

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

**NOAH'S ARK PROCESSORS, LLC d/b/a
WR RESERVE**

and

**Cases 14-CA-217400
14-CA-224183
14-CA-226096
14-CA-231643
14-CA-235111**

**UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL NO. 293**

**COUNSEL FOR THE GENERAL COUNSEL'S
REPLY BRIEF TO RESPONDENT'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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Counsel for the General Counsel (GC) respectfully file this Reply Brief¹ in response to Noah's Ark Processors, LLC d/b/a WR Reserve's (Respondent) Brief to the Administrative Law Judge (ALJ) in this matter. For the reasons set forth below, Respondent's arguments are not supported by the record or Board law.

I. Respondent failed to rebut or deny Complaint allegations

Respondent's Brief to the ALJ failed to deny or provide any substantive arguments in response to the following allegations set forth in the GC's Second Consolidated Complaint and confirmed by the record:

- (a) About September 2018, Respondent, by Lidia Acosta, solicited employees to resign from the Union and interrogated employees about their support for the Union. GC 1-EEE, p. 5 (Complaint paragraph 5(c)(1) and (3)).
- (b) On various dates since January 23, 2018, Respondent, by Lidia Acosta and Dinora Murillo, coerced employees into signing preprinted forms prohibiting Respondent's disclosure of employees' employment information without employees' written consent. GC 1-EEE, p. 5-6 (Complaint paragraph 5(c)(4)).
- (c) Since at least January 23, 2018, Respondent failed to remit employee dues to the Union pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations in violation of Section 8(a)(1) of the Act. GC 1-EEE, p. 6 (Complaint paragraph 5(d)).
- (d) Since about November 6, 2017, Respondent has failed and refused to furnish presumptively relevant information to the Union concerning bargaining unit (Unit) employees in violation of Section 8(a)(1) and (5) of the Act. GC 1-EEE, p. 8 (Complaint paragraph 8).
- (e) Since January 23, 2018, Respondent changed Unit employees' hourly wage rates and paid Unit employees' wages, including between January 23, 2018 and January 28, 2018, when Respondent's actions were contrary to the parties' collective-bargaining agreement in violation of Section 8(a)(1), (5) and 8(d). GC 1-EEE, p. 9. (Complaint paragraph 10(a)).²

¹ References will be denoted using the following abbreviations followed by the page number: Trial Transcript (T.); General Counsel's Exhibits (GC); Respondent's Exhibits (R); Joint Exhibits (JT); General Counsel's Brief to the ALJ (GC Brief), and Respondent's Brief to the ALJ (R Brief).

² Contrary to Respondent's assertion on pages 17-18 of its brief, the evidence did not establish that the Union was on notice of the wide-spread wage increases implemented on August 23, 2018. Respondent conceded at hearing that it did not involve or notify the Union about implementing those changes. T. 241. On January 25, 2019, Mary Junker informed Mike Marty that Respondent did not include a wage proposal in its last, best and final offer because

- (f) Since January 23, 2018, Respondent failed and refused to deduct and remit to the Union dues pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations, including between January 23, 2018 and January 28, 2018, when Respondent's actions were contrary to the parties' collective-bargaining agreement in violation of Section 8(a)(1), (5) and 8(d). GC 1-EEE, p. 9 (Complaint paragraph 10(b)).
- (g) By the conduct set forth in Complaint paragraph 12(a), Respondent has attempted to undermine the Union as the exclusive collective-bargaining representative of the Unit. GC 1-EEE, p. 11 (Complaint paragraph 12).

For all of the reasons described in the GC's Brief to the ALJ, and as conceded by Respondent by its failure to rebut the allegations at the hearing or in its post-hearing brief, the Complaint allegations set forth above are proven violations of the Act.

II. Respondent's general denials regarding coercive statements to employees

Respondent addressed several of the GC's Complaint allegations by citing to the generic denials offered by Respondent's supervisors, managers and agents. R Brief at 5-9.³ For each allegation generally denied by Respondent, both current and former employees provided testimony that supported the GC's Complaint. Current and former employees spoke to Hernandez's coercive statements related to continued Union representation during a meeting in March 2018. T. 389-392, 459-461; GC Brief at 2. As set forth in the GC's Brief to the ALJ on pages 3-8, numerous former employees consistently testified to the threats made by Paul

Respondent's prior proposal differed from the wages currently in effect for Unit employees. T. 95. Although Marty testified generally that he was aware that wages were different, he also confirmed that he not know what Junker was talking about. T. 686-687. Respondent has not established, nor has it argued, that it placed the Union on notice of any wage changes in advance of implementation and any Union knowledge that occurs thereafter is *fait accompli*. As detailed in the GC's Brief to the ALJ on pages 44-53, Respondent has engaged in a number of unilateral changes to employees' wages during the 10(b) period while the parties were negotiating a successor collective-bargaining agreement and while the Union was banned from the facility. Respondent has failed to establish that it placed the Union on notice or bargained with the Union over any changes to employees' wages beyond making its May 15, 2018 proposal.

³ "March 2018 Statements by Paul Hernandez and Lidia Acosta" is in reference to Complaint paragraph 5(a). R Brief at 4-5; GC 1-EEE, p. 5. "March 27, 2018 Statements by Paul Hernandez and Mike Helzer" is in reference to Complaint paragraph 5(b). R Brief at 5-6; GC 1-EEE, p. 5. "Statements/Actions by Other Supervisors" is in reference to Complaint Paragraphs 5(c). R Brief at 7-9; GC 1-EEE, p. 5.

Hernandez and Mike Helzer as the employees engaged in a protected work stoppage on March 27, 2018. Current employee Celeste Sanchez provided testimony concerning the actions she observed on the work room floor wherein Lidia Acosta approached employees about resigning from the Union. T. 380-387. Sanchez provided details of her observations of Acosta approaching employees with the same Union resignation forms with some employees signing and some employees not signing. At no point during the hearing did Acosta deny this or attempt to clarify her actions. Multiple employees testified to the deception and flat out lies told to them by Lidia Acosta and Dinora Murillo in order to get employees to sign confidentiality forms regarding their employment information. GC Brief at 19-23. Again, neither Acosta nor Murillo denied this testimony. Even if the HR representatives had done so, the Board has historically found the testimony of current employees to be highly reliable particularly where in direct contradiction to their employer's testimony. *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979), citing, e.g., *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961); *Gateway Transportation Co, Inc.*, 193 NLRB 47, 48 (1971). Respondent offers "facts" by references to its self-serving testimony of supervisors, managers and agents seeking to cover up for unlawful conduct

III. Respondent's termination of ten employees on March 27, 2018⁴

Respondent makes several arguments in defense of its actions to end the employment of approximately ten employees who engaged in protected concerted activities related to their wages on March 27, 2018. Respondent argues that the GC cannot meet his burden under *Wright Line*, 251 NLRB 1083 (1980). Respondent first argues that the employees at issue were not engaged in protected activity. R Brief at 19. Respondent's argument rests on the fact that the

⁴ Complaint paragraph 6. GC 1-EEE, p. 7.

employees were engaged in a wildcat strike because the Union did not authorize the work stoppage and the parties' CBA contained a no strike clause. R Brief at 19-20. Respondent's argument lacks legal support and its own brief exposes the flaws in this argument. Respondent's counsel wrote the following at page 19:

“Ordinarily, a wildcat strike occurs when unionized employees engage in a strike, stoppage, slowdown, or suspension of work *in violation of an existing collective bargaining agreement*, or otherwise fail to obtain the support and ratification of the whole union.”

It is undisputed that the parties' CBA expired without an extension on January 28, 2018.

It is well-settled that a no-strike clause does not survive an expired contract. See *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1657-1658 (2015); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). Therefore, when the employees engaged in a work stoppage to address their terms and conditions of employment on March 27, 2018, they were engaged in protected activity. *Atlantic Scaffolding, Co.*, 356 NLRB 835, 836-837 (2011); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962).

Respondent next argues that the employees were not terminated as a result of anti-union animus. R brief at 20. Respondent's basis for this argument is its citation to *Wright Line* that ... “the employer acted as it did on the basis of anti-union animus.” R brief at 19. Respondent misunderstands Board law as the employees engaged in a protected work stoppage on March 27, 2018 did so without a connection to the Union. Respondent is correct that the Board applies the *Wright Line* analysis to Section 8(a)(1) concerted activity cases that involve an employer's motivation for taking an adverse employment action against employees. *Hoodview Vending Co.*, 359 NLRB 187 (2012), reaffirmed 362 NLRB No. 81 (2015); *Saigon Gourmet Restaurant, Inc.*, 353 NLRB 1063, 1065 (2009). In order to establish a violation, the evidence must show (1) the employees engaged in protected concerted activities; (2) the employer knew of the concerted

nature of the activities; and (3) the adverse action taken against the employee was motivated by the activity. Once this showing is made, the employer has the burden of showing it would have committed the action in question even absent the protected concerted activity. *Hoodview*, supra. In such cases, there is no element of union animus to be analyzed. Employees are protected by the Act to engage in Section 7 activities related to their terms and conditions of employment without regard to the existence of a union, union support or union activities. In its brief, Respondent cites to *RELCO Locomotives, Inc.*, 734 F. 3d 764, 780 (Aug. 20, 2013). *RELCO* involved the termination of a union leader in violation of Section 8(a)(3) of the Act. In the current case, there is no burden to establish a connection between Respondent's actions and the Union support of the packaging employees. What is required is a showing that Respondent's actions were motivated by the protected conduct of the employees. As detailed in the GC's brief to the ALJ, the GC met this burden. GC Brief at 3-13.

Lastly, Respondent argues that even if the GC has met its burden, it has established that it would have taken the same action absent the protected activity. R Brief at 21. Respondent argues that regardless of "the underlying reason for the employees' decision to stop work and leave the facility, Noah's Ark neutral policy regarding job abandonment serves as "the justification" for the termination of the employees." R Brief at 21. Respondent's argument fails for several reasons. First, Respondent provided no evidence that it possessed any kind of policy that was applied to these employees. The only evidence Respondent provided concerning its decision to end the employment of those employees was the testimony provided by their supervisor Joel Murillo. Murillo confirmed that he signed separation notices because the employees did not go back to work on March 27, 2018, he marked them as voluntarily resigned due to job abandonment but also involuntary termination because they had refused to go back to work on

March 27, 2018, and he marked them as not rehireable because they walked off the job and they may do it again. T. 298-300. Additionally, Respondent cannot divorce itself from its unlawful actions while the employees engaged in a protected work stoppage. Respondent made coercive statements to employees in the course of their protected conduct wherein management ordered employees to leave the facility, threatened employees with job loss, threatened employees with the police, and ultimately gave employees the directive to return their work ID's necessary to return to the facility. Respondent was required to present evidence that it would have terminated these employees even absent their protected concerted activity. See *Correctional Medical Services*, 356 NLRB 277, 278 (2010). To argue that Respondent would have made the decision to end the employees' employment had they not engaged in protected conduct lacks any kind of factual or legal support. For these reasons, Respondent's arguments in its brief lack merit.

IV. Respondent's direct dealing regarding the Independence Day holiday⁵

Respondent does not provide a legal argument in defense of the GC's allegation that Respondent's managers directly dealt with employees regarding moving the observance of the 2018 Independence Day holiday in violation of Section 8(a)(5) of the Act. Respondent simply cites to testimony confirming the undisputed testimony of both managers and employees that Respondent engaged in the very conduct that is alleged in the Second Consolidated Complaint. R Brief at 17. Nothing in Respondent's brief disputes or provides an argument against finding that Respondent directly dealt with employees over the observance of the 2018 Independence Day holiday in violation of Section 8(a)(5) of the Act. GC Brief at 43.

V. Respondent provided more than ministerial aid to employees seeking to resign from the Union⁶

⁵ Complaint paragraph 9. GC 1-EEE, p. 9.

⁶ Complaint paragraph 5(c)(2). GC 1-EEE, p. 5.

Respondent cites a 4th circuit case in *Narricot Industries, L.P. v. NLRB*, 587 F. 3d 654, 662-663 (4th Cir. 2009) in noting that an employer does not violate the Act by providing more than ministerial aid to employees if done “in a situational context free from coercive conduct.” R. Brief at 21. As set forth in the entirety of the GC’s Complaint and the GC’s Brief to the ALJ, Respondent has created a work environment at its facility with a foundation based on coercive conduct. The only Board case Respondent cites in its brief as an example of conduct deemed to constitute appropriate ministerial aid is *Ernst Home Centers, Inc.*, 308 NLRB 848 (1992), citing *Eastern States Optical Co.*, 275 NLRB 371 (1985). In *Ernst Home Centers*, the employer simply provided an employee with language for a decertification petition. The Board found that such conduct, alone, did not rise to the level of a violation. Respondent, on the other hand, did much more than simply inform employees of language to use in order to decertify or resign from the Union. Respondent created an environment filled with unremedied unfair labor practices, including but not limited to making coercive statements concerning continued Union representation, threats of termination for engaging in protected, concerted activities related to employees’ terms and conditions of employment, demanding that employees meet with attorneys retained by Respondent for the purpose of interfering with the Board’s investigative processes, and questioning employees about the Union and/or Board activities. Within the context of this environment, Respondent did more than provide basic information to employees. It injected itself into the resignation process in a manner that the Board has previously found unlawful. The GC cited similar cases in his Brief to the ALJ, but one of note is *Winn-Dixie Stores, Inc.*, 128 NLRB 574 (1960). In that case, the Board upheld the ALJ’s finding that the employer provided more than ministerial aid when it assisted employees to resign from the Union. In that case, after being informed of certain employees’ interest in resigning from the union, the employer provided the

employees with a resignation letter, and after the employees signed it, mailed the letter to the union on the employees' behalf. Id. at 588. Although there was a dispute concerning whether the employer initiated interest/action in resigning from the Union, the ALJ found that regardless of who initiated the action, the employer had gone too far:

“But wholly apart from who initiated the action, the Respondent went too far when it either prepared (as it did for Lusk) or permitted preparation of the letter by a bookkeeper, then took the letters and actually addressed the envelopes, and saw to the mailing of the letters. Respondent did more than perform a mere ministerial act. The Trial Examiner has noted that all four letters of resignation are almost identical in language. The preparation of a form letter by Respondent, when viewed in the light of the heretofore found coercive remarks (“washing their hands of this whole union deal”) is further indication of interference. I find that Respondent, under all the circumstances of this case, interfered with the rights guaranteed to employees by their acts of preparing a form letter and by their acts of actually writing and mailing the union resignation letters.” Id. (citations omitted).

Respondent argues that it has clean hands in that it simply provided employees with a pre-made form for employees to revoke their dues-checkoff authorizations and that it did not encourage or solicit employees to do so. R brief at 22. Respondent's argument ignores the testimony provided by current employee Celeste Steward and her observations of Lidia Acosta on the work room floor⁷ and the many other unfair labor practices Respondent has committed over the past year and a half, undermining the Union and reducing its membership list from well over 100 to less than 30. JT 14, p. 1-4, 20. The record does not support Respondent's clean hands argument.

VI. Respondent interrogated employees about their Union and/or Board activities.⁸

In the facts section of its brief, Respondent cites to the origin of Respondent's knowledge of employees receiving investigative subpoenas during the Board's investigation of this matter. R Brief at 9-10. Respondent spends a majority of its brief citing to various managers' denials

⁷ T. 380-387.

⁸ Complaint paragraph 5(e). GC 1-EEE, p. 6.

regarding whether they subsequently questioned employees about receiving letters or subpoenas from the Board. R. Brief at 10. Respondent provides no explanation as to why the ALJ should credit the self-serving denials of supervisors alleged to have engaged in unlawful conduct in comparison to the overwhelming contradictory testimony provided by current employees. Multiple current employees, and at least one former supervisor, provided testimony concerning supervisors questioning employees about their receipt of such documents. T. 413-416 (Juvencio Ramirez de la Cruz), 451-455 (Marcial Torres Santiago), 166 (Josue Guerrero). The Board has historically found such testimony to be highly reliable particularly where in direct contradiction to their employer's testimony. *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979), citing, e.g., *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961); *Gateway Transportation Co, Inc.*, 193 NLRB 47, 48 (1971).

VII. Respondent interfered with the Board's investigation⁹

In its brief, Respondent argues that “an employer may offer its employees assistance in securing legal counsel, so long as the assistance is offered to “all employees, regardless of the position they take with respect to talking to the Board's agent. There must not be any ‘coercion, threat of reprisal, or force’ in offering such assistance.” R Brief at 23. Respondent goes on to argue that in response to employees approaching Respondent after receiving a letter/subpoena from the Board, it posted a Notice to Employees informing employees of their right to have counsel; they were not required to report/consult with Respondent about obtaining counsel; employees could speak with the counsel Respondent had retained for the employees if they so desired; Respondent would pay for the services as a benefit to employees; and Respondent did not have an attorney-client relationship with the attorneys. R Brief at 24, citing JT 15.

⁹ Complaint paragraph 5(f). GC 1-EEE, p. 6.

Respondent attempts to argue that it had clean hands and simply wanted employees to know they had the right to legal counsel if they so desired. The record is clear that Respondent did so much more and Respondent completely disregarded the credible testimony offered by numerous employees about Respondent's actions that contradict both the notice posting and Respondent's argument in its brief. The cases cited in the GC's brief show the Board has found violations of Section 8(a)(1) of the Act by employers intruding in the Board's investigation process by offering legal counsel for employees subject to that process. *KFMB Stations*, 349 NLRB 373 (2007); *S.E. Nichols, Inc.*, 284 NLRB 556 (1987); *Florida Steel Corp.*, 233 NLRB 491, 494 (1977). *Florida Steel* is a good example of an employer who notifies employees that it was willing to provide legal counsel for those employees interested in having an attorney if contacted by the Board. The credible testimony offered by current employees established that not only did Respondent offer employees the benefit of free legal counsel, it required employees to meet with those attorneys. Respondent's managers approached employees and directed them to the plant manager's offices and other management offices to meet with the attorneys. Employees were instructed to meet with attorneys, some understanding them to be Respondent's attorneys. Employees also testified to understanding the meeting to be mandatory and being fearful of not meeting or leaving the meeting out of fear of getting trouble or even terminated. T. 365-372, T. 413-416, 417-419, 440-441, 451-452, 508-509, 517-520. Respondent conveniently disregards the overwhelming interference identified by employees' testimony when it argues, "Employees knew that they had the exclusive discretion to determine whether or not they wanted to be represented by counsel..." R Brief at 25. The record established otherwise and supported the conclusion that Respondent interfered with the Board's investigation through the retention of

free legal counsel for employees and through its instructions that employees were required to meet with those attorneys in violation of Section 8(a)(1) of the Act.

VIII. Respondent's statements to employees regarding meeting with attorneys¹⁰

In its fact section, Respondent cites to the testimony of Paul Hernandez and his denial of any unlawful statements to employees ahead of meeting with Respondent's paid for attorneys. R brief at 15. Similar to other unlawful statements confirmed by current employees yet denied by self-serving, wrong-doing supervisors, Respondent provides no explanation regarding the very detailed testimony provide by Aramis Hernandez Acosta wherein he detailed not only Paul Hernandez's coercive statements to him prior to meeting with Respondent's attorneys but also Paul Hernandez's interrogation of Aramis once he had privately met with a Board agent. T. 365-372. Respondent's brief provides no justification for crediting one of Paul Hernandez's numerous self-serving denials over the credible testimony of a current employee.

IX. Respondent bargained in bad faith with the Union¹¹

In defense of the allegation that it engaged in bad faith bargaining in violation of Section 8(a)(5) of the Act, Respondent provided minimal argument or defense in its brief. R Brief at 17-18, 25-26. Respondent argues that in seven and a half months of meetings, the only agreements that were reached between the two parties were the minor tentative agreements related to a change in Respondent's name, updating anti-discrimination language and moving certain language from one article to another. R Brief at 26. Respondent compares these minimal agreements to the invalid impasse found in *NLRB v. Whitesell*, 638 F. 3d 883, 890 (8th Cir. 2011) wherein agreements had been reached on thirty issues while the parties continued to

¹⁰ Complaint paragraph 5(g). GC 1-EEE, p. 6.

¹¹ Complaint paragraphs 11 and 13. GC 1-EEE, p. 10, 11-12.

come to agreements on important issues all the way up until the parties last session. *Id.* Respondent additionally argues that after receiving its last, best and final offer, the Union failed to accept, reject or present a counter-proposal in a four week period. As a result, Respondent argues there was a “contemporaneous understanding of the parties as to the state of negotiations” that they were “at the end of their rope.” R Brief at 26 citing *Whitesell*.

First, Respondent’s assertion that declaration of impasse was warranted because four weeks had passed without acceptance, rejection or presentation of a counter-proposal is hypocritical under the circumstances. To begin with, at no point during negotiations did Respondent provide the Union with a deadline for response to either of its two bargaining proposals. When Mary Junker gave Mike Marty Respondent’s last, best and final offer, she did not indicate any type of deadline to respond. During the parties’ negotiations, Respondent never made a counter proposal in comparison to the Union doing so on numerous occasions. Lastly, during negotiations Respondent often took weeks, sometimes months, to respond to the Union’s proposals. Respondent took over four months to respond to the Union’s original March 22, 2018 proposal (not responding until July 27, 2018). The Union hustled to create a modified proposal on the same date Respondent had rejected the Union’s proposal. It took three more meetings and four weeks and six days for Respondent to communicate its rejection of the proposal. Lastly, Respondent took just shy of four weeks to communicate its rejection of the Union’s September 12, 2018 proposal on October 11, 2018. To claim a lack of timeliness in providing a response is the height of hypocrisy. Furthermore, once Respondent prematurely declared impasse and implemented its LBFO, the Union requested to have Respondent rescind the implementation and return to the table. It refused to do so.

Respondent also generally argues that the parties were at the end of their rope because

they had met 20 times over a 7.5 month period with limited tentative agreements reached. R Brief at 26. What Respondent completely fails to address is the nature of the negotiations process that led to the lack of movement between the parties. As significantly detailed in the GC's brief, Respondent engaged in overwhelming bad faith conduct both at and away from the table. Respondent delayed for months in responding to the Union's request for negotiations; agreed to two negotiation dates in a six month period while simultaneously proposing a date the parties already had reserved for an arbitration; used a representative at the table without the authority to bind the company; made two proposals in the span of 7.5 months; failed to provide explanations or counter proposals following each systematic rejection of the Union's proposals; failed to provide the Union with presumptively relevant information regarding bargaining unit employees including but not limited to wage information necessary for the Union to make an economic proposal; directly dealt with bargaining unit employees concerning a mandatory subject of bargaining; provided more than ministerial aid to employees by assisting them to resign from the Union; unilaterally discontinued deducting and remitting Union dues pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations; and unilaterally paid employees wages contrary to the CBA and implemented wage increases contrary to the CBA and without notice to or agreement by the Union. In the face of all of the above-referenced unfair labor practices, many of which Respondent did not rebut during the hearing or in its brief, Respondent declared impasse *immediately* following the Union's attempt to enforce an arbitration award granting the Union access to Respondent's facility. Yet, Respondent argues that it had the right to do so without an explanation beyond its view that the parties were at the end of the rope. As detailed in the GC's Brief to the ALJ, Board law does not support Respondent's defense.

X. Conclusion

The General Counsel respectfully submits that for all of the reasons set forth above, Respondent's Brief to the Administrative Law Judge fails to provide factual or legal justification for the unlawful conduct set forth in the General Counsel's Second Consolidated Complaint and as supported by the record.

Dated: May 10, 2019

Respectfully Submitted,



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