

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

S & S ENTERPRISES, LLC D/B/A APPALACHIAN HEATING

Respondent – Charged Party

v.

SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS,
LOCAL UNION NO. 33

Charging Party

Case Nos.	09-CA-235304; 09-CA-235307; 09-CA-235314; 09-CA-236905; 09-CA-237847; 09-CA-237851; 09-CA-237858; 09-CA-238621; 09-CA-238930; 09-CA-239148; 09-CA-239170; 09-CA-241292; 09-CA-242230; 09-CA-242235; 09-CA-242238
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RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCPETIONS TO
ADMINISTRATIVE LAW JUDGE DAVID I. GOLDMAN'S DECISION AND ORDER

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S&S ENTERPRISES, LLAC d/b/a APPALCHIAN HEATING ("Appalachian") submits the following Answering Brief to the General Counsel's Exceptions to Administrative Law Judge David Goldman's Decision in the above-captioned case.

I. GENERAL COUNSEL'S EXCEPTIONS SUMMARIZED

The General Counsel ("GC") alleges several exceptions to Judge Goldman's Decision and Recommended Order issued on January 15, 2020 in the above-captioned matter. Specifically, the exceptions are as follows:

1. The Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(1) of the Act when Respondent interrogated employees during a safety meeting on January 10, 2020.
2. The Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(3) and (1) of the Act when Respondent failed to promote Eric Faubel to the foreman position.
3. The Administrative Law Judge's finding that Respondent did not violate Section 8(a)(3) and (1) of the Act when it reassigned Eric Faubel to work at the vet clinic.
4. The Administrative Law Judge's finding and conclusion that Respondent did not violate Section 8(a)(1) of the Act by promulgating and maintaining a new "anti-harassment policy" on March 8, 2019.
5. The Administrative Law Judge's failure to include his finding of the Section 8(a)(1) and (3) violation regarding Respondent's March 27, 2019 discipline of Stephen Marolf in the Conclusions of Law, Remedy, Order or Notice to Employees.

II. GENERAL COUNSEL'S EXCEPTION 1 IS UNFOUNDED

A. Respondent's Position on Exception 1

The General Counsel excepts to Judge Goldman's finding and conclusion of law that Respondent did not violate the Act by interrogating employees during a safety meeting on January 10, 2020. The GC's exception is based on an erroneous reading of the ALJ's Decision and due to this erroneous reading, it cites to irrelevant case law as support. Most strikingly, in its exception the GC seeks to suggest that the Board rely upon the transcript of the audio recording entered into evidence and ignore the recording itself.

The recording, in contrast to the transcript, provided the judge access to extrinsic evidence of tone of voice, inflection, timing, and volume among other characteristics of the presentation which may be used to determine the context of the meeting conversations and the credibility of the speaker(s) and ultimately the Respondent's arguments concerning the same. The long-established Board standard mandates that an ALJ consider the totality of the evidence presented in reaching a decision based on what the preponderance of that evidence demonstrates.

It cannot be stressed enough that, at hearing, the GC presented the case that it chose to present without any interference from the Respondent or the judge. The Respondent did not seek to prevent any of the material evidence from being proffered and made no objections during the course of hearing as to authenticity of said evidence, including but not limited to the clandestine audio recording of the January 10, 2020 safety meeting. The only objection raised by the Respondent as to this and other clandestine recordings, was that the entire recording must be played, or in lieu of a complete playback, that there must be a corresponding transcript for the

record based on the whole document rule. (Tr. 137:4-140:24; 162:3-163:15)¹. The GC could easily have created a dispassionate transcript which excluded the aforementioned extrinsic evidence from the record and the judge, but it did not. It chose instead, not to just enter the extrinsic evidence, but prior to the Respondent's whole document objection had no intention produce a transcript which would operate to exclude this extrinsic evidence.

The judge determined through his assessment of the context and credibility factors present in the extrinsic evidence of the actual recording to be the determining basis upon which he held that no violation of the Act occurred. (ALJD 30:1-15)². The GC's decision to admit an audio recording was a decision to place into the record the words of those clandestinely recorded and equates to providing testimony of the speakers. Entering prior statements of witnesses is a common occurrence at hearing, albeit audio recordings are not always the medium through which prior statements are proffered.

The Board has long held that it will not substitute its judgment on credibility of witnesses over that of an ALJ. *Stern Produce Co., Inc.*, 368 NLRB No. 31, fn 1. (July 31, 2019)(The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.) citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Judge Goldman's assessment of the tone and rhetorical nature including the monologue-like nature of the meeting and lack of conversational pauses for employee responses equate to the same

¹ References to the trial transcript shall be noted as follows: (Tr [page number]:[line number])

² References to the Administrative Law Judge's Decision shall be noted as follows: (ALJD [page number]:[line number])

credibility assessments made at hearing live testimony. Under the Board's standard, the GC's exceptions to these assessments by the judge will not be set aside.

B. The General Counsel's Erroneous Legal Theory

General Counsel, in its brief, contends that Judge Goldman failed to consider: Daniel Akers' ("Akers") conversation with the salt in the instant case Eric Faubel ("Faubel") the previous day where Akers expressed his disdain for the union and interrogated Faubel about his union activity (GC Brief 2)³; his own conclusion that Akers unlawfully solicited grievances during the same meeting (GC Brief 3); and the subsequent interrogation of Faubel by Dan Akers ("Dan") (GC Brief 3). The GC's inartful, if not erroneous, application of the *Bourne* factors in the context of these alleged errors by Judge Goldman fails to support its exceptions. (GC Brief 3-4). These alleged omitted considerations shall be addressed in the order stated above.

1. Judge's Alleged Failure to Consider Conversation of January 9, 2020.

The assertion that the judge failed to consider the evidence of the January 9, 2020 conversation is simply not supported by any evidence contained in the GC's brief. Nothing in the judge's ruling indicates expressly, and the GC points to no such expression or other circumstantial evidence, that he failed to consider the January 9 incident when deciding the lawfulness of the alleged questioning during the safety meeting the following day.

However, there is evidence easily gleaned from the judge's decision which indicates a uniformity in his Decision and Recommended Order⁴ which belies the GC's claim. Notably, the judge expressly utilizes the same, not just similar, language when analyzing the lawfulness of the

³ References to the General Counsel's Brief in Support of its exceptions shall be noted as follows: (GC Brief [page number])

⁴ Since the filing of Exceptions Judge Goldman has issued an Amended Decision and Recommended order. The errata concern Exception 5 of the GC's exceptions and will be discussed later. Note that any reference to the judge's Decision throughout incorporates and acknowledges the Amended Decision.

conduct of both days. The judge uses the same case-law-based framework to analyze both allegations.

Discussing the January 9 conversation, Judge Goldman writes, “Akers wanted to know, and pointedly and nonrhetorically asked if Faubel had been solicited by the union organizer.” (ALJD 26:34-35). He further writes, “It was not a general question but one posed *specifically* to Faubel about his contacts with the Union.” (ALJD 26:46-49)(emphasis added). Finally, the judge wrote, “He [Faubel] felt compelled to answer untruthfully, another indicium of the reasonable tendency of the questioning to coerce.” (ALJD 27:8-9).

The judge’s analysis of the interrogation allegation of the January 10 meeting⁵ cites identical elements. The facts in the record regarding the January 10 safety meeting, including the actual audio recording, produced a stark contrast to those of the January 9 conversation.⁶ The judge concluded from contextual cues present in the recording, that the questioning was rhetorical. (ALJD 30:4-6). The judge determined that the questioning was not directed at any one person. (ALJD 30:8-9). There were not any answers given (ALJD 30:9-10), or in fact even an opportunity given by Akers for any one employee to respond (ALJD 30:10-13).

The judge asserted the same elements when evaluating the two incidents. He used the same case law as his guide. (ALJD 26:37-41; 30:1-4). He systematically applied the facts as presented by all the evidence available in the record to the elements. This systematic, well-reasoned analysis produced drastically different outcomes.

⁵ It cannot be ignored that, in the Decision document, the analysis of the January 10, 2020 safety meeting immediately follows the analysis of the January 9, 2020 interrogation allegation. Certainly, it is possible the judge wrote various sections in a random order, but at some point, the sections were organized into a final draft and reviewed by the author. It seems anecdotally an impossibility that the January 10 analysis was not influenced by and considered equally with the January 9 analysis.

⁶ The January 9, 2020 phone conversation with Faubel was also recorded and the recording was referenced by Judge Goldman in his recitation of the statement of the case. (ALJD 4:39-40).

Analyzing two events, which immediately followed each other in real-time and appear in succession in the judge's Decision, without considering the effect of the first on the second is not just unlikely, it is a practical impossibility. The instant exception is unsupported by any direct or circumstantial evidence demonstrating Judge Goldman failed to consider the first allegation's relation to the second. The only circumstantial evidence speaking to the matter whatsoever weighs in favor of a finding the judge did consider the safety meeting in context with the conversation the previous day. This is evidenced by his identical analysis of the two allegations and his use of nearly identical language, and identical case law guidance for both.

2. Judge's Alleged Failure to Consider Grievance Solicitation

The GC's contention that the judge failed to consider his own conclusion that Akers unlawfully solicited grievances during the same meeting is untenable on its face. While a claim that an incident of a different day was not considered may be at least peripherally viable, it is simply not plausible that two allegations occurring at a single meeting were not considered both simultaneously and individually in context. Even more persuasive of this point, the judge found that the meeting was unlawful with respect to the grievance solicitation *first* in his Decision and that the interrogation allegation should be dismissed immediately afterward in the same section of the document. (ALJD 28:1 – 30:18).

The GC makes much of the temporal fact that the grievance solicitation occurred immediately after the alleged interrogation. (GC Brief 3). The plain reading of the transcript, and even a cursory listening of the audio recording, demonstrates that the alleged interrogation was a distinct and separate topic from the grievance solicitation during the meeting. The GC's expectation appears to be that Judge Goldman should have looked only at isolated portions of the factual record (the recording transcripts); ignored other portions (the actual audio of the meeting);

made special inference from those the GC believed relevant (transcript); and dismissed those it deemed not relevant (extrinsic factors present in the recording). That is simply not the standard under which an ALJ or the Board operates. The Board's standard in alleged interrogation violations under 8(a)(1) is to look at the totality of the evidence presented and determine what the preponderance of that evidence demonstrates. See *Rossmore House*, 269 NLRB 1176, 1178 (1984).

To grant the GC's exception would be to completely disavow Board precedent. The Board has held, and Judge Goldman rightly pointed out, "not every interrogation is unlawful. (ALJD 26:37-40). Whether the questioning constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors 'to be mechanically applied in each case.' *Rossmore House*, 269 NLRB 1176, 40 1178 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000)". (ALJD 26:37-41) *see also* (ALJD 30:1-4). The GC's theory appears to be a progeny o the fruit of the poisonous tree concept. That is, the meeting had an unlawful element so all elements including the alleged interrogation are by default also unlawful. This does not comport with Board precedent. The finding of unlawful solicitation of grievances was considered, but deemed not relevant, and therefore not dispositive of the lawfulness or not of the alleged interrogation.

3. The Judge's Alleged Failure to Consider Dan's Conversation with Faubel January 14, 2020.

In determining whether an alleged interrogation is unlawful, the Board has long adhered to the standard established in *Rossmore House*. "It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit

of §8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177 (1984).

It is unclear why the GC cites in its brief the January 14, 2020 incident when excepting to the finding about the January 10, 2020 incident. It is possible the addition was simply an afterthought to the other assertions in the section. Whether that is the explanation, or the GC portends to make the claim that the judge erred when he did not consider the January 14 conversation when deciding the January 10 alleged meeting interrogation, it is addressed here.

The standard articulated in *Rossmore House* clearly indicates two elements to consider 1) the words themselves and 2) the context in which they were spoken. The January 14 conversation between Dan and Faubel bears on neither as it relates to the January 10 meeting held by Akers, his son, which Dan did not attend. The judge did not consider the January 14 conversation with Dan when determining the lawfulness of the January 10 conduct relating to interrogation, and such was proper.

4. General Counsel's Faulty Legal Analysis

The GC in its summary of this exception runs afoul of a reasonable and organized analysis of the issue. The assertion that the "number of instances of unlawful conduct ... during the union's organizing campaign" is an unrealistic standard of retroactive application of standards to previous conduct that is in direct conflict with the basis of the no *ex post facto* prohibition of American jurisprudence.

The record is crystal clear that the Respondent lacked knowledge that it was subject to a union organizing campaign at the time of the January 10, 2020 safety meeting. (GCX 9: RT

27:18⁷; GCX 9: RT 27:21; ALJD 36:8-9; Tr. 267:14-21). The ALJ was not obligated, nor would it have been appropriate, to ascribe as context for pre-knowledge conduct engaged in post-knowledge. The Respondent concedes that if the January 10 meeting was held post-knowledge of the organizing effort, the holding of the judge may have been different because the context would have been very different. The January 10 meeting was not post-knowledge and ascribing post-knowledge context would have been error and the judge rightly avoided this pitfall.

a) Totality of Circumstances and *Bourne* Factors Standard

The Board has adopted a totality of the circumstances standard when reviewing unlawful interrogation under 8(a)(1) of the Act. *Westwood Health Care Ctr.*, 330 NLRB 935, 939 (2000). This test was set forth in *Rossmore House*, 269 NLRB 1176 (1984). Under the *Rossmore House* test, the Board considers what have come to be known as “the *Bourne* factors,” so named because the Board first articulated them in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are (1) The background, i.e. is there a history of employer hostility and discrimination; (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees; (3) The identity of the questioner, i.e. how high was he in the company hierarchy; (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality; (5) Truthfulness of the reply. *Id.*

⁷ References to recording transcripts entered into the record shall be noted as follows: (GCX [exhibit number]: RT [page number]:[line number])

b) Bourne Factor Analysis

(1) Factor 1 - Background

The GC cannot meet the burden of proving a “a history of employer hostility and discrimination” as the first factor requires. The earliest event in the entire record for which any evidence was provided was the January 9 incident. The judge determined that Akers’ conversation with Faubel was unlawful. (ALJD 26:23). The January 10 meeting occurred less than twenty-four (24) hours later. Twenty-four hours does not establish a history even when considering the judge’s finding concerning the January 9 interrogation. Furthermore, there is no discrimination alleged by the time of the January 10 meeting, let alone a proven and established a history of the same. The GC attempts to alter time and assign future conduct as proof of the historical requirement of the factor. The first *Bourne* factor weighs in favor of supporting the judge’s finding.

(2) Factor 2 – Nature of the Information Sought

The analysis of the second factor, the nature of the information sought, also supports the judge’s holding. “Did the interrogator appear to be seeking information on which to base taking action against individual employees” is the example provided by the Board. Judge Goldman held that these alleged questions were not directed at any one employee. (ALJD 30:8-9). A review of the recording supports the judge’s finding in this regard. (GCX 9)⁸. At no point in his monologue did Akers suggest any action against anyone for engaging in union activity. (GCX 9). Akers explicitly states during his rhetorical diatribe, “Obviously, you can do whatever you want to, um, but I wanted to let you guys know that we, we enjoy working with every one of you.” (GCX 9: RT 19:6-7). This statement cannot be seen as to imply any action against any individual employee.

⁸ References to General Counsel Exhibits shall be noted as follows: (GC [exhibit number])

In short, on January 10, Akers did not seek information. He did not elicit, wait for, or expect answers to the rhetorical questions posed in his monologue. The questions and surrounding prose of this monologue did not indicate any action would be taken against any employee for any reasons, including union support.

Dispositive of this point is Akers' admonition concerning workers' compensation claims. (GCX 9; RT 16 paragraph 1). Akers specifically addresses the company's position concerning accidents. (*Id.*). He encourages everyone to report all accidents and be safe. (*Id.*). He expressly states, "I want everybody to know that if if [sic] you get hurt on a jobsite, I am not going to be mad at you." (*Id.*). "...it's vital that if you guys do get hurt, to report it. Um, that the proper documentation is done so if...if anything arises out of it that you need medical attention or even long-term care, for our workers' comp to cover it, the proper stuff's gotta be done." (*Id.*). This discussion demonstrates a high level of credibility in an area fraught with abuse by both employers and employees. It clearly demonstrates that the company does not seek to punish employees for exercising their rights. The second factor of *Bourne* supports the finding of the ALJ.

(3) Identity of the Questioner

Akers, the alleged questioner of the January 10 meeting is the second highest ranking official in the company. In regard to hierarchy, The Respondent must concede that this factor would weigh in favor of a finding that the interrogation is unlawful. However, the consistent position of the Respondent, shared by the judge, that the event in question did not consist of any actual questioning would make his position in the company moot. The "questions" were rhetorical and not intended or expected to be answered. In the purest sense, there is not a "questioner" that can be identified because there was no questioning. Based on the foregoing the Respondent asserts

that the third factor under *Bourne* is moot and therefore weighs in favor of supporting the judge's finding.

(4) Place and Method of Interrogation

The event occurred in a large room at the Respondent's warehouse in Charleston, W.V. Nearly all the Charleston-area workers were present. It was a group meeting. There was nothing coercive or intimidating about the place and manner of any alleged interrogation. This factor weighs in favor of the judge's finding.

(5) Truthfulness of the Reply

There were no replies. The judge even indicated in his Decision that the record was void of any indication of nods or other non-verbal signs in response to the alleged questioning. (ALJD 30:9-10).

The GC makes note that the fact that there were no responses was indicative of workers concealing their support and cites to *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182 (2011) for support. The GC misreads the cited authority. When reviewing *Camaco* it references two other cases in support of its holding that attempts to conceal union support weigh in favor of the unlawfulness of the interrogation at question. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011). The referenced cases relied upon by the Board in *Camaco* provide clear insight into what is meant by conceal.

In the first case relied upon by the Board in *Camaco*, there were several union salts who were attempting to gain employment with a company. During the hiring process these applicants actively sought to conceal their union support in the face of pre-employment interrogation. *Sproule Constr. Co. & Int'l Union of Operating Engineers, Local Unions 139, 150, & 234*, 350 NLRB 774, 778 (2007). The GC provided no evidence or argument that any employee, including

any salts, actively sought to conceal their support or that the alleged interrogation was the cause of some employee actively concealing their union support. Again, the actual audio recording demonstrates the discussion alleged to be unlawful interrogation produced no actions which could conceal or response of any kind from the employees. Further demonstrating that the GC's argument fails, the general activity level and incidental conversation amongst the employees remained consistent throughout the meeting. There is no discernable change in atmosphere, conversations levels, or ambient activity level prior to the alleged interrogation, during the alleged interrogation, or after the unlawful grievance solicitation. No evidence exists, and the GC has not offered any evidence, demonstrating any employee was concealing their union support as a result of the alleged interrogation.

The second case relied upon also involved interrogation that necessitated a response, not rhetorical in nature, and therefore necessitated a concealment of union support. In that case an agent of the employer made a declaratory statement to a bargaining unit member "I hear you are voting for the union... I heard from the boys... that Cox was a strong leader in the union." *In Re Cubitt*, 338 NLRB 877, 879 (2003). This was individualized, confrontational questioning and clearly was unlawful. It necessitated a response and thereby created a situation for the employee by which concealment was his only option.

In contrast, the instant case was a non-confrontational, large group setting, and the alleged questioning not only did not elicit any responses but did not allow for responses for the reasons cited in the judge's Decision. (ALJD 30:4-14). The absence of responses or even the opportunity for responses precluded any union supporter from concealing that support. The authorities cited by the GC do not support the GC's theory. The fifth factor weighs in support of the judge's finding.

The overwhelming weight of the *Bourne* factors supports the judge's finding that the alleged interrogation during the January 10 safety meeting was not unlawful. Even though Akers was the second highest ranking company official, the facts do not support that he was actually engaged in questioning of the employees. All five factors weigh in support of the judge's findings. The Respondent respectfully requests the Board deny Exception 1 as unfounded and unproven. The Respondent requests the Board sustain the judge's finding on the matter and any other such relief as may be appropriate.

III. GENERAL COUNSEL'S EXCEPTIONS 2 AND 3 ARE UNFOUNDED

A. Respondent's Position on Exceptions 2 and 3

The General Counsel's excepts to Judge Goldman's findings and conclusions of law that Respondent did not violate the Act when it failed to establish knowledge of union activity when it chose to not promote Faubel and reassigned him temporarily to another job site. The argument offered by the GC supporting the exceptions is unpersuasive. The judge carefully and methodically detailed the evidence on the record regarding the Board's standard for both actual and inferred knowledge under its *Wright Line* analysis. (ALJD 33:4-36:25). This detailed and thoughtful analysis at times seems to seek a pathway to establish the knowledge element, but at each turn the evidence on the record fell short of being sufficient. The judge summed up the tone of his analysis on the subject well when he wrote, "...any intuition or suspicion of employer knowledge of Faubel's union sympathies at this time is just that, and no more." (ALJD 36:11-12). The standard is not suspicion or intuition, the standard is evidentiary, and a preponderance of the same is required. A more detailed vetting of the GC's exceptions on the knowledge issue follows.

B. General Counsels Specific Assertions Supporting Its Exceptions 2 & 3

1. Knowledge Should be Inferred

The GC makes much of the judge's dicta that inferring knowledge was a "close call." (GC Brief 5 referencing ALJD 34:7-8). The implication is that it was close, and the judge should have gone the other way with that call. This is an incredulous idea when viewed in the context of the judge's complete and thorough discussion of the issue that follows the phrase.

The union cites to the January 9 interrogation by Akers and the Google search of Faubel's reference, John McDougal ("McDougal") provided to Dan⁹ as evidence the Respondent suspected Faubel had union ties. The union contended the Google search and phone call with McDougal prompted Dan to ask during the January 14 call whether Faubel worked on the union or non-union side of the company. (GC Brief 5). The GC offers no evidence, even circumstantial, of causation advancing this theory.

A close review of the evidence on the record weighs heavily against any suspicion of Faubel on the part of Akers or Dan. On January 9, the date of the first interrogation, the initial mention of the possibility of promotion was proffered to Faubel by the Respondent. After the January 9 interrogation, held by the judge to be unlawful, the promotion was still moving forward. The record also demonstrates a lack of suspicion through the clear words of Dan on January 14

⁹ It must be noted that in its brief the GC characterized Dan's finding concerning McDougal that he was a "union contractor" (GC Brief 5:7), which is an inaccurate statement. The clear testimony of Akers indicated that McDougal said he operated a split shop, that Eric denied that he was affiliated with the union-side, and that he was not union-affiliated currently. The most poignant and conveniently omitted portion of this matter is that Akers expressly made clear he trusted Faubel, and that the consideration for promotion continued beyond this GC-inaccurately-alleged bombshell about McDougal. (Tr. 191:14-192:17).

both before and after the conversation with McDougal. (GCX 10; GCX 11). After the brief discussion about whether he worked union or non-union, also held to be unlawful interrogation by the judge, Dan goes on to review the expectations he has for the foreman and eventually says, "I'm pleased with what John said and I'm pleased with what -- the discussion you and I had. So, let's move forward and hopefully both of us can make some money." (Tr. 194:24-195:2). The offer became more solid with the passage of each of these encounters, held to be unlawful interrogations, in clear contradiction of any indication of suspicion on the part of the Respondent.

Judge Goldman recognized this non-sequitur and indicated in his decision that it was dispositive in his mind in helping resolve the issue. (ALJD 34:13-18). The GC simply cannot have it both ways. It cannot claim the company had such pervasive union animus, was unlawfully seeking to ferret out all union operatives, knew of or suspected Faubel's involvement in the movement while also considering him for a trusted position as the leader of the largest jobsite in the company's history.

The GC's claim that this is an instance where an inference of knowledge should be ascribed because "the evidence *manifestly* reveals that an employer's disciplinary action was prompted by an unlawful discriminatory motive" (GC Brief 4)(emphasis added) is simply not supported by the record. Had the record contained evidence that manifestly revealed discriminatory motive, the call would not have been close at all.

2. Union Animus

The GC asserts that the Respondent had demonstrated overwhelming union animus by January 18, 2020 when it removed Faubel from consideration for promotion. (GC Brief 5). The level of animus inferred by the GC's brief far outpaces what the evidence on the record demonstrates.

As a threshold matter, the GC again misstates the evidence regarding the solicitation of grievances. The GC asserts an express promise to remedy the grievances if employees refrained from organizational activity. (GC Brief 5). Respondent is not raising an exception to the judge's determination that the promise to remedy was impliedly tied to refraining from union activity, but rather making the distinction between that finding which the record supports and the more sinister express promise the GC claimed in its brief.

The record shows and the judge fully discussed in his Decision that he was satisfied that there was sufficient union animus present for the third prong of *Wright Line*. (ALJD 32:28-33:5). There were three instances of interrogation of Faubel, the solicitation of grievances to the employees, and Akers reactions to the various YouTube videos being posted about the company by the union's General Counsel, Eli Baccus ("Baccus"). (ALJD 32:30-33:2). The judge goes on to say that this animus would be sufficient but for the failure of the second prong of *Wright Line*, specifically the knowledge issue. (ALJD 33:4-7).

3. No Nexus Between Alleged Animus and Failure to Promote

"Simple animus toward the union is not enough. While hostility to [a] union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, ... general hostility toward the union does not itself supply the element of unlawful motive." *Nichols Aluminum, LLC v. N.L.R.B.*, 797 F.3d 548, 554–55 (8th Cir. 2015). "The General Counsel must prove a connection or nexus between the animus and the firing--i.e., that the "discriminatory animus toward [the employee's] 'protected conduct was a substantial or motivating factor in' [the employer's] decision to discharge him." *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (Nov. 22, 2019).

Even in the instance that the Board is persuaded that Judge Goldman's close call on inferring knowledge should have gone the other way, there is no evidence in the record that union animus was a motivating factor in Faubel's failure to earn the promotion. Judge Goldman points out that the explanation for the failure to promote is not particularly illustrative by the Respondent. (ALJD 34:26-27). He goes on to cite that the only nexus evidence that exists in the record, weighs in favor of a valid non-discriminatory motive, namely a falling out between Dan and Faubel. (ALJD 34:33-38). It is important to note that the dispositive portion of this scant evidence is an admission against interest entered into evidence by the GC of an apology text from Faubel to Dan saying in part, "[I] apologize for overreacting... I know better and should have handled things differently." (ALJD 34:35-36; Tr. 205:20-206:5; Tr. 287:4-10; GCX 21). The only explanation which can be gleaned from the record is that something occurred that caused Dan to rescind the promotion and Faubel to apologize.

4. Respondent's "Change of Heart" Alleged by the General Counsel

The GC cites to the judge's comment that the Respondents explanation for its change of heart was "not very compelling" and "barely plausible." (GC Brief 5). The GC goes on to assert that because of this the judge should find that the Respondent was aware of or at least suspicious of Faubel's union affiliation. (GC Brief 5). This is a twisting of the Board's mandated burden of proof in 8(a)(3) discriminatory motive cases. The burden lies squarely on the GC to prove the elements of *Wright Line*. A burden of proof is an affirmative mandate. Even, as Judge Goldman stated, a "barely plausible" explanation is sufficient when the GC has failed to provide any explanation or evidence establishing the second prong of *Wright Line*.

As discussed herein and by Judge Goldman, the Board has held that direct evidence need not be presented if the inference may be made from the record as a whole. (ALJD 33:34-39). Yet

another method of imputing knowledge may be reached if it can be shown that the Respondent suspected or believed that the employee engaged in protected conduct. (ALJD 35:1-2). Both alternatives to direct evidence still place the burden on the GC to proffer evidence either “on the record as a whole” or to “show the Respondent suspected or believed the employee engaged in protected conduct.” No such evidence was proffered and there none exists in the record.

The GC had ample opportunity during hearing to develop such evidence. It called both Akers and Dan in its case in chief yet did not solicit testimony tending to prove either theory above. The Respondent's counsel called Akers in its case in chief, and the GC had the opportunity to cross. No testimony supporting the theories above was solicited. Finally, the GC had the right to present, and in fact did present, a rebuttal case. By the close of the Respondent's case, it was clear that the Respondent sought, through its thorough cross-examination of Faubel and the direct testimony of many of its witnesses, to establish that it lacked knowledge of Faubel's union affiliation at the time the promotion was rescinded.

Respondent's attack on the second prong of *Wright Line* has been consistent since the investigation of the allegation commenced at the Region. The GC was well-aware that the Respondent stood firmly on the assertion that it possessed no knowledge of any union activity or sympathy of Faubel until he released the YouTube video on January 30. Yet, the GC failed to call any witnesses or present any further evidence buttressing its claim that the Respondent possessed the required knowledge nor did it present any evidence lending credence to either of the two alternative methods of establishing knowledge sanctioned by the Board.

The argument presented above cites specifically the failure to promote allegation. The GC's third exception is the isolation allegation which occurred at essentially the same time as the rescission of the promotion. The Respondent asserts the same arguments as they relate to the

alleged isolation. The arguments in support of the judge's finding that Respondent lacked knowledge of Faubel's union affiliation or protected activity, and therefore the GC's *prima facie* burden under *Wright Line* failed are dispositive. The allegations must be dismissed.

The GC's argument boils down to, this is suspicious, the Respondent's explanation is not good, we have no evidence demonstrating our theory, but it must be unlawful because the Respondent's evidence is not good. Thankfully, this is not the standard the Board has laid out. The GC must prove the elements of *Wright Line* to establish its *prima facie* case. The employer has no burden to prove the negative that it did not possess knowledge. Failure of the GC to meet its burden is fatal to any claim of unlawful discriminatory motive under the Act.

The Respondent respectfully requests the Board deny Exceptions 2 & 3 as unfounded and unproven. The Respondent requests the Board sustain the judge's finding on the matters and any other such relief as may be appropriate.

IV. GENERAL COUNSEL'S EXCEPTION 4 IS UNFOUNDED

The General Counsel's brief in support of its exception that Judge Goldman's finding and conclusion of law that Respondent did not violate the Act when it by promulgating and maintaining a new anti-harassment policy. The judge dismissed based on the GC's attribution of language that did not exist in the flyer (ALJD 46:8-24; JX 5¹⁰) that was central to the allegation. The misquote was in both the Complaint and the GC's post-hearing brief. (ALJD 46:17-20).

The GC in its brief suggests that the judge did not, but was obligated to, speak to the lawfulness of the language. This was simply not the case. The judge clearly acknowledged the GC's claim from the Complaint and wrote, "The General Counsel's theory (GC Br. at 51-52 & see 10 complaint ¶8(c)) is that that the insert constituted the promulgation and maintenance of a

¹⁰ Joint Exhibits shall be noted as follows: (JX [exhibit number])

new anti-harassment policy, one that amended the longstanding antiharassment policy in the employee handbook to include enhanced punishment for violation of the policy in the form of criminal prosecution.” (ALJD 46:9-13). He went on to write, “This theory does not align with the facts. More specifically, the March 8 insert is not reasonably understood as a statement of or promulgation of a new rule.” (ALJD 46:15-16).

The GC in its brief insists the judge should have weighed in on the alleged rule. The judge did weigh in as detailed above when he declared “is not reasonably understood as a statement of or promulgation of a new rule.” (ALJD46:15-16).

A plain reading of the Decision can only be interpreted that the GC’s theory the flyer was the promulgation of a new rule with enhanced punishment is not correct because the facts do not support it. The flyer is not reasonably understood as the promulgation of a rule, so even if the GC had not misquoted in the Complaint and had issue properly, the matter would still have been dismissed because the flyer was not deemed a rule promulgation by the judge.

Respondent asserts the judge did weigh in on the merits in spite of his dismissal of the allegation for technical reasons. Respondent in its brief once again misstates a material fact. The brief states that the alleged new policy “threatens employees with criminal prosecution,” (GC Brief 9) which is simply not the case. (JX 5; JX 1). Nowhere in the flyer, or the company handbook is any such threat leveled. (JX 5; JX 1). The record is replete with evidence that Appalachian has not promulgated any new rules during the times relevant to the complaint. (JX 1; Tr. 615:16-616:17; 617:15-18).

The Respondent respectfully requests the Board deny Exception 4 as unfounded and unproven. The Respondent requests the Board sustain the judge’s finding on the matter and any other such relief as may be appropriate.

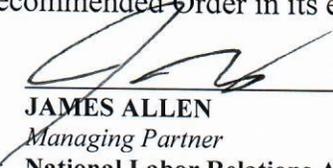
V. GENERAL COUNSEL'S EXCEPTION 5 IS MOOT

Since the filing of the GC's exceptions, Judge Goldman issued an Amended Decision and Recommended Order. The Respondent's position on the GC's exception 5 is that the Amended Decision and Recommended Order addresses the GC's concerns raised. To the extent the GC's concerns are not met, the Respondent does not challenge the remedy sought in GC's exception 5 as such remedy is standard as a matter of course for the violations referenced.

VI. CONCLUSION

The General Counsel failed to support its Exceptions to the Administrative Law Judge's Decision with reliable evidence. The evidence and record demonstrate that Judge Goldman considered all the evidence and facts and meticulously applied the facts to the appropriate controlling case law. The General Counsel asks the Board to alter its burden under *Wright Line* and seemingly shift the burden to the Respondent to prove that it did not have knowledge of Faubel's union affiliation. It is a well-known legal principle that proving a negative is an impossibility, which is why the Board has placed the burden of proof upon the GC. It failed in that burden. The judge recognized this failure and ruled accordingly.

General Counsel has failed to support its exceptions with evidence from the record. The evidence in the record established clearly that the exceptions are not well-founded. The Board should dismiss the General Counsel's exceptions. The Respondent respectfully requests the Board adopt Judge Goldman's Amended Decision and Recommended Order in its entirety.



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CERTIFICATE OF SERVICE

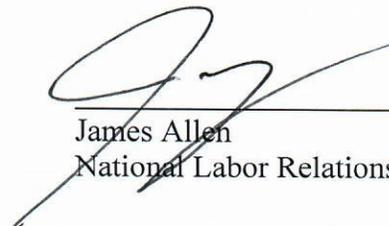
I certify that a copy of the foregoing has been made with the Board via the Agency's e-filing portal, and courtesy copies have been electronically served on February 25, 2020 to the following parties:

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