

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

WENDT CORPORATION

and

**Cases 03-CA-212225
03-CA-220998
03-CA-223594**

SHOPMEN'S LOCAL UNION NO. 576

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Brief in Support of Cross-Exceptions to the Decision of Administrative Law Judge Ira Sandron (ALJ), dated February 15, 2019, in the above-captioned case. Separately, Counsel for the General Counsel also files with the Board on this date an Answering Brief to Wendt Corporation's (Respondent's) exceptions. It is respectfully submitted that in all respects, other than what is excepted to herein, the findings of the ALJ are appropriate, proper and fully sustained by the credible record.

I. PRELIMINARY STATEMENT

The ALJ appropriately determined that Respondent committed numerous violations of the Act. The ALJ accurately found multiple violations of Section 8(a)(1) of the Act due to unlawful comments and/or threats from plant manager Daniel Voigt to Respondent's bargaining unit employees and the denial of a unit member's request for a union representative during an investigatory interview. (ALJD at 10-11; ALJD at 12:1-8; ALJD at 24:2-32). The ALJ correctly determined that Respondent committed multiple violations of Section 8(a)(3) of the Act by suspending employee Dennis Bush, assigning employee/welder William Hudson to operate the

saw and denying Hudson overtime. (ALJD at 21-23; ALJD at 24:1-10). The ALJ further accurately decided that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with Shopmen's Local Union No. 576 (Union) before issuing discretionary suspensions to two bargaining unit employees, using shop supervisors to perform bargaining unit work, unilaterally requiring two bargaining unit employees to work mandatory overtime, and refusing to provide the Union with requested information (ALJD at 24:36-45; ALJD at 25:1-8; ALJD at 34:26-42; ALJD at 35:1-7; ALJD at 42:7-41; ALJD at 46:37-46; ALJD at 47:1-13). Lastly, the ALJ appropriately held that Respondent violated both Section 8(a)(3) and (5) of the Act by laying off unit employees in February 2018 and failing to timely provide employee evaluations and wage increases. (ALJD at 26:33-43; ALJD at 27; ALJD at 28:1-29; ALJD at 32-33; ALJD at 34:1-24).

The ALJ inappropriately dismissed the allegation that Respondent interrogated a unit member about his union activities in violation of Section 8(a)(1) of the Act. (ALJD at 11:28-37). Further, while appropriately determining that Respondent failed to timely provide employee evaluations, the ALJ, as part of the remedy in the Notice to Employees, erroneously required Respondent to cease performance reviews of unit employees during negotiations with the Union for a collective-bargaining agreement. (ALJD at Appendix p. 1).

II. FACTS AND ARGUMENT

Following a Board-run election, the Union was certified as the collective-bargaining representative of Respondent's production and maintenance employees on June 23, 2017. (ALJD 6:28-33). The parties initially met for contract negotiations in July 2017, but after approximately 36 bargaining sessions, have yet to reach agreement on a contract. (ALJD 6:44-45).

1. The ALJ erred in dismissing the allegation that Respondent unlawfully interrogated a unit member about his union activities.

The ALJ correctly determined that from approximately September 2017 through April 2018, Respondent's plant manager Voigt made a series of unlawful statements to bargaining unit employees Jeff George, Dale Thompson, and Dmytro Rulov regarding their union activities and sympathies. (ALJD at 7-12). Notably, and without any explanation from Respondent, Voigt did not testify during the hearing. (ALJD at 5:19-20). As a result, the ALJ properly credited the "unrebutted and credible accounts of witnesses who testified about incident in which [Voigt] participated," including known union supporter George. (ALJD at 5:21-23; ALJD at 7:9-11).

On January 25, 2018, Voigt approached George in the morning while he was working and asked him about a union meeting the previous evening. (Tr. 284). George told him there had not been a union meeting, and Voigt replied "no, the negotiations meeting." (Tr. 284). The conversation continued:

George: Oh, I don't really know, you know, anything about negotiations. You know, nobody tells me any of that stuff since I'm not on the bargaining committee.

Voigt: Well, if you hear anything that you think I should know, you need to tell me, and I'll be a good friend and do the same for you. (ALJD at 11:28-30; Tr. 284; GC Ex. 41).

The ALJ acknowledged that Voigt "had no reason to question George about what was said at negotiations because he could have obtained such information from company representatives who were present." (ALJD at 11:31-33). Despite that finding, the ALJ incorrectly determined that Voigt did not ask about "employees' internal union activities and sympathies," and because the parties' negotiations were "open knowledge and not confidential," Voigt's questioning of George was not coercive and therefore lawful. (ALJD at 11:33-37).

An employer's request that an employee report on the union activities of his or her fellow coworkers violates Section 8(a)(1). *See, e.g., Metro Networks, Inc.*, 336 NLRB 63, 63 (2001) (employer asking employee to keep him "informed about what's going on" about an organizing drive violated Section 8(a)(1)); *Granite City Journal*, 262 NLRB 1153, 1155-56 (1982) (repeated employer requests for information regarding what occurred at union meetings violates Section 8(a)(1)); *Sussex Properties*, 283 NLRB 896, 896 (1987) (employer request that employee find out from other employees "what was going on with the Union" was unlawful).

Voigt was not merely asking George for an update on negotiations. Importantly, George made it clear to Voigt that he was not a member of the bargaining committee, and therefore did not have any information. (ALJD at 11:28-30). It is undisputed that Voigt, knowing George was not on the Union's bargaining committee, replied "if you hear anything I should know, **you need to tell me.**" (Tr. 284, emphasis added). Taken in context (and considering Voigt's position as plant manager¹ and his numerous prior unlawful statements), Voigt clearly sought any information George had related to negotiations, including conversations between and amongst union leaders and other members of the bargaining unit. Such a statement to a known union supporter clearly seeks information about internal union activities, is an unlawful interrogation, and therefore violates Section 8(a)(1) of the Act. As such, the Board should amend the ALJ's decision and find that Voigt's statement to George violated Section 8(a)(1) of the Act.

¹ Voigt, as the Plant Manager, is one of the highest-ranking officials employed at Respondent's facility. (R Ex. 9 – October 19, 2017). Problematic questions posed by a high-ranking official is another factor supporting the finding of a violation, as the Board regularly considers the identity of the person conducting the questioning. *See, Bozzutos, Inc.*, 365 NLRB No. 146, slip op. at 2 (2017).

2. Respondent's bargaining unit employees are entitled to performance reviews while the parties continue to negotiate a a collective-bargaining agreement.

The ALJ correctly determined that Respondent's refusal to timely provide performance reviews and wage increases to members of the bargaining unit consistent with the existing practice violated Section 8(a)(3) and (5) of the Act. (ALJD at 32-34). Further, the ALJ correctly required Respondent to make affected employees whole for its failure to timely provide performance reviews and wage increases. (ALJD at 48:45-46; ALJD at 49:1-5; ALJD at 52:12-15). Further, the ALJ required Respondent to, upon request, bargain with the Union before implementing any changes to employee performance reviews and/or wage increases. (ALJD at 49:32-33; ALJD at 51:35-42; ALJD 52:39-40).

However, in the Notice to Employees, the ALJ proposed the following language:

“WE WILL NOT...conduct performance reviews...or implement other terms and conditions of employment when we are engaged in negotiations for a collective-bargaining agreement and have not reached an overall impasse.” (ALJD at Appendix p. 1).

The ALJ's proposed language allows Respondent to continue to refuse to conduct performance reviews and issue wage increases until the parties reach a collective-bargaining agreement, even though the ALJ correctly deemed Respondent's refusal to timely provide performance reviews and wage increases unlawful. The appropriate remedy is to require Respondent to maintain the existing practice regarding the issuance of performance reviews and wage increases, until the parties reach a collective-bargaining agreement containing language governing the timing of performance evaluations and wage increases. As such, the Board should amend the Notice to Employees to require Respondent to maintain the existing practice of issuing performance reviews and wage increases as it existed prior to its commission of the unfair labor practices.

DATED at Buffalo, New York, this 10th day of May, 2019.

Respectfully submitted,

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