

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

In the Matter of:	:	
	:	<b>CASE NO. 08-CA-226350</b>
LABORERS' LOCAL 894,	:	
	:	
Charging Party/Union	:	
	:	
and	:	
	:	
KENNY/OBAYASHI V, A JOINT	:	
VENTURE,	:	
	:	
Respondent/Employer	:	

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**RESPONDENT/EMPLOYER'S POST-HEARING BRIEF**

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## **I. INTRODUCTION**

The instant case was the subject of a hearing that lasted seven days before Hon. Thomas M. Randazzo, Administrative Law Judge. General Counsel's case was presented over five days, while Respondent's case was presented in a day and a half. The Complaint in this case alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Ivan Thompson on August 24, 2018, because Ivan Thompson assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Compl., ¶¶ 6-7.

Based on the entire record as a whole, including testimonial and documentary evidence, General Counsel has failed to carry the burden of demonstrating that the discharge of Ivan Thompson was unlawfully motivated. For this reason, and those set forth below, Respondent respectfully requests that the Administrative Law Judge find that Respondent did not violate Section 8(a)(1) and (3) in discharging Ivan Thompson, and dismiss the Complaint.

## **II. STATEMENT OF THE CASE**

### **A. The Project**

This case relates to a long-term construction project in Ohio that started in November of 2015 – the Ohio Canal Interceptor Tunnel Project (the "Project"). R. at 144:6-8; Joint Ex. 2, at 1. The Project involved the construction of a conveyance and storage tunnel system to control combined sewer overflows for several regulators in the downtown Akron area. R. at 42:10-43:16. The Project consisted of several major components, including a conveyance and storage tunnel, drop shafts, diversion structures, consolidation sewers, and related appurtenances. R. at 42:10-43:16; Resp.

Ex. 1; Resp. Ex. 2; Resp. Ex. 3; Resp. Ex. 4; Resp. Ex. 5. Tunnel excavation was the central component of the Project, which was accomplished by using a machine known as a Tunnel Boring Machine (a “TBM”), which is a one-path system whereby the TBM simultaneously excavates and tunnels, placing a final piping liner behind it as it continues along its path. R. at 52:7-53:18; Resp. Ex. 1, Resp. Ex. 2. The TBM operates in segments – it pushes forward a certain number of feet, then excavates, then places the liner. R. at 52:7-53:18. It does this in a continuous cycle along its entire path. R. at 52:7-53:18. The tunnel excavated by the TBM was approximately 6,200 feet long with a finished inside diameter of 27 feet. R. at 42:13-18. The Project was demanding and required continuous mining on two shifts each day in order to complete the Project on time and to meet the requirements imposed by the City of Akron. R. at 318:23-319:2; *see also* GC Ex. 4.

The Project consisted of three main areas where work was performed: (1) OCIT-1, (2) OCIT-2, and (3) OCIT-3. The OCIT-1 site is the portal site from where the TBM was launched. R. at 172:14-21; Resp. Ex. 3. The OCIT-2 site is the intermediate site with multiple drop shafts and diversion structures. R. at 172:22-25; Resp. Ex. 4. The OCIT-3 site is the retrieval shaft from where the TMB was removed. R. at 173:1-4; Resp. Ex. 5.

The Project also consisted of three different crew types: the TBM crew, the Yard crew,<sup>1</sup> and the Shaft crew. R. at 176:23-177:4. The TBM crew performed work in the portal and up to the surface, which was associated with the main underground tunneling work on the Project. R. at 176:25-177:4. The Shaft crew was comprised of workers on all of the shafts, including those attached to the various areas of the Project – OCIT-1, OCIT-2, and OCIT-3 – that connect the sewers vertically to the surface throughout the entire

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<sup>1</sup> The Yard crew was also commonly referred to as the “bullgang” crew, which is referenced in some of the exhibits.

city of Akron. R. at 176:23-25. The yard crew performed work outside of the portal and surface areas, including receiving deliveries and receiving, stocking, and handling the precast segmental liners that were eventually moved into the portal and placed in the tunnel, and performing various other yard-crew tasks. R. at 54:11-17; 60:18-22; 61:19-21; 93:8-24; 177:4. The yard crew primarily worked in the staging yard adjacent to the tunneling operations in order to supply needed items and materials to those doing the mining underground and, importantly, to receive segments, because the TBM could not operate without segments. R. at 93:8-24.

When the Project began in November of 2015, Respondent first relied on union subcontractors and its own crew of two to three experienced workers it transferred from another project in Columbus to get the Akron site ready for excavation, which means preparing the jobsite to receive the TBM machine. R. at 177:9-20. Once the TBM machine arrived, the Project really began to ramp up with all employees working on day shift to assemble the TBM, which was a very involved and arduous process with an all-hands-on-deck mentality. R. at 178:23-179:5; R. at 181:17-25. The employees were not split into separate crews or shifts until shaft work and mining began, which was a little under a year later. R. at 181:11-17. After hiring a foreman and superintendent to begin the shaft work, all hires on the Project came from local unions, which at that time were mostly “laborers” and “operating engineers.” R. at 181:18-182:3.

The TBM was launched around October 2017<sup>2</sup> and mining work was done throughout that time until the end of August of 2018, at which time the TBM broke through the retrieval shaft. R. at 386:15-21. Respondent had approximately 70 employees in early

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<sup>2</sup> For context, this is approximately two months after Ivan Thompson began employment with Respondent.

2017 during the assembly phase, but once the Project moved into the mining phase, employees were separated into two shifts – a day shift and a night shift – of approximately 25 employees on each shift, and a yard crew of approximately 10 employees, including both laborers and operators, for a total of approximately 60 employees on the Project each day. R. at 182-182; Resp. Ex. 6.

As a primary portion of the Project was drawing to an end, layoffs began in August of 2018, only a few days before the TBM broke through the retrieval shaft, and continued for the next several months into 2019. R. at 185:5-11. As of the date of hearing in this case, the Project was nearly completed and the crew had been cut down to a substantially smaller size with approximately 11-12 employees total, including superintendents, foremen, laborers, operating engineers, and oilers. R. at 186:2-5; CP Ex. 2. With respect to only laborers, the Project had only 5 laborers employed as of the date of the hearing with two laborer foremen. CP Ex. 2. The limited remaining tasks as of the hearing date in this case included managing the subcontractors that were building surface structures, and performing some additional change orders for which the City of Akron contracted later in the Project. R. at 185:17-23.

**B. Ivan Thompson's Employment, the Yard Crew, and the August 24, 2018 Reduction in Force**

Ivan Thompson was hired on August 14, 2017. R. at 63:3-7; Resp. Ex. 6, at 2. When his employment began, he assisted with the assembly of the TBM alongside every other employee on the Project (because at that time, there were not three separate crews; rather, it was an all-hands-on-deck task). R. at 54:21-25; 178:23-179:5; 181:11-25. Approximately one to two months after Ivan began working on the Project, the workforce was split into three separate crews that worked in and around Akron, and Ivan Thompson

was assigned to the Yard (or bullgang) crew. R. at 62:24-63:2; R. at 181:11-17. As a part of the yard crew, Ivan Thompson assisted with handling deliveries of shipments and segments, maintaining tools and connex storage boxes, pulling parts and restocking parts in the shop, maintenance work outside and around the buildings, pulling exterior trash, general cleanup and yard maintenance, weed whacking and yard maintenance around fencing, packing lumber, packing and shipping out other materials, organization of the shop, and general housekeeping-type tasks. R. at 61:19-21, 62:18-23, 91:22-25, 92:1-17; 92:22-93:4; 1129:10-15. These were the duties and functions of the entire yard crew, not solely Ivan Thompson's responsibilities; rather, he was one of several individuals on the yard crew that performed this type of work. R. at 1129:8-15.

Ivan Thompson was laid off temporarily on December 14, 2017, due to a work stoppage. R. at 68:23-69:21, 1128:18-23. The TBM was stopped for an extended period of time due to construction issues, and therefore there was no need for the yard crew to offload segments and deliver segments to the TBM crew (because if the TBM was not operating, no segments were being installed in the tunnel), so the Respondent laid off several employees to keep costs down until the TBM was back in production. R. at 68:23-69:21. Ivan Thompson was recalled on December 26, 2017 when the TBM was back in production. R. at 68:23-69:21, 1128:21-23. He performed good work, which is why he remained on the Project until August 24, 2018. R. at 91:11-21.

One of Ivan Thompson's primary responsibilities on the yard crew, particularly towards the end of his employment, involved working with segments. R. at 96:20-23; R. at 1130:5-18. Segments are large slabs of concrete that make up the circle/ring of the TBM machine and made the tunnel. R. at 93:10-14, 1269:19-24. Each circle/ring was

comprised of eight segment pieces. R. at 93:10-14. Each segment weighed about 11,000 pounds. R. at 93:10-14. Segments arrived on a truck in two stacks of two, so two truckloads comprised one ring for the TBM. R. at 93:10-14. During mining, when the TBM was going through the tunnel, the yard crew would lift the segments off of the truck (with the assistance of a crane), store the segments in the yard, and then assist in moving the segments from the yard up to where the crane could put them to get them into the head of the TBM so that the TBM could then install the segment into the tunnel. R. at 93:15-20.

When the segments arrived, the yard crew inspected the segments and ensured that there were no cracks, scratches, or anything else wrong with the segments. R. at 1270:2-5. Pictures were taken of each segment and documentation was completed with numbering that corresponded to each individual segment received. R. at 1270:6-10. Then, the segments were unloaded. The crane operator would use a forklift to pick up the segments, and with the assistance of a yard crew laborer to spot, would set the segment in the yard until the TBM crew was ready for it to be moved into the tunnel. R. at 1270:10-17. Initially, an office employee named Joe Dombroski performed the paperwork associated with the segments while other yard crew laborers did the manual labor associated with moving the segments. R. at 1271:1-8. However, at some point, this task transitioned to Monty Thompson. R. at 1270-1271. When Monty Thompson started handling the paperwork associated with the segments, he received one or two trucks per day, so he performed other work with the yard crew throughout the day when he was not handling segments. R. at 1271:14-19. However, by the time summer of 2018 hit, he was receiving trucks and segments all day long. R. at 1272:16-1273:11. Monty Thompson

testified that before segment work picked up, he was the primary person responsible for handling the segments; however, once the workload picked up in the summer of 2018, he testified that his father, Ivan Thompson, assisted him. R. at 1273:15-19. Monty Thompson also testified that he trained Ivan Thompson on the paperwork associated with the segments, as well as Mark Seese, and that they were the only other employees who were trained to complete the paperwork associated with the segments. R. at 1274:23-1275:6. When asked by General Counsel who primarily completed the segment paperwork, Monty Thompson replied: “We both did the sheets.”<sup>3</sup> R. at 1276:16-18. He also testified that in early August, he was injured while working with the segments. R. at 1277:4-10. Because he was injured, he was not able to perform the same duties that he had previously performed. R. at 1278:20-23. Monty Thompson testified that because he was unable to perform the work on the segments that he was previously performing, Ivan did the work instead. R. at 1279:2-5. Specifically, Monty Thompson testified that Ivan “handled all the physical part” related to the segments. R. at 1279:15-16.

At the time of Ivan Thompson’s discharge, in August of 2018, there were approximately six laborers on the yard crew – Mark Seese, Ivan Thompson, Monty Thompson, Mia Turner, Mark Strong, and Patricia Wheeler.<sup>4</sup> R. at 1128:25-1129:7,

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<sup>3</sup> General Counsel attempts to argue that Ivan Thompson merely filled in for Monty Thompson on the segments; however, both testimonial and documentary evidence contradict this position. Mr. Chastka testified that “Ivan worked on the segments for the entire project when he was needed.” R. at 919:13-14. Mr. Chastka further explained that segment-related work involved two aspects – the documentation of the segments and the physical off-loading of the segments. R. at 919:3-7. He explained that Monty Thompson was the primary person who handled the documentation of the segments, but that the off-loading of the segments was three to five people at any given time.” R. at 919:3-7; 17-23. The testimony of General Counsel’s witness and Ivan Thompson’s son, Monty Thompson, also supports Mr. Chastka’s testimony.

<sup>4</sup> There were other employees who worked on the yard crew who were operating engineers; however, as an entirely different trade, they perform very different work from the laborers and are employed under a separate collective bargaining agreement.

1281:10-14. In early August of 2018, prior to Ivan Thompson's discharge, Respondent had been preparing for a reduction in force. See, e.g., GC Ex. 18. For example, in an August 7, 2018, email from Project Manager David Chastka to Local 894's Bill Orr, David Chastka informed Bill Orr that "we should discuss the upcoming layoffs associated with the tunnel work coming to an end so that we can avoid any further issues." GC. Ex. 18, at 2. The yard crew specifically was going to have reductions by virtue of the majority of the work that the yard crew performed was winding down. R. at 139:21-25, 1133:8-11. The TBM was close to reaching the retrieval shaft, which meant that tunneling was completed, and the segments were no longer being delivered as of August 22, 2018; thus, there would be a substantial reduction in workload necessitating a reduction of the yard crew force from **six laborers down to two laborers**. R. at 1140:6-9. In deciding which employees to retain and which to discharge in the reduction in force, the Respondent considered the technical aspects of the Project and the remaining work that needed to get done, as well as team work and ability and looking at who would work best together to get the work done. R. at 1140:6-13, 1158:16-23. Thus, Superintendent Mike Quinn made the recommendation to David Chastka that Mark Seese, Ivan Thompson, Monty Thompson, and Patricia Wheeler be included in the reduction in force. R. at 1140:1-3, 1141:13-18. This would mean that the remaining two laborers on the yard crew would be Mia Turner and Mark Strong. This is not surprising given that Mark Seese, Ivan Thompson, and Monty Thompson were the only individuals who were trained to complete the segment documentation, and Ivan Thompson and Monty Thompson had been the primary individuals handling the segments throughout the summer of 2018 (which was

the preceding several months immediately before Ivan Thompson's layoff). This recommendation was made during the week before the layoffs occurred. R. at 143:1-7.

At the time of the reduction in force, all of the segments had been received, which, as noted above, was the primary task for which Ivan Thompson had been involved for the preceding several months, with the last segment having been delivered to the jobsite on August 22, 2018. Resp. Ex. 8; Resp. Ex. 9. Thus, Ivan Thompson was a natural choice for the reduction in force because the work he had been substantially performing over the prior two-month period had just come to an end. Resp. Ex. 8; Resp. Ex. 9. The Employer also discharged other employees from the same crew during this reduction in force, including laborer employees Mark Seese, Kevin Truitt, and Patricia Wheeler.<sup>5</sup> R. at 1141:22-25. Thus, the laborer employees who remained on the yard crew after the reduction in force of August 24, 2018, included Monty Thompson, Mia Turner, and Mark Strong. At that time, Monty Thompson was retained because, at the time of the August 24, 2018 reduction in force, David Chastka believed that Monty Thompson was not at work due to the birth of his child, and David Chastka did not want to discharge an employee under those circumstances; thus, David Chastka made the decision to retain Monty.<sup>6</sup> R. at 1283:8-15. Mia Turner was retained because she was a parts runner who was responsible for obtaining and running parts and tools to wherever they were needed on the jobsite, which was her responsibility throughout her employment. R. at 240:2-9; 1287:16-17. Mark Strong performed general yard work, but he did not work on the segments. R. at 1282:8-9; R. at 1289:8-9. In fact, Monty Thompson, who was called as a

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<sup>5</sup> Kevin Truitt was also discharged at this time, but he had approached management and requested a layoff for health reasons. R. at 1142:4-12.

<sup>6</sup> Monty Thompson testified that his child was born on August 25, 2018, which supports Mr. Chastka's testimony that he believed Monty Thompson was awaiting the birth of his child. R. at 1283:8-9.

rebuttal witness by General Counsel, testified that Monty did not train Mark Strong to assist with segments, and that “Mark Strong never did segments.” R. at 1281:20-22, 1282:8-9. Thus, while Ivan was busy working with the segments in August, Mark Strong was performing other work for which the yard crew was responsible. R. at 1282:1-3.

In advance of the reduction in force, David Chastka took the extraordinary step (not required by the collective bargaining agreement) to meet and confer with Local 894’s Business Agent, Vern Floyd, to discuss the employees being selected for the reduction in force. R. at 644, 1155:11-25. Vern Floyd did not raise any concerns or issues on behalf of the Union or its members at that time about the employees selected for the layoff. R. at 1156:19-21.

### **C. The Grievance and the Employer’s Investigation**

#### **i. *The Grievance***

On August 6, 2018, almost three years after the Project began, the Employer received an email from the Union’s Business Manager, Bill Orr, about the termination of employee Carrington Chatman. GC Ex. 17; GC Ex. 18; R. at 343:22-344:1. At that time, the Union was seeking justification for the termination of Carrington Chatman. R. at 344:21-23. This then led to the Union raising concerns about the terminations of Carrington Chatman and Andre Dabne, which formed the basis of the Union’s grievance. R. at 344:21-345:4; 430:10-13.

This led to the Union’s contention that safety policies were not being applied uniformly, which was the first time this claim was raised, three years into the Project and on the eve of intended layoffs. GC Ex. 17; GC Ex. 18; R. at 343:22-344:1, 346-348. The Union supplied photos to David Chastka of other employees who had violated company

policies by sleeping on the jobsite, similar to Andre Dabne. R. at 345:19-25. David Chastka explained to the Union that he wrote up the individuals in the photos, and that any future instances would result in a stronger response. R. at 347:14-22. David Chastka also communicated with Bill Orr that the reason Andre Dabne was terminated was because he was found sleeping on the TBM machine while he was in a safety-sensitive position that required constant attentiveness **and** he had already been warned earlier that day about a policy violation and was specifically warned that continued inattention would result in termination. R. at 351:3-11, 352:4-353:3. David Chastka explained that Andre Dabne's situation (explained above) was different from the Union presenting him with photos of others sleeping because (1) the photos were taken in a manner that also violated company policy; (2) Respondent could not identify all of the individuals in the photos; and (3) of the identified individuals, they were not previously given warnings the same day for policy violations. R. at 347-348; GC Ex. 18.

The Union was not satisfied with Respondent's explanation regarding the terminations of Carrington Chatman and Andre Dabne, so the parties met for a Dispute and Grievance meeting pursuant to Section 12 of the Project Labor Agreement. GC Ex. 6; GC Ex. 14. On August 9, 2018, a meeting was conducted between Local 894's Business Manager, Bill Orr, its Business Agent, Vern Floyd, and the Employer's Project Manager, David Chastka. GC Ex. 6. During this meeting, Local 894 claimed, for the first time on this Project and again, on the eve of upcoming layoffs, that Union workers were being discriminated against based on race and Local 894 affiliation, claiming that turnover was more inclined towards Local 894 employees and that disciplinary actions are inconsistent between Local 894 members and other Laborer members. GC Ex. 6. The

Employer indicated at that time that workers are not discriminated against based on race or Local 894 affiliation, and that the then-current list of employees onsite at the Project from Laborers consisted of approximately 80% Local 894 members, 60% City of Akron residents, and 50% minority. GC Ex. 6.

Because the Union was not satisfied with David Chastka's explanation and because the grievance related to Carrington Chatman and Andre Dabne could not be resolved at the jobsite level, one of the Employer's Labor Relations Manager's, Ms. Catherine Moncada, became involved to investigate the concerns. R. at 430:12-16. The initiation of Catherine Moncada's involvement was limited at that time to investigating concerns related to Carrington Chatman and Andre Dabne. R. at 431:7-11. Although Bill Orr had indicated over the phone to her that he had some broader concerns, Catherine Moncada testified that Bill Orr was unable to articulate specifically what those concerns were, except very broad-brush concerns related to racial discrimination and/or union affiliation. R. at 432:19-25, 433:1-13.

**ii. *Employee Interviews Conducted by Catherine Moncada***

Catherine Moncada traveled from California to Ohio on Wednesday, August 15, 2018, arriving in Akron early on August 16, 2018. R. at 432:18-19; 432:17-18. On Thursday, August 16, 2018, Catherine Moncada interviewed Travis Heatley, Terry Quinn, and Jack Harris related to the grievance, which, as she testified, had to do with Carrington Chatman and Andre Dabne. R. at 433:22-434:4. She interviewed them separately in the job trailer at the Project, and no one else was present for those interviews except for her and the interviewee. R. at 434:16-24. Following those interviews, Catherine Moncada met with the Union's Bill Orr and Vern Floyd at the Union hall. R. at 435:15-16, 436:1-4.

It was at that time that Bill Orr and Mr. Floyd indicated they were very concerned based on new information that they had received that day concerning a pattern of discrimination at the jobsite. R. at 439:19-24. Based on this information, Catherine Moncada canceled her flight plans to return to California, which were originally scheduled for Friday, August 17, 2018, and instead she decided to stay to conduct a broader investigation, which ultimately led to her interviewing employees on the jobsite to investigate claims of discrimination. R. at 439:1-11, 441:11-24.

Catherine Moncada interviewed approximately 17 laborers on August 17, 2018, and went on to interview approximately 26 individuals in total, including operating engineers. R. at 443:6-11, 477:20-21. On August 17, 2018, she arrived on the jobsite and began interviews. She interviewed some non-Local 894 employees before Bill Orr and Vern Floyd arrived at the Project, which was around 9:00 a.m. EST. R. at 1193:1-4, 1194:4-6. She then began interviewing Local 894 members. R. at 1194:10-11. Her intent was to interview all available Local 894 members who were on site that particular day, and she testified that individuals were brought to the jobsite trailer by John Criss in groups of three. R. at 1195:2-13. Neither Bill Orr nor Vern Floyd had any input into the employees brought to the conference room to be interviewed by Catherine Moncada. R. at 1196:1-8.

Throughout the day, Catherine Moncada interviewed numerous employees, including Greg Dougherty, Mark Strong, and Mia Turner.<sup>7</sup> R. at 1196:12-1201:4. Catherine Moncada testified that Mark Strong told her that he felt that there was a culture

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<sup>7</sup> These and other individuals made numerous other statements to Catherine Moncada about their observations on the Project, many of which were negative. Several of those individuals relayed similar observations to Catherine Moncada as those Ivan Thompson did. For the sake of brevity, not all statements are included in this brief, but these statements may be reviewed in full in Resp. Ex. 12.

of fear on the jobsite. R. at 1198:25. Catherine Moncada testified that Mia Turner told her that “[i]t’s all horrible,” and that she believed there was an issue of prejudice on the job site, that she distrusted her foreman, and that she felt that there was cliquishness, favoritism, and race issues on the jobsite. R. at 1199:20-1200:16. Monty Thompson was also interviewed by Catherine Moncada, wherein he raised the “broom incident,” which had occurred approximately six months earlier, and numerous other concerns. R. at 477:16-22; see also Resp. Ex. 12. Another employee, Joe Minor, was interviewed and he told Catherine Moncada that not many African American laborers worked in the tunnel or remained in the tunnel if they were assigned to the tunnel crew. R. at 462:4-16.

At one point during the interviews, Bill Orr indicated that he had heard enough and was ready to leave. R. at 1205:1-4. Catherine Moncada testified, however, that while he was welcome to leave, it was her intention to continue with her investigation and to continue interviewing Local 894 members. R. at 1205:8-11. Catherine Moncada’s interviews continued the following day, on August 18, 2018. R. at 1215:12-14. Later that week, on August 24, 2018, Catherine Moncada interviewed Jack Harris, a Laborer foreman who worked in the tunnel, and Mike Quinn, the Project Superintendent.

**iii. *Ivan Thompson’s Interview with Catherine Moncada***

On August 17, 2018, Mr. Ivan Thompson was summoned to a meeting with Catherine Moncada.<sup>8</sup> Ivan Thompson testified that he was told to report to a conference room in the main office trailer by his foreman. R. at 742:2-7. He further testified that Catherine Moncada was an employee from Granite and that she indicated that she was investigating “what was going on” on the jobsite. R. at 743:2-6. He testified that he met

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<sup>8</sup> Unbeknownst to Catherine Moncada, the Union was surreptitiously recording the interview of Ivan Thompson, as well as numerous other employee interviews.

with Catherine Moncada for “about 45 minutes” and that he told her that Laborer foreman Jack Harris “is one of the most fucked-up individuals on the planet,” and that went on to tell her that Jack Harris is a racist. R. at 743:13-16; 744:9-14. What followed thereafter, was Ivan Thompson’s recanting of a litany of personal gripes and complaints about things he had observed on the Project over a year-long period. Mr. Thompson testified that he told Catherine Moncada that “the reason why I said that [Jack Harris] was a racist that he cost me \$40,000 was two weeks into working, I was working for Jack. He was my foreman for that time. That’s when we first started building the machine. Two weeks in, building the machine, Jack basically disrespects me, call me out of my name in front of my son.” R. at 744:19-745:3. He testified that he went on to tell her about the incident with Jack Harris that had occurred two weeks into Ivan Thompson’s employment, which would have been in late August/early September of 2017, approximately one year before this meeting with Catherine Moncada. After recanting the incident to Catherine Moncada, Ivan Thompson also indicated that he told Catherine Moncada: “So I thought it was all said and done.” R. at 748:2. He further testified about telling Catherine Moncada about another incident involving Jack Harris where he told her that Jack Harris denied Mr. Thompson from working in the tunnel and “[t]hat’s where the money is . . . . So I’m, like, mad. Really mad.” R. at 748:5-17.

Ivan Thompson testified that he “also let [Catherine Moncada] know about other racism and other things that was going on.” R. at 748:19-20. He testified about a time on the project when he thought he would work on a specific Saturday to build steps and get overtime, but he was not asked to work overtime, and instead, Andy and Raychel were asked to work on this particular Saturday. R. at 748:19-750:25. Ivan Thompson later

testified that he told Catherine Moncada that Raychel was a laborer who Ivan Thompson suspected that Jack Harris liked and that she was “his little pet.” R. at 752:23-753:11. Ivan Thompson testified that he also told Catherine Moncada about an incident on the jobsite involving Jack Harris and Ivan Thompson’s son, Monty Thompson. R. at 757:1-4. Ivan Thompson testified at length about this incident, which was referred to as the “broom incident” by many throughout the hearing. Ivan Thompson testified that he told Catherine Moncada while his son, Monty, was working, Raychel “came up from the hole, and she want a broom. But she goes over to tell my son to get her a broom. She a laborer just like him. He told her, no, go get your own broom, basically. So she gets mad, has a little hissy fit, go back down and go tell Jack. Jack comes up, gets all in my son’s face about not going to get her a broom, and my son tell him, ‘Get out my face.’” R. at 753:12-23. He testified that he told Catherine Moncada that “[w]hen my son told Jack to get out of his face. Leave him alone, get out of his face. You know, arguing. They mad. He mad. Get out my face.” R. at 754:23-755:1. Ivan Thompson testified that he told Catherine Moncada that he tried to get them apart from one another by having Jack Harris go one way and Monty Thompson go the other way, and that eventually the Union’s field representative, Vern Floyd, arrived on the jobsite. R. at 755:7-15.

Ivan Thompson testified that he told Catherine Moncada that “the only real black person that was in the hold the whole time, the best of my knowledge, was Jack’s friend Carl.” R. at 755:16-21. He also testified that he told Catherine Moncada that “everybody on the top pretty much was black. Everybody in the hole pretty much was white.” R. at 755:24-756:1. He also testified: “Then you started seeing black people go in the hold, but you also see them start getting shipped right back out the hole. And I told her that also.

They would go in once there was a big issue about this whole situation that we're in right now. They start, you know, adding and putting people in. But just as fast as they would go in, you see them going back out." R. at 756:7-15.

When asked what else he told Catherine Moncada about "things that were going on at the facility," Ivan Thompson testified that "[t]here was so many things" and proceeded to testify that he told Catherine Moncada about safety policies where the company had double and triple standards and that the safety guy was "super aggressive" and an "in-your-face kind of guy." R. at 757:1-759:16. Specifically, he testified that he told her: "When certain people do certain things, it's different. That's where the status changed. It's like, not good for me to do something, but it's okay for other people to do it." R. at 759:23-760:2.

Ivan Thompson testified that he told Catherine Moncada about "the African guy that they did wrong" and who Vern Floyd of the Union told him about. R. at 780:8-13. He testified that "the reason why they got rid of him, that was brought to my attention, because they couldn't understand him" because he "had an accent." R. at 781:22-782:1. He testified that he told Catherine Moncada about Cedric "Rickey" Coleman: "And I had to explain that, you know, Rickey had just got there, and they let him go because they said he didn't do anything. But like I had told her, you all agreed, you all just learning the tunnel, and you can't learn nothing in one day. In only - - you give them one day and then you get rid of them." He went on to tell her that the real "reason why they got rid of them, which I explained to Catherine Moncada, was because the night shift people had they clique just like the day shift people. And the night shift people, son - - one of the guys wanted to get they son on. So they booted Rick off and put they son on." R. at 781:1-14.

Ivan Thompson also testified that he told Catherine Moncada that Dave Chastka treats everyone fair. R. at 784:6-8. He testified that with respect to his meeting with Catherine Moncada “I think I pretty much talked about everything I seen.” R. at 785:14-15. He testified that he did not want to talk with Catherine Moncada about anything else and that “[w]hen she left, it was over for me.” R. at 847:18-19. He further testified that most of his concerns were surrounding Jack Harris. R. at 848:22-23. In fact, he testified that concerning Jack Harris, he told Catherine Moncada, “That’s the only dude I really got a problem with.” R. at 854:17-20. He testified that he told her that he lost \$40,000 “because of Jack.” R. at 854:25-855:14. Ivan Thompson testified that he told Catherine Moncada that Mike Quinn is “fair,” “a good guy,” and that he “would come to him before I would go to anybody else.” R. at 850:8-25.

**iv. Respondent’s Internal Communications**

Project Manager David Chastka and Superintendent Mike Quinn were both out of town during the interviews conducted by Catherine Moncada and did not participate in any way in the interviews. R. at 921:13-23.

David Chastka testified that although he knew that Catherine Moncada met with employees, he did not know what went on during the interviews, did not know what allegations were raised, and did not know the issues. R. at 369:19-370:6. David Chastka testified that he was present for a telephone discussion between Catherine Moncada and Jack Harris, wherein Catherine Moncada wanted to get Jack Harris’ side of the story concerning the use of the “n-word” and other slang terms, and Jack Harris asked David Chastka to be present. R. at 923:3-14; 923:20-924:1.

Aside from being present during this telephone conversation with Jack Harris, both David Chastka and Catherine Moncada testified at length that David Chastka's involvement in the investigation was limited to supplying information to Catherine Moncada upon request. For example, in GC Ex. 10, Catherine Moncada requested numerous items of information from David Chastka; however, none of the items pertained or related to Ivan Thompson. See GC Ex. 10. Similarly, in General Counsel's Ex. 11, Catherine Moncada sought additional information from David Chastka in September of 2018, after Ivan Thompson's discharge. Again, Ivan Thompson's name was not raised at all in the email. GC. Ex. 11. Likewise, in General Counsel's Ex. 12, Catherine Moncada emails David Chastka on August 23, 2018, which is one day before Ivan Thompson's discharge, wherein she apprises David Chastka of the status of her investigation. Again, nowhere in the email is Ivan Thompson's name mentioned, nor is any concern raised that would implicate or suggest Ivan Thompson's involvement.

Similar to David Chastka, when Catherine Moncada arrived in Ohio to interview employees on the Project, Superintendent Mike Quinn was not physically present in Ohio or on the jobsite. R. at 921:13-23. Mr. Quinn testified that although he knew that other employees on the Project were interviewed, he did not know the identity of employees interviewed, he was not present for anyone else's interview, did not discuss those interviews with any of the laborers on the Project, and did not discuss the interviews with Project Manager David Chastka. R. at 1083:4-17.

Mike Quinn was interviewed by telephone by Catherine Moncada on August 24, 2018, which is the same day that Ivan Thompson was discharged. R. at 1237:19-20. Catherine Moncada testified that she spoke with Mike Quinn on August 24, 2018, around

midmorning, and she further indicated that her notes support her recollection because her notes ended the previous day on August 23, 2018, at 2:08 p.m., which would have been 5:08 p.m. in Ohio, which is after-hours Ohio time and she would not have spoken to Mike Quinn that late in the evening. R. at 1237:11-1238:8. Despite counsel for Charging Party attacking Catherine Moncada's credibility and memory, documentary evidence also confirms that Catherine Moncada called Mr. Quinn on August 24, 2018, at 11:14 a.m. EST, and that the call duration was 58 minutes in length. See Resp. Ex. 15.

Mike Quinn testified that he was interviewed by Catherine Moncada, but he had a vacation planned during the time period when Catherine Moncada was visiting the jobsite, so his interview with her was a telephone interview after she had left the Project and after he returned from vacation. R. at 1087:3-1088:1. He further testified that although he could not recall the date, his interview occurred over the phone and that Catherine Moncada called him on his cell phone. R. at 1088:4-9. Mike Quinn further testified about his memory of the contents of that interview with Catherine Moncada, and he specifically indicated that he did not recall her asking him about Ivan Thompson. R. at 1099:23-25. However, whether she did or not is entirely irrelevant because the call log confirms that they spoke on August 24, 2018, at 11:14 a.m. EST, which occurred **after** the decision to discharge Mr. Thompson in the reduction of force.

The Timecard Detail Report shows that Ivan Thompson's hours worked for August 24, 2018 were not notated with the specific work he was scheduled to perform, but rather, his timecard was coded as "layoff," meaning he was being laid off that particular day. See Joint Ex. 3(a), at 1860; see *also* R. at 1303:11-1306:1. The Timecard Detail Report is also marked "Foreman: ZZ\_QUINN, MT" in the upper left-hand corner. Joint Ex. 3(a), at

1830. This marking corresponds with the Time Card Status Report (Resp. Ex. 14), which shows the dates, times, and all changes made to various timecards. The last entry on this report shows the August 24, 2018 timecard entry for “Foreman ZZ\_QUINN,MT” and it shows that it was sent to payroll on August 24, 2018 at 9:21 a.m., which is two hours before Catherine Moncada spoke with Mike Quinn.

**D. The August 28, 2018 Reduction in Force and the Remaining Work on the Project**

Ivan Thompson testified that when he was laid off on August 24, 2018, Superintendent Michael Quinn approached him with a check in his hand. R. at 837:23-838:2. Ivan Thompson testified that he asked Michael Quinn how many people were getting laid off that day, and Mr. Quinn indicated “about four.”<sup>9</sup> R. at 839:3-6. This is consistent with David Chastka’s testimony that the individuals planned for the layoff on August 24, 2018, included Mark Seese, Patricia Wheeler, Ivan Thompson, and Monty Thompson. R. at 934:4-12. David Chastka further testified that Monty Thompson was not laid off because Monty Thompson was not present at work that particular day, and David Chastka understood that Monty Thompson was expecting the birth of his child, and David Chastka “didn’t feel right about that, so [Respondent] held off on the termination.” R. at 935:10-16.

Ivan Thompson acknowledged that he did not know the process for a layoff with the Respondent, only that other employers he had worked for in the past would give

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<sup>9</sup> Mr. Thompson initially testified that he believed Mr. Quinn said “about four” people were getting laid off on August 24, 2018; however, Mr. Thompson then changed his testimony in contradiction with his confidential witness affidavit and testified that he actually asked Mr. Quinn how many people were getting checks that day and that Mr. Quinn’s response was “about four.” R. at 838-844. When asked whether it was his understanding that getting a check that day meant being laid off, he indicated that it meant “[l]aid off, terminated, let go, yes.” R. at 844:20-22.

advanced notice of a layoff. R. at 844:24-845:8. However, David Chastka testified that Respondent's typical procedure for layoffs involved contacting the Union's Business Agent ahead of time to let the Union know that a layoff was coming, but that there would be no formal documentation or paperwork provided until the day of termination. R. at 64:3-11. In this case, keeping in line with Respondent's typical procedure, David Chastka contacted Local 894's business agent, Vern Floyd, prior to the August 24, 2018 reduction in force to inform him of the upcoming layoff. R. at 644:17-18. In fact, David Chastka raised the upcoming layoff with Bill Orr at the beginning of August – before broader concerns of discrimination were even raised with Respondent and before Catherine Moncada interviewed anyone on the Project:

I also think that we should discuss the upcoming layoffs associated with the tunnel work coming to an end so that we can avoid any further issues.

Thank you,

David Chastka

GC Ex. 18.

At the time of the August 24, 2018 reduction in force, the tunnel was days away from breaking through at the retrieval site, which, as explained *supra*, meant that the Project would not be receiving any additional segments; in fact, the last segment was delivered to the jobsite on August 22, 2018. Resp. Ex. 8; Resp. Ex. 9. After the tunnel broke through, "everybody did whatever w[as] needed done. It was not a segregated activity." R. at 940:22-24. Thus, the crews were no longer working in traditional "crews," so to speak, but were completing the remaining tasks as needed. For example, beginning in August of 2018, tools and parts had to be shipped off the Project since the Project was winding down to an end; however, the parts did not leave the same way that they arrived. R. at 95:2-12. Rather, some parts were sent to various other active projects, some were

sent back to the TBM manufacturer, and some were sent back to Respondent's home yard, so prior handling of tools and equipment was not needed to complete this task of packing up tools and shipping them out to various destinations. R. at 95:10-17.

Although Respondent hired laborers as late as August 9, 2018 to work at the Project, including work in the tunnel, David Chastka explained that there was auxiliary work at the retrieval shaft that needed completed, so Respondent hired laborers to complete that work because the remaining laborer employees on the Project at that time – August 9, 2018 – were working in other areas on the Project on other tasks. R. at 98:7-14; see also GC Ex. 32(a) and (b). Specifically, David Chastka testified that “[i]t was a timing issue,” because “the Yard crew still had to perform their work while the mining was happening,” but Respondent needed the newly hired laborers “to prep for the mining machine to be able to come through the shaft wall, build a cradle, a surface to be able to pull the machine out and rip it apart.” R. at 1157:23-1158:4. David Chastka explained that he had to bring in new people to perform this work because the yard crew was performing other work and both areas of work had to be completed at the same time. R. at 1158:4-13. Thus, although laborers were hired to complete that separate task and duties, the workload as a whole was substantially winding down, as evidenced by the fact that the tunnel was no longer in operation and the Respondent continued to reduce its workforce over the next several months from nearly sixty employees prior to August of 2018 to only 11 at the time of the hearing in this case. R. at 186:2-5; Resp. Ex.6. More specifically, in just a three-month timeframe between August 24, 2018 through November 21, 2018, an additional **20 employees** were discharged in additional reductions to the workforce, including the following employees, several of whom participated in

Respondent's investigation and who made statements to Catherine Moncada: Chuck Brush (9/5/18), Tyler Dettra (9/7/18), Bart Hanlon (9/7/18), John Cheeser (9/17/18), Elijah Dabdeh (10/1/18), Derrick Martin (10/18/18), Adam Schemrich (10/18/18), Cory Friedman (10/19/18), Cody Pratt (10/19/18), Curtis Ball (10/23/18), Carl Johnson (11/2/18), Timothy Snyder (11/2/18), Greg Daugherty (11/21/18), John Oster (11/21/18), Cullen Rogers (11/21/18), Josh Spaulding (11/21/18), Michael Trump (11/21/18), Jack Zager (11/21/18), Bill Heatley (11/30/18), and Travis Heatley (11/30/18). Resp. Ex. 6.

### **E. The Charge and Complaint**

The original Charge filed against Respondent was filed on August 27, 2018. It alleged that Respondent violated the Act by discriminating and/or retaliating against employees Cedric Coleman, Jeff Longville, Andrew Zager, Carrington Chatman, Andre Dabne, and Mark Seese by terminating them in order to discourage union activities. GC Ex. 1(a). The Charge was amended on October 15, 2018, and alleged that (1) Respondent created a hostile work environment by disparately making negative racial statements concerning African American Laborers; (2) Respondent disparately enforced its cell phone policy, policy against sleeping, policy concerning calls, requesting time off and daily report times against certain Laborers; (3) Respondent unlawfully terminated Andrew Zager, Andre Dabne, Ivan Thompson, and Mark Seese; and Respondent unlawfully prohibited Ivan Thompson and Monty Thompson from working as "spotters" and subsequently isolating Monty Thompson from other employees because of his race and engaging in protected concerted activities. GC Ex. 1(c).

The Charge was amended a third time on November 5, 2018, to include an additional violation of the Act when Respondent terminated Monty Thompson. GC Ex.

1(e). The Charge was amended yet again for a fourth time on November 19, 2018, to include alleged violations of additional sections of the Act. GC Ex. 1(g). In the face of dismissal of all allegations except those related to Ivan Thompson, Charging Party withdrew all other allegations. The Complaint in this case issued on August 25, 2019, wherein it alleged that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Ivan Thompson for assisting the Union and engaging in concerted activities and to discourage employees from engaging in such activities – this is the only issue before the Administration Law Judge in this case. GC Ex. 1(i), ¶¶ 6-7. Respondent denied these allegations. GC Ex. 1(k).

### III. LAW & ANALYSIS

In order to prove that a discharge violates the Act, the General Counsel must initially prove that “the employee’s Section 7 activity was a motivating factor in the employer’s decision to discharge the employee.” *Electrolux Home Products, Inc.*, 368 NLRB No. 34, at \*3 (2019). To that end, the General Counsel must establish, by a preponderance of the evidence, three elements to support this initial showing: (1) union or other protected concerted activity by the employee, (2) employer knowledge of such activity, **and** (3) animus on the part of the employer. *Id.* Only when the General Counsel makes this showing does the burden of persuasion shift to the employer “to demonstrate that it would have taken the same adverse action even in the absence of the employee’s protected conduct.” *Id.*, citing *Wright Line*, 251 NLRB 1083, 1089 (1980); *see also Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1205 (2014); *Bemis Company, Inc.*, No. 18-CA-202617, 2019 WL 274814 (NLRB Div. of Judges, July 1, 2019).

In this case, the General Counsel failed to establish the burden for each of the three required elements. However, even if General Counsel could make an initial showing that Mr. Thompson's alleged section 7 activity was a motivating factor in Respondent's decision to discharge him, Respondent has demonstrated that it would have made the same decision even in the absence of any such protected conduct. Thus, Respondent respectfully requests the Administrative Law Judge find that Respondent did not violate the Act by discharging Ivan Thompson.

**A. The General Counsel failed to establish that Ivan Thompson engaged in union or other protected concerted activity.**

Section 7 of the Act provides employees with “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157. In order to be protected as “other concerted activities for the purpose of collective bargaining or other mutual aid or protection” under Section 7 of the Act, “employee conduct must be both ‘concerted’ and engaged in for the purpose of ‘mutual aid or protection.’” *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014); see also *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019).

**i. Ivan Thompson did not engage in union activity.**

The Complaint alleges that Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Mr. Ivan Thompson because he “assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.” Complaint, ¶¶ 6(B), 7. However, General Counsel has failed to establish that Mr. Ivan

Thompson was engaged in any union activity whatsoever, aside from simply being a member of Local 894. There is no evidence to suggest that Mr. Ivan Thompson was engaged in forming or joining a labor organization. Rather, the relationship between Respondents and Local 894 had been ongoing since the start of the Project in 2015. R. at 144:6-18. More to the point, though, General Counsel's position, as articulated by General Counsel during the hearing, is that Mr. Thompson provided the Respondent with "a true account of his experience at the facility," and that after making that "true, honest, open account, he was let go." R. at 36:1-4. However, General Counsel also acknowledged during the hearing, and which evidence supports, that the request for Mr. Thompson to speak with Catherine Moncada "was made by management . . . ." R. at 35:17-19. The testimonial and documentary evidence also confirms that Respondent initiated interviews of all employees, including employees from other trades, on the jobsite at the Project (not just Laborers). R. at 1193; Resp. Ex. 12.

In fact, the only reason Catherine Moncada was in Ohio to interview the workforce was because of a grievance entirely unrelated to Mr. Thompson, concerning two other employees – Carrington Chatman and Andre Dabne. R. at 101:11-18; 430:6-16. The Union did not request Mr. Thompson's assistance (at the very least, there is absolutely nothing in the record to demonstrate that his assistance was requested). He was not engaged in an election, he was not engaged in steward duties, he was not engaged in a strike or picket, and he was not engaged in negotiations for another collective bargaining agreement. Similarly, he did not voice his support for the Union in a captive audience meeting or directly to any supervisor or agent for Respondent. Rather, Mr. Thompson was summoned to the Project's conference room by Respondent's Project Engineer John

Criss, and Catherine Moncada asked him to share with her his personal experiences working on the Project. Thus, there is no evidence to suggest that Mr. Thompson was engaged in forming, joining, or assisting a labor organization.

ii. ***Ivan Thompson’s participation in Respondent’s investigation does not constitute “concerted” activity.***

Whether conduct rises to the level of concerted activity is a factual inquiry based on the totality of the record evidence. *Alstate Maintenance*, at \*3. In order for employee conduct to be considered “concerted,” the Board requires that the conduct “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*). The Board has indicated that when the record demonstrates group activities, the Board will find the conduct to be concerted. *Alstate Maintenance*, at \*3. However, the Board has reiterated that there must be **evidence of “group activities,”** which the Board explained as “prior or contemporaneous discussion of the concern between or among members of the workforce – warranting a finding that the employee was indeed bringing to management’s attention a ‘truly group complaint,’ as opposed to a purely personal grievance.” *Id.* (emphasis added). “Absent such evidence,” the Board has indicated that “there is no basis to find that an individual employee who complains to management about a term or condition of employment is acting other than solely by and on behalf of him- or herself.” *Id.*

In analyzing whether a conversation is concerted activity, the Board confirmed a prior holding by the Third Circuit in *Mushroom Transportation Company, Inc. v. NLRB*, wherein the Court held that “a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very

least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees.” *Id.*, citing *Mushroom Transportation Company, Inc. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). “Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere ‘griping.’” *Mushroom Transportation Company, Inc. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). As to the latter instance of concerted activity by virtue of bringing a truly group complaint to the attention of management, the Board requires record evidence that demonstrates such group activities. *Meyers Industries*, 281 NLRB 882, 886 (1986) (*Meyers II*). Here, the facts show personal gripes not calling for group action.

Subsequent Board rulings have permitted the inference of a concerted objective where a complaint was raised in a group-meeting context in the presence of fellow employees. See, e.g., *Whittaker Corp.*, 289 NLRB 933 (1988); *Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000). Most recently, the Board articulated factors relevant to determine whether drawing an inference of concerted activity include: (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hour, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protect or complain about the decision, not merely (as in *Worldmark*) to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision’s effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and (5) the meeting presented the first opportunity employees

had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.” *Alstate Maintenance*, at \*8.

In this case, the importance of the process cannot be underscored enough – Respondent initiated its own investigation to obtain as much information as possible about employee experiences and observations while working on the Project. To that end, Catherine Moncada interviewed nearly thirty employees on the Project. Respondent summoned those individuals to the Project’s jobsite trailer to a conference room where Catherine Moncada asked them questions. The Union’s representatives, Bill Orr and Vern Floyd, were present for several of those interviews; however, their presence was at Catherine Moncada’s invitation. Employees were not being interviewed for any disciplinary purpose and, thus, Bill Orr’s and Mr. Floyd’s presence was not required. Indeed, at one point, Bill Orr expressed that he was considering leaving and Catherine Moncada told him that he was welcome to leave, but that she was going to continue her interviews. During that time, she asked them questions. She asked them to tell her what they had heard and what they had seen and what they observed on the Project. This is not a case where one, two, or even a dozen employees approached their employer to complain about wages. This is entirely the opposite. This case involves the employer seeking out employee observations.

Turning specifically to Mr. Thompson, Catherine Moncada summoned him to the jobsite trailer. She told him who she was and why she was there and that she wanted him to tell her about his experience on the Project and share with her what he had seen and observed. He did exactly that. He did not ask for better wages or a new supervisor or a different role. He did not ask to be moved from the yard crew to the tunnel crew. His

statements to Catherine Moncada were not in an attempt to initiate or induce group action because the Respondent asked him to share his experiences, observations, and feelings. There is no evidence to suggest that Mr. Thompson went to the Union or to the Respondent to speak out about conditions of employment or to seek some type of action in response with respect to his alleged protected activity in this case.<sup>10</sup> If anything, his statements to Catherine Moncada would be more akin to griping about his experiences and co-workers rather than seeking some type of action from Catherine Moncada. After all, Mr. Thompson had been working on the Project for approximately one year before he was summoned into the meeting and asked to share with Catherine Moncada his experience working on the Project. In addition to there being no evidence that Mr. Thompson was acting with the object of initiating or inducing or preparing for group action, as is required under *Mushroom Transportation and Alstate Maintenance*, an inference of a concerted objective is also inappropriate here, where the statements made by Mr. Thompson were not made in a group-meeting context and do not satisfy any of the relevant factors as outlined in *Alstate Maintenance* where the drawing of an inference of concerted activity would be permitted.

**iii. *Ivan Thompson's participation in Respondent's investigation was not for the purpose of mutual aid or protection.***

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<sup>10</sup> Mr. Thompson's interview can be contrasted with an earlier incident, unrelated and untimely to this case, when Ivan Thompson *did approach* Respondent *on his own initiative* concerning the "broom incident," when Ivan Thompson went to David Chastka and was very "excited" and "animated" over an altercation that had occurred in the yard between his son, Monty Thompson, and laborer foreman Jack Harris, and was seeking action from Mr. Chastka to resolve the situation. R. at 324-326. Mr. Thompson's complaints related to the "broom incident" were open and obvious to everyone involved, including Mr. Chastka and Mr. Quinn; despite the obvious complaints made about Jack Harris at that time, no one took any action against Mr. Thompson; rather, Respondent worked with the Union amicably to resolve the altercation and move on.

Although closely related to the concept that employee conduct must be “concerted,” the conduct must also be engaged in for the purpose of “mutual aid or protection,” which the Board has confirmed is an analytically distinct element that General Counsel bears the burden of proving. *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), *citing Summit Regional Medical Center*, 357 NLRB No. 134, slip op. at 3 (2011). “The concept of ‘mutual aid or protection’ focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to ‘improve terms and conditions of employment or otherwise improve their lot as employees.’” *Id.*, *quoting Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

In this case, General Counsel contends that Respondent discharged Ivan Thompson “because employees and [Ivan Thompson] . . . assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.” Complaint, at ¶ 6. Once again, however, there is no evidence to support that Mr. Thompson’s statements to Catherine Moncada were made for the purpose of mutual aid or protection; indeed, Mr. Thompson never offered in his testimony, nor did General Counsel establish, that Mr. Thompson’s comments were advanced for the mutual aid or protection of himself *and* his fellow employees. Respondent does not dispute that the subject-matter of Mr. Thompson’s statements relate to terms and conditions of employment. The issue in this case, however, relates to the *goal* underlying Mr. Thompson’s statements. Unlike the case where employees band together in solidarity to protest racially discriminatory hiring practices or supervisory handling of safety issues, Mr. Thompson did not protest anything. He did not report safety concerns. He did not take any action with the goal of improving working conditions.

Rather, Catherine Moncada asked him to speak openly and frankly with her about his experience working on the Project and to share with her anything he had observed, heard, or saw. He did that. There is nothing in the statements he made to Catherine Moncada, nor his testimony or the testimony of others, to suggest that he made those statements for the purpose of changing his working conditions. In contrast, the record supports that he was *asked by Respondent* to share with Catherine Moncada his experience on the jobsite, and he did precisely that. At the end of his interview, he did not ask what changes would be made on the Project, he did not ask for a wage increase, he did not ask for different working conditions, he did not do anything else. He shared his observations and Catherine Moncada gave him her business card and told him that he could reach out to her directly if he had anything to add. Respondent requested Mr. Thompson's participation in its internal investigation and Mr. Thompson participated. Nothing more, nothing less. For these reasons, Mr. Thompson's statements to Catherine Moncada were not made for the purpose of mutual aid or protection.

**B. The General Counsel failed to prove employer knowledge of any alleged protected concerted activity by Ivan Thompson.**

In order to prove that a discharge violates the Act, the General Counsel must establish that the employee's Section 7 activity was a motivating factor in the employer's decision to discharge the employee. *Electrolux Home Products, Inc.*, 368 NLRB No. 34, at \*3, citing *Wright Line*, 251 NLRB 1083, 1089 (1980). To that end, the General Counsel must show that the employer had knowledge of the employee's Section 7 activity. *Id.* Importantly, the Board has confirmed that in a discharge or layoff case, the issue is not whether anyone working for the employer has knowledge, but rather, "the issue is whether the decisionmaker knew of the concerted protected activity . . . ." *Reynolds Electric, Inc.*,

342 NLRB 156, 157 (2004). Additionally, actual knowledge is the standard; thus, the issue is “not whether the decisionmaker should or reasonably could have known.” *Id.* Moreover, where an employer can show that a supervisor or agent did not pass on information to others, such credible denial will not permit knowledge of an agent or supervisor to be imputed to the employer. *Dobbs International Services*, 335 NLRB 972, 973 (2001); *G4S Secure Solutions*, 364 NLRB No. 92 (2016); *Roseburg Forest Products Co.*, 2018 WL 5676045 (NLRB Div. of Judges Oct. 31, 2018) (imputing supervisor’s knowledge to decisionmaker where decisionmaker was fed information about a discussion with an employee **and** decisionmaker acted upon that information).

In this case, the record is entirely devoid of evidence to establish employer knowledge of any alleged union or concerted activity by Mr. Thompson. The record is clear in this case that the decisionmaker was Superintendent Michael Quinn. R. at 139:2-16, 140:1-24. Specifically, Michael Quinn approached David Chastka and recommended that Mark Seese, Ivan Thompson, Monty Thompson, and Patricia Wheeler be discharged in the first reduction of the workforce based on David Chastka’s earlier directive to Mr. Quinn that when the segments were done being delivered, employees had to be cut. R. at 1140:1-3, 1141:12-18. Further, Mr. Chastka testified that the process implemented for any layoff is that superintendents bring a recommendation to Mr. Chastka and then David Chastka has the final authority. R. at 139:2-16. Mr. Chastka further testified that it is “very seldom” that he disregards a superintendent’s recommendation. R. at 139:9-11. Thus, the decisionmaker was Superintendent Michael Quinn in this case, who brought the recommendation to discharge Ivan Thompson to David Chastka. To the extent David Chastka exercised his final authority to include Ivan Thompson in the reduction in force,

then Mr. Chastka, too, would be considered a decisionmaker. There is no evidence in the record that anyone else employed by Respondent was a decisionmaker in discharging Ivan Thompson.

Assuming that the protected concerted activity is what the General Counsel claimed it to be during the hearing – Ivan Thompson’s statements to Catherine Moncada during her interview of him – there is absolutely no evidence whatsoever that the decisionmaker who selected Ivan Thompson for the reduction in force had any knowledge whatsoever about Ivan Thompson’s statements made to Catherine Moncada. In fact, the evidence of record shows entirely the opposite – that neither Superintendent Mike Quinn nor Project Manager David Chastka had any knowledge of Ivan Thompson’s statements to Catherine Moncada. In fact, General Counsel’s own exhibits support this conclusion.

When Catherine Moncada arrived in Ohio to interview employees on the Project, Superintendent Mike Quinn was not physically present in Ohio or on the jobsite. R. at 921:13-23. Mr. Quinn testified that although he knew that employees on the Project were interviewed, he did not know the identity of employees interviewed, he was not present for anyone else’s interview, did not discuss those interviews with any of the laborers on the Project, and did not discuss the interviews with Project Manager David Chastka or anyone else. R. at 1083:4-17.

Mike Quinn was interviewed by Catherine Moncada on August 24, 2018, which is the same day that Mr. Thompson was discharged. R. at 1237:19-20. Catherine Moncada testified that she spoke with Mr. Quinn on August 24, 2018, around midmorning, and she further indicated that her notes support her recollection because her notes ended the previous day on August 23, 2018, at 2:08 p.m., which would have been 5:08 p.m. in Ohio,

which is after-hours Ohio time and she would not have spoken to Mr. Quinn that late in the evening. R. at 1237:11-1238:8. Despite counsel for Charging Party attacking Catherine Moncada's credibility and memory, documentary evidence also confirms that Catherine Moncada called Mr. Quinn on August 24, 2018, at 11:14 a.m. EST, and that the call duration was 58 minutes in length. See Resp. Ex. 15.

Mike Quinn's testimony is consistent on this point, as well. He testified that he was interviewed by Catherine Moncada, but he had a vacation planned during the time period when Catherine Moncada was visiting the jobsite, so his interview with her was a telephone interview after she had left the Project and after he returned from vacation. R. at 1087:3-1088:1. He further testified that although he could not recall the date, his interview occurred over the phone and that Catherine Moncada called him on his cell phone. R. at 1088:4-9. Mr. Quinn further testified about his memory of the contents of that interview with Catherine Moncada, and he specifically indicated that he did not recall her asking him about Ivan Thompson. R. at 1099:23-25. However, whether she did or not is entirely irrelevant because the call log confirms that they spoke on August 24, 2018, at 11:14 a.m. EST, which means that it occurred **after** the decision to discharge Mr. Thompson in the reduction of force. This is confirmed by both testimonial and documentary evidence. The Timecard Detail Report is the best evidence as it shows that Mr. Thompson's hours worked for August 24, 2018 were not notated with the specific work he was scheduled to perform, but rather, his timecard was coded as "layoff," meaning he was being laid off that particular day. See Joint Ex. 3(a), at 1860; see *also* R. at 1303:11-1306:1. The Timecard Detail Report is also marked "Foreman: ZZ\_QUINN, MT" in the upper left-hand corner. Joint Ex. 3(a), at 1830. This marking corresponds with

the Time Card Status Report (Resp. Ex. 14), which shows the dates, times, and all changes made to various timecards. The last entry on this report shows the August 24, 2018 timecard entry for “Foreman ZZ\_QUINN,MT” and it shows that it was sent to payroll on August 24, 2018 at 9:21 a.m., which is **two hours before Mr. Quinn spoke with Catherine Moncada**. Thus, unlike the case in *Roseburg Forest Products Co.*, not only was Mr. Quinn not fed information about Mr. Thompson’s statements, there was also no opportunity for him to be fed such information or for him to act upon such information, as his decision to discharge Mr. Thompson preceded any communication he had with Catherine Moncada. Further, the testimony confirms that he did not speak with anyone else about the investigation, and merely had a general understanding that an investigation was ongoing and that employees were interviewed. Because the relevant knowledge that General Counsel must prove is of *Mr. Thompson’s* union or protected concerted activity, as opposed to general union activity from anyone on the jobsite, such general knowledge is insufficient to establish employer knowledge, particularly in a case such as this where virtually all of the employees participated in the investigation.

Similarly, Mr. Chastka was also not fed information about Mr. Thompson’s statements. Throughout the hearing, General Counsel attempted to show employer knowledge through emails between the Union and Mr. Chastka and emails between Catherine Moncada and Mr. Chastka. However, none of these emails show employer knowledge. In short, the evidence simply does not support General Counsel’s theory.

General Counsel’s Exhibit 5, is an email dated August 4, 2018, and for example, shows communication between Bill Orr and Mr. Chastka, and only names one employee by name – “Elijah.” GC Ex. 5. Mr. Chastka’s testimony is that as of that time (early August

of 2018), the Union had only raised concerns related to Laborers Carrington Chatman and Andre Dabne, and that “Elijah” was referenced in the email but had not been a subject of major concern at that time. R. at 107:16-23.

General Counsel’s Exhibit 7 is an email from Catherine Moncada to Local 894’s Bill Orr, wherein she communicates: “Thank you for your patience with the investigation. Dave and I have been working together continuing to investigate some of the issues that were raised to us all on Friday.” GC Ex. 7. This email also does not establish employer knowledge. Catherine Moncada’s communication to the Union that she and Mr. Chastka were investigating concerns raised during the prior week does not support a finding that Mr. Chastka had the same knowledge as Catherine Moncada, particularly in light of testimony and evidence that Mr. Chastka was not present for the interviews and that Catherine Moncada merely asked questions of Mr. Chastka and assistance from him in gathering documents and information. More tellingly is the fact that of all the questions and information that Catherine Moncada sought from Mr. Chastka, as outlined in GC Ex. 10, not a single item related to Mr. Thompson.

General Counsel went to great lengths to emphasize the importance of GC Ex. 10. However, this email, too, does not establish employer knowledge. General Counsel questioned both Mr. Chastka and Catherine Moncada about this email, wherein Catherine Moncada wrote to Mr. Chastka, in relevant part, as follows:

Thank you again for your help and cooperation with the investigation of the allegations made by the Laborers Union. I know you are aware, but it would be remiss of me not to state that everything we discussed, and the items below, are confidential.

I have gone through my notes and attempted to distill them into something coherent. I conducted 26 interviews, so this was not easy. As part of that process, I have identified the following that require additional information; we discussed most of this already, but I thought it would be helpful to have it in written form.

- Timecard log for Mark Seese's timecards (stamps on approvals/edits). We must take very seriously the allegation that his timecards are being altered after he submits them.
  - Copies of all written warnings provided to any employee, and copies of any documentation of verbal warnings.
  - Was the belt running when Andre Dabney was terminated for sleeping? Was Andre Dabney the first employee assigned exclusively to the belt? Is there any documentation of any previous counseling or warnings provided to Mr. Dabney?
  - Is Monty Thompson earning an overscale rate?
  - Is there any documentation of Take 5 or other meetings where cell phone use was addressed?
  - Do you have a contact number for Jason Dolan? Mr. Dolan's name came up multiple times during the interviews and I would like to try to speak with him.
  - Please provide any written documentation that may exist concerning the Broom Incident.
  - Alfred (?) Squire – please provide information concerning his employment and layoff.
  - Please provide a narrative concerning Carl Johnson's return to work from FMLA; apparently there was some delay in his being put back to work.
- 
- Please provide a narrative concerning Jason Quinn's employment. Please ensure this is an explanation of the facts as you currently understand them, from the time of his hire to the time of his separation including what positions he occupied and what shifts he was working.
  - What steps are being taken, or have been taken, to enforce our site-wide PPE policies on Parsons employees?
  - Video of portal time stamped with CJ (Carrington Chatman) leaving the day in question? The date of the incident is August 2.
  - Please provide a narrative and any associated paperwork concerning Charles Berner's (?) employment. You mentioned that he was overheard using the expression "the n\*\*\*\*\*s in the back." Who heard this? Was it documented? Was action taken? What were the circumstances surrounding his separation from KOV?

Thank you,

**Catherine Moncada**

In the above email, Catherine Moncada thanked Mr. Chastka for his "help and cooperation with the investigation of the allegations made by the Laborers Union." GC Ex. 10. She went on to ask for additional information from Mr. Chastka. Importantly, while the email may convey some information about the investigation in general, **none of the information requested was related to or even referenced Ivan Thompson, and Mr. Thompson's name was not mentioned anywhere in the entirety of the email.** Moreover, the information sought related to concerns throughout the Project, of various topics and at various locations, so it is highly illogical for anyone to conclude that the

information sought was related to Mr. Thompson as opposed to anyone else who participated in the investigation, or that Mr. Thompson's statements were the cause of Catherine Moncada asking for information on the subjects that she did.

Similarly, in General Counsel's Ex. 11, Catherine Moncada sought additional information from Ms. Chastka in September of 2018, after Mr. Thompson's discharge. Again, Mr. Thompson's name was not raised at all in the email. Likewise, in General Counsel's Ex. 12, Catherine Moncada emails Mr. Chastka on August 23, 2018, which is just one day before Mr. Thompson's discharge, wherein she apprises Mr. Chastka of the status of her investigation. Again, nowhere in the email is Mr. Thompson's name mentioned, nor is any concern raised that would implicate or suggest Mr. Thompson's involvement.

In sum, the testimony confirms that the decisionmakers – Mr. Quinn and Mr. Chastka – had no knowledge of Mr. Thompson's alleged protected concerted activity. They had no knowledge of statements made by Mr. Thompson during his conversation with Catherine Moncada, and they had no knowledge of the subjects or topics he raised with her. What did they know? They knew that an investigation was conducted and that employees on the Project were interviewed. However, that knowledge is not sufficient to establish employer knowledge of Mr. Thompson's alleged protected concerted activity. If it were, then the employer would not be able to discharge ANY employee because, as was confirmed during the hearing, Catherine Moncada interviewed all of the employees on the Project that were present the day she visited the Project, and she also called other individuals and employees from other trades who were not present on the jobsite that particular day. Mr. Chastka and Mr. Quinn were not present for those interviews and they

did not participate in those interviews. Moreover, General Counsel has not shown any evidence to suggest that Catherine Moncada shared detailed information with either of them, and in fact, the record has ample evidence to the contrary – that she did not share any information whatsoever about statements made by Mr. Thompson with either Mr. Chastka or Mr. Quinn. Thus, the Respondent did not have knowledge of any alleged protected concerted activity, and General Counsel failed to establish employer knowledge.

**C. The General Counsel failed to establish animus on the part of the Employer.**

General Counsel bears the burden of proving animus on the part of the Employer to prove that a discharge violates the Act under *Wright Line. Electrolux Home Products, Inc.*, at \*3. Under certain circumstances, in the absence of direct evidence, animus may be inferred from circumstantial evidence based on the totality of the record. *Id.* However, this type of circumstantial evidence will only suffice to support a finding of illegal discharge when it is combined with evidence of employer animus that is directed at an employee’s protected activity. *Alldata Corp. v. NLRB*, 245 F.3d 803, 808 (D.C. Cir. 2001). Absent that crucial link, circumstantial evidence will not suffice such an inference. *Id.*

he Board recently articulated that “the Board may infer from the pretextual nature of an employer’s proffered justification that the employer acted out of union animus, ‘at least where . . . the surrounding facts tend to reinforce that inference.’” *Electrolux Home Products, Inc.* at \*4. However, like circumstantial evidence, pretext alone does not support such an inference. *Id.*, at \*4, fn.10. As the Board recently articulated only a few months ago, “When an employer has offered a pretextual reason for discharging or disciplining

an alleged discriminatee, the real reason might be animus against union or protected concerted activities, *but then again it might not. Id.* at \*4 (emphasis added).

For example, in *Electrolux Home Products, Inc.*, the employer, Electrolux Home Products, employed over 700 workers represented by the IBEW. *Electrolux Home Products, Inc.*, at \*1. After an organizing drive in 2016, the local IBEW was certified as the exclusive bargaining representative and three weeks later, the parties reached an interim agreement regarding employee discipline. *Id.* Employee Mason was hired in 2013. *Id.* She was counseled in December of 2016 for failing to properly scan inventory. *Id.* The employer then discharged Mason in May of 2017, citing her failure to comply with a supervisor's directive to ensure microwaves were delivered to the production line. *Id.* Prior to her discharge, Mason had assisted the IBEW's organizational efforts by distributing authorization cards, handing out union flyers, and wearing pro-union clothing. *Id.* at 2. She also spoke out in a group meeting held by Respondent, at which time she was told by a supervisor to "shut up." *Id.* On several other occasions during her employment, Mason raised concerns about terms and conditions of employment, including just a couple of months before her termination. *Id.* at 3.

In reviewing the ALJ's decision that Mason's union activity motivated the employer's decision to discharge her, the Board reversed the decision and dismissed the complaint, concluding that there was no basis to infer that the employer discharged Mason because of her union activities, aside from a finding of pretext based on evidence of disparate treatment. *Id.* at \*3. In so finding, the Board noted that the General Counsel had not shown that the employer committed any contemporaneous unfair labor practices and the Board found nothing suspicious about the employer's investigation into Mason's

failure to perform certain work as requested. *Id.* at 4. The Board went on to explain that the interaction between Mason and a supervisor at the group meeting, although rude, did not establish that the employer harbored union animus. *Id.* at 5. Additionally, the Board emphasized the fact that the record had countervailing evidence that the employer did not bear any animus against collective bargaining or toward employees of the IBEW's bargaining team. *Id.* Specifically, the Board noted that at the time of Mason's discharge, the employer and IBEW representatives had been meeting and bargaining in good faith, and the record did not reveal any incidents of animosity during those bargaining sessions. *Id.* The Board was also persuaded by the fact that there was no reason to suggest that the employer would have singled Mason out from a group of employees who served on the bargaining committee. *Id.* For these reasons, the Board held that the disparity in disciplinary treatment of Mason did not warrant an inference that the discharge was motivated by Mason's union activities. *Id.*

Applying the above framework to this case, General Counsel failed to establish animus on the part of Respondent. There is no direct evidence of animus; thus, General Counsel must point to circumstantial evidence in an attempt to infer animus. However, the evidence of the record does not support such an inference. At the time of Mr. Thompson's discharge, Respondent had had an ongoing relationship with Local 894 since the start of the Project in 2015. Respondent communicated with the Union throughout the duration of the Project, before, during and after Mr. Thompson's employment, including advanced discussions about layoffs, which was not required by the collective bargaining agreement. Similar to the employer's bargaining relationship with the IBEW in *Electrolux Home Products, Inc.*, there is nothing in the record to suggest

any incidents of animosity between Respondent and Local 894 over the course of the three-year Project. While the parties disagreed on paths moving forward from the Union's last grievance, the parties remained in communication and continued to work together on the Project without any incidents of animosity flowing in either direction.

Additionally, like the Board's finding that Electrolux did not single Mason out from the bargaining group for disparate treatment, the same conclusion should be drawn here – there is no reason to suggest that Respondent would have singled out Mr. Thompson from the group of dozens of employees who participated in Respondent's investigation and who also made negative statements about their experiences and observations working on the Project. For example, Monty Thompson, a Local 894 Laborer and Ivan Thompson's son, told Catherine Moncada about the "boys" incident involving Jack Harris, and he told her that he had heard that Jack Harris told Mark Seese that he wanted to fire employees because they were black. Monty Thompson also told Catherine Moncada about the broom incident and told her that Respondent did not enforce its policies fairly. He also told her that Respondent had problems with nepotism. He told her about employees with drug problems, and spoke negatively about numerous employees, including laborer foreman Jack Harris, Safety Manager Brad Swinehart, and Superintendent Mike Quinn. Similarly, Mia Turner, a Local 894 Laborer, told Catherine Moncada that there were serious race issues on the Project and that there were problems with cliquishness and nepotism. Mark Strong, another Local 894 Laborer, also told Catherine Moncada that there were issues with nepotism on the Project. Each of these individuals spoke at length with Catherine Moncada about their experiences, observations, and feelings about working on the Project, and each of them spoke about

several things they did not like or things that they thought were “horrible,” yet none of them were part of the August 24, 2018 reduction in force. Simply put, there were dozens of employees who spoke with Catherine Moncada, and there is no reason to suggest that Respondent would have singled out Ivan Thompson for inclusion in a reduction in force from the many others that also participated in the investigation. In fact, one of the other individuals discharged on August 24, 2018 – Patricia Wheeler, a Local 894 Laborer on the yard crew – did not participate in Respondent’s investigation and was not interviewed, which further supports Respondent’s contention that the participation in the investigation and statements made to Catherine Moncada simply did not play any role in Respondent’s decision with respect to who would be included in the August 24, 2018 reduction in force.

Because the record is replete with countervailing evidence that Respondent did not bear any animus against Local 894 or toward its ongoing relationship with the Union, General Counsel failed to establish union animus on the part of the Respondent and such an inference should not be drawn.

**D. Even if the General Counsel could establish that the Employer’s proffered justification for discharging Ivan Thompson was pretextual, on the record as a whole, the General Counsel failed to satisfy General Counsel’s burden of proving that Ivan Thompson’s alleged union activity was a motivating factor in his discharge.**

It is anticipated that the General Counsel’s positions and assertions will closely mirror the strategy taken during the course of the hearing – attempted obfuscation of the facts and substantial broadening of the legal question before this Administrative Law Judge to issues and matters wholly irrelevant to Ivan Thompson’s employment or his discharge. These irrelevant facts and arguments should be given no weight in the

decision in this case – whether Respondent discharged Ivan Thompson because he engaged in alleged union or protected concerted activities.

For example, although a review of the record would suggest otherwise, this is not a Title VII case. Mr. Thompson's race is not an issue in this case – nor is the race or local union affiliation of anyone else who worked on the Project. In fact, the three laborers on the yard crew who were retained at the time of the August 24, 2018 reduction in force were each African American, Local 894 laborers. All three of them were also interviewed by Catherine Moncada in Respondent's investigation. All three of them made statements to Ms. Moncada similar to those made by Ivan Thompson. The non-discrimination language in the Project Labor Agreement is not relevant to Mr. Thompson's discharge (except insofar as Charging Party seeks to make this a Title VII case, in which case the grievance and arbitration provision would apply). The hundreds of pages of the record devoted to Carrington Chatman and Andre Dabne and Respondent's alleged disparate enforcement of its policies is entirely irrelevant to Ivan Thompson. The issue related to Respondent's policies was the subject of a grievance, as well as numerous charges of discrimination before the Ohio Civil Rights Commission and a prior unfair labor practice charge, all of which were dismissed with no probable cause findings. Importantly, though, none of that is relevant to this case. Mr. Thompson was not involved in that dispute – he was not one of the employees involved, he never raised those concerns to anyone on the Project, and he was never disciplined under those policies. Simply put, the dispute between the Union and Respondent over the alleged disparate enforcement of company policies is entirely irrelevant to *Ivan Thompson's* employment or *his* discharge.

This is also not a breach of contract case. Testimony by Mark Seese about how long he would remain on the Project and how much work was left to do is irrelevant to Mr. Thompson. As Mr. Seese acknowledged during the hearing, no promises were made to him or anyone else about the duration of the Project, and when Mr. Seese inquired about how long the Project would last, he was asking in the context of wanting to move to Respondent's next project and he was asking for himself. At no point did he ask Respondent how long Ivan Thompson would be working on the Project, or how long everyone on the yard crew would work on the Project. Thus, any testimony regarding alleged assurances for the length of the Project should be given little weight, particularly in light of the countervailing evidence that shows, categorically and not rebutted by General Counsel, that the Project did in fact reduce its workforce beginning on August 24, 2018, and continuing each week or so for the next several months. The Project was winding down. General Counsel cannot refute that reality.

The hundreds of pages of the record devoted to other employees and their regular or light duty status or what they were told about how much work was left on the Project is also irrelevant to Mr. Thompson. Monty Thompson's light duty status has nothing to do with *Ivan Thompson*. Even if General Counsel argues that Monty Thompson was not discharged in the reduction in force because Respondent would not discharge an employee who was on light duty status, again, is absolutely irrelevant. Such a showing would say nothing about Respondent's motives in discharging *Ivan Thompson*. In fact, it would seem only to suggest that Respondent was cautious and aware of potential traps for litigation and sought to avoid them by not discharging employees under circumstances

that raised the potential for litigation. Again, there is nothing improper about that, and more importantly, nothing relevant to Ivan Thompson's discharge.

Similarly, assertions that the yard crew members worked longer or that they performed more physically-demanding tasks than those who worked in the tunnel (because of certain periods of time when the TBM was down and therefore the tunnel crew had periods of downtime on occasion) is entirely irrelevant to Ivan Thompson's discharge. The allegation in and of itself is false, as Mr. Chastka explained during his testimony, but even if it were true, it simply does not have any relation to Ivan Thompson. Even assuming that he worked longer hours than employees in the tunnel, it is simply not a fact that has any relevance. Mr. Thompson had been working on the Project for over one year at the time of his discharge. He had been working on the yard crew for approximately nine to ten months. Any suggestion by General Counsel that Ivan Thompson should have been working in the tunnel, or earning overtime based on hours worked by the tunnel crew, is inappropriate and irrelevant. Additionally, the Complaint does not allege that Respondent's decision to assign Ivan Thompson to the yard crew was discriminatory or a violation of the Act, and any attempt to argue that Respondent denied Mr. Thompson to work in the tunnel or overtime would be time-barred.

General Counsel's assertion that Ivan Thompson was the most senior or most qualified employee also has no merit or relevance. First, aside from General Counsel's broad assertion, General Counsel did not establish either of those assertions during the hearing; more to the point, however, both testimonial and documentary evidence established that seniority played no role in staffing decisions – Both Catherine Moncada and Mr. Chastka testified that seniority did not impact job assignment decisions for

Respondent on its projects, and, importantly, the Laborers' collective bargaining agreement also did not have any provisions that made seniority a relevant consideration for layoff decisions, or any other criteria for layoffs.

Even if the General Counsel could establish that Respondent's decision to discharge Ivan Thompson as part of its August 24, 2018 reduction in force was pretextual, the record as a whole does not support a finding that Ivan Thompson's alleged union or protected concerted activity was a motivating factor in his discharge. Several aspects of this case compel this conclusion.

First and foremost, the August 24, 2018 reduction in force was not something that Respondent arbitrarily implemented as a mechanism to get rid of Ivan Thompson. Rather, the evidence shows that it had been planned for quite some time. Mr. Chastka and Mr. Quinn both testified that they had conversations leading up to the reduction in force about the fact that layoffs would be necessary once Respondent stopped receiving segments. In early August, before Ivan Thompson's name was ever on anyone's radar and before Catherine Moncada was ever contacted about a grievance and before Mr. Thompson was ever interviewed, Mr. Chastka wrote an email to Local 894's Bill Orr indicating that "we should discuss the upcoming layoffs associated with the tunnel work coming to an end..." Again, Mr. Thompson's name had never been raised and Mr. Thompson had not been interviewed by Catherine Moncada at that time.

Second, the workload had substantially reduced at the time of the reduction in force. The last segment was delivered to the jobsite on August 22, 2018, and the TBM had reached the retrieval shaft at the end of the August 2018. Thus, as of August 22, 2018, there was no more work involving segments. Again, there is ample evidence to

demonstrate that Mr. Thompson was heavily involved with handling the segments at that time. Indeed, his own son, Monty Thompson, who was called to testify by General Counsel, testified that Ivan Thompson was the employee who had been primarily working with the segments for the preceding several months. Monty Thompson further testified that he, Ivan Thompson, and Mark Seese were the only individuals on the yard crew who were trained to complete the paperwork, and that because Monty was injured in early August, Ivan Thompson had taken on all of the duties associated with handling the segments. Thus, it is no coincidence that when segment work came to an end, and Respondent had to cut employees, Ivan and Mark Seese (the only other person who was trained to work with segments), would be selected for the reduction in force.

Finally, perhaps the most compelling evidence in this case to show that Ivan Thompson's alleged union activity was not a motivating factor in his discharge is to look at the group of employees discharged in the reduction in force and the subsequent reductions to the workforce over the next several months. On August 24, 2018, Ivan Thompson, Mark Seese, and Patricia Wheeler were discharged. Patricia Wheeler was not even involved in the investigation whatsoever. If the statements made by Ivan Thompson were so appalling to Respondent that it wanted to retaliate against him, why would it not select others who made similar statements, like Ivan Thompson's son, Monty, or Mia Turner, or Mark Strong? Moreover, additional reductions to the workforce continued to occur right after the first one on August 24, 2018. In fact, the next reduction in force occurred just two weeks later with another three employees being discharged. Overall, an additional **20 employees** were discharged in additional reductions to the workforce in September, October, and November of 2018. Several of those individuals

were interviewed by Catherine Moncada, and a number of them were not. The interviews simply did not matter and did not influence the decisionmakers on the Project. In short, Respondent would have made the exact same decision with respect to which employees to include in its various reductions to its workforce regardless of whether the investigation and interviews occurred or not. For these reasons, Ivan Thompson's alleged union or protected activity was not a motivating factor in his discharge.

#### IV. CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Administrative Law Judge to find that Respondent did not violate Section 8(a)(1) and (3) of the Act, and to dismiss the Complaint.

Respectfully submitted,

/s/ Nadia A. Lampton

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