJ to rely on his testimony.

Anderson claims he had a one-on-one discussion with Brawner in Dwayne McCloud's office (which is in the fleet shop, where Anderson works), in which Brawner asked him for "a chance to try and fix the problems that were incurred there at the facility." (Tr. 460:23-463:24). As discussed below, Anderson was not a credible witness because he was proven to have falsified

[26] The ALJ held that the testimony of these witnesses was similar in substance and consistent with Brawner's alleged comments at group meetings, which is unsupported by the record. (D. 5:29-31) (Tr. 192:1-4; 207:2-210:22; 351:17-24; 354:1-8, 18-24; 355:22-24; 356:2-7; 362:13-17; 363:12-15; 379:12-15; 380:6-11; 460:23-463:24; 657:21-23; 660:9-19; 664:1-3; 666:3-10; 675:4-6; 676:5-22; 677:16-21; 682-10-15; 686:3-7; 689:11-14; 705:10-706:14).

testimony about a document he claimed to have been shown by Fix. Therefore, the ALJ erred in crediting his testimony. Further, even if Fix's testimony regarding Brawner was credited, this testimony, in which Brawner is alleged to have asked for "a chance" and discussed the possibilities of bargaining, does not establish a violation of the Act.

Taylor claimed that he had a ten-minute one-on-one discussion with Brawner at the Charleston yard. (Tr. 657:21-23, 660:9-19). Taylor's recollection about this meeting was limited, even at the time he executed his affidavit in July 2017. (Tr. 686:3-7). Therefore, the ALJ erred in crediting his testimony over Brawner's. Taylor further admitted Brawner did not promise any improvements to wages and benefits during their conversation. (Tr. 682:10-15). Taylor claimed Brawner "may have said something along the lines that he was there to make things better" and that he may have asked Taylor for "12 months to change everything." (Tr. 664:1-3). As shown above, such comments do not violate the Act.

After being shown his confidential Board affidavit to refresh his recollection, Taylor testified about certain vague statements by Brawner that would not rise to the level of an unlawful promise. Taylor claimed he had complained to Brawner about Sysco Columbia requiring supervisors to work out of the Columbia facility, and Brawner said "all it takes is one call to fix that." (Tr. 666:3-10). Taylor also claimed Brawner said in a phone conversation he "could bring back employee banquets to Myrtle Beach." (Tr. 675:4-6). These vague statements about what Brawner "could" do simply do not rise to the level of an unlawful promise. *See Rupp Forge Co.*, 201 NLRB 393, 403 (1973) (holding that employer's promise to throw a party if the Company won the election did not violate the Act insofar as it was not "a promise of a benefit that is significant or has any significant impact upon an employee exercising his rights under Section 7 of the Act, or in voting a free choice as to a collective-bargaining representative or not.").

Finally, John Gruber ("Gruber") claimed that he had a one-on-one conversation with Brawner at the Charleston yard in which Brawner approached him, asked about his family, and asked "What's going on?" (Tr. 705:10-706:4). When Gruber told Brawner that drivers were unhappy because "the pay has gone down and the work has gone up," Brawner did not respond. (Tr. 706:4-14). According to Gruber, this was the end of the conversation. *Id.* This testimony does not establish any violation of the Act, as Brawner's innocuous question of "What's going on?" simply cannot be regarded as unlawful solicitation of grievances or interrogation. *See Hogan Transp., Inc.*, 363 NLRB No. 196 (2016).

With respect to the witnesses called by the GC, the ALJ erred in disregarding their testimony that their conversations with Brawner were cordial and non-intimidating in nature. (D. 6:1-5). The ALJ essentially found that such evidence was irrelevant, which is inconsistent with the law. *See Mission Clay Products Corp.,* 206 NLRB 280 (1973) ("Before…statements by employers can be held to be unfair labor practices, they must be shown to have some relation to the coercion or restraint of the employees in their right of self-organization. Infrequent, isolated, sporadic and innocuous inquiries of a few employees…standing alone, do not constitute interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act."). The ALJ should have considered the extensive testimony that employees' conversations with Brawner were non-coercive in nature. (Tr. 205:23-206:2; 400:7-12; 713:20-24).[27]

F. *The ALJ erred in disregarding evidence that provides context for Brawner's alleged comments.*

The ALJ further erred in disregarding materials utilized by Brawner, English, and Sysco Columbia, which provide context for statements the ALJ found to be unlawful. For example,

[27] The Decision also repeatedly referenced the alleged mandatory nature of the meetings (*See* D. 9:27-29), which is both contrary to the substantial weight of the record and bears no legal relevance.

English regularly presented a "disclaimer" slide during meetings, which several witnesses, recalled and which stated:

> The purpose of this presentation is a follow-up discussion about information regarding the Teamsters' rules as they may relate to you as potentially-unionized workers.
>
> NO ONE CAN PREDICT future events…
>
> Therefore, no predictions will be made about what will happen if you become represented by the Teamsters.
>
> This is a discussion of FACTS and the LAW, as well as what CAN or MAY happen, NOT what WILL happen.

(SC5 at 15) (Tr. 862:18-19; 1074:9-14; 1112:14-24).

The ALJ also disregarded the contents of scripts and PowerPoint presentations used by Brawner and others at group meetings (D. 9:13-14), which the General Counsel acknowledged contained no unlawful statements. The ALJ acknowledged that there was no contention that these materials were unlawful (D. 9:12-15), yet he erred in failing to consider them as the best evidence of Sysco Columbia's communications. These lawful materials provided context for the comments at issue in this case – as further discussed below in the section of this brief addressing the DVD allegations – and the ALJ should have considered them in determining the lawfulness of Brawner's alleged statements.

G. *The ALJ erred in finding that Brawner's alleged solicitation of grievances violated the Act, because Sysco Columbia had an extensive past practice of soliciting grievances.*

Even if Brawner's request to "give [him] 12 months" could be viewed as solicitation of grievances, which is denied, the mere solicitation of grievances is not unlawful where the employer has an established pattern of soliciting grievances from employees. The Board has repeatedly held that "[a]n employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign." *Naomi Knitting Plant*, 328 NLRB 1279

(1999), *citing House of Raeford Farms*, 308 NLRB 568, 569 (1992); *TNT Logistics North America, Inc*., 345 NLRB 290 (2005) (holding that the employer did not violate Act the by asking an employee "What would make things better?" where employer had an "established practice of soliciting employee concerns, a practice it had followed before the Union arrived on the scene," including by promulgating an open door policy); *Johnson Technologies, Inc*., 345 NLRB 762, 764 (2005) ("It is well established that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizational campaign"); *Wal-Mart Stores, Inc.*, 339 NLRB 1187, 1187 (2003) (no violation where employer with past practice of soliciting employee grievances brought in additional district and regional managers who solicited grievances from employees, noting "an employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign"); *Wal-Mart Stores, Inc*., 340 NLRB 637, 640 (2003) ("It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign."); *Curwood, Inc*., 339 NLRB 1137 (2003), *affd. in part, vacated in part*, 397 F.3d 548 (7th Cir. 2005) (employer's continued practice of allowing employee questions did not violate the Act); *MacDonald Machinery Co.*, 335 NLRB 319 (2001) (no unlawful solicitation of grievances where "the Employer undertook to solicit employee grievances prior to the onset of the union campaign."); *PYA/Monarch, Inc.*, 275 NLRB 1194 (1985) (Regional Vice President did not unlawfully solicit grievances when he told employees that the employer's door was always open to hear any complaints, where employer had an open-door policy prior to the outset of union organizing campaign).

Sysco Columbia presented evidence of numerous avenues whereby it solicits employee concerns, all of which were in place before the union campaign at Sysco Columbia. Specifically:

- Sysco Columbia has a policy entitled "Open-door Philosophy" that encourages employees to openly discuss with management any "suggestion[s] as to ways to improve the Company" and to let management know "should a problem arise." (SC 40).
- Transportation Director Bo Nash, upon arriving at Sysco Columbia, implemented a "Fix One Thing" philosophy, which he had previously followed at Sysco Cleveland. (Tr. 887:10-18). He implemented the philosophy about two weeks after he arrived at Sysco Columbia in June 2015. (Tr. 894-95.) According to Nash:

  > Fix one thing means give me something every day that you feel needs to be fixed to help you do your job efficiently. So I'm going to fix something every day. I'd rather fix something that's going to mean something to somebody.

  (Tr. 887:6-9).

  According to GC witness Brewer:

  > [S]ince [Nash] got there, his whole concept has been let's fix one thing today. And not only has he left voice mails about it, he's sent through emails through our tablets that we have in our trucks. And it's, hey, if you've got something that needs to be fixed, send it up the ladder and we'll try our best to get it taken care of.

  (Tr. 170:24-171:5).

  Pursuant to the "Fix One Thing" program, Nash has received dozens of complaints from Drivers regarding aspects of their working conditions. Nash estimated he had received around forty-five (45) "fix one thing" suggestions from his arrival in July 2015 to the date of trial. (Tr. 886:7-8; 911:4-13). Nash regularly adjusts those grievances and solicits further input from employees. Many of the complaints received through the "Fix One Thing" process impact Drivers' terms and conditions of employment.[28]

[28] For example, Nash received complaints about matters impacting employees' terms and conditions of employment, including communications, loads, stop classifications, routing, stop delays, productivity, size of deliveries, and safety. (Tr. at 892:10-906:17) (SC 9-15).

- Sysco Columbia implemented a Positive Associate Relations (PAR) program in Fall 2016, before the start of any union organizing, pursuant to which Sysco Columbia management or HR personnel holds short conversations with non-supervisory employees about their workplace concerns, and maintains a record of any actionable items that arise out of those conversations "so that we—make sure that we have a plan in place to get those issues addressed." (Tr. 1182:7-1184:12).[29] The PAR program involves communications that are initiated by employees, as well as communications initiated by supervisors. (Tr. 1185:20-26). The spreadsheet is stored on a shared drive for supervisors and HR. (Tr. 1187:3-9).
- Sysco Columbia has a "load condition hotline" whereby Drivers can lodge complaints about the conditions of their loads, which impacts their pay. (Tr. 904:21-905:2).
- Sysco Columbia maintains an "Ethics Hotline" for employees to raise issues. (Tr. 1182:3-10) (S*ee also* SC 40).

As the foregoing shows, Sysco Columbia maintains numerous avenues whereby it solicits and receives grievances, concerns or ideas from employees. Accordingly, even if Brawner's vague comments could be regarded as a solicitation of grievances, such comments do not violate the Act.

The ALJ essentially disregarded this past practice of soliciting employee concerns, grievances or ideas, characterizing it as being a "general policy of encouraging employees to voluntarily contact management on their own volition," which is contrary to the substantial weight of the record. (D. 23:8-17). Weldon's uncontroverted testimony was that management proactively reaches out to employees to solicit grievances as part of the PAR program. (Tr. 1185:20-25).

[29] Examples of the concerns raised through this process – many of which were remedied by Sysco Columbia – include concerns about scheduling, routing, stop classification, loads, equipment, delays at stops, benefits, and compensation (SC 41).

Further, contrary to the ALJ's ruling, it is not material whether the employer's past practice of receiving employee complaints was employee-driven or employer-driven. In *MacDonald Machinery, supra*, the Board noted it was not "critical" that before the campaign, employees approached the employer about problems and the employer only began approaching the employees to solicit grievances after the campaign began. 335 NLRB at 320. The Board noted: "The significant point is that, both prior to the onset of the union campaign and after, the Employer was willing to listen to the complaints of its employees and to respond to them." *Id.*; *see also Johnson Technology, Inc.*, 345 NLRB 762 (2005) (fact that prior solicitations may have been employee-initiated, rather than employer-initiated, was not sufficient to establish a violation of the Act). Accordingly, the ALJ erred in disregarding the extensive evidence presented by Sysco Columbia as to its efforts to solicit employee grievances and concerns.

VI. EXCEPTIONS APPLICABLE TO THE ALJ'S FINDINGS, RULINGS AND CONCLUSIONS WITH RESPECT TO CLAIMS INVOLVING FIX [Exceptions 60-86]

A. *The ALJ Erred in Finding Fix a Supervisor*

Section 2(11) of the Act defines a "supervisor" as an individual who possesses the authority in the interest of the employer, to use independent judgment in exercising or effectively recommending any one of 12 enumerated indicia, including disciplining, assigning, and responsibility directing employees. The party asserting supervisory authority has the burden to prove it by a preponderance of the evidence. *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, *slip op.* at *7; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). (D. 18:36-41). Here, the ALJ erred in finding that the GC satisfied its burden to show that Fix was a 2(11) supervisor.

The ALJ predicated his analysis with the erroneous finding that "[t]here is no dispute that the Fleet Maintenance Supervisor position which Fix encumbered in mid-April was supervisory within the meaning of Section 2(11), conferring authority to, inter alia, assign, direct, evaluate,

and discipline employees." (D. 18:43-45). That is precisely the issue in dispute, but is mischaracterized by the ALJ. (D. 18:45; 19:1-3). Fix had applied, and was training for, a supervisor position, but never had 2(11) authority or exercised that authority, using independent judgment, until he effectively replaced his supervisor when Randall Drafts ("Drafts") retired in May 2017 – weeks after the scheduled election. (Tr. 1131:24-25; 1132:6-12). The ALJ wholly failed to consider evidence that, during the period between the end of March and May 2017, Fix was not just training to learn the computers and programs needed for his eventual supervisor position, but also learning the functions performed by the Maintenance Coordinator, who was also retiring in May. (Tr. 1132:6-12; 1135:18-25; 1136:1-6, 18-21).

The ALJ erroneously found significant that

> "[i]n any event, by mid-April Fix was engaged exclusively in performing or being trained in administrative/supervisory functions and no longer performed any rank-and-file work. He was learning how to write employees' performance appraisals and participated in interviewing applicants for employment; had changed his work hours in order to interact with outgoing Supervisor Drafts[30] and Clerk Kiko; used Draft's office; and, on his own, performed Draft's functions in Draft's absence, including directing spotters when to fill in for other spotters. Other than continuing to wear a mechanic's uniform, his role as a mechanic had ended. The General Counsel notes (GC 42) Respondent's omission of Fix from the list of eligible voters. I find this was an implicit concession that at least by April 8, the Respondent considered him promoted out of the unit and into a supervisory position."

First, whether Fix was in or out of the unit at the time is irrelevant to whether he was a 2(11) supervisor. That is clearly not one of the factors defined in the Act. Indeed, Kiko, the Maintenance Coordinator referenced by the ALJ, (and whose job Fix was also learning), was not a supervisor nor in the voting unit. Second, the fact that Fix was learning to write performance appraisals, observing job interviews or had different hours of work, does not make him a supervisor. In fact,

[30] Drafts was the supervisor Fix was training to replace upon retirement.

the record is entirely void of any documentation or evidence showing that Fix effectively gave anyone a performance appraisal or recommended anyone for hire.[31] Finally, Nuttry, the sole GC witness relied upon by the ALJ to find that Fix allegedly "performed Draft's functions in Draft's absence, including directing spotters when to fill in for other spotters" (D. 14:31-32) was not credible, and his testimony was in sharp contrast to every other witness, including the General Counsel's other witnesses. Indeed, the ALJ's reliance upon Nuttry's testimony illustrates the ALJ's clear misunderstanding of where Nuttry actually worked or clear bias to reach a pre-determined decision. Nuttry was a spotter who worked outside of the shop in the trailer yard and spent his hours of work moving trailers around the yard and between the docks. (J 2(a); 2(b)) (Tr. 428:2-11; 429:2-5; 460:24-463:24; 464:14-465:4; 925:11-24; 928:15-930:25; 931:11-25; 932:15-21; 1127-28; 1129:14-16; 1131:24-25; 1132:6-12; 1135:18-25; 1136:1-6, 18-21; 1139:20-24; 1140:2-10, 22-25; 1141:1-4, 16-20).

He had limited, if any, opportunity to observe what Fix was doing in the shop. (SC 3) Furthermore, to be clear, Nuttry was one of only four Spotters, so if one was absent, it would require no independent discretion for anyone to select the coverage for that position.

Contrary to Nuttry, Fix testified that during this period of time, he did not have authority of any kind over regular mechanics. (Tr. 1139:20-24). "I was shadowing Randall. He held the responsibility. I was just in training." *Id*. Fix did not discipline a spotter or mechanic; he was not responsible for directing their work. (Tr. 114:2-9). As Fix testified: "I basically looked over Randall's shoulder and see how he ran it." (Tr. 114:8-10).

Fix's testimony regarding his duties during the period in question were supported by the testimony of Turner, Vice President of Operations. (Tr. 928:15-9:30:6; 930:10-21; 931:11-19;

[31] The GC was unable to present much evidence despite the ALJ requiring Respondent to respond to a broad subpoena seeking such evidence. (GC 23-43) (Tr. 1195:6-1196:5).

1132:6-12; 1135:20-22). Turner, who made the decision to promote Fix, was familiar with his activities and responsibilities during the period from March to May 2017. (Tr. 925:11-18; 9:30:6-9). Turner testified that Fix did not have the authority of a 2(11) supervisor (*e.g.*, to hire or fire employees, to lay off, or discipline employees, etc.). (Tr. 930:6-25). As to the direction of work of the Spotters, Turner stated, "they was pretty much self-sufficient." (Tr. 22-25). Drafts was still there during this period, and "he was doing the job that he – as supervisor, as he always had done." (Tr. 931:11-16).

Virtually every witness of the General Counsel (2 of 3) who was questioned about Fix's job duties during April 2017 supported Fix's testimony. For example, Anderson, a Mechanic, testified that in April 2017 Fix was a "supervisor in training," learning the job of Fleet Supervisor. (*See* Tr. 464:14-15, 20-21). Fix was learning the computer systems, and learning the administrative side, more than anything else. (Tr. 464:22-25; 465:1-4). Similarly, Chris Bookert ("Bookert"), a Mechanic, testified that he did not think that Fix was a supervisor while Drafts was still there; he transitioned into that role after Drafts retired. (Tr. 428:2-11; 429:2-5).

Remarkably, the ALJ dismissed the substantial record evidence above, finding "[h]aving two supervisors simultaneously supervise a group of employees is not inherently illogical or contradictory, and the Respondent produced no evidence that it has a policy prohibiting dual supervision of a department." (D. 19:20-22). The ALJ's flawed reasoning and misplacement of the burden of proof on Respondent is absurd and in error.

The ALJ's attempt to distinguish *Bredero Shaw*, 345 NLRB 782 (2005) misses the mark entirely as he fails to observe the critical point, that a supervisor in training is not a 2(11) supervisor unless the individual exercises 2(11) authority. The ALJ's suggestion (but not finding) that Fix may have possessed apparent supervisor authority (D. 19:34-40) is similarly contrary to the record

evidence and testimony of every witness (except Nuttry) presented within the department.[32] The ALJ also admitted emails sent or received by Fix without any context or supporting testimony and relied upon those emails as Fix's exercise of independent judgment. (D. 14:6-10) (Tr. 1195:6-1196:3).

This was in error, as was the ALJ's reliance upon Fix's exclusion from a voter list as evidence of his alleged supervisory status. (D. 14:10-12; 19:13-15). As the record illustrates, supervisors were not the only employees excluded from the voting unit and Fix's exclusion was not an admission of 2(11) status.

B. *The ALJ's Findings that Fix Violated the Act are Erroneous*

Predicated on his erroneous finding that Fix was a 2(11) supervisor, the ALJ also found that Fix violated Section 8(a)(1) of the Act by allowing employees to park at the back of the facility, soliciting grievances, promising employees benefits if they rejected the union, and threatening employees that their wages and benefits would be frozen at the status quo if they voted for a union. (D. 13:25-43; 14:1-38; 15:1-15; 20:1-38). These finding are neither supported by the preponderance of record evidence, nor Board precedent.

C. *The ALJ Did Not Properly Apply the Burden of Proof*

[32] The ALJ made no finding concerning Fix's status as a 2(13) agent of Respondent, independent of his erroneous finding that Fix was a 2(11) supervisor. The standard for proving agency status under Section 2(13) of the Act is the same as the common law analysis. *Ready Mix Inc.*, 337 NLRB 1189 (2002). "[T]he burden is on the party asserting agency status to prove such status, by offering specific evidence in its support." *Arden Post Acute Rehab*, 365 NLRB No. 109 (July 25, 2017). Furthermore, to find that apparent authority exists it must manifest in such a way that it "creates a reasonable basis for the [third party] to believe that the principal had authorized the alleged agent to perform the acts in question." *Southern Bag Corp*., 315 NLRB 725 (1994). Here the GC presented insufficient evidence to show that Mechanics and Spotters had a reasonable basis to believe that Sysco Columbia has authorized Fix to perform the alleged unlawful acts in question, particularly any discussions he allegedly had with Mechanics or Spotters about the Union organizing effort or their wages. Indeed, there is no evidence that Fix acted as an agent of the company in any discussions or actions that he had with other employees that were in any way related to the Union organizing efforts directed at the Mechanics. As Fix testified, after March 27, 2017, he did not conduct any meetings with Mechanics to discuss the Union organizing effort. (Tr. 1142:22-25). He never attended any management meetings about the Union. (Tr. 1143:19-22). Further, the Company never asked Fix or directed Fix to communicate anything to the Spotters and Mechanics about the Union. (Tr. 1143:13-18).

In order to prove a Section 8(a)(1) violation, the General Counsel must establish that the employer engaged in conduct that would reasonably tend to restrain, coerce, or interfere with employees' rights under the Act. *Webasto Sunroofs Inc.*, 342 NLRB 1222, 1223 (2004) *citing Am. Freightways Co.*, 124 NLRB 146, 147 (1959). The General Counsel must prove this by a preponderance of the evidence. *Cheyney Constr. Inc.*, 344 NLRB 238, 239 (2005) (finding no violation of the Act because the objective facts did not prove a violation by a preponderance of the evidence); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995) ("[I]t is well established that the test of interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act."). The ALJ did not hold the GC to its burden in this case.

Illustrative are the ALJ's findings of fact based on pure conjecture and then reliance upon those findings in his erroneous legal conclusions. For example, the ALJ found:

> I previously stated my belief that he, as a newly-made first-level supervisor, [Fix] would not have initiated the mid-April conversations that he had with at least two of the four mechanics and with all four spotters in a group, absent management's approval. Notably, he said, expressly or implicitly, that he was speaking on behalf of the Company, and the contents of his conversations were very similar to what Brawner told individual employees, as well as to Brawner's off-script statements at the 25th hour meetings. These factors lead me to believe that Fix was given at least loose guidelines or instructions on what to say.

(D. 24:4-10).

Yet, none of the witnesses testified that Fix had any script or instructions; every witness who was asked acknowledged that Fix played no part in the communication meetings about the Union (Tr. 1142:22-25); and Fix testified (uncontested) that, after March 27, 2017, he did not conduct any meetings with Mechanics to discuss the Union organizing effort. (Tr. 1142:22-25). He never attended any management meetings about the Union. (Tr. 1143:19-22). Further, the

Company never asked Fix or directed Fix to communicate anything to the Spotters and Mechanics about the Union. (Tr. 1143:13-18). Finally, it is undisputed that Brawner's 25th hour meetings with the Mechanics and Spotters occurred after the Decision and Direction of Election on April 21, 2017, scheduling an election for the Mechanics unit, which was *after* Fix had the alleged discussions with the Mechanics and Spotters. The ALJ's conclusions and finding were just baseless conjecture.

The ALJ found that Fix had separate discussions about wages and/or working conditions with Mechanics Anderson and Bookert and Spotter Nuttry "immediately after his promotion at the end of March." (D. 6:32-35). In crediting the testimony of the GC's witnesses, the ALJ stated, "I have to conclude that [Fix], a new first-line supervisor, would not have initiated and held those discussions without having been invested with actual authority by management." (D.6:42-44). Again, the ALJ's finding, which he relied upon in concluding that Fix violated 8(a)(1), was not based on record evidence but mere conjecture. Moreover, the ALJ's finding is directly contradictory to the testimony of Bookert (whom the ALJ credited), who stated that he had discussions with Fix about pay before Fix was ever promoted, which clearly refutes the ALJ's false premise. (Tr. 431:3-18).

D. *The ALJ Failed to Properly Consider the Legal Importance of Fix's Relationship with the Mechanics and Spotters*

The ALJ recognized that "Fix was a master technician for 6-7 years before being promoted to Fleet Maintenance Supervisor on March 27.[33] Prior to his promotion, he had conversations about working conditions with coworkers and was a union supporter." (D. 13:25-27). However, throughout his analysis of the allegations against Fix, the ALJ failed to properly consider the legal importance of Fix's history of employment duties, involvement in the Union campaign as a

[33] Fix has worked in the machine shop at the facility for 13 years. (Tr. 1127:1-2).

Mechanic, and his relationship as a peer of the other Mechanics and Spotters. This is precisely the context in which the Board has recognized in *Rossmore House*, 269 NLRB 1176 (1981) and its progeny the significant latitude that must be given to workplace discussions, particularly among former peers. Factors such as the background of the relationship, nature of the statement, identity of the person making the statement, and the place and method of statement should be considered. *Id.* The ALJ failed to do so in this case.

E. *Fix Did Not Unlawfully Solicit Grievances or Promise Employees Benefits if They Rejected the Union*

The ALJ's conclusion that Fix solicited grievances, promised benefits, and threatened employees that their wages would be frozen at the status quo were similarly based on scant and mischaracterized evidence arising from one group meeting with Spotters and two one-on-one discussions with Mechanics, Bookert and Anderson. (D. 24:4-6). In the single meeting Fix allegedly had with the Spotters, there is nothing referenced by the ALJ that is coercive or related to the Union. (D. 24:13-14). The ALJ simply finds "[Fix] directly asked what was bothering them as issues, and he wrote down what they said." (D. 24:12-13).

The ALJ also found that Fix asked Bookert to give him an opportunity to resolve a specific issue, pay. (D. 24:12). However, the ALJ completely ignored Bookert's testimony that he did not think Fix was a supervisor at the time (Tr. 428:1-11; 429:1-5), that he had discussions with Fix about the pay scale before Fix was promoted, and that those discussions with Fix were more from a personal standpoint, as Fix had been his mentor. (Tr. 417:6-14; 418:1-12; 431:3-18; 435:10-17) (SC 3).

Finally, the ALJ relied upon the testimony of Anderson concerning a discussion regarding pay. Crediting Anderson's account, the ALJ found that [Fix] asked if Anderson was happy with everything and stated that if Anderson rescinded his position and "employees voted 'no,' it would

help speed things up on getting pay increases and items fixed around the facility." D. 24:15-17). Ironically, the ALJ made this determination despite being presented with clear evidence that Anderson's testimony and the GC's exhibit introduced through his testimony were contrived. (Tr. 1140:12; 1144:15-25; 1145:2; 1150:14-18; 1151:13, 16-18). The Exhibit purportedly shown by Fix to Anderson was proven to be a page scale provision out of a Teamsters Collective Bargaining Agreement with a company in Riverside, California (Tr. 805:4-24) – a document to which neither Sysco Columbia nor Fix would have access. (Tr. 1144:15-1145:2; 1149:12-1151:13).[34] Finally, Anderson also acknowledged under cross-examination that he knew that Fix could not change anything. (Tr. 1127:1-2).

F. *Fix Did Not Threaten Employees that Their Pay and Other Benefits Would be Frozen at the Status Quo if They Voted for a Union*[35]

Finally, the ALJ again credited Anderson, in the same one-on-one conversation, in finding that Fix stated "if they voted in the union, his hands would be tied, everything would be frozen and employees would be put in status quo." (D. 24:17-18.). The ALJ relied upon this in finding that Fix unlawfully "threatened that employees' pay and other benefits would be frozen at the status quo if they vote for the Union." (D. 24:20-22). The ALJ's credibility determination was erroneous. But, more importantly, even if true, the ALJ's legal conclusion is contrary to Board precedent. *See Neighborhood House Ass'n*, 347 NLRB 553, 554 (2006) ("As a general rule, where parties are engaged in negotiations for a collective-bargaining agreement, the employer must maintain the status quo of all mandatory bargaining subjects absent overall impasse."); *Flambeau*

[34] The ALJ seemingly dismissed the importance of this, stating "[s]imply put, I do not believe that all three employees [Bookert, Anderson and Nuttry] engaged in a concerted fabrication." (D. 6:39-40).

[35] The ALJ appropriately found that Fix did not blame the Union for employees not getting wage increases. (D. 24: 23-24). The ALJ also found that two allegations were subsumed by the allegations that he found meritorious and were therefore redundant. (D. 24:24-27).

Airmold Corp., 334 NLRB 165, 165 (2001) ("It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed negotiations."). *See also, Uarco, Inc.,* 286 NLRB 55 (1987) (Board held that the employer's references during a union organizing campaign to wages being "frozen" during negotiations would reasonably be construed by employees "to mean only that the Respondent would maintain the status quo pending negotiations"); *Flexsteel Industries, Inc.,* 311 NLRB 257 (1993) (employer did not violate the Act by telling employees "[n]egotations often go on for many months while your wages and benefits would be frozen by law (the Company could not unilaterally agree to give a wage increase) while negotiations continue."); *Dillon Companies,* 340 NLRB 1260, 1274 (2003) (holding that employer's statement "that insurance would be 'frozen' during negotiation was, in context, no more than a statement that the Employer would not take unilateral action to change insurance."); *Naomi Knitting Plant*, 328 NLRB 1279, 1290 (1999) (employer did not violate Act by telling employees: "Also, we discussed that in this bargaining process, your wages/benefits to be NEGOTIATED, starts at ZERO and your current wages/benefits can be frozen until the bargaining process is complete. THERE ARE NO GUARANTEES.") (emphasis in original).

G. *The Change in Parking Location Was Not an Unlawful Conferral of a Benefit*

The ALJ concluded that Respondent violated Section 8(a)(1) and (3) of the Act by "conferring a parking benefit on mechanics and spotters in Mid-April, to discourage them from voting for the union." (D. 20:37-39). The ALJ's factual findings and legal conclusion, however, are in error.

The ALJ correctly states, "[a]n employer violates Section 8 of the Act by conferring employee benefits while a representation election is pending if the purpose is to induce employees to vote against the union." *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 406 (1964); *Vista Del Sol Healthcare*, 363 NLRB No. 135, *slip op*. at 1 fn. 2 (2016)*; see also Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944). The burden is on the employer to show a legitimate business reason for the timing of a grant of benefits during an organizing campaign, or the Board will infer improper motive. *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992); *see also Kanawha Stone Co.*, 334 NLRB 235, 235 fn. 2 (2001).

Here, however, the General Counsel did not prove by a preponderance of the evidence that Fix's confirmation of permission for employee Mechanics and Spotters to park in the back lot occurred during the critical period following the filing of the petition for the Mechanics and Spotters' election. (*see* Tr. 1147:18-20, 23-25). Further, permission to allow Mechanics and Spotters to park in the rear lot was not unprecedented (Tr. 1148:17-20; 1149:3-5), and did not provide those employees with any new benefit or any material benefit over other employees. The mechanics and spotters received the same benefit of parking, and virtually every witness who was questioned about the net change in distance acknowledged that the Mechanics and Spotters still walk farther to get to the shop from the parking area along the back fence than the distance drivers and other employees walk from the front parking lot to their work areas or that the distances are comparable. Indeed, Fix measured the distance between the front parking lot and the warehouse at 150 feet. (Tr. 1160:16-21). Fix measured the distance from where the mechanics and spotters are now parking along the back fence to the shop at 260 feet. (Tr. 1160:22-25).

While the ALJ dismisses Respondent's position as "irrelevant," the ALJ provides no Board support for that contention in his conclusion. Further, the ALJ mischaracterizes, at least in part,

Respondent's position. To be clear, Respondent's position is that the benefit of free parking provided to employees did not change. Accordingly, contrary to the ALJ, Sysco Columbia believes the Board's Decision and rationale in *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005), is equally compelling here.

In *Berkshire Nursing Home, LLC*, the Board recognized that a mere change in parking is legally insufficient to establish an unlawful, unilateral change in terms and conditions of employment under the Act. There, the employer unilaterally changed the location where employees were allowed to park their cars. Employees had been parking their cars in a lot that was about a one-minute walk from the facility. Then, the employer unilaterally decided to move employee parking to a different parking lot that was a three to five minute walk from the facility. The Board ruled, "the relevant inquiry is not employee preference, but whether the change properly can be characterized as 'material, substantial, and significant.' Here we do not find that the difference between a one-minute walk and a three to five-minute walk from the parking lot to the entrance is a sufficiently significant difference to warrant imposing a bargaining obligation…At most, such an increase in walking time is a relatively minor inconvenience to the employees, not a statutorily cognizable change in their terms and conditions of employment." *Id*. at 220.

The ALJ attempts to distinguish *Berkshire* to no avail. (D. 20:34-36). Specifically, the ALJ stated, "I find *Berkshire* inapposite inasmuch as it involved a unilateral change, unlike the situation here, where the Respondent conferred a benefit that could impact the outcome of a pending election." (D. 20:34-36). This is an erroneous distinction without a difference.

VII. EXCEPTIONS APPLICABLE TO THE ALJ'S FINDINGS, RULINGS AND CONCLUSIONS WITH RESPECT TO CLAIMS INVOLVING THE DVD SYSCO COLUMBIA DISTRIBUTED TO EMPLOYEES (Exceptions 87-91)

The ALJ erred in holding that Sysco Columbia unlawfully threatened to freeze wages in a DVD shown to employees. As an initial matter, the Complaint and the Conclusions of Law set

forth in the Decision clearly misstated the content of the DVD. Paragraph 9 of the Second Amended Complaint states that Sysco Columbia, "by DVD, threatened employees that their wages would remain frozen during negotiations if they choose the Union to represent them." (GC Ex. 1(a)). Likewise, the Decision stated that Sysco Columbia "[t]hreatened employees that their pay and benefits would be frozen if they voted for the Union." (D. 26:27-28). However, there is no dispute that the relevant portion of the DVD actually says: "And even if you didn't pay dues or didn't support the union, your wages and benefits would still be frozen *at the status quo*, during the possible months or years of negotiations." (GC Ex. 6 at 23) (emphasis added). Under Board law, no employee would reasonably interpret the actual language of the DVD as a threat to freeze wages.

The Board has repeatedly held statements like the statement contained in the DVD to be lawful. In a strikingly similar case, *Uarco, Inc.*, 286 NLRB 55 (1987), the Board held that the employer's references during a union organizing campaign to wages being "frozen" during negotiations would reasonably be construed by employees "to mean only that the Respondent would maintain the status quo pending negotiations," relying in part on employer's repeated communications to employees that benefits could be gained or lost in negotiations. *See also Mantrose-Haeuser Co.*, 306 NLRB 377 (1992) (employer did not violate the Act by sending employees a booklet that stated, "While bargaining goes on, wage and benefit problems typically remain frozen until changed, if at all, by a contract," noting that language about wages and benefits being frozen did not appear in any other campaign materials and there was no other objectionable language in the booklet); *Flexsteel Industries, Inc.*, 311 NLRB 257 (1993) (employer did not violate the Act by telling employees "[n]egotations often go on for many months while your wages and benefits would be frozen by law (the Company could not unilaterally agree to give a wage

increase) while negotiations continue."); *Dillon Companies*, 340 NLRB 1260, 1274 (2003) (holding that employer's statement "that insurance would be 'frozen' during negotiation was, in context, no more than a statement that the Employer would not take unilateral action to change insurance."); *Naomi Knitting Plant*, 328 NLRB 1279, 1290 (1999) (employer did not violate Act by telling employees: "Also, we discussed that in this bargaining process, your wages/benefits to be NEGOTIATED, starts at ZERO and *your current wages/benefits can be frozen until the bargaining process is complete*. THERE ARE NO GUARANTEES.") (emphasis in original).

The ALJ did not address *Uarco* or any of the other cases above, except for *Montrose-Hauser*, 306 NLRB 377 (1992). As shown above, those cases clearly establish that Sysco Columbia's communication regarding wages being "frozen at the status quo" was lawful. *Montrose-Hauser* does not compel a different result. In that case, the Board held that a campaign communication informing employees that wages would be frozen during negotiations was lawful, relying on the fact that a Vice President of the Company had told employees that the *amount* of wage increases was subject to negotiation. Similarly, as shown below, Sysco Columbia's communications to employees informed them that *discretionary* wage increases could not be granted *unilaterally*, which is an accurate statement of the law and provides further clarifying context for the statement that wages would be "frozen at the status quo."

Like the employer in *Uarco*, Sysco Columbia repeatedly communicated to employees about the possibility of benefits being gained or lost in negotiations, as well as the fact that Sysco Columbia could not *unilaterally* grant *discretionary* wage and benefit changes during bargaining. For example, the Company distributed to employees a booklet stating:

> QUESTION:
>
> Can a company give its employees *discretionary* wage and benefit increases during ongoing contract negotiations?

> ANSWER:
>
> No. During the months or years of negotiations, a company cannot *unilaterally* grant wage and benefit improvements, even if those improvements are granted to nonunion employees at its other facilities. Source: *NLRB v. Fitzgerald Mills Corp*., 313 F.2d 260 (2d Cir.).

(SC 42) (emphasis added). This discussion about unilaterally granting improvements is strikingly similar to the comment the Board upheld in *Flexsteel Industries, Inc*., 311 NLRB 257 (1993) ("Negotiations often go on for many months while your wages and benefits would be frozen by law (the Company could not unilaterally agree to give a wage increase) while negotiations continue.").

Along the same lines, Brawner communicated the following about the status of negotiations at Sysco Southeast Florida to employees via text message:

> Federal law precluded Sysco Southeast Florida, LLC from unilaterally implementing any changes to wages and benefits until an agreement was reached with the union. Therefore, the SE Florida drivers were below the Florida market base rates for the last nine months.

(GC 10.)

Additionally, English presented a "disclaimer" slide during meetings, which several witnesses recalled, and which stated:

> The purpose of this presentation is a follow-up discussion about information regarding the Teamsters' rules as they may relate to you as potentially-unionized workers.
>
> NO ONE CAN PREDICT future events…
>
> Therefore, no predictions will be made about what will happen if you become represented by the Teamsters.
>
> This is a discussion of FACTS and the LAW, as well as what CAN or MAY happen, NOT what WILL happen.

(SC 5 at 15) (Tr. 862:18-19; 1074:9-14; 1112:14-24).

The ALJ erred by failing to consider any of these lawful communications promulgated by Sysco Columbia, which provide clarifying context for the DVD's comments that wages would be "frozen at the status quo." The ALJ also erred in ruling that the DVD violated the Act. No reasonable employee would interpret the DVD's statement about wages being "frozen at the status quo" as an unlawful threat. The General Counsel's efforts to downplay the plain language used in the video in order to assert a claim that Sysco Columbia threatened employees are absurd. Sysco Columbia merely stated – in plain terms – the status of the law concerning bargaining. *See Neighborhood House Ass'n*, 347 NLRB 553, 554 (2006) ("As a general rule, where parties are engaged in negotiations for a collective-bargaining agreement, the employer must maintain the status quo of all mandatory bargaining subjects absent overall impasse."); *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001) ("It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed negotiations.").

VIII. EXCEPTIONS APPLICABLE TO THE REMEDY ORDERED BY THE ALJ (Exceptions 115-121)

A. *The ALJ Erred in Ordering the Extreme Remedy of Notice-Reading*

The ALJ's extreme remedies as set forth in the Decision (D. 27:28-28:21), are unsupported by a preponderance of the evidence on the record. The GC failed to establish that the Company has a proclivity to violate the Act, or has "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979); *see also NLRB v. Blake Constr. Co., Inc.*, 663 F.2d 272 (D.C. Cir. 1981). Notwithstanding this absolute failure, the ALJ ordered extraordinary remedies where such remedies are not warranted and are improper.

The Board "reserves extraordinary remedies for cases involving unfair labor practices that are 'so numerous, pervasive, and outrageous' that 'special' remedies are necessary to 'dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 935 (D.C. Cir. 2005) (finding General Counsel failed to justify need for extraordinary remedies). Extraordinary remedies may also be justified if a violation "has produced coercive effects chilling the free exercise of employee rights." *United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 638 (D.C. Cir. 1981). None of these circumstances are present in this case. The Company does not have a "proclivity" to violate the Act. *Food Store Emps. Union, Local 347 v. NLRB*, 476 F.2d 546 (D.C. Cir. 1973); *Reno Hilton*, 319 NLRB No. 140 (1995); *Batavia Nursing Inn*, 275 NLRB No. 125 (1985); *Dee Knitting Mills, Inc.*, 214 NLRB No. 138 (1974).

The General Counsel failed to establish "pervasive," "numerous," or "outrageous" misconduct sufficient to justify extraordinary remedies. In addition, the evidence at the hearing established that the Company has proven defenses to the allegations in the Complaint. The ALJ failed to articulate why traditional Board remedies are insufficient to cure the purported harm. *See Chinese Daily News*, 346 NLRB 906, 909 (2006) (holding "extraordinary" notice-reading remedy was not appropriate because "neither the General Counsel nor the dissent have offered any evidence to show that the Board's traditional remedies are insufficient" to remedy multiple violations, including threats of job loss); *Register Guard*, 344 NLRB 1142, 1146, n. 16 (declining to order notice-reading, despite multiple 8(a)(1) violations, including a hallmark unit-wide wage increase); *First Legal Support Services, LLC*, 342 NLRB 350, 350, n. 6 (2004) (declining to order additional remedies, including notice-reading, notwithstanding multiple violations, including repeated threats of discharge and plant closure and actual discharge of two union supporters, where

"[n]either the General Counsel nor our dissenting colleague has shown that traditional remedies are so deficient here to warrant imposing" additional remedies).

It was error for the ALJ to order extraordinary remedies in this case, in that it involves primarily garden-variety 8(a)(1) allegations, rather than the extreme allegations that have justified imposition of extraordinary remedies in other cases (such as the termination of union supporters). Further, the 8(a)(1) allegations from the election process arose out of three sites, yet the General Counsel ordered that the notice be read at all Sysco Columbia sites, which was error. As further error, the ALJ conflated the totality of conduct in two separate campaigns– despite the fact that much of that alleged conduct was only alleged to have affected one of the voting units – to justify imposing an extraordinary remedies applicable to all voting units.

Finally, it was erroneous for the ALJ to order a remedy that would require Propps or Brawner to read a notice or be present for that reading when: (1) there was no evidence to show that Propps had any role in any alleged violation of the Act; and (2) the ALJ found that it was Sysco Columbia's post-election conduct that justified the notice-reading remedy, and there is no evidence that Brawner played any role in that alleged conduct.[36] For these reasons, the ALJ's imposition of a notice-reading remedy should be reversed.

B. *The ALJ Erred in Ordering Backpay*

The ALJ also erred in awarding backpay without providing any guidance regarding the timing of the backpay obligation or the method by which backpay should be calculated. (*See* D. 27:5-27). The ALJ merely stated vaguely that "[t]he wage adjustments that the Respondent's warehouse employees received, as well as wage adjustments given to drivers and to mechanics

[36] The ALJ also erred by characterizing Brawner as a "particular corporate individual" of Sysco Columbia and ordering him to participate in the reading, when the uncontroverted evidence was that he does not work for Sysco Columbia nor have authority over its day-to-day operations.

and spotters at other Sysco Southeast companies, may provide guidance." (D. 27:12-15). However, there was no evidence presented at trial to suggest that the wage adjustments granted to warehouse employees at Sysco Columbia, or to Drivers, Mechanics, and Spotters at unaffiliated Sysco operating companies elsewhere in the Southeast has any bearing on the wage increases Sysco Columbia would grant to its Drivers, Mechanics, and Spotters. Indeed, the undisputed record evidence of wage adjustments separately made for drivers and mechanics, respectively, made no reference to these factors. Additionally, because there was no evidence to establish a methodology for calculating prior wage increases, there is no evidence from which backpay could be calculated. Accordingly, it was error to award this remedy.

CONCLUSION

For these reasons, Sysco Columbia respectfully asks that the Amended Complaint, all amendments thereto, and all the underlying charges be dismissed in their entirety; that the Exceptions of Sysco Columbia be granted; and that the Decision of the ALJ be reversed.

Respectfully submitted this 28th day of December, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Mark M. Stubley, Esq.
John T. Merrell, Esq.
The Ogletree Building
300 North Main Street
Greenville, SC 29601
864.271.1300 (phone)
864.235.8806 (fax)

Counsel for Sysco Columbia, LLC