UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

GENPAK, LLC and RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, MID-SOUTH COUNCIL	Case 15-CA-237525

GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the General Counsel (General Counsel) files this Opposition to a Motion for Summary Judgment (Opposition), in response to the Motion for Summary Judgment (Respondent's Motion) filed by Genpak, LLC (Respondent), dated April 9, 2020. General Counsel respectfully requests the Board deny Respondent's Motion as there are genuine disputes of material fact such that summary judgment is not warranted.

I. BACKGROUND

Based on a Second Amended Charge filed by the Retail Wholesale and Department Store Union, Mid-South Council (Union), the Regional Director for Region 15 issued the Complaint in the above-captioned case on February 21, 2020. The Complaint alleges on about January 27, 2019, Respondent issued a written warning to its employee Horace Brown (Brown), and on February 28, 2019, Respondent discharged Brown in retaliation for engaging in Union activities and to discourage employees from engaging in these activities in violation of Sections 8(a)(1) and (3) of the Act. The Complaint also set the matter for a hearing before an Administrative

Law Judge on May 18, 2020 in Montgomery, Alabama. On March 2, 2020, Respondent filed its Answer to the Complaint. It admitted it took the alleged adverse actions against Brown but denied that it took the actions in violation of the Act, and asserted defenses. Also on March 2, 2020, Respondent filed a Motion for Bill of Particulars. General Counsel opposed it, and on March 17, 2020, Deputy Chief Administrative Law Judge Arthur Amchan denied Respondent's Motion for Bill of Particulars. On April 9, 2020, Respondent filed Respondent's Motion which is now opposed.

II. ARGUMENT

A. The Board's Legal Standard Regarding Summary Judgment

The Federal Rules of Civil Procedure[1] provide a motion for summary judgment shall be granted only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The Board will only grant motions for summary judgment if there is "no genuine issue as to any material fact," and "the moving party is entitled to judgment as a matter of law." *Conoco Chemicals. Co.*, 275 NLRB 39, 40 (1985). Section 102.24(b) of the Board's Rules and Regulations provides "[t]he Board in its discretion may deny [a motion for summary judgment] where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist." Under these rules, it is the burden of the moving party to establish by admissible evidence that "there is no genuine issue as to any materials fact and that the moving party is entitled to judgment as a matter of law." *Conoco Chemicals Co.*, 275 NLRB at 40 (citing *Stephens College*, 260 NLRB 1049, 1050 (1982)).

[1] Section 10(b) of the Act provides Board proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code."

In considering a motion for summary judgment, the pleadings and evidence must be viewed in the light most favorable to the nonmoving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001); *Petrochem Insulation, Inc.*, 330 NLRB 47, 52 n.20 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001). Regarding the pleadings and evidence, Section 102.24(b) of the Board's Rules specifies, "Neither the opposition nor the response must be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing." Thus, General Counsel need only provide pleadings which "indicate on their face that a genuine issue may exist." *Id.*

B. Respondent's Motion Fails to Meet the Summary Judgment Standard

First, the pleadings reflect a genuine dispute over material facts regarding the allegations in the Complaint. The questions of whether Brown was disciplined and then discharged for engaging in Union activity will turn on evidence and therefore the matter requires a hearing. Respondent complains that General Counsel has not provided specific evidence of Brown's Union activities.[2] (Respondent's Motion, p. 2) Indeed, there are no specifics as yet because there is no record. Respondent's Motion must fail because it merely assumes facts to its benefit which have not yet been entered into evidence, much less proved. This, of course, is due to the Board's longstanding practice of not permitting pre-hearing discovery, a practice that has withstood challenge in the federal courts. *NLRB v. Robbins Tire and Rubber Co*., 437 U.S. 214, 236-237 (1978). A hearing is required to resolve these issues so that this, and contrary evidence including witness testimony, may be presented to an administrative law judge to evaluate the strength of the evidence and the credibility of witnesses.

[2] Respondent's Motion for a Bill of Particulars was denied because such specificity is not required to put the Respondent on notice of the violations alleged. General Counsel views Respondent's Motion as another attempt at pre-trial discovery after Respondent's Motion for Bill of Particulars was denied on March 17, 2020.

Specifically, Respondent's Motion, with its numerous factual assertions and attachments, demonstrates the need for a hearing. The assertions and attached documents are the very kind of evidence that would be expected to be presented at a hearing and should not be considered by the Board unless and until offered and received by an administrative law judge as part of a record through an unfair labor practice hearing. Thus, Respondent's Motion, which contains extensive alleged facts, authority, and argument, supports General Counsel's position that there are genuine issues as to material facts which warrant a hearing.

Furthermore, General Counsel will submit evidence at hearing, if permitted by the Board upon the denial of Respondent's Motion, to demonstrate Respondent held animus toward Brown's extensive Union and protected concerted activities. General Counsel intends to present evidence of animus sufficient to satisfy its *Wright Line* burden for both alleged violations of Sections 8(a)(1) and (3). 251 NLRB 1083 (1980) enf'd. 662 F.2d 899 (1st Cir. 1981). General Counsel intends to present evidence to establish "a nexus between the employee's protected activity and the challenged adverse employment action[s]," *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, at *10 (2019), such that material disputes of fact must be resolved by the administrative law judge at the hearing.

Second, Respondent's Motion fails to show it is entitled to judgement as a matter of law. Respondent's Motion cites two Board cases which each dismissed Section 8(a)(3) allegations, and a case from the United States Court of Appeals for the Fifth Circuit wherein the Court refused to enforce a Board order regarding a Section 8(a)(3) remedy. The cases were cited to support Respondent's argument that its agents and supervisors could not harbor, as a matter of law, animus toward Brown months after he engaged in extensive concerted Union organizing activities. (Respondent's Motion, pp. 2-3) The cases do not support the asserted matter of law.

Each cited case was decided *after* a hearing in front of an administrative law judge resulted in the offer and acceptance of evidence by parties, credibility determinations, and findings of fact. *See Electrolux Home Products, Inc.*, 368 NLRB No. 34, at *1 (2019) (Board reverses administrative law judge based on facts developed at hearing); *T-Mobile USA, Inc.*, 365 NLRB No. 15, at *14 (2017) (Board adopts the recommended order of the administrative law judge based on facts developed at hearing); *Valmont Indus. v. N.L.R.B.*, 244 F.3d 454, 465 (5th Cir. 2001) (Fifth Circuit panel refused to enforce a Board order, in part, because it viewed the record of evidence of animus as insufficient). None of the cases cited held that judgement may be granted based on the premise of Respondent: that there can not be animus as a matter of law, based on only contested pleadings and an asserted fact that there are a number of months between protected activities and the adverse employment action. Quite simply, the cases cited were decided based on fully developed records, and nothing in them precludes General Counsel from proceeding to a hearing before an administrative law judge and presenting all manner of admissible evidence to resolve the genuine factual dispute about whether animus against Brown's Union activities motivated the Respondent's decision to discipline and ultimately terminate him after 18 years of employment.

Finally, Respondent's Motion essentially further argues that its *Wright Line* rebuttal burden has been met as a matter of law and the Complaint should be dismissed. 251 NLRB at 1089. Respondent's Motion fails on this point as well, because the asserted *Wright Line* rebuttal defense cannot be credited before General Counsel has been given the chance to test it by calling witnesses for examination, submitting evidence, and cross-examining Respondent's witnesses so the administrative law judge may determine whether the circumstances around the discipline and termination of Brown were regular or based on unlawful motivations. Based on the foregoing,

there are genuine issues of material fact that need to be assessed by the administrative law judge and summary judgment is inappropriate.

III. CONCLUSION

Respondent's assertions that the Complaint should be dismissed have no merit. The pleadings present genuine issues of material facts which should be fully litigated before an administrative law judge. *Conoco Chemicals Co.*, 275 NLRB at 40. Moreover, viewing the evidence and pleadings in the light most favorable to non-moving party General Counsel, as required by Board precedent, Respondent is not entitled to relief as a matter of law. *Eldeco, Inc.*, 336 NLRB at 900. Therefore, General Counsel respectfully moves that Respondent's Motion be denied.

Dated this 20th Day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy to be served on the following parties by filing with the NLRB E-File system and e-mail on April 20, 2020:

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