

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

**MONDELEZ GLOBAL LLC,  
Respondent,**

**-and-**

**BAKERY, CONFECTIONERY,  
TOBACCO WORKERS AND GRAIN  
MILLERS INTERNATIONAL UNION,  
LOCAL 719, AFL-CIO,**

**Union.**

**Case Nos. 22-CA-174272, 22-CA-178370,  
22-CA-178591, 22-CA-179007, 22-CA-  
180206, 22-CA-180213, 22-CA-181423,  
and 22-CA-183609**

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**RESPONDENT MONDELEZ GLOBAL LLC'S REPLY BRIEF IN FURTHER SUPPORT  
OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the National Labor Relations Board’s (“NLRB” or the “Board”) Rules and Regulations, Respondent Mondelēz Global LLC (“MG LLC” or “Respondent” or “Employer”) submits this Reply Brief in Further Support of its Exceptions to the January 7, 2019 Decision and Order (“Decision”) of Administrative Law Judge (“ALJ”) Kenneth W. Chu.<sup>1</sup>

### **SUMMARY OF ARGUMENT**

With respect to the ALJ’s Section 8(a)(3) findings, Counsel for the General Counsel (“General Counsel”) and Charging Party, The Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 719, AFL–CIO, Local 719, (“Union” or “Charging Party”) join the ALJ in erroneously attempting to show: (1) Respondent initiated a study to determine the cause of its excessive overtime costs; and (2) terminated five employees for time theft as a ruse to rid itself of three of those employees - Claudio Gutierrez (“Gutierrez”), Bruce Scherer (“Scherer”), and Nafis Vlashi (“Vlashi”) (collectively “Discriminatees”) because of their purported union activities. The ALJ, General Counsel, and Charging Party all overlook several critical facts which undermine such conspiracy theories which are insufficient to establish General Counsel’s Wright Line burden:

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<sup>1</sup> “(D. \_\_)” references the Decision by page and line numbers. General Counsel insinuates that Respondent’s Brief and Exceptions fail to comply with Rule 102.46 (a)(1)(i)(A) or (D). GC Answer Br. at n. 1. General Counsel cites no Board authority to suggest how Respondent has not complied with the Rules. Even if she did, when “good faith efforts to comply with Board regulations are made and no prejudice would result to any party,” the Board excuses such deficiencies. See, NLRB v. Washington Star Co., 732 F.2d 974, 975 (D.C. Cir. 1984)(noting the Board’s procedural rules are “confusing.”). Here, General Counsel does not assert any prejudice. To this end, Respondent does not object to General Counsel’s failure to comply with Rule 102.6 requiring 12 point font for footnotes.

Respondent also objects to the Union’s inclusion of Appendix I to its brief as it exceeds the 50 page limitation set forth in Rule 102.46(h). Therefore, it should be disregarded by the Board.

- Rogelio Melgar Moron (“Melgar”), the Continuous Improvement Manager at the Fair Lawn Bakery who initiated and designed the overtime study, had no knowledge of the Discriminatees’ purported union activities when he discovered their transgressions. (Tr. 874:23-875:8) (Melgar testifying that the report “wasn't commissioned. It was a series of databases that I put together for my own understanding[.]”);
- There is no evidence any other Company official instructed Melgar to single out the three Discriminatees;
- Respondent terminated other individuals, not known to be Union supporters, at the same time for committing similar misconduct;
- Other Union supporters who engaged in similar purported union activities as the Discriminatees were not disciplined.

Simply stated, Union status does not immunize individuals from the consequences of time theft and intent to conceal time theft. Moreover, the evidence demonstrates Respondent would have terminated the Discriminatees regardless of their union activities. The Board should not countenance such behavior by giving credence to the ALJ’s conclusions.

General Counsel likewise fails to support the ALJ’s erroneous Section 8(a)(5) findings. There is no evidence the changes the ALJ found violative of the Act had a material impact on employment terms or conditions. Additionally, Respondent had a sound arguable basis for the changes. As a result, the Complaint should be dismissed in its entirety.

**I. THE BOARD SHOULD CONFIRM THAT WRIGHT LINE’S PRIMA FACIE BURDEN REQUIRES A NEXUS BETWEEN PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT ACTION**

The instant case provides a sound opportunity for the Board to re-confirm that to establish the prima facie burden under Wright Line, the General Counsel must establish some nexus between an employee’s purported protected activity and an adverse employment action. In other words, it is not enough for the General Counsel to demonstrate the existence of three disjointed concepts: (1) protected activity; (2) knowledge of protected activity; and (3) animus without also linking them to the adverse employment action in question. Wright Line makes this point clear, where the Board noted “our task in resolving cases alleging violations which turn on

motivation is to determine whether a *causal relationship* existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment." 251 NLRB 1083, 1089 (1980)(emphasis added); Valley Health System, LLC, 352 NLRB 112, 117 (2008)(The Board adopted the ALJ's conclusion that Wright Line requires a "nexus or link between the protected activities and the adverse action underlying motive.")<sup>2</sup>

In this case, the ALJ failed to apply the correct standard and did not point to any record evidence establishing such a link which, in and of itself, warrants reversal.

**A. The ALJ Erred In Finding General Counsel Established The Knowledge Prong Of The Wright Line Analysis**

General Counsel and the Union suggest Respondent was aware of the Discriminatees' union activities because union rallies transpired in public and were documented on Facebook. However, the record is clear Melgar was unaware of any union activity associated with the Discriminatees and Melgar unequivocally testified that he did not know the employment or union status of any of the employees in his study. (Tr. 872:11-25; 856:6-18; 870:2-10). Pamela DiStefano ("DiStefano"), Director of Labor Relations for the North America Region, the ultimate decision-maker, likewise lacked knowledge of the Discriminatees' union activities. (Tr. 1175:5-21). Although DiStefano, knew Vlashi was the Union president, she testified, without contradiction, his position played no role in his termination. (Tr. 1175:5-21).

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<sup>2</sup> In fact, the United States Court of Appeals for the Seventh Circuit has noted that there must be a link between antiunion animus and the adverse employment action under review. See Auto Nation v. NLRB, 801 F.3d 767, 775 (7th Cir. 2015)("This court has held, correctly in [the employer's] view, that there must be a showing of a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker.")

Despite General Counsel and Union’s attempts to establish the contrary, the employer-knowledge element of Wright Line *prima facie* burden requires General Counsel to prove knowledge “on the part of the company official who actually made the discharge decision.” Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1338 (4th Cir. 1976). “Automatically imputing such knowledge to a company improperly removes the General Counsel’s burden of proving knowledge.” See, Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB, 219 F.3d 677, 685 (7th Cir. 2000); In Gestamp S.C., LLC v NLRB, 769 F.3d 254 (4th Cir. 2014), the human resources director discharged two union supporters for falsifying a job application and time card. Because two front-line supervisors knew the discharged employees were actively supporting the union, the Board imputed that knowledge to the human resources director. Id. at 261. The United States Court of Appeals for the Fourth Circuit declined enforcement, holding there could not be a finding of unlawful motivation without evidence the person who made the discharge decision had knowledge of the employees’ union activity.<sup>3</sup> Id.

The Union cites Acme Bus Corp., 357 NLRB 902, 904 (2011), to argue HR Manager Erica Clark-Muhammad’s and Plant Manager Charlotta Kuratli’s knowledge of the union

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<sup>3</sup> General Counsel and the Union erroneously claim the Board in West Pak, Inc., 248 NLRB 1072 (1980), “rejected” the ALJ’s refusal to impute the supervisor’s knowledge of union activity to the official who made the decision. Rather, the West Pak, Inc., Board found “even assuming knowledge on [the decision maker’s] part the record as a whole does not establish that Respondent terminated [the discriminatee] for reasons proscribed by the Act.” Accordingly, it was “unnecessary to pass” on the “circumstances in which it may be inappropriate to impute a supervisor’s knowledge of an employee’s union activity to higher management[.]” Id. at n. 1. Thus, West Pak, Inc. fully supports Respondent’s position, and it is not accurate to suggest that the Board rejected or otherwise took issue with the ALJ’s finding. Likewise, here, even assuming *arguendo* that all decision makers had the requisite knowledge of the union activity, the record as a whole shows that General Counsel failed to prove that Respondent’s decision was motivated by anti-union animus. In fact, Respondent overwhelmingly demonstrated the same decision to terminate would have been made regardless of such knowledge.

officials' protected activity should be imputed to Respondent. This case is inapposite. In Acme Bus Corp., knowledge was imputed to the company because the ALJ

[F]ound as a factual matter that [the supervisor] had informed [the HR manager] of [the employee's] earlier distribution of union flyers[, and because the] decision was based entirely on reports from [the supervisor], whose unlawful animus is clear. As a matter of law, then, [the supervisor's] unlawful animus may be attributed to the Respondent.

Id. at n. 12. Here, there is no evidence Melgar, Clark-Muhammad or Kuralti exhibited union animus, much less that they shared it with DiStefano, thereby rendering Acme distinguishable.

General Counsel attempts to establish her case by flipping her burden on its head, arguing Respondent did not disprove knowledge because “only DiStefano and Keenan testified” and “neither [Clark-Muhammad nor Kuratli] testified.” (GC Answer Br. at 22). In fact, General Counsel asserts she met her burden to show knowledge because “[t]here was no evidence establishing the lack of knowledge of Kuratli, Clark-Muhammad, McCutcheon or Addison.” Id. It appears the ALJ too placed the burden on Respondent to “reasonably dispute[, that Nafis Vlashi, Bruce Scherer, and Claudio Gutierrez engaged in union activity well known to the Respondent[.]” D. at 32. The Board should flatly reject this backwards application of Wright Line because “[a]n absence of evidence does not cut in favor of the one who bears the burden of proof on an issue.” NLRB v. Louis A. Weiss Mem. Hosp., 172 F.3d 432, 446 (7th Cir. 1999).

#### **B. General Counsel and the Union Fail to Support The ALJ's Finding of Unlawful Animus**

General Counsel and the Union likewise rely upon ambiguous and non-threatening statements, *mostly made to others besides the Discriminatees*, to demonstrate Respondent harbored some form of union animus. However, conspicuously absent from General Counsel and the Union's answering briefs is any explanation of how Melgar – who initially identified all three Discriminatees as committing misconduct – could have demonstrated any antiunion animus

when it is undisputed he was totally unaware of their union roles when he was performing his study, which was undertaken well before the purported union activity at issue. General Counsel and the Union likewise do not and cannot point to any evidence suggesting anyone instructed Melgar to focus on these three Discriminatees. In response, General Counsel notes whether Melgar himself had knowledge or animus is irrelevant because the discriminatory treatment of the 8(3)'s in his report spoke volumes. The Board should ignore this sweeping unsupported assertion as General Counsel is in no position to question Respondent's decision making process.

General Counsel further postulates, without record support, that: (1) “[i]ndeed, it appears that it is precisely because Vlashi, Scherer and Gutierrez were not easily intimidated that they were terminated from Fair Lawn;” and (2) “[t]he Employer’s supervisors, in an obviously coordinated campaign after the expiration of the contract, repeatedly told employees that they had no contract, which was clearly intended to communicate to them that they had no rights under the contract.” GC Answer Br. at 26.<sup>4</sup> General Counsel cannot fill in the glaring gaps in her prima facie case by simply inferring the motive and intent behind the ambiguous “no contract” statement. General Counsel cites no analogous authority that a comment like this one establishes unlawful animus. Cf. Raysel-IDE, Inc., 284 NLRB 879, 880 (1987); Obars Mach. & Tool, 322 NLRB 275 (1996)(supervisor’s statement to laid off employee his layoff was due to union activity was not sufficient evidence of union animus even though that same comment constituted a violation of Section 8(a)(1)).

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<sup>4</sup> Notably, General Counsel’s and the Union’s theory of violation improperly credited by the ALJ, is critically undermined by the fact Gutierrez was not initially identified in Melgar’s report. Rather, Respondent uncovered his time theft in conjunction with the investigation into another employee’s time theft transgressions. The pure randomness of this discovery supports that Respondent was not predisposed to target the Discriminatees. See, Ozburn-Hessey Logistics, LLC, 366 NLRB No. 177 (2018)(“The General Counsel bears the burden of proving that an assertedly random selection system had been rigged to single out union supporters[.]”).

Despite General Counsel's claim, Respondent recounted Gutierrez's statements and testimony accurately. Gutierrez unequivocally testified he approached Dawn Sprague, HR Supervisor, after hearing the rumor that Sprague told employees they would be fired. However, Gutierrez never testified Sprague told him that he or any other employee would be fired. (Tr. 672:24-673:19).<sup>5</sup> Further, General Counsel attempts to downplay the supervisor's apologies to Vlashi concerning the "no contract" statement, stating "There is no evidence that they retracted their statements to the employees who heard the statements." GC Answer Br. at 27. This claim is baseless as there is no evidence of any adverse employment action against the employees who actually heard the statements.

### **1. There Was Nothing Improper About The Timing Of The Discriminatees' Terminations**

As a threshold matter, the Discriminatees' July 2016 discharges were based on Melgar's overtime study, which began in September 2015 (Tr. 874:8-14), long before the Discriminatees engaged in union activity in February and March 2016. The events were too remote in time from one another and it is undisputed the Discriminatees engaged in intervening misconduct which continued as late as May 2016. (GC Ex. 19).

To argue animus may be inferred from the timing of the terminations, the Union relies upon inapposite authority where the temporal proximity between the union activity and termination was much closer than in the present case and where there was no evidence of intervening misconduct. See, 1621 Route 22 W. Operating Co., LLC v. NLRB, 825 F.3d 128, 146 (3d Cir. 2016)(union activists disciplined 11 days after the election); Reno Hilton Resorts v. NLRB, 196 F.3d 1275, 1283 (D.C. Cir. 1999) (timing of decision to contract out work following

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<sup>5</sup> Gutierrez likewise testified the Company never said anything to him about his union activity. (Tr. 737:13-15).

a strike occurring four months earlier was “suspect” because employer “knew long before the Union’s certification that contracting out its security work could save a significant amount of money[.]”); Saigon Gourmet Rest., Inc., 353 NLRB 1063, 1065 (2009)(employees discharged days after signing authorizations to participate in a wage and hour lawsuit); Case Farms of North Carolina, Inc., 353 NLRB 257, 260 (2008) (noting “timing factor supports an inference of animus and discriminatory motivation, *particularly where an employer simultaneously discharges multiple employees for unrelated reasons.*” (Emphasis added indicating the text left out of the Union’s quotation.); Equitable Resources Exploration, 307 NLRB 730, 730-31 (1992)(layoff just one week after union won election found to be unlawfully motivated). None of these cases support finding Respondent was unlawfully motivated to discharge the Discriminatees in July 2016 based on the supposedly hostile anti-union statements made in March 2016. Further, Respondent suspended and then discharged Vlashi, Scherer and Gutierrez in June and July respectively for intervening misconduct occurring as late as May 2016. (GC Ex. 19).

By contrast, the cases Respondent relied on in its Exceptions Brief are instructive. In Syracuse Scenery & Stage Lighting Co., 342 NLRB 672, 675 (2004), the Board held the ALJ improperly ignored the “close proximity in time between the employees blatant misconduct and the Respondent’s decision to terminate them.” Id. In these circumstances, which are present in this case, the Board has held that “the factor of timing is too weak a foundation upon which to base a finding of pretext.” See also, Snap-on Tools, 342 NLRB 5 (2004)(union activity occurring more than two months from discharge too remote to establish animus based on timing); Pacesetter Corp., 307 NLRB 514, 521-522 (1992) (timing was a factor to help establish animus when employee “was discharged, without prior warning, soon after the Union lost the election.”).

As a result, General Counsel cannot rely upon timing to support the ALJ's incorrect animus finding.

## **2. Respondent Did Not Depart From Its Disciplinary Practices**

General Counsel and the Union also claim Respondent conducted a "sham" investigation into the misconduct at issue. According to the General Counsel, if Respondent was truly paying attention, it would have uncovered holes in Melgar's methodology and discarded his report. However, there is no evidence Melgar evinced any animus in the first place. This glaring omission is a critical flaw because it was Melgar's idea to compile and study the data in the first instance. (Tr. 809:13-19, 874:23-875:8).

Additionally, it is surprising General Counsel and the Union suggest Respondent should have delved deeper into other employees flagged for similar unusual overtime patterns. The consequences of doing so could have caused more unit members to be disciplined. It appears General Counsel and the Union seek to take the untenable position that to save these three employees who engaged in unequivocal time theft Respondent should have been predisposed to take more adverse actions against those employees the Union also represents.

Respondent's reliance on New Otani Hotel was sound. 325 NLRB 928, 928, n. 2 (1998). General Counsel and the Union point to the Board's footnote noting it was not relying upon the ALJ's suggestion that "direct evidence of animus is a requisite element of the General Counsel's case or that unlawful motivation may not be proven by an inference drawn from evidence of blatantly disparate treatment." In its moving brief, Respondent quoted the passage of the ALJ's decision stating:

absent independent proof of the employer's antiunion animus, even evidence of actual, conscious disparity of treatment by an employer [] when it comes to rule-

enforcement is [<sup>6</sup>] not a reasonable basis for inferring that the employer's enforcement of the rule in a given instance against an employee who has engaged in union activities known to the employer was motivated in any way by the employee's union activities.

Id. at 942 (1998). A fair reading of this portion of the decision reveals the New Otani Hotel ALJ was not asserting that, "direct evidence of animus is a requisite element of the General Counsel's case."<sup>7</sup> Id. at n. 2.

There is simply insufficient record evidence of disparate treatment to show animus. Although the Union pointed to a litany of employees with irregular time entries whom Respondent allegedly failed to further investigate, there is no demonstration or contention these individuals were similarly situated to the Discriminatees (i.e. they had the same supervisor, engaged in the same misconduct, etc.). The Board recognizes in such cases that utilizing a "stricter standard than that utilized by some other supervisors,[] does not establish blatant disparity from which [the Board] can infer unlawful animus." Meritor Automotive, Inc., 328 NLRB 813, 816 (1999). Similarly, the Board in Pontiac Osteopathic Hospital, 284 NLRB 442, 465 (1987) found no unlawful disparity, notwithstanding different treatment of employees, where the absence of uniformity, even assuming that the circumstances were similar, could "be attributed to the fact that different supervisors, acting without guidance from written disciplinary

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<sup>6</sup> Respondent inadvertently omitted the word "generally" here.

<sup>7</sup> Notably, the Board's footnote in New Otani Hotel relied upon Fluor Daniel, Inc., 304 NLRB 970, 971 (1991) where the Board concluded, in a much more discrete failure to hire fact pattern, that it was "reasonable to infer that it was not just coincidental that all those applicants who displayed union affiliation were refused employment while those who were hired did not display union affiliation" as evidence of a "blatant disparate treatment" being sufficient to support a prima facie case.

As described herein, there is no similar clear evidence of "blatant disparate treatment" in the present case.

standards, made the disciplinary decisions at different times.” Id. As a result, contrary to the Union’s claims, there could be no “blatant disparate treatment” for the ALJ to consider here.

### **3. Respondent Did Not Improperly Withhold Information From The Union**

Charging Party also focuses on the fact Respondent purportedly withheld information from the Union concerning the alleged Discriminatees and deviated from its disciplinary practices. For the reasons discussed in Respondent’s initial brief, there were no such improprieties. The Union claims “a decision to keep a union in the dark regarding the specific reasons for a termination is ‘alone . . . enough to support an inference that the [terminations were] discriminatory.’” Union Answer Br. at 27; quoting M.J. Mech. Servs., Inc., 324 NLRB 812, 817 n.37 (1997); and citing NLRB v. Griggs Equipment, Inc., 307 F.2d 275, 278 (5th Cir. 1962)); Dynabil Industries, Inc., 330 NLRB 360, 363 (1999). However, these cases have nothing to do with an employer withholding information from a union and do not involve the discharge of union supporters.<sup>8</sup> As a result, these cases are inapposite because Respondent notified each Discriminatee his termination stemmed from time theft.

Also, the Union and/or General Counsel could have asserted these issues as independent unilateral changes in violation of Section 8(a)(5) and did not, reflecting that they are truly red herrings. Further, the Union cites to no evidence suggesting Respondent *intentionally* withheld information for the reason the Union contends. Therefore, this contention should be disregarded.

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<sup>8</sup> In M.J. Mech. Servs., Inc., the first time the employer asserted the employee was terminated for “falsification of time or any other company records” was in its post-hearing brief to the ALJ. Id. at 817. Likewise, NLRB v. Griggs Equipment, Inc., and Dynabil Industries, Inc. involved the discharge of an employee without any reason stated. These fact patterns are wholly dissimilar.

#### **4. Respondent Terminated Other Non-Union Supporters For The Same Infraction, Demonstrating It Did Not Single Out The Discriminatees**

Next, the Union suggests Respondent ensnared Koroskoski and Maneveski as part of a scheme to hide its true discriminatory aim, i.e., that they were the white sheep who suffered along with the black. This claim is wholly unsupported by the record. Further, neither of the cases the Union relies upon for this contention are anywhere near on point. See EDP Med. Computer Sys. Inc., 284 NLRB 1232, 1271 (1987) (Board rejected employer’s argument an hours reduction was “across the board,” instead finding it impacted only the unit the union sought to represent); Flexsteel Industries, 316 NLRB 745 (1995)(General Counsel asserted innocent bystander’s termination also violated Section 8(a)(3)).

By contrast, National Security Technologies, LLC, 356 NLRB 1438, 1448, n. 1 (2011) is particularly apt. There, the Board held “nondiscriminatory treatment of [known union supporters]” shows the employer’s “lack of animus toward union activity.” In fact, such evidence is entirely appropriate to show the “General Counsel[] fail[ed] to meet his initial burden.” Here, General Counsel never alleged Respondent’s termination of Koroskoski and Maneveski violated the Act. As a result, this contention is without merit.

#### **5. The Union’s Attack of Melgar’s Report Is Meritless**

The Union devotes a significant portion of its brief to attacking Melgar’s report, including his methodology, and alternate steps the Union believes he should have taken. However, the Union provides no support that its hindsight approach would establish any improper motive.<sup>9</sup> The key fact the Union, General Counsel, and the ALJ have consistently

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<sup>9</sup> To this end, General Counsel and the Union likewise do not meaningfully distinguish the facts of New Otani Hotel other than to suggest that, for some unspecified reason, a fellow houseman’s report of time theft misconduct should be given more weight than one initiated by an employer. There is no basis for such a sweeping assertion.

ignored is there is no evidence Melgar had any knowledge of these three employees when he uncovered their misconduct. The Union and General Counsel cannot get around that impenetrable roadblock. At best, the Union can only speculate, which is insufficient to establish Respondent engaged in any improper motive.

In sum, there is simply no evidence the overtime report was commissioned as a “hit job” on the three union officials. The Union and General Counsel give themselves too much credit for thinking the Respondent would go to such great lengths of transferring someone from Australia to Fair Lawn for this purpose and fire five people to discriminate against three. That is precisely why the ALJ erred in failing to assess the nexus between the Discriminatees’ union activities and their adverse employment actions. These allegations should be dismissed.

## **II. RESPONDENT WOULD HAVE TAKEN THE SAME ACTION AGAINST THE DISCRIMINATEES REGARDLESS OF THEIR PURPORTED UNION ACTIVITIES**

Even if it is necessary for the Board to proceed to the second step of the Wright Line analysis, Respondent established it would have taken the same action regardless of any purported union activity.

### **A. The Union and General Counsel Incorrectly Discount That The Discriminatees Admitted Their Misconduct**

Each Discriminatee admitted leaving the work area without authorization and/or using the badge of another employee or allowing their badge to be used by another employee, which violated company policy and could expose them to discipline and discharge. (Tr. 480:14-24; 608:21-609:13; 709:3-711:25). They also agreed that, when clocked in, they were expected to be performing work for the Company. (Tr. 610:4-7; 711:22-25). The record testimony is contrary to the General Counsel’s contention that there was no evidence of misconduct.

Scherer admitted he bypassed the turnstile and the ALJ expressly found “Melgar believed his assumption was correct about Scherer after he reviewed a security camera screen shot that showed Scherer squeezing between the turnstile bar and the wall in order to bypass the turnstile and not use his card to enter the plant on May 5.” (D. at 26:29-31; GC Ex. 19 at 36). General Counsel claims even though Scherer admitted his misconduct, it should be excused because Scherer “testified that he did that because the turnstile was broken.” This post-hoc explanation does not change the fact that Scherer flouted Respondent’s rule, and it certainly does not show that Respondent’s disciplinary decision was motivated by unlawful animus. In any event, Union Business Agent, Stan Milewski, testified if the turnstiles did not work, the employee was required to sign in or out with security, which Scherer did not do. (Tr. 166:11-167:1).

**B. The Discriminatees Were Simply Not Credible About Their Whereabouts**

General Counsel seems to flip her burden under Wright Line and assert Respondent had the burden in this case to prove misconduct. GC Answer Br. at 36 (“The Employer has not established that Vlashi stole time.”). General Counsel further contends Respondent “has [n]ever limited the activities of employees on union time.” GC Answer Br. at 36. However, the union business excuse does not cover the misconduct here because, for example, on Sunday, May 22, 2016, Vlashi was unaccounted for, out of the building, from 2:31 PM to 6:06 PM while being paid a double time rate. (GC Ex. 19 at 31; Tr. 852:10-17). Similarly, the Union shifts the blame to the Respondent for purportedly not conducting the investigation the Union thinks it should have been completed. The Union and General Counsel are not in a position to suit up as Monday morning quarterbacks.

The Union also contends that because “Mr. Scherer and Mr. Vlashi were assigned to full time union business during shifts when the ‘overtime study report’ concluded they were engaged

in intentional time theft,” they could not have engaged in any time theft during those periods.” Union Answer Br. at 44-45. The Union is wrong.

First, according to the Union, “Mr. Vlashi was assigned to full time union business on first shift every Tuesday, Wednesday, and Thursday. Tr. 398:24-399:2 (Vlashi).” Union Answer Br. at 44-45. However, the record does not reflect a single example of a union business task which would take the Discriminatees out of the building for up to five hours at a time. Rather, at trial, Vlashi testified that union business took him outside the plant, “[t]wo, three times a day. . . [for] [f]ive, 10 minutes. At most.” (Tr. 516:10-23). Later, Vlashi testified union business on a Tuesday, Wednesday or Thursday would require him to be outside the plant for a total of forty-five minutes. Nevertheless, Vlashi was out of the building on Thursday, May 12, 2016, for a total of five hours. (Tr. 850:14-851:8). Additionally, on May 21 and 22, 2016, a Saturday and Sunday, Vlashi was outside of the building for two and one-half hours and three and one-half hours respectively while being paid either time and half or double time. (Tr. 851:22-852:17).<sup>10</sup>

As for Scherer, the Union states he “was assigned to full time union business on second shift on Wednesdays and Thursdays. Tr. 566:11-14 (Scherer).” Union Answer Br. at 45. The Union claims Scherer was conducting union business outside of the facility on May 5 and 6, 2016. On May 5, a Thursday, Respondent paid Scherer for 16 hours. (GC Ex. 19 at 37).

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<sup>10</sup> General Counsel states:

The Employer is wrong to say that Vlashi never explained why he left the plant while on Union business. While the ALJ decision states, “Vlashi stated that he did not recall exactly when and what he did on those dates May 6, 12, 21, and 22.” D. 31:11-15. “Employer does not credibly accuse [Vlashi] of stealing time on [May 12] because it did not present evidence that his activities were limited when he was on Union business.”

CG Answer Br. at 36. If union business was truly the motivator behind Vlashi’s absence, it would seem apparent Vlashi would not have difficulty remembering his activities that day.

Although Scherer's "time in" on that day was manually adjusted to 7:18 AM, he was captured on the security video evading the turnstile at 7:45 AM. (GC Ex. 19 at 37). Then, he clocked himself out at 11:30 PM. (GC Ex. 19 at 37). Yet, the turnstile records and security video show he was out of the building for at least six hours between 5:36 PM to 11:31 PM. It defies logic to believe Scherer was conducting six hours' worth of union business on May 5. Then, on May 6, a Friday night, admittedly not a union business day at all, security video captured Scherer leaving the building at 5:36 PM and not returning until 7:11 PM. (GC Ex. 19 at 37).<sup>11</sup>

Second, the Discriminatees, who were in the best position to explain their union business, could have stated during their June 2016 investigatory interviews they were on such business during the times that they were engaged in time theft, but they never did so. In any event, "employers are not obligated to 'investigate' [employee misconduct] in any particular way," and it is not the Board's province to "function as a ubiquitous 'personnel manager,' supplanting its judgment on how to respond to [employee misconduct] for those of an employer." Detroit Newspaper Agency v. NLRB, 435 F.3d 302, 310 (D.C. Cir. 2006).<sup>12</sup>

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<sup>11</sup> General Counsel suggests Scherer's admissions of misconduct should be ignored because during questioning by Respondent's Counsel at trial, Scherer said, "I think you're misinterpreting that in my case." GC Answer Br. at 35. However, the transcript shows Scherer was asked "Would you also agree that leaving the work area without authorization would be a violation of plant rules?" and that he replied, "I think you're misinterpreting that in my case." General Counsel conveniently omits Scherer ultimately admitted that leaving the work area would violate plant rules. Tr. 608:25-609:7. Further, Scherer never mentioned union business in his interview with Clark-Muhammad. "Did Union business ever come up during that meeting? A. No. I didn't know I was on Union business." Tr. 623:10-12.

<sup>12</sup> The Union avers that Respondent "wildly" mischaracterized this case because in Detroit Newspaper Agency there was no agreed upon termination procedure. Union Answer Br. at 23-24. To further elaborate, in Detroit Newspaper Agency, the court wrote, "The Board has not cited any agreed-upon termination procedure between the Union and the Company, and puts forth no cogent reason for why [a manager's] alleged departure from his written seminar outline is evidence of antiunion animus. Indeed, Detroit News was not obliged to "investigate" [an

Third, General Counsel inaccurately characterized Gutierrez's testimony. Gutierrez testified that during his interview, Clark-Muhammad asked him whether anyone, specifically Nove Koroskoski, swiped his card and he acknowledged he "knew somebody used his card." Tr. 685:24-25; 687:19-22. Nevertheless, Gutierrez also testified that during the interview he flatly denied any wrongdoing, telling Clark-Muhammad he had not "done anything like that, falsifying records, you know, doing manual punches and this and that." Tr. 687:5-9. However, Gutierrez later elaborated that shortly after his interview with Clark-Muhammad, he had a conversation with Koroskoski and conveniently remembered an elaborate story about being outside the plant without his wallet. (Tr. 689:15-690). According to Gutierrez, he asked Koroskoski to "bring me the wallet so I can go in, [and] punch my card. And he didn't do that obviously." Id. And that day, according to Gutierrez he "left the building without punching out." Id. As a result, Gutierrez' testimony shows he was aware of other employees using his card but was not fully forthcoming during his interview. Likewise, he never raised the Koroskoski incident prior to the hearing.

In sum, the Discriminatees' lack of candor concerning their whereabouts demonstrates Respondent would have terminated their employment regardless of their purported union activities, even if General Counsel could establish her prima facie Wright Line burden. As a result, the Board should reverse the ALJ's findings in this regard.

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employee's misconduct] in any particular way, and further, the Board offers nothing material that the employer would have uncovered had it investigated the matter differently." Id. at 310.

Here, just as in Detroit Newspaper Agency, there is no agreed upon termination or investigation procedure. Rather, the parties agreed that, "full power of discharge and discipline lies with the Company." (GC Ex. 3 at 37). Further, General Counsel did not set forth any relevant past practice. To the extent there is a departure from a prior investigation into or discipline for time theft, it is readily explained by the fact that Melgar compiled and studied payroll and security data for the first time "in the history of the plant." (Tr. 809:13-19).

### **III. THE ALJ'S SECTION 8(A)(5) ALLEGATIONS SHOULD BE REVERSED**

As discussed herein, the ALJ's Section 8(a)(5) findings are flawed and should be reversed.

#### **A. Respondent Reasonably Interpreted Its STD Return Policy**

General Counsel fails to address the real issue Respondent was solving when it clarified this particular policy and relies upon circular logic. Respondent simply made clear an employee needed to receive medical clearance to return before the weekly schedule was created. The policy had always required 24 hours' notice before the next *scheduled* shift. (Compare, GC Ex. 4 to GC Ex. 5) (emphasis added). It is simply untenable to conclude an employee could be placed back on the schedule without first being cleared to be put on the schedule in the first place. Accordingly, because Respondent made this clarification, "pursuant to a claim of right under the parties' agreement," NLRB v. United States Postal Serv., 8 F.3d 832, 837 (D.C. Cir. 1993), the "sound arguable basis" standard applies. See NCR Corp., 271 NLRB 1212, 1213 (1984). Here, even Union Business Agent Milewski acknowledged employees returning from STD leave do not have a "scheduled shift" and that in order to have a scheduled shift, the returning employee would have to be cleared before the schedule is posted on Thursdays. (Tr. 188:9-25). As a result, Respondent did not make a material change and even if it did, such change would not violate the Act because Respondent had a sound arguable basis for interpreting the existing policy.

#### **B. The Company Did Not Violate Section 8(a)(5) Concerning Its Joint Participation in Union Orientation Meetings**

Contrary to the General Counsel's claim, this alleged change did not impact employees' terms and conditions of employment. As the Board found in Peerless Food Prod., Inc., 236 NLRB 161 (1978), it was not unlawful to "remove [the representative's] former 'right' to engage unit employees in conversations on the production floor when those conversations are unrelated

to contract matters” because the change did “not materially, substantially, or significantly reduce” the employees’ access to the union for representation purposes.<sup>13</sup>

General Counsel argues that Peerless does not apply here because there was an ultimate reduction in the Union’s access and that Southern Bakeries, LLC, 364 NLRB No. 64 (2016) is more analogous. GC Answer Br. at 14. First, General Counsel’s attempt to equate Respondent’s presence in the “joint orientation” to the union access restrictions in Southern Bakeries is erroneous. In that case, the employer placed the following restrictions on union access: banned all visits not involving grievances; prohibited solicitation; capped the duration and frequency of visits; prohibited meetings in the large break area; threatened to respond to violations with expulsion, arrest and total exclusion; and banned all access over an eight month period. Id. at 141. Here, there is no evidence Respondent placed any restriction on the Union’s access. Rather, Respondent attended the “joint orientation” consistent with a sound arguable basis to support its belief that meetings were to be conducted jointly. Finally, contrary to General Counsel’s claim, sound arguable basis is the proper standard for § 8(a)(5) claims with a contractual defense. See, Bath Marine Draftsmen’s Ass’n v. NLRB, 475 F.3d 14, 26 (1st Cir. 2007)(“sound arguable basis” standard applies to both §8(d) and § 8(a)(5) claims with a contractual defense.).

### **C. The Company Properly Modified The B & R Processors’ Shift Schedules**

General Counsel claims Respondent failed to schedule hours “as consistent as possible.” That is *her* interpretation of the CBA. The flaw in the General Counsel’s argument is the contract contains aspirational language (“uniform as possible”) as opposed to the mandatory language

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<sup>13</sup> Any speculative testimony as to employees being less engaged has no bearing over whether the change was material and related to work terms and conditions. Milewski testified that at the May 12 meeting no one wanted to contribute toward the Union’s political action committee because he assumed the new hires were “nervous.” (Tr. 100:21-24). However, accordingly to Milewski, those same “nervous” employees “asked questions about the . . . dues deduction cards [] at the May 12 meeting.” (Tr. 101:1-6). Conjecture does not establish causality.

which General Counsel incorrectly reads into the provision. (GC Ex. 3 at 11). Respondent had a sound arguable basis to implement a uniform shift start time in light of the CBA provisions both requiring Respondent to keep start times uniform and granting Respondent authority to direct the production schedule. Thus, the Company's decision to align the shift start times of the B&R Processors to the same start time in all other departments did not constitute an impermissible unilateral change.

### **CONCLUSION**

For the foregoing reasons, and those illustrated in Respondent's initial brief, the Board should dismiss the Consolidated Amended Complaint in its entirety.

Dated: May 17, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned affirms that on May 17, 2019, Respondent's Reply Brief in Further Support of Exceptions to Administrative Law Judge Kenneth W. Chu Decision was filed with the National Labor Relations Board using the e-filing system at [www.nlr.gov](http://www.nlr.gov), and that copies were served on the following individuals by electronic mail:

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