

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

**TSCHIGGFRIE PROPERTIES, LTD**

**And**

**Case 25-CA-161304**

**TEAMSTERS LOCAL 120,  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS**

**THE GENERAL COUNSEL'S  
STATEMENT OF POSITION TO  
THE NATIONAL LABOR RELATIONS BOARD**

In response to the Board's November 9, 2018 request for statements of position with respect to the issues raised by the Eighth Circuit's remand in the above-captioned matter, the General Counsel respectfully submits the following:

**I. PROCEDURAL HISTORY AND INTRODUCTION**

On February 13, 2017, the Board issued a decision finding that Tschiggfrie Properties, LTD. (the "Respondent") violated Section 8(a)(1) and (3) of the Act by discriminatorily warning and then terminating employee Darryl Galle for his protected and Union activity, and additionally violated Section 8(a)(1) by failing to provide relevant assurances required by *Johnnie's Poultry Co.*, 146 NLRB 770, 774-76 (1964), *enforcement denied*, 344 F.2d 617, 619 (8th Cir. 1965) while conducting two pre-hearing interviews with another employee. *Tschiggfrie*

*Properties, LTD*, 365 NLRB No. 34 (February 13, 2017). In concluding that the General Counsel established that the Respondent discriminatorily discharged Galle, the Board majority (Members Pearce and McFerran) stated that, under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *certiorari denied*, 455 U.S. 989 (1982), *approved in NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), while the General Counsel was required to show that Respondent harbored anti-union animus, he did not need to demonstrate a “nexus” between Respondent’s anti-union animus and its decision to terminate Galle. *Id.*, slip op. at 1 & n.1. Acting Chairman Miscimarra disagreed and noted his view that such a nexus is required, and that general hostility toward the Union is insufficient to satisfy the General Counsel’s burden under *Wright Line*. *Id.* Nevertheless, Acting Chairman Miscimarra found that the General Counsel had, in fact, presented sufficient evidence that Galle’s discharge was motivated by his protected activity. *Id.*

On July 24, 2018, the Eighth Circuit remanded Galle’s alleged unlawful discharge allegation to the Board.<sup>1</sup> *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880 (8th Cir. 2018). In particular, the Eighth Circuit disagreed with the Board majority’s articulation of its *Wright Line* test. *Id.* at 886-87. The court noted that the Board majority’s holding that *Wright Line* requires only a general showing of anti-union animus is inconsistent with Eighth Circuit precedent, which mandates that the General Counsel prove a “connection or nexus” between an employer’s anti-union animus and an adverse employment action. *Id.* at 886 (citing *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015)). However, because the Board argued to the court that the General Counsel had nevertheless shown a “nexus” between Respondent’s animus and

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<sup>1</sup> The court enforced the Board’s order with respect to the discriminatory warning to Galle and reversed it with respect to Respondent’s failure to provide pre-interview *Johnnie’s Poultry* assurances to the other employee. 896 F.3d 880.

Galle's discharge, the Eighth Circuit remanded the case to the Board to apply *Wright Line* in a manner consistent with the court's opinion. *Id.* at 887.

The Board's articulation of the *Wright Line* standard in its February 2017 decision in this case does not comport with the requirement of establishing that an employee's protected conduct was a "substantial or motivating factor" in the adverse employment action. *See NLRB v. Transp. Mgt.*, 462 U.S. at 401; *Nichols Aluminum, LLC v. NLRB*, 797 F.3d at 554. Under the applicable authority, the General Counsel must demonstrate a connection or nexus between the employer's anti-union animus and its adverse action. The General Counsel therefore urges the Board to clarify that there must be a showing of a nexus between the employee's protected activity and the adverse employment action and that a "generalized hostility toward a union does not itself supply the element of unlawful motive." *Nichols Aluminum, LLC v. NLRB*, 797 F.3d at 554-55.

## **II. WRIGHT LINE REQUIRES THE GENERAL COUNSEL TO DEMONSTRATE A CAUSAL CONNECTION OR NEXUS BETWEEN AN EMPLOYER'S ANTI-UNION ANIMUS AND THE ADVERSE EMPLOYMENT ACTION AT ISSUE**

To establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that animus toward protected activity was a "motivating factor" for an adverse action against an employee. *Austal USA, LLC*, 356 NLRB 363, 363-64 (2010). To do that, the General Counsel must show that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take the adverse action. *Director, Office of Workers' Comp. Programs v. Greenwich*

*Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transp. Mgt.*, 462 U.S. at 395, 403 n.7; *Wright Line*, 251 NLRB at 1089.

The Board, however, has occasionally (as here) stated incorrectly that, to establish that the employee's protected activity was a motivating factor in the employer's adverse employment decision, *Wright Line* requires that the General Counsel need only demonstrate union or protected activity, employer knowledge of that activity, and general anti-union animus on the part of the employer. *See, e.g., Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11, n.25 (May 31, 2018); *Libertyville Toyota*, 360 NLRB 1298, 1301, n.10 (2014), *enforced sub nomine AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015); *Kawa Sushi Restaurant*, 359 NLRB 607, 607, n.1 (2013).

Several Board members have noted their disagreement with this formulation of *Wright Line*. In *Kitsap Tenant Support Services, Inc.*, Chairman Ring explained his view that *Wright Line* is "inherently a causation test," and, therefore, the essential question is whether there is a nexus between an employee's protected activity and the challenged adverse action. 366 NLRB No. 98, slip op. at 11 & n.25. *See also Advanced Masonry Assoc., LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3-4 & n.8 (2018) (Chairman Kaplan, disagreeing with majority's formulation of *Wright Line*; noting that *Wright Line* requires a nexus between the employer's animus and the employee's protected activity); *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 53, n.2 (2013) (Member Johnson, clarifying his view on the correct formulation of *Wright Line* in the same manner). As Chairman Ring emphasized, "[n]ot just any evidence of animus against protected activity generally" will satisfy the *Wright Line* requirement; instead, the General Counsel must show evidence of animus for the specific adverse

employment action at issue. *Id.* The General Counsel is in agreement with that articulation of the *Wright Line* standard.

The Board's failure to articulate the *Wright Line* test correctly has created difficulties in securing enforcement of Board orders in the courts of appeal. For example, in *Nichols Aluminum, LLC v. NLRB*, 797 F.3d at 554-55, the Eighth Circuit denied enforcement of the Board's order holding that the employer unlawfully discharged a returning striker after he got into an altercation with another employee. The Board had relied solely on general evidence of employer animus towards the strike, rather than on any particular animus towards the returning striker's participation in the strike. *Nichols Aluminum, LLC*, 361 NLRB 216, 218-19 & n.11 (2014). In denying enforcement of the Board's order, the circuit court noted that the striker had not taken any leadership role during the strike or distinguished himself in any way, and that absent evidence of employer animus towards the particular employee's activity, the Board did not establish that the employer had unlawfully discharged him. *Nichols Aluminum, LLC v. NLRB*, 797 F.3d at 554-55. Similarly, in *AutoNation, Inc. et al. v. NLRB*, 801 F.3d at 774-77, the Seventh Circuit criticized the Board's statement in the underlying decision that *Wright Line* does not require a showing of "particularized motivating animus towards the employee's own protected activity." While the court nevertheless found sufficient record evidence to conclude that the discriminatee's protected activity *did* motivate his discharge, the court lamented that the Board's language was "regrettable" and "may have deviated from *Wright Line* or introduced imprecision." *Id.* at 776.

The Board should take this opportunity to clearly state that, in addition to establishing protected employee activity and employer knowledge of that protected activity, the General Counsel must also demonstrate that an employer's animus to that specific activity, rather than

hostility to unions or protected activity generally, “contributed to” the employer’s decision to take an adverse action against the employee and therefore was a motivating factor in the decision.<sup>2</sup> *Director, Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. at 278, clarifying *NLRB v. Transp. Mgt.*, 462 U.S. at 395, 403 n.7; *Wright Line*, 251 NLRB at 1089. To the extent there are Board decisions in which the Board’s incorrect articulation of the *Wright Line* standard yielded incorrect results, the Board should overrule those cases.

**III. THE BOARD SHOULD USE THE CORRECT *WRIGHT LINE* STANDARD AND FIND THAT THE GENERAL COUNSEL ESTABLISHED A NEXUS BETWEEN RESPONDENT’S ANIMUS AND GALLE’S TERMINATION, AND THAT GALLE’S DISCHARGE THEREFORE VIOLATED THE ACT**

Applying the correct *Wright Line* standard, the General Counsel has met his burden of establishing that Galle’s protected activity was a motivating factor for Respondent’s discharge decision. Galle led the organizational effort at Respondent’s facility and served as the Union’s observer at the election. Soon after the election, Respondent’s attorney unlawfully warned Galle to stop talking about the Union at work. Six weeks later, Respondent discharged Galle. Although at trial the Respondent claimed that Galle was discharged for sleeping on the job and having a nonwork-related website open on his personal laptop while at work, as the Board already found, Respondent knew that Galle had been falling asleep on the job and had never in the past

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<sup>2</sup> Board members have sometimes disputed whether *Wright Line* is properly considered to be a three-part or four-part test. As Chairman Ring and Members Kaplan and Johnson have observed, whether *Wright Line* is framed as a three-part or four-part test is irrelevant, as “the ultimate inquiry” of the traditional three-part *Wright Line* analysis is whether there is a nexus between an employee’s protected conduct and the adverse employment action at issue. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 & n. 25 (citing *Advanced Masonry Assoc., LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3-4 & n.8; *St. Bernard Hospital & Health Care Center*, 360 NLRB at 53, n.2).

disciplined Galle for it, and made no reference to his sleeping on the job when it terminated Galle. *Tschiggfrie Properties, LTD*, 365 NLRB No. 34, slip op. at 1 & n.1. Moreover, Respondent has no rule prohibiting employees from accessing non-work materials on their laptops, and in fact has consistently allowed employees to do so. *Id.*

Thus, as required by *Wright Line*, the General Counsel established a nexus between Galle's protected activity and the Respondent's adverse action in discharging Galle and thus that Galle's protected activity was a motivating factor in Respondent's discharge decision. Galle engaged in Union activity, and as its unlawful warning demonstrates, Respondent was aware of that activity and Respondent's animus towards that activity motivated Galle's discharge. Further, Respondent failed to establish that it would have taken the same adverse action absent Galle's protected activity.

Thus, the General Counsel has established that Respondent's discharge of Galle violated Section 8(a)(3).

#### IV. CONCLUSION

Accordingly, the General Counsel urges the Board to conclude that he satisfied his *Wright Line* burden of establishing a nexus between Respondent's animus and Galle's Union activity, and that Galle's discharge violated Section 8(a)(3).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the Brief of the General Counsel in Case 25-CA-161304 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 2nd of January, 2019.

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