

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD	:	Case No. 03-CA-242367
PACKAGING - NIAGARA, A DIVISION OF	:	03-CA-243854
CASCADES HOLDING US, INC.	:	03-CA-248951
	:	
<i>and</i>	:	
	:	
INTERNATIONAL ASSOCIATION OF	:	
MACHINISTS AND AEROSPACE WORKERS	:	
DISTRICT LODGE 65, AFL-CIO	:	

**RESPONDENT'S BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO
DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE PAUL BOGAS**

Don T. Carmody
Carmen M. DiRienzo
Kaitlin A. Kaseta
Counsel for the Respondent
4 Honey Hollow Court
Katonah, New York 10536
dcarmody@carmodyandcarmody.com

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Cascades Containerboard Packaging – Niagara, A Division of Cascades Holdings US, Inc., the Respondent in the above-captioned cases (hereafter, the “Respondent” or “Employer”), hereby submits, by and through the Respondent’s Undersigned Counsel, this Brief in Support of the Respondent’s Exceptions to the Decision (hereafter, the “Decision”) issued by Administrative Law Judge Paul Bogas (hereafter, the “Judge” or “Judge Bogas”) on March 17, 2020.

BACKGROUND

The International Association of Machinists and Aerospace Workers, District Lodge 65, AFL-CIO, the Charging Party (the “Union”), was certified in April of 2019 as the collective bargaining representative of the approximately 115 production and maintenance employees of the Respondent (the “Bargaining Unit Employees”), the operator of a cardboard paper mill located in Niagara Falls, New York,. (Tr. 8, 31.)¹

On May 30, 2019, the Union filed an Unfair Labor Practice Charge with Region Three (the “Region” or “Region Three”) of the National Labor Relations Board (the “Board”) in Case No. 03-CA-242367 (the “First Charge”), alleging that the Respondent had violated §§ 8(a)(1) and (5) of the National Labor Relations Act (the “Act”) by unilaterally implementing layoffs without bargaining either the decision or the effects of the layoff with the Union, in retaliation for the Bargaining Unit Employees’ election of the Union. G.C. Ex. 1(a). On June 25, 2019, the Union filed another Unfair Labor Practice Charge with Region Three in Case No. 03-CA-243854 (the “Second Charge”), alleging that the Respondent had violated §§ 8(a)(1), (3), and (5) the Act by unilaterally “altering employees’ profit share in retaliation for” choosing to be represented by the

¹ General Counsel Exhibits will be notated “G.C. Ex. ___”. Respondent Exhibits will be notated “R. Ex. ___”. Joint Exhibits will be notated “J. Ex. ___”. References to the transcript of the Hearing will be notated “(Tr. ___)”. References to the parties’ Post-Hearing Briefs will be notated “PHB ___.” References to the Judge’s Decision will be notated “Decision ___”.

Union, and § 8(a)(1) of the Act by virtue of statements purportedly made by Production Supervisor Robert Pozzobon. G.C. Ex. 1(c). On September 27, 2019, the Union filed an additional Unfair Labor Practice Charge with Region Three in Case No. 03-CA-248951 (the “Third Charge”), alleging that the Respondent had violated §§ 8(a)(1), (3) and (5) the Act by refusing to furnish information concerning the Respondent’s “profit-sharing system”; ceasing display of the Respondent’s “profit sharing formula” at the Employer’s facility; and subcontracting work historically performed by bargaining unit employees. G.C. Ex. 1(e).² On October 3, 2019, the Union amended its Third Charge to remove the allegation that § 8(a)(3) of the Act had been violated G.C. Ex. 1(g).

On October 30, 2019, the Regional Director for Region Three (the “Regional Director”) issued an “Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing” (the “Second Consolidated Complaint”), whereby the First Charge, Second Charge, and Third Charge were consolidated and scheduled for a Hearing on December 3, 2019.³ G.C. Ex. 1(s). The Second Consolidated Complaint alleged that the Employer had violated § 8(a)(1) of the Act by way of comments allegedly made to employees by Pozzobon [G.C. Ex. 1(s), ¶¶ 6 (a), (b)

² Contrary to the Judge’s Decision, the Second Consolidated Complaint is therefore not “focused” on allegations occurring “immediately” (Decision 3) after the Union’s organizing campaign, which took place five months before the Union’s Third Charge was even filed; but this description illustrates the misguided lens through which the Judge wrongly viewed the allegations against the Respondent - as though each were the basis for an alleged violation of § 8(a)(3) of the Act.

³ On August 6, 2019, the Region issued a “Complaint and Notice of Hearing” in connection with the First Charge, to which the Respondent filed a timely Answer on August 22, 2019. G.C. Exs. 1(i), 1(m). The Complaint and Notice of Hearing did not include the allegation, contained in the First Charge, that the layoffs conducted by the Employer had violated § 8(a)(3) of the Act. G.C. Ex. 1(i). On October 1, 2019, the Region issued an “Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing”, consolidating the First Charge and the Second Charge, to which the Respondent filed a timely Answer on October 15, 2019. G.C. Exs. 1(p), 1(r).

and (c) and (10)]; §§ 8(a)(1) and (3) of the Act by discontinuing the posting of “company profit sharing information” [G.C. Ex. 1(s), ¶¶ 8 (a), (f) and (11)]; §§ 8(a)(1) and (5) of the Act by laying off employees in May 2019 [G.C. Ex. 1(s), ¶¶ 8 (b), (c), (g), (h) and (12)]; §§ 8(a)(1) and (5) of the Act by “subcontracting bargaining unit work [G.C. Ex. 1(s), ¶¶ 8 (d), (g), (h) and (12)]; §§ 8(a)(1), (3), and (5) of the Act by “altering” the employee profit sharing plan [G.C. Ex. 1(s), ¶¶ 8 (e), (f), (g), (h), (11) and (12)]; and §§ 8(a)(1) and (5) of the Act by failing to provide the Union with information it had requested concerning profit sharing [G.C. Ex. 1(s), ¶¶ 9 (a), (b) and (c) and (12)]. G.C. Ex. 1(s). On November 12, 2019, the Respondent filed a timely Answer to the Second Consolidated Complaint, which denied the material allegations of the Second Consolidated Complaint. G.C. Ex. 1(u). On December 2, 2019, the Respondent timely filed an Amended Answer to the Second Consolidated Complaint, which again denied the material allegations of the Second Consolidated Complaint and set forth affirmative defenses to the Second Consolidated Complaint.⁴ G.C. Ex. 1(x-1). Specifically, the Respondent averred that, *inter alia*: the General Counsel lacked the authority to issue the Second Consolidated Complaint with regard to the profit sharing plan and information request allegations; that the profit sharing and information request allegations and any remedy related thereto conflicted with Canadian law; that the profit sharing plan was a discretionary gift concerning which the Respondent did not have any duty to bargain with the Union; and that the Respondent did not control any “alteration” of the profit sharing plan

⁴ On November 18, 2019, the Second Consolidated Complaint was amended to allege that the Union had requested information from the Respondent in writing on or about August 16, 2019, and to attach the Union’s written request as an Exhibit to the Second Consolidated Complaint. G.C. Ex. 1(v). The Respondent’s December 2, 2019 Amended Answer admitted the additional allegations contained within the amendment. G.C. Ex. 1(x-1).

or the provision of the profit sharing plan, and thus could not have violated the Act. G.C. Ex. 1(x-1).

Thereafter, the Record was opened before Judge Bogas on December 3, 2019, and closed on December 5, 2019. (Tr. 5, 493) The Judge issued his Decision on March 17, 2020, finding that the Respondent had violated §§ 8(a)(1), (3), and (5) of the Act as alleged by the General Counsel in the Second Consolidated Complaint. Decision 31.

STATEMENT OF THE CASE

I. Background Information

The Respondent operates a cardboard paper mill located in Niagara Falls, New York. (Tr. 8) The Employer's parent company is Cascades, Inc.⁵, which is a Canadian corporation that is headquartered in Kingsey Falls, Canada ("Cascades, Inc."). (Tr. 423; 486) ⁶ Cascades, Inc. is divided into three sectors: tissue, specialty products group (or "SPG") and containerboard. (Tr. 422) The Respondent's mill is part of the containerboard sector, which is comprised of six cardboard paper mills (of which the Respondent is one) and approximately thirty "box plants." (Tr. 422-423) Cascades, Inc. is the entity which administers a profit sharing plan for employees of all three sectors, based upon each sector's profitability in a given period. (Tr. 423) All of the information about the profit sharing plan is retained by Cascades, Inc. in Quebec, Canada. (Tr. 480-482) Similarly, Cascades, Inc. possesses authority and control over certain of the decisions made by the individual mills within each sector – for example, concerning the publication and availability of sensitive information to employees of the mills. (Tr. 352)

⁵ Not "Cascade", Inc., in the singular tense, as stated in the Judge's Decision. See Decision 2, 6.

⁶ The Respondent respectfully requests that the Board take judicial administrative notice that information about the corporate entities owned and operated by Cascades, Inc. is provided on its website at www.cascades.com. See Tr. 487.

As noted, *supra*, the Union was certified as the collective bargaining representative of the Bargaining Unit Employees in April of 2019. (Tr. 8, 31, 110-111 315.)⁷ The Union’s organizing drive at the Respondent’s facility began in August of 2018.⁸ (Tr. 202) After the Union was certified, the parties began negotiating an initial collective bargaining agreement in July 2019, and had met for six or seven bargaining sessions between July 2019 and December 3, 2019, but, as of the time of trial, had not yet reached a collective bargaining agreement. (Tr. 31-32)

II. The June 2019 Profit Sharing Payments

As noted above, Cascades, Inc. has historically directed the distribution of a “share” of “profits” twice a year, in June and December, to all employees with at least one year of seniority. (Tr. 131, 166, 208, 423) The Employer’s two handbooks both identify the profit sharing program as a “non-negotiable [...] discretionary corporate program which can be modified or reviewed at any time by the Company.” (Tr. 415-416); R. Ex. 8. At the Hearing, General Manager Normand Laporte and Human Resources Manager Joe Zilbauer offered uncontroverted testimony that the profit sharing is a gift from the corporate office that is not guaranteed, and testified that when employees are on-boarded, they are advised that the profit sharing program is a corporate program that the Respondent cannot control, and that it is treated as a gift. (Tr. 419, 420-421, 482) The Respondent plays no role in creating or altering, and does not possess, the formula by which each employee’s profit share is calculated, but is instead simply instructed by the corporate office as to the amount of money to provide to each of the Respondent’s employees. (Tr. 423-424) The Respondent’s singular role with regard to facilitating the profit sharing plan is merely to “validate”

⁷ The Board certified the Union in Board Case No. 03-RC-238346 on May 6, 2019, as is recorded in the case information found on the Board’s website at www.nlr.gov.

⁸ The Decision claims that the organizing campaign was initiated by employees rather than the Union (Decision 2), but this assertion lacks record support.

that all employees are accounted for in a file received from the corporate office and that their salary information is listed correctly, so as to ensure that every employee on the list provided by the corporate office was employed during the pertinent period so as to be eligible to receive a profit share from the corporate office. (Tr. 425)

The amount of the profit share payment given to each employee has always varied from one payment to the next, and the percentage of the profit share received has always varied from employee to employee. (Tr. 132, 133, 166) Neither the Union representatives nor any of the employees who testified had any knowledge concerning the specific calculation or formula by which each employee's amount of profit share was, or is now, determined. (Tr. 90, 92, 133, 154, 171, 196) Some of the employees who testified claimed that they could “kind of figure [...] out” or “ballpark” the amount of profit share they received, estimating based upon what they had received historically and the hours they had worked. (Tr. 138-139, 169, 214) The record does not suggest in any manner that any member of the Respondent’s management team possesses or has possessed knowledge of the formula for profit sharing, has authority to make any alteration to the profit sharing formula, or has possessed or possesses any information about either the formula or any changes to the formula.

Ron Warner, a Directing Business Representative of the Union, and some of the bargaining unit employees testified that it was their understanding that the methodology for calculating each employee’s profit share had changed twice in the past twenty years - most recently to begin taking into account the profits of some unspecified number of the other mills owned by Cascades, Inc. (Tr. 45, 106, 148, 167-168, 210-212) When those two changes were made, they were announced to employees. (Tr. 168-169, 213) More recently, however, both Warner and Richard Dahn, a Business Representative for the Union, confirmed that the Union had never been advised by the

Respondent or Cascades, Inc. that any kind of change had been made to the profit sharing plan insofar as the June, 2019 profit share was concerned. (Tr. 42, 117) Warner admitted that the Union had no firsthand knowledge of whether the Respondent's profits were higher or lower in June 2019 than in previous years, or how employees' profit share amounts compared to the amounts received in prior years. (Tr. 92-93) Similarly, Shawn Reed, an employee with nineteen years of service who testified for the General Counsel, admitted that he had no information about how many of the parent company's other facilities' profits were comingled for the purpose of calculating employees' profit share amounts. (Tr. 240-241) In fact, even Laporte and Zilbauer testified that they are not provided with information about the profits of other mills involved in the employees' profit share, and exercise no control over the computation of each employees' profit share, or the overall profit sharing formula. (Tr. 382, 423-424, 425-426, 480-481)

Employees Cracknell and Reed, and another employee produced by the General Counsel, Randy Butski, all testified that, in June of 2019, consistent with past practice, Production Supervisor Robert Pozzobon met with them and read to them from a document, the typed text of which mirrored the memorandum provided to all employees. G.C. Exs. 21, 22. The employees claimed that Pozzobon then also read from a handwritten addition to the memorandum, which stated that the profit share in June 2019 was "adjusted" due to the "current conditions" and "current situation" at the Employer's mill. (Tr. 141-142, 175-177, 221) Pozzobon also testified that he told the employees with whom he met that their profit share had been affected by the current situation at the mill – a statement that he read off of a handwritten statement provided to Pozzobon by Pozzobon's Manager, Pat Schamall. (Tr. 287, 288, 290-291). Finally, Pozzobon testified that he always relays to the employees who he meets with to distribute profit sharing that the profit share is a gift. (Tr. 295-296) Butski testified that his June 2019 profit share was "close to the

same” as what he had been expecting, and Reed testified that he received roughly 89% of the amount he was expecting, though he claimed that his estimate was limited by the fact he was unable to obtain information about the mill’s profits from the whiteboard in Marlowe’s office, as he ordinarily had in the past. (Tr. 177, 223)

III. The Union’s Requests for Information

On August 16, 2019, Warner, on behalf of the Union, sent the Respondent a request for information concerning the profit share payments made to employees. (Tr. 44-45); G.C. Ex. 4. On August 29, 2020, Zilbauer wrote a letter responding to the request on behalf of the Respondent, stating that, to the extent the Respondent possessed the information requested by the Union, certain of the information requested was confidential and proprietary; and seeking an explanation of the relevance of the Union’s requests. (Tr. 49, 95-96); G.C. Ex. 6. On August 26, 2019, Warner sent the Respondent a second, identical request for information, which was not received by the Respondent until August 29, 2019. (Tr. 48); G.C. Ex. 5. On September 6, 2019, Warner responded to Zilbauer’s letter, setting forth the claimed relevance of the information that the Union had requested. (Tr. 51-52); G.C. Ex. 7. The Respondent did not respond to the Union further thereafter, other than through the defense to the Charges, the Petition to Revoke the Administrative Subpoena which was filed contemporaneous with the Union’s information requests, and eventually in the Answer to the Second Consolidated Complaint. (Tr. 53)

Warner testified at the Hearing that the Union’s information requests were submitted so that the Union could make proposals in bargaining concerning the profit share received by employees. (Tr. 87) However, on September 18, 2019, several weeks after submitting their request for profit sharing information, the Union *actually made* a profit sharing proposal in its first proposal, even though they were not in receipt of the profit sharing information they had requested.

Warner and Zilbauer testified, and the documentary evidence confirmed, that the Union's profit sharing proposal was taken word-for-word from the Employer's employee handbooks,⁹ including the provisos that the profit sharing program would be non-negotiable and a wholly discretionary corporate program. (Tr. 82, 428); G.C. Ex. 3; R. Ex. 8. Warner testified at the Hearing that the Union's intent in making the proposal was that the Employer would continue administering the profit sharing program as had been done historically, with the sole addition of providing monthly profit reports to the Union. (Tr. 82-83)

IV. The Posting of Profit Information

During the Hearing, employees testified that, for the last 10 to 15 years, Controller Chris Marlowe had written the Respondent's monthly mill profits on a whiteboard in her office every month. (Tr. 134, 170-171, 215) Employees were permitted to enter her office and observe the mill's monthly profits. (Tr. 134) Cracknell additionally testified that supervisors would also inform employees of the mill's profits, that employees discussed monthly profits internally, and that information about the profits could always be obtained by "word of mouth". (Tr. 134, 135, 138, 154) Butski testified that the mill's profits were last displayed on the whiteboard in February of 2019. (Tr. 174) Reed testified that the profits were last displayed on the whiteboard in May of 2019. (Tr. 218) When Butski and Reed inquired about the whiteboard profits, Marlowe stated that she was no longer allowed to post them, but did not say why. (Tr. 172-173, 218) Cracknell testified that, sometime after the Union election, the mill's profits were no longer written on the whiteboard in Marlowe's office. (Tr. 136) He inquired of Laporte as to why the profits were no

⁹ The complete profit sharing text from the employee handbooks constitutes, verbatim, the Union's entire profit sharing proposal, except that the Union added one sentence in its proposal setting forth a requirement not contained in the employee handbooks that "Monthly profit reports will be posted and provided to the Union." See G.C. Ex. 3; R. Ex. 8.

longer written on the whiteboard, and was told that, because there was now a third party involved, the Employer could no longer share the numbers. (Tr. 151) Similarly, when Reed asked Laporte why the mill's profits were no longer being displayed on the whiteboard, Laporte responded that the Union had proven they could not be trusted with important information. (Tr. 224) Reed knew that the Union had distributed a flyer with personal information about Laporte, and understood Laporte to be referencing that flyer when they spoke. (Tr. 235)

Specifically, the flyer disseminated by the Union in April of 2019 attacked Laporte, questioning his educational credentials, implying he had falsified his resume, and disclosing his personal address, information about his personal finances, and the name of his wife. (Tr. 345, 349-351); R. Ex. 6. Laporte testified that the flyer's allegations were untrue, and that he was "very disappointed" by the flyer, and became so sincerely emotional during his testimony about the flyer that the Judge chose to adjourn the Hearing for several minutes to allow Laporte to regain his composure. (Tr. 346-347) Upon his return, Laporte spoke to his acute reaction to talking about the flyer by explaining that, during a prior union organizing campaign at a previous employer, he had personal information about himself disclosed by a union and that, as a result, he, his wife and their children had to be guarded by private security. (Tr. 348) Laporte advised management of the Respondent's corporate parent company, including Luc Pelletier, David Guillemette and Karen Jobin, of the flyer, and shared his concerns. (Tr. 352) In response, the Respondent's parent company instructed the Employer to discontinue the practice of sharing confidential information at the facility. (Tr. 352-354) Thereafter, a memorandum was released on April 29, 2019, expressing, in relevant part, concern with how the Union had "taken sensitive information and used it to put together an adversarial campaign including personal attacks", and advising that,

consequently, the Respondent “may not be comfortable to share” “sensitive and private information”, “such as profits”. (Tr. 352-353); R. Ex. 5.

V. The May 2019 Layoffs

Both Laporte and Zilbauer, testified that, by approximately mid-March of 2019, the Respondent had produced inventory beyond storage capacity and sales for the Respondent were slow, to a point where the Respondent was storing excess product in multiple warehouses. (Tr. 317-321, 398-399, 401) As a result, it became necessary for the Respondent to engage in a temporary, two-week shutdown of one of the two production machines within the plant, from May 20, 2019, through May 31, 2019. (Tr. 124, 205, 330, 399); G.C. Exs. 15-18. All laid-off employees were returned to work in their former positions on or before May 31, 2019. (Tr. 38) Employees Cracknell, Butski and Reed all testified that such temporary shutdowns of similar scale and for similar, market-driven reasons had occurred in previous years, including in 1997, 2006 and/or 2007, and 2008.¹⁰ (Tr. 130-131, 160-164, 207, 233)

On May 14, 2019, Laporte sent Union Business Representative Rick Dahn an email, with a memorandum attached. (Tr. 111-112, 123, 316, 400); G.C. Ex. 15. The memorandum explained that, due to market conditions and consistent with past practice, some bargaining unit employees would be temporarily laid off over the course of the two-week shutdown, “to begin May 20, 2019.” G.C. Ex. 15. Dahn shared the email with Union Business Representative Ronald Warner on May 14 or 15, 2019. (Tr. 32-34) Despite the Union’s receipt of the Respondent’s notice on May 14, 2019, the Respondent did not receive a response from the Union until May 22, 2019— two days

¹⁰ Union Business Representative Ronald Warner testified that he had no knowledge of the Respondent conducting prior layoffs and made no effort to determine whether layoffs had been conducted previously, but admitted that an employee had told him that the Respondent had “short shutdowns” in the past. (Tr. 34-35, 75)

after the start date of the layoff identified in the Respondent's May 14th notice. The Union's response was dated May 17, 2019, but had been sent by regular mail. G.C. Ex. 2. The Union letter received by the Respondent on May 22nd was from Warner to Zilbauer, offering to meet and discuss the layoffs on either May 28, 2019 or May 29, 2019, at the earliest. ¹¹ (Tr. 35-36, 126, 327-328,401-402); G.C. Ex. 2. When Dahn met with Zilbauer and Laporte on May 29, 2019 to discuss another matter, Laporte and Zilbauer asked to discuss the layoffs, and Dahn responded that the layoffs could only be discussed with Warner. (Tr. 329, 404); G.C. Ex. 16. Dahn was then informed by Zilbauer and Laporte that all of the employees who had been temporarily laid off would be returned to work by the following Sunday. ¹² (Tr. 112-114); G.C. Ex. 16. ¹³

VI. Assignment of Custodial Work

Historically, in addition to using an independent contractor for custodial work, the Respondent had employed one Janitor, named Steve Jackson. (Tr. 52-53, 339); G.C. Ex. 8. For at least ten years, Jackson had been primarily responsible for the custodial work associated with the production area of the mill, while the cleaning service was primarily responsible for the Employer's front offices and the completion of major cleaning projects. (Tr. 181, 184, 226, 370, 407, 455-456) The cleaning company also cleaned the production area during Jackson's tenure, at any time when Jackson was otherwise unavailable, or the work required additional crew. (Tr.

¹¹ When Dahn and Warner were questioned as to why they had waited so long to respond to the Respondent's notice of the layoffs, Dahn responded that he "couldn't [say] exactly why", and Warner testified that he waited to respond until he had access to his letterhead. (Tr. 123, 78) Both Warner and Dahn further admitted that they made no efforts to call either Zilbauer or Laporte after receiving the Respondent's notice of the layoffs to discuss the matter. (Tr. 79, 123-124)

¹² Warner testified that Zilbauer relayed the same information to him during a telephone call sometime during the first week of June 2019. (Tr. 37-38)

¹³ Respondent respectfully requests that the Board take Administrative Judicial Notice that May 29, 2019 was a Wednesday and that June 2, 2019, the following Sunday, was four days later.

369-372, 409-410) Jackson retired in May of 2019, shortly after the Union election, and, thereafter, his position was not immediately filled by the Respondent. (Tr. 57, 339, 368, 408) Instead, the Respondent began to utilize the same independent contractor who had cleaned the front offices to clean the production areas previously assigned to Jackson. (Tr. 57, 66, 227, 339, 373, 409) Laporte and Zilbauer testified that, historically, the Employer had not always filled every vacant position that had arisen, particularly “non-critical function positions”, and that, in these particular circumstances, the Employer wished not to fill the vacancy because janitorial work was not the Employer’s “core business”. (Tr. 342, 408-409, 414)

On June 4, 2019, Warner sent the Respondent a letter, stating the Union’s position that the Respondent was obligated to hire an employee to fill Jackson’s position. (Tr. 57); G.C. Ex. 10. The Respondent did not respond to Warner’s letter until Laporte and Zilbauer met with Warner on June 10, 2019, on which occasion Warner again shared the Union’s view that the Respondent was obligated to fill the vacancy left by Jackson. (Tr. 58-59) Zilbauer responded that he was not sure they were going to fill Jackson’s position at that time, and that, even while Jackson had been employed, the Respondent had used the independent contractor as needed to perform janitorial work. (Tr. 103, 411-413); G.C. Ex. 11. Warner again reiterated the Union’s position in a letter sent to the Respondent on June 21, 2019, to which the Respondent did not respond. (Tr. 59-60); G.C. Ex. 11. Warner followed up his June 21, 2019 letter with an email to Zilbauer on June 27, 2019, to which Zilbauer responded on July 2, 2019, stating that the Employer intended to post Jackson’s position, “with the understanding we need to continue our discussion with the union about the position”. (Tr. 60-61, 411-413); G.C. Ex. 12. Thereafter, the Respondent did post Jackson’s position, but did not fill it. (Tr. 61-63, 186, 229); G.C. Ex. 20. During the same period of time, the Respondent pursued with the Union the concept of substituting another position for

the open Janitor vacancy. (Tr. 342-343, 413-414) Specifically, the Respondent offered to post and fill a vacancy for an Inbound Team Leader, a different bargaining unit position that was actually needed. (Tr. 414-415) The Union never responded with any interest in the Employer's proposals. (Tr. 415)

On September 5, 2019, Warner sent Zilbauer another email, questioning when Jackson's position would be filled. (Tr. 63, 341, 411-413); G.C. Ex. 13. Zilbauer responded to Warner on September 9, 2019, and stated that the Respondent did not have a need to fill the position at that point in time, and was not obligated by past practice to do so. (Tr. 63, 341, 411-413); G.C. Ex. 14. Warner responded to Zilbauer by email on September 13, 2019, reiterating the Union's position, and threatening to file a Charge with the Board. (Tr. 64, 411-413); G.C. Ex. 14. Thereafter, Zilbauer responded to Warner by email on September 23, 2019, requesting that the Union identify any Board precedent that obligated the Respondent to fill the vacancy, and reiterating that the Respondent did not intend to fill the vacancy. G.C. Ex. 19. Warner responded by email the same day, reasserting the Union's position, but failing to identify any applicable precedent. G.C. Ex. 19.

QUESTIONS PRESENTED

1.) Whether the Judge erred by finding that the Respondent violated § 8(a)(1) of the Act when it allegedly told Respondent's employees that their profit-sharing plan payments had purportedly been reduced and changed by an entirely separate legal entity (a different "employer"), because of the union situation at the facility. (See Exception Nos. 4, 19, 20-28, 47-48, 82, 84, 88, 94-97, 126, 146, 148, 172)

- 2.) Whether the Judge erred by finding that the Respondent violated §§ 8(a)(5) and (1) of the Act by failing to give the Union reasonable notice and an opportunity to bargain regarding the 2-week layoff. (See Exception Nos. 9-10, 98-111, 173)
- 3.) Whether the Judge erred by finding that the Respondent violated §§ 8(a)(5) and (1) of the Act by subcontracting bargaining unit janitorial work. (See Exception Nos. 7-8, 91-93, 112-125, 17)
- 4.) Whether the Judge erred by drawing an adverse inference against the Respondent upon the basis of the underlying record. (See Exception Nos. 38, 44, 54-55, 57-80, 87, 128, 141)
- 5.) Whether the Judge erred by failing to dismiss the Second Consolidated Complaint on the grounds that the General Counsel had wholly failed to present a *prima facie* case concerning the profit-sharing allegations, as required by the Act? (See Exception Nos. 52)
- 6.) Whether the Judge erred by finding that the Respondent violated §§ 8(a)(5) and (1) of the Act by changing the manner in which it calculated, and the amounts of, the June / July 2019 profit-sharing payments to employees. (See Exception Nos. 4, 6, 11-16, 18-30, 38, 42, 44-45, 47-51, 53-54, 56, 59, 61, 81-90, 94, 126-142, 144-146, 148, 153, 170, 173)
- 7.) Whether the Judge erred by finding that the Respondent violated §§ 8(a)(5) and (1) of the Act by refusing to provide the information that the Union requested regarding the profit-sharing plan. (See Exception Nos. 170-171, 174)
- 8.) Whether the Judge erred by finding that the Respondent discriminated on the basis of employees' protected activity in violation of §§ 8(a)(3) and (1) of the Act by reducing employees' profit-sharing plan payments. (See Exception Nos. 4, 11-16, 18-30, 38, 42, 44-45, 47-51, 53-54, 56, 59, 81-90, 94, 126-128, 130-141, 143-151, 153, 170, 175)

- 9.) Whether the Judge erred by finding that the Respondent discriminated on the basis of employees' protected activity in violation of §§ 8(a)(3) and (1) of the Act by ceasing to display, or otherwise share, monthly profit information for the Niagara facility. (See Exception Nos. 5-6, 29-46, 152-169, 175)
- 10.) Whether the Judge erred by making any other findings that were unsupported by the evidentiary record. (See Exception Nos. 1-3, 17)
- 11.) Whether, in light of the Judge's errors, the Judge's Conclusions of Law, Remedy, and Proposed Order, and Proposed Appendix, as set forth in the Judge's Decision, are supported by the evidentiary record and legal precedent. (See Exception Nos. 172-201)
- 12.) Whether the Judge erred in issuing a "Recommended Order" in circumstances where the record demonstrates that the Respondent cannot possibly comply with the "Recommended Order" because the Respondent lacks any control over the profit sharing plan subject to the "Recommended Order." (See Exception Nos. 177-182, 184-186, 189-190, 193-201)

ARGUMENT

I. The Record Does Not Support the Judge's Finding that the Respondent Made Any Statements in Violation of § 8(a)(1) of the Act

In his Decision, the Judge first found that Respondent supervisor Pozzobon made statements to employees in connection with his distribution of their profit-sharing plan payments that violated § 8(a)(1) of the Act. Decision 20. The Judge's factual determination that Pozzobon made the statements alleged by the General Counsel served as a necessary lynchpin for the Judge's later findings that "alterations" were made to the profit-sharing plan payments by the Respondent; that those alterations violated the Act; and therefore, that the Respondent's refusal to provide the Union with information about the profit-sharing plan and payments also violated the Act. See, e.g., Decision 3, 7, 11, 13, 25, 27, 28. However, the Judge's factual findings concerning the

statements allegedly made by Pozzobon are not supported by the evidentiary record, and therefore, must be reversed. Furthermore, the Judge does not contend with the fact that his analysis holds the *Respondent* responsible for allegedly relaying statements concerning actions allegedly taken by an *entirely separate* legal entity with whom neither a joint or single employer relationship is alleged - a proposition in support of which the Decision cites absolutely no legal authority. Once the Judge's erroneous findings concerning the statements made by Pozzobon are reversed, it follows that his other findings, which lean heavily on Pozzobon's alleged statements, must be reversed, as well.

When reviewed objectively, the record simply does not support the conclusion that Pozzobon made the statements that the General Counsel has alleged. The Judge found that Pozzobon, during meetings that were consistent with the Respondent's past practice, told Cracknell that his profit-sharing payment was being "adjusted" due to the "situation" with the "Union". Decision 7. In fact, the record shows that, upon review of his affidavit, Cracknell admitted during his testimony that Pozzobon referenced the Union "in a roundabout way" and may not have even used the word "union" at all during their discussion. (Tr. 141-142, 155-156) Cracknell's testimony illustrates that it was he, rather than Pozzobon who gave "evasive" testimony, rather than "clear" testimony, as claimed by the Judge. See Decision 8, FN 9. A review of the record illustrates that it is equally, if not more likely, that Pozzobon's alleged reference to the "current situation" at the mill was a reference to the soft market and the temporary layoffs that the mill had so recently endured - in other words, a simple explanation that profits were down (which, coincidentally, would also explain Pozzobon's reference to an "adjustment" associated with lower mill profits). Similarly, the Judge found that Pozzobon told Butski that profit-sharing payments were "reduced" "because of the Union", when the record demonstrates that Pozzobon credibly denied stating in *any*

employee meeting concerning profit-sharing plan payments that payments had been adjusted because of the Union. (Tr. 287) This record evidence is directly contrary to the Judge's findings that Pozzobon did not deny making a statement about the Union to Butski, and thus the Judge's finding that Butski's testimony was "uncontradicted". Decision 7-8, FN 9. ¹⁴

The Judge additionally erred by attempting to shoehorn Zilbauer's testimony concerning Guillemette's alleged statements into his analysis as to whether Pozzobon had made statements to employees that violated § 8(a)(1) of the Act. Specifically, the Judge found that Pozzobon communicated Guillemette's alleged statement to Zilbauer – namely, that profit-sharing payments were changed because of the Union – to employees. Decision 7. The Judge's finding is entirely unsupported by the evidentiary record, which does not at all indicate that Pozzobon had ever spoken with either Guillemette or Zilbauer, or was instructed to "pass along" Guillemette's statements to employees. ¹⁵ Therefore, the Judge's effort to "supplement" the record of alleged §

¹⁴ Though Reed also testified regarding his conversation with Pozzobon concerning his profit-sharing payment, the Judge did not rely upon Reed's testimony in concluding the Respondent had violated § 8(a)(1). See Decision 8, 20. However, the objective shakiness of Reed's testimony on the subject should have served to reverse the Judge's overall conclusion that Pozzobon's testimony was not credible. Specifically, Reed testified that Pozzobon stated that there had been a change in employees' profit shares "due to the current situation", and that it was Reed's opinion, rather than anything Pozzobon said, that the "change" was the Union. (Tr. 221-222)

¹⁵ As a related matter, the Judge failed entirely to confront the Respondent's argument that Zilbauer's testimony about Guillemette's alleged statement was, in and of itself, entirely vague and ambiguous. As the Respondent argued to the Judge, when Zilbauer's testimony is carefully studied, it is not at all probative of whether the "change" he believes Guillemette mentioned was a negative one. In fact, it is equally plausible that the change referenced by Guillemette benefitted employees, resulting in an increase in their payments, or may have been a neutral, such as a change in the manner that profit shares are electronically coded in the company's system, now that the employees of the facility were unionized. Accordingly, Zilbauer's testimony did not, as the Judge suggests (Decision 11), establish that a material "change" was made, that the "change" had a negative impact on employees, or that the reference to the Union by Guillemette illustrated any animus or retaliatory intent. This is particularly so, in light of record evidence that profit sharing payments in June of 2019 were some of the highest that employees had received. See J. Ex. 3.

8(a)(1) statements to employees must also be rejected. Finally, the statements allegedly made by Pozzobon, when reviewed objectively on the basis of the record evidence, do not rise to the level of the statements made in the cases cited in the Judge's Decision, wherein the Board found that the statements violated § 8(a)(1). See Decision 20. Accordingly, the General Counsel's § 8(a)(1) allegation should have been dismissed.

II. Neither the Record Nor Precedent Support the Judge's Decision to Draw an Adverse Inference Against the Respondent

As with the Judge's finding that the Respondent violated § 8(a)(1) of the Act, a great many of the Judge's erroneous findings are primarily and fundamentally constructed upon the Judge's wrongful imposition of sanctions¹⁶ on the Respondent, by way of his drawing of adverse inferences against the Respondent. Specifically, the Judge drew an adverse inference that: (1) the profit-sharing payment to unit employees were calculated based, in whole or in part, on the Niagara facility's profits and the other earnings of the particular recipient during the relevant time period (which went to the heart of the Judge's analysis of whether the profit-sharing plan was controlled by the Respondent, and whether the profit-sharing payments constituted a gift); (2) the change made to the operation of the profit-sharing plan in June / July 2019 was substantial (which permitted the Judge to conclude the alleged change violated the Act, and again supported the Judge's finding that the profit-sharing payments were not a gift); and (3) the Respondent was responsible for the change (allowing the Judge to dodge the questions of corporate control raised by the Respondent, and the dearth of evidence presented by the General Counsel on the question

¹⁶ As an initial matter, some of the Circuit Courts question whether the Board possesses the authority to impose sanctions at all, where Congress explicitly reserved the authority to enforce the Board's subpoenas to the Federal Courts. See NLRB v. Int'l. Medication Systems, 640 F.2d 1110 (9th Cir. 1981). On the basis of those Courts' decisions, the Respondent submitted that the Judge was without authority to impose sanctions in the instant case. The Judge did not contend with the Respondent's position in his Decision.

of what actual “change” had allegedly occurred). See Decision 14, 17. The Judge’s decision to draw adverse inferences against the Respondent was based upon the Judge’s biased and reactionary response to the Respondent’s resistance of the General Counsel’s problematic subpoena, and the adverse inferences are unsupported by both the Respondent’s actions and Board precedent. Accordingly, the Judge’s adverse inferences must be struck, and the Judge’s findings which rest upon those adverse inferences must be reversed.

As an initial matter, the Judge’s conclusion that adverse inferences were appropriate is based upon the Judge’s erroneous finding that the information subpoenaed by the General Counsel was “properly sought” by the General Counsel, and “highly relevant” to the General Counsel’s prosecution of the Second Consolidated Complaint – claims that he repeated often in his Decision. See Decision 13, 14, 15 FN 18, 16. However, the Judge failed to appreciate the Respondent’s arguments against enforcement of the General Counsel’s subpoena, including the General Counsel’s abuse of authority in pursuing the profit sharing allegations in the Second Consolidated Complaint in circumstances where the Union could not and did not present a *prima facie* case that the Act had been violated; the fact that the profit share was a gift concerning which the Union is not entitled to bargain; the compelling conflict of laws issues raised by the Canadian blocking statutes; and the Board’s controlling precedent in Electrical Energy Services; and the vague and ambiguous nature of certain of the General Counsel’s requests¹⁷ – all of which the Judge dismissed as “meritless”. Decision 14.

In particular, the Judge’s assessment of the Respondent’s arguments pursuant to Electrical Energy Services falls woefully flat. There is no Board precedent that supports the Judge’s distinction of Electrical Energy Services on the single, solitary basis that the requests for the profit

¹⁷ See R. Ex. 1, pp. 21-22 and 24-25.

sharing information were not the only trial issue. See Decision 14, FN 17. Specifically, in Electrical Energy Services, the employer refused to respond to a request for information served upon it by a union representing some of its employees. Id. The union filed an unfair labor practice charge against the employer, alleging an unlawful refusal to provide information, and a complaint was issued. Id. Thereafter, the General Counsel for the Board served the employer with “a subpoena *duces tecum* attempting to obtain each and every document placed in issue by the complaint.” Id. at 931. The Board affirmed the Administrative Law Judge’s finding that the General Counsel was “attempting to use the subpoena *duces tecum* as a substitute for the Board order sought by the complaint”, which the Administrative Law Judge found (and the Board affirmed) was an “improper [...] abuse of the subpoena power because it would undercut the statutory requirement for an unfair labor practice hearing where the ultimate issue to be decided is whether the General Counsel is entitled to the information in question.” Id. at 931. The Administrative Law Judge therefore granted the employer’s petition to revoke the subpoena *duces tecum*. Id. The Board’s holding is straightforward and practical – if it did not exist, unions would always simply obtain information resisted by an employer by filing unfair labor practice charges. The facts in the instant case are identical in every material respect to those presented by Electrical Energy Services – namely, virtually every item of information sought by the Union in its request for information submitted during bargaining is encompassed by the General Counsel’s subpoena. See G.C. Exs. 4, 5; R. Ex. 1, Att. A. Furthermore, there is no support in Electrical Energy Services or any other case for the Judge’s proposition that the Board’s holding was limited to only those cases where failure to respond to the union’s request for information was the only alleged unfair labor practice. See Decision 14, FN 17. Indeed, by way of the Judge’s reasoning, it is only the Region’s consolidation of the cases which rendered the General Counsel’s subpoena enforceable

– surely not the result intended by the Board in Electrical Energy Services. Thus, for all these reasons, the Respondent should not have been obligated to respond to the General Counsel’s subpoena.

Similarly, the Judge’s Decision failed to appreciate, and in fact wrongfully chastised the Respondent for raising, the production issues associated with the conflict of laws and jurisdictional issues that arise as a result of the application of the Quebec Business Concerns Record Act and the Ontario Business Records Protection Act – a pair of Canadian blocking statutes.¹⁸ Quebec Business Concerns Records Act, CQLR, Ch. D-12; Ontario Business Records Protection Act, RSO 1990, Ch. B.19. These blocking statutes prevent the disclosure or transfer of “any document” or “any material” to any place outside of those provinces upon a requirement (including a subpoena) issued by a foreign authority, including an “administrative authority.” CQLR, Ch. D-12, §2; RSO 1990, Ch. B.19, §1. As set out in the statutory provisions, failure to comply with the requirements of these laws can ultimately subject a party to a finding of contempt and, in the case of the Ontario statute, imprisonment. CQLR, Ch. D-12, §5; RSO 1990, Ch. B.19, §§2, 3.¹⁹

The Judge’s argument dismissing these laws rests primarily on his citation to Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 544 FN 29 (1987) for the proposition that the federal law of the United States would not yield to a foreign blocking statute. Decision 15, FN 18. Aerospatiale is relevant to the analysis of the blocking statutes at issue in the instant case for the purposes of providing the framework to analyze whether

¹⁸ In point of fact, the Decision wholly fails to contend with the Respondent’s citations to the Ontario Business Records Protection Act, and references only the Quebec Business Concerns Records Act. See Decision 15, FN 18.

¹⁹ The Judge first claims that the Respondent did not cite the text of the statute to the Court, which ignores that the statute was quoted for the Judge in the Respondent’s Petition to Revoke. See Decision 15, FN 18; R. Ex. 1, pp. 21-22, FN 9.

the statutes would, before a United States tribunal, serve to block the production of certain documents. See *Aerospatiale* at 543-544 (citing to the standard for, and need to apply, international comity). Instead, the Judge's Decision implies that *Aerospatiale* functions as a complete bar to the application of a foreign blocking statute, which it is not. This fact is illustrated not only by *Aerospatiale* itself, but also the cases cited to the Judge by the Respondent in which United States courts held, pursuant to analysis which accounted for *Aerospatiale*, that a foreign blocking statute prevented the production or disclosure of certain documents. See *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2015); *Minpeco, S.A. v. Conticommodity Services, Inc.*, 116 F.R.D. 517 (S.D.N.Y. 1987); *Tiffany LLC v. Qi Andrew*, 276 F.R.D. 143 (S.D.N.Y. 2011), *cited by* R. PHB 48.²⁰ Finally, the Judge's closing citations to Board cases in which the Board found that federal law overrides contrary local law (Decision 15, FN 18) serve only to illustrate that the Judge has misunderstood the gravamen of the issue raised by the Respondent. The enforcement of the General Counsel's subpoenas was not, therefore, a simple question of federal precedence; but instead, a much more complicated analysis of international comity, which the Judge was obligated to undertake in order to properly resolve the issue, and did not.

Next the Judge turns, with heated rhetoric, to his assessment of the Respondent's production of documents responsive to the General Counsel's subpoena over the course of the

²⁰ These citations illustrate that the Judge's implication that the Respondent had not cited any precedent in support of its arguments concerning the blocking statute is demonstrably false. See Decision 15, FN 18. Equally puzzling and unsubstantiated was the Judge's claim that the justifications in the instant case were stronger than those in cases such as *Central Wesleyan College*, 143 F.R.D. 628 (D. S.C. 1992) and *Petruska v. Johns-Manville*, 83 F.R.D. 32 (E.D.Pa. 1979), wherein the production of documents was sought in, respectively, a class-action tort case concerning asbestos damages and a wrongful death action; and where the parties resisting disclosure were named in the litigation (and thus parties over whom the courts had jurisdiction). See Decision 15, FN 18.

hearing. The Judge's analysis was clearly and inappropriately colored by his blatant personal irritation with Respondent's counsel's zealous advocacy on behalf of the Respondent.²¹ First, in determining that sanctions were warranted, the Judge claimed that the Respondent had continued to refuse to produce information after he had denied the Respondent's Petition to Revoke the General Counsel's subpoena²², and characterized the Respondent's refusal to produce documents as "contumacious". Decision 13, 14. The Judge's findings badly mischaracterize the evidentiary record. Immediately after receiving the Judge's ruling on its Petition to Revoke, the Respondent began producing documents responsive to the General Counsel's subpoena on the first day of hearing. See (Tr. 16) The documents not produced on the first day of hearing were the documents the Respondent did not possess, or which implicated the questions of foreign law raised by the

²¹ To this end, the Judge wrongly and unfairly claimed that the Respondent's handling of subpoena demonstrated "contempt for Board processes and authority." (Decision 16) The Judge's reaction, much like his other reactions to the Respondent's challenges to the General Counsel's subpoena, being consistent with his general attitude toward the Respondent and Respondent's counsel (See, e.g., Decision 9, FN 11, erroneously claiming the Respondent "misrepresented the record" and Decision 11, mischaracterizing counsel as having "helped" LaPorte with his testimony), was hyperbolic and overblown. The vigorous defense of the Respondent's rights, in response to vast overreach by a federal agency, does not equate to contempt – no matter how much the Respondent's resistance might have been perceived as an inconvenience or irritation to the Judge.

²² If any misstep was made *vis a vis* timing, it was committed by the Judge, who, somewhat tellingly, began discussing the imposition of sanctions upon the Respondent with the General Counsel before even having ruled on the Respondent's Petition to Revoke (rather than after the Respondent refused production as he claimed in his Decision). See (Tr. 14-16); Decision 13-14. Counsel for the Respondent was thus put in the position of needing to draw the Judge's attention to this prejudicial misstep: Specifically, that the Judge was considering sanctions for a failure to respond to the General Counsel's subpoena before even ruling upon the Respondent's Petition to Revoke, let alone resolving what steps the Respondent had already taken or would be taking to respond. To put it mildly, the Judge's Decision makes clear that the Respondent never recovered from the embarrassment caused Judge Bogus in the moment – a chagrin which he took personally, as reflected in his subsequent, unjustified treatment of Respondent Counsel during the Trial, and in his unusually harsh comments about Respondent witnesses in the Decision.

Canadian blocking statutes.²³ Furthermore, before the close of the Hearing, the Respondent made an extra effort, above and beyond what is required by Board law, to present the General Counsel with the information sought, even when doing so meant culling through the data in its possession overnight in order to create summary reports for the General Counsel, as well as to provide the General Counsel with four years of un-aggregated data from two different payroll systems in order to back up those summary reports. See (Tr. 428); J. Exs. 1-3. At no point in time during the hearing did the General Counsel raise the need for additional time or witnesses as a result of the speed of the Respondent's document production. Thus, it is clear that the Judge's claims to the contrary are entirely unsupported by the evidentiary record.

Similarly, the Judge's vitriolic attack on the Respondent's arguments concerning the Respondent's possession of the subpoenaed documents must be rejected. The Judge claimed that the Respondent "stunningly and abruptly" raised possession after the Respondent's Petition to Revoke was denied, and dismissed the Respondent's arguments as "specious". Decision 15, 16. The record proves otherwise – in point of fact, the Employer advised, from the very outset in response to the Union's request for information and General Counsel's subpoenas, that the pertinent documents might be outside of the Respondent's possession. See G.C. Ex. 6 (Response to Union request for information); R. Ex. 1 (Respondent's Petition to Revoke); G.C. Ex. 1(x-2) (Respondent's Amended Answer); (Tr. 23) ("I will advise Your Honor and Counsel for the General Counsel and the Union that we do not possess or control possession of the information

²³ As a related matter, the Judge's Decision failed to address the Respondent's assertion that the General Counsel bore the burden to establish that the Employer was in possession of the information that the General Counsel had subpoenaed – a necessary underpinning to the imposition of sanctions. See Dish Network Corp., 359 NLRB No. 108, 10 FN 31 (2013); North Hills Office Services, 344 NLRB 1083, 1084 FN 13 (2005); Shamrock Foods Co., 366 NLRB No. 117, 1 FN 1 (2018).

that is being sought by the subpoena that was issued by the General Counsel.”).²⁴ Furthermore, contrary to the Judge’s assertion, both Laporte and Zilbauer offered credible, unrebutted testimony that the Respondent did not possess information about the profit-sharing plan or formula.²⁵ See Tr. 382, 421-426, 480-481. Finally, even if the Respondent had waited to raise the issue of possession, that question was not implicated until after the Judge had ruled on the Respondent’s Petition to Revoke, and the General Counsel had reiterated its request for the documents.

The Judge’s related argument that the Respondent was obligated to make efforts to obtain responsive documents from Cascades, Inc., and perhaps other, separate subsidiary corporate entities, given the vague wording of the subpoena, ignores not only the issues related to the blocking statutes, which the Judge summarily dismissed, but is additionally unsupported by the cases cited by the Judge’s Decision. See Decision 16. The Judge’s assertion that the Respondent was required to obtain information from “other persons or companies” (Decision 16) is based upon Clear Channel Outdoor, Inc., 346 NLRB 696 (2006) and Winthrop Management, 2018 WL 834316, but fails to recognize that both cases, the Board held only that the respondents were obligated to produce all documents *they had a legal right to obtain*. In the case at bar, for the reasons explained herein, the Respondent has demonstrated that it has no legal right to obtain documents from Cascades, Inc. or any other entity, given not only the application of the Canadian

²⁴ In a similar vein, and for similar reasons, the Judge’s ire over the Respondent’s advancement of the argument that the profit-sharing plan payments were a gift (Decision 14, FN 17) is unfounded. The Respondent regularly raised this argument from the outset, including in its Amended Answer, filed before the hearing even began. See G.C. Ex. 1(x-2).

²⁵ Similarly, the Judge’s claim that sanctions were warranted because the Respondent had failed to call a custodian of records concerning possession borders on disingenuous. See Decision 16, FN 19. Clearly, Laporte and Zilbauer served in the role of custodian when they offered their testimony concerning the Respondent’s possession of responsive documents. Even the Judge’s claim were accurate, there is no case law to support his contention that the Respondent’s “broken promise” to him was a grounds upon which to draw an adverse inference.

blocking statutes at issue, but also, the total lack of evidence presented by the General Counsel of a relationship between the entities that would establish or permit such a right on the part of the Respondent.

Finally, the Judge's analysis made no effort to contend with the Board's precedent's requirement that the imposition of sanctions is only appropriate where a preliminary showing of prejudice has been made. See Sisters Camelot, 363 NLRB No. 13, 12 (2015); Addressograph-Multigraph Corp., 207 NLRB 892, 892 FN 2 (1973). In the case at bar, the record illustrates that, by the end of the hearing, the General Counsel made no claim of prejudice. The General Counsel's arguments for sanctions in his Post-Hearing Brief similarly do not claim prejudice. See G.C. PHB 28-29. In fact, the Judge's own Decision illustrates that the drawing of adverse inferences based in the instant case was unwarranted – the Judge held that the adverse inferences he drew were unnecessary for him to reach his ultimate findings that the Respondent had violated the Act. Decision 17. This assertion is compelling evidence that the General Counsel suffered no prejudice in presenting his case, in the mind of the Judge, and this fact should have thus prevented the Judge from imposing the sanctions that he did upon the Respondent.

III. Neither the Record Nor Precedent Support the Judge's Finding that the Profit-Sharing Plan was Altered, by the Respondent, in Violation of §§ 8(a)(5) and (1) of the Act

The Judge's Decision next errs in connection with three critical findings that form the foundation of the Judge's conclusion that alleged changes to employees' June 2016 profit-sharing plan payments violated the Act. First, the Judge incorrectly found that the General Counsel had proven that a change to the profit-sharing plan had even occurred. Decision 3. Next, the Judge wrongfully attributed control over the plan and the alleged change to the Respondent, despite uncontroverted record evidence that the profit-sharing plan is wholly controlled by the Respondent's corporate parent without any substantive input from the Respondent. Decision 6,

27. Finally, the Judge erred by failing to find that the profit-sharing plan constituted a gift to the Respondent's employees, concerning which the Union was not entitled to bargain. Decision 26. Accordingly, given these errors, the Judge's Decision must be reversed.

d. The Record Contains No Evidence of the Alleged Alteration

Despite the Judge's best efforts, he is unable to salvage the woefully inadequate record left to him by the General Counsel on the subject of the alleged change to the profit-sharing plan payments to employees. The entire Decision constitutes an effort to "fill in the gaps" and reconstitute the Record before the Judge, all the while excusing the General Counsel's utter failure to satisfy his burden and elicit the proof necessary to establish the profit-sharing violations alleged. Indeed, *the Judge himself admits* in the Decision that "[t]he record evidence does not establish exactly how much the profit-sharing plan's operation was changed." Decision 13. This is a mammoth understatement, for the record not only fails to establish "how much the profit-sharing plan's operation was changed", the record contains *nothing* about the elements of the profit-sharing plan, other than the well-intentioned, but wholly insufficient, perceptions and conjecturing of several employees called as witnesses by the General Counsel. In point of fact, all the General Counsel managed to establish was that the employees called by the General Counsel *believed* that the amount of the profit share payment that each employee received in June of 2019 had varied from the amount of the profit share payment that each employee received in the past. This "change", however, is entirely to be expected, given the testimony of every witness that the amount of an employee's *profit* share will turn on the amount of *profit* – which, as the General Counsel admitted (Tr. 10), will vary for every six-month period, and has historically been wide-ranging. Despite the vague and ambiguous conjectures of some witnesses to the contrary, the General Counsel failed to prove that the profit sharing formula was in any way different in June of 2019

than it was in prior profit sharing distribution periods, or if there was any difference, what had constituted the difference and how it affected employees.²⁶ Accordingly, the Judge should have granted, rather than denied, the Respondent's Motion to Dismiss these entirely unproven claims.

²⁷ See Decision 13, FN 15.

In order to buoy the General Counsel's lackluster case, the Judge includes many findings in his analysis that are unsupported, if not outright contradicted, by the underlying record. For example, the Judge claims that the process for calculating profit-sharing payments was changed (Decision 7), despite a total lack evidentiary support for this assertion. The Decision further claimed that the formula for the profit-sharing plan payments was based on facility profits and

²⁶ The Judge's Decision puts much credence in employees' testimony that they estimated their payments were roughly \$1,000 less than they expected. See Decision 8, 13, 28, 25. The record illustrates that there is no reason to believe that employees' "guesstimates" were in any way accurate. In fact, Reed admitted that he did not have (and never did have) information about either the Employer's profits, or the profits of other mills, to calculate an accurate estimate (Tr. 177, 213), and Butski admitted that his June 2019 profit share was, in fact, "close to the same" as what he had been expecting. (Tr. 177) Even if the Judge's finding were accurate, the record does not support the Judge's repeated characterization of the change as "substantial" (Decision 25) where, by the Judge's own calculation, the change was, on average, less than 10% difference from the prior payment. See Decision 6, FN 7.

²⁷ In relation to the Respondent's Motion to Dismiss, the Judge's Decision wholly fails to discuss or analyze the Respondent's assertion that the General Counsel lacked authority to issue the Second Consolidated Complaint. The General Counsel abused its authority and denied the Employer its rights to due process and equal protection by prosecuting these allegations despite a total lack of supporting evidence. In point of fact, as asserted in the Respondent's Answer, the General Counsel issued the subject Complaint in circumstances where he possessed – at the time of issuance of the Complaint – no evidence whatsoever of who was responsible for the profit distribution in June of 2019 which was alleged as being unlawful in the Complaint. See G.C. 1(x-1). This is further evidenced by the fact that the General Counsel pursued, but then withdrew (without having received any additional evidence), an Investigatory Subpoena *Duces Tecum* (No. B-1-16EDQLP) before issuing a Complaint. Therefore, it is clear that the profit sharing allegations should never have been pursued, where the Union possessed nothing more than an unsubstantiated hunch to support its claim of an alteration, and by extension, the General Counsel lacked possession of any evidence resembling the requisite *prima facie* showing of a "profit-sharing" violation having been committed by the Respondent at the time the Complaint was issued, let alone when the record opened before the Judge.

“other compensation the Respondent paid to the employee during the relevant period”. Decision 6. The record, which includes no information about the formula underlying profit-sharing payments, does not support this finding. For similar reasons, the record does not support the Judge’s claim that the payments were calculated dividing up the facility’s profits amongst employees based upon their earnings. Decision 6. There is simply no credible record evidence to support the Judge’s finding; and in fact, the record illustrates that even employees and the Union admitted that the formula took into account some unknown portion of the profits of other facilities owned by the same corporate parent. See (Tr. 45, 106, 148, 167-168, 210-212) ²⁸ Finally, the Judge claims that Zilbauer “knew about a change” to the plan based on his conversation with Guillemette (Decision 13), despite the fact that Zilbauer’s testimony, as explained above, was far too vague and ambiguous to support this conclusion.

Because the record does not support that a substantive change to the profit-sharing plan was made, the Judge leans heavily on his § 8(a)(1) findings and his drawing of an adverse inference in order to prop up the General Counsel’s case. See Decision 11, 12, 25. As explained above, the Judge’s findings concerning Pozzobon’s alleged statements to employees, and the rationale for his decision to draw adverse inferences against the Respondent, must both be rejected by the Board. Accordingly, the Judge’s finding that a change was effectuated to the profit-sharing plan must also fall, as those flawed findings form its foundation. Thus, because the Judge’s claim that he would have found that a change was effectuated regardless of his drawing of adverse inferences (Decision 17) is, as explained above, entirely unsupported by the record, the Judge’s

²⁸ This evidence renders the Judge’s finding that the profit-sharing payments had been reduced on two prior occasions (Decision 6) equally inaccurate – what the record actually shows is that two prior alterations were made to profit-sharing in part to account for the profits of other mills into the formula utilized by Cascades, Inc. to determine payment amounts, well before the Union was certified.

findings cannot be maintained upon either the basis of the adverse inferences drawn by the Judge or the Judge's interpretation of the remainder of the record. Consequently, it is clear that the Judge's finding of a change to the profit-sharing plan must be vacated.

e. The Judge Ignored Critical Evidence of Respondent's Lack of Control

The Judge next held, despite a mountain of record evidence to the contrary, that the Respondent controlled, and was thus responsible for, the amount of the profit-sharing payments that employees received in June 2019. The record, including the uncontroverted testimony of Zilbauer and Laporte,²⁹ proved conclusively that Cascades, Inc. possessed sole control over the profit-sharing plan, the formula for profit sharing, any changes made to the profit-sharing plan, and virtually all of the information concerning how profit shares are established and calculated.³⁰ See (Tr. 382, 423-424, 425-426, 465-466, 480-481) Notably, the Judge made much of Zilbauer's testimony regarding a conversation between himself and Guillemette, in which Guillemette

²⁹ The Decision claimed that the testimony offered by Zilbauer and Laporte was "self-serving". Decision 17. Pursuant to the broad standard evidently applied by the Judge, *all* testimony offered by a party in support of its arguments would be self-serving. This claim, standing alone, does not render testimony either unrefuted or incredible, as the Judge seems to suggest. Similarly, for reasons addressed in more detail below, the Judge's repeated exhortations that Laporte was an unreliable witness (See, e.g., Decision 10, 11, 18) were wholly unsupported by the evidentiary record, and the Judge's findings in this regard were based on credibility determinations concerning Laporte's testimony regarding other matters (See Decision 18) – which thus constituted proverbial "apples and oranges".

³⁰ The Judge's Decision observed that, "For over 20 years, the *Respondent* has made semi-annual profit-sharing plan payments to employees at the Niagara facility." (Decision 6)(emphasis added) This quote illustrates the Judge's regular conflation of the Respondent with Cascades, Inc. - while it is true that employees at the Niagara Falls Mill have been the recipients of profit-sharing payments for over twenty years, the record clearly establishes the payments were decided upon by Cascades, Inc. This repeated error reveals the Judge's lack of comprehension as to who was being prosecuted, and what the record developed before him contained (and did not contain) as concerns the "profit-sharing plan." See Also Decision 8 (Wherein the Judge perpetuates an omnipresent confusion between the Niagara facility (the mill in Niagara Falls that doesn't own "other facilities") as the Respondent identified in the Second Consolidated Complaint, and the entity actually in control of the profit-sharing plan.)

allegedly stated to Zilbauer that there had been a change in the profit-sharing plan. See Decision 11. To the extent this testimony proved anything, it proved that Cascades, Inc., rather than the Respondent, controlled the profit-sharing payments, but was too vague merit the heavy reliance heaped upon it by the Judge. Despite the Respondent having repeatedly joined the issue of what legal entity actually had control over the profit-sharing plan which is the subject of the Second Consolidated Complaint and Decision, the General Counsel, who had the burden to establish who was responsible for the alleged wrongdoing, never even attempted to prove that it was the Respondent. Accordingly, because a review of the substantial record evidence demonstrates that the Respondent was not liable for administration of, or changes to, the profit-sharing plan,³¹ the Decision's conclusions to the contrary were erroneous.

Despite the evidentiary record, the Judge found that the Respondent made the payments to employees, and held the Respondent responsible for allegedly reducing the amount of the payments received by employees in June of 2019. Decision 3, 6, 27. Once more, the Judge's finding is almost entirely reliant upon his drawing of adverse inferences against the Respondent, which – as explained above – was in and of itself erroneous. The Judge's further claim, that he would have found that the Respondent controlled the amount of employees' profit-sharing payments regardless of the adverse inference he had drawn (Decision 17), lacks credulity, given

³¹ Contrary to the Judge's claim, the Respondent never asserted that it had no "involvement" in the profit-sharing plan. (Decision 25) However, the record is quite clear that the Respondent's involvement is limited to the administrative task of reviewing the list of employees provided by the corporate office to ensure that all eligible employees were listed, and any ineligible or former employees' names were struck. (Tr. 425) The Respondent's *de minimis* involvement thus did not support the Judge's finding of control. The Judge's finding that the Respondent analyzed employees' earnings, hours of work, and seniority to determine payment amounts (Decision 6) is clearly contradicted by Zilbauer's testimony, wherein he explained that he merely confirmed that the salary information and dates of employment, as considered by Cascades, Inc. and provided to him for review, were reflected accurately - in sum, wholly ministerial duties. (Tr. 425)

the complete lack of evidentiary support for such a finding.³² Second, in the absence of relying upon the adverse inference, the Judge stated that he relied on Pozzobon's alleged statements to employees, including the alleged statement that the changes were made only at the Niagara facility. Decision 17, 18. Not only were those statements disputed and unproven, but even if true, the statements in no way attributed control over the profit-sharing formula or payments to the Respondent, rather than Cascades, Inc.³³

As a related matter, the Judge's "Recommended Order" mandates that the Respondent "rescind the unlawful changes to the manner in which we calculate profit sharing plan payments to [the Employees]". The Respondent cannot possibly comply with the foregoing mandate because, as is irrefutably demonstrated in the record developed before the Judge, the Profit-Sharing Plan which is the subject of the Complaint and the Judge's Decision, is not the *Respondent's* profit-sharing plan – it is the profit-sharing plan of Cascades, Inc. - and the Respondent lacks any authority or responsibility to control the Profit-Sharing Plan.

Accordingly, the Judge has knowingly recommended an Order which contains a mandate which the record before him proved is destined to present compliance issues. The resolution of the Respondent's inability to comply with the Order may even necessitate a contempt proceeding

³² The Judge's own Decision undercuts the Judge's claim, inasmuch as the Decision claims that, to the extent the General Counsel did not make out its case, it was due to the Respondent's failure to respond to the General Counsel's subpoena, illustrating the Judge's inherent (and incorrect) reliance upon the adverse inferences he had drawn. See Decision 17.

³³ To the extent the Judge acknowledges some corporate control over the profit-sharing plan, he further claims that Pozzobon's alleged comments to employees illustrate that, if corporate control *did* exist, it was heavily influenced by the Respondent's local management. Decision 18. The Judge's finding is both completely unproven by the record, and unsupported by the Board's precedent, which has never adopted the theory of "cat's paw liability" that the Judge's Decision suggests.

before it is accepted that the Respondent cannot perform the Judge's Order, despite the clarity of the record on this matter before the Judge. The Judge's "Recommended Order" further directs that the Respondent must "make [the Employees] whole, with interest, for the loss of earnings and other benefits suffered as a result of [the Respondent's] decision to unlawfully change your profit-sharing plan payments." Setting aside the fact that the record is barren of any showing that the *Respondent* actually made a change in the Profit-Sharing Plan which is the focus of the Judge's Decision, the Respondent, once again, cannot abide by the Judge's directive because the Respondent does not possess the information or the means to obtain the information on the basis of which the profit distribution in June of 2019 (being the distribution in contention) was calculated by Cascades, Inc.

In a manner of speaking, the Judge is recommending that the Respondent be punished for something which may or may not have been done by another legal entity (to wit, the legal entity responsible for the profit-sharing plan) by being forced to pay compensation to its Employees, the amount of which is incalculable, because the Respondent has no authority over or access to the pertinent internal workings of the profit-sharing plan.

f. The Judge Wrongly Found that Profit Sharing Was Not a Gift

Finally, the Judge erred by rejecting the Respondent's argument that the profit-sharing plan payments received by employees were a gift from Cascades, Inc., and thus were not a subject concerning which the Union was entitled to bargain on behalf of employees. Decision 26. The Employer's handbook identifies the profit sharing program as a "non-negotiable [...] discretionary corporate program which can be modified or reviewed at any time by the Company." At the hearing, Pozzobon, Laporte and Zilbauer all described the profit sharing as a "gift" that is not guaranteed. They further testified that when employees are on-boarded, and twice every year when

employees are given their profit share, they are advised that the profit sharing program is a Cascades, Inc. program that the Employer cannot control, and is a gift to employees.³⁴ Despite this evidentiary record, the Judge found that the profit-sharing payments were not a gift, based primarily on the Judge's rationale findings that the payments could not be gifts because they were "not *de minimis*" and were based upon "employment-related factors". Decision 26.

The Judge's assertion that, because the profit-sharing plan payments were not *de minimis* they could not qualify as a gift, absent other indicia the payments were not gifts, is not supported by Board precedent. Furthermore, the "employment-related factors" relied upon by the Judge are all³⁵ derived from the Judge's erroneous finding that the Respondent determined the amount of each employee's payment on the basis of their salary, which in turn took into consideration their hours of work and their seniority. Decision 26. This finding appears to be based on a misinterpretation of Zilbauer's testimony, wherein he stated that he confirmed that salary information provided to him by the corporate office was accurate. (Tr. 425) Not only does Zilbauer's testimony *not* prove that employees' salaries factored into the formula employed by Cascades, Inc. to determine each employees' profit-sharing payment, but furthermore, the testimony certainly does not prove that employees' salaries reflected their hours of work or seniority with any precision or constancy, so as to render those factors additional factors that would have been considered by the corporate office simply by dint of any consideration given to each

³⁴ Contrary to the Judge's finding, Zilbauer did not testify that the only the Respondent considered the profit-sharing payments to be gifts (Decision 6), but that Cascades, Inc., as the entity who controlled the payments, took this position, as well. (Tr. 419, 420-421, 482) Similarly incorrect are the Judge's claims that the Respondent or Cascades, Inc. consider the profit-sharing payments as a "mere" gift or a "pat on the back". Decision 25, 26.

³⁵ The Judge attempts to rely upon the facility's profits as an employment related factor (Decision 26), but this claim is erroneous - the facility's overall profits are not an employee-specific metric so as to be considered "tied" to each, individual employee's employment.

employee's salary. Accordingly, because the Judge's efforts to distinguish the profit-sharing payments from gifts must fail given the underlying record, the profit-sharing payments must be recognized as a gift to employees from Cascades, Inc.

In this regard, the Judge incorrectly rejected the Respondent's reliance upon Bob's Tires, 368 NLRB No. 33 (2019). Decision 26, FN 26. First, the Judge's implication that Bob's Tires was inapposite, simply because it dealt with a bonus paid to employees, rather than a profit-sharing plan payment (Id.), is fatuous. The principles of the Board's analysis are still applicable, regardless of whether the two cases are factually identical. Furthermore, the Judge's claim that the cases were factually opposite (Id.) is erroneous. As explained above, the record in the instant case, like the record in Bob's Tires, does not illustrate that the remuneration to employees at issue was tied in any way to employment related factors. The Judge's claim to the contrary (Id.) appears to be based in its entirety upon the Judge's prior finding that the formula utilized by Cascades, Inc. took into account employment-related factors (Decision 6, 26) – a claim which was - as explained above – entirely unsupported by the record. Furthermore, the Judge relies upon his finding that the profit-sharing payments to employees were “substantial” (Decision 26, FN 26) to distinguish the case from Bob's Tires, but Bob's Tires does not suggest, let alone dictate, that the amount of the remuneration to employees is a talismanic or controlling factor in the analysis of whether a payment constituted a gift. Finally, the Judge claimed that the instant case was analogous with Gas Machinery Co., 221 NLRB 862 (1975), in which the Board found bonuses constituted a mandatory subject of bargaining, rather than Bob's Tires. Decision 26. The Judge's reliance upon Gas Machinery Co. is misplaced, because the factors that militated against finding the bonuses were gifts in that case were, as explained above, not presented on the record in the instant case.

Furthermore, the cases the Judge found “dispositive” (Decision 26) of the question of whether the profit-sharing payments constituted a gift are distinguishable, and are in fact far from dispositive of the issue. J.P. Stevens & Co., 239 NLRB 738 (1978), Western Foundries, Inc., 233 NLRB 1033 (1977), and Sunshine Food Markets, 174 NLRB 497 (1969) are cited by the Judge for the proposition that, in certain circumstances, a profit-sharing plan could be considered a mandatory subject of bargaining. However, the fact that, under entirely distinguishable factual circumstances, profit-sharing plans have been found to constitute mandatory subjects of bargaining is irrelevant to the factual analysis of whether the profit-sharing plan in the instant case constituted a gift – for example, though bonuses are often found to be mandatory subjects of bargaining, it was still appropriate for the Board to find in Bob’s Tires that the bonuses at issue therein constituted gifts. By similar logic, the evidentiary record in the instant case demonstrates that the profit-sharing plan at issue herein (which was not tied to employment-related factors) was distinguishable from those in the cases cited by the Judge, and thus constituted a gift rather than a mandatory subject of bargaining.

Finally, as explained throughout, Board law holds that an employer cannot unilaterally change a “term and condition of employment” in effect as of the date of a union’s certification; rather, the employer must maintain all benefits, unchanged, and negotiate with the union to the point of agreement or impasse before modifying a prevailing “term and condition of employment”. As additionally explained herein, the record developed before the Judge establishes that, as of May 6, 2019, the date of the Union’s Certification, the profit-sharing plan which is the subject of the Decision constituted a “gift”. The Union (by the underlying Charge), the General Counsel (through the issuance of the Second Consolidated Complaint), and now the Judge (in his Decision) seek to unilaterally divine that what was irrefutably proven a gift as of 11:59 P.M. on the eve of

the Union's Certification, was transformed into a "term and condition of employment" as of midnight on May 6, 2019, the date of the Union's Certification.

The record before the Judge is barren of any direct evidence that the Profit-Sharing Plan which is the subject of the Judge's Decision was anything other than a "gift" when the Union's Certification was issued on May 6, 2019, and – in light of that fact - there is no Board precedent which requires that Cascades begin to treat the distribution of the profits in June of 2019 as a "term and condition of employment" purely as a consequence of the Union's Certification. As a related matter, Board law also precludes an employer from granting "new" benefits to employees without first negotiating with a newly-certified labor organization. According to this authority, if it is assumed that the record establishes (as it does) that as of the Union's Certification, the profit-sharing plan was a "gift" and not a "term and condition of employment", then it would have been unlawful for Cascades to unilaterally commence affording the employees the benefits of the profit-sharing plan as a "term and condition of employment" as the Judge now suggests it must. Moreover, § 8(d) of the Act provides that Cascades' bargaining obligation arising from the Union's Certification cannot ". . . compel [Cascades] to agree to a proposal or require the making of a concession . . ." in negotiating with the Union. Contrary to this requirement, the remedy sought by the Union and the General Counsel, and recommended by the Judge in his Decision, would do precisely what the statute proscribes. In other words, the Board lacks the statutory authority to require Cascades to accept the proposal submitted by the Union as a part of its Initial Proposals on September 18, 2019, to include the profit-sharing plan as a "term and condition of employment" in an initial collective bargaining agreement.

IV. Neither the Record Nor Precedent Support the Judge's Finding that the Alleged Alterations to the Profit-Sharing Plan Violated § 8(a)(3) of the Act

The Judge next erred by finding that the alleged alterations to the profit-sharing plan, which he found were made by the Respondent, were made in violation of § 8(a)(3) of the Act. Decision 28. As a preliminary matter, if it were not for the Judge's erroneous findings that a change was made to the profit-sharing plan, his failure to draw a distinction between the Respondent and Cascades, Inc., and his finding that the Respondent was responsible for the change, were erroneous, he never would have had a basis for even considering the General Counsel's allegations that the change violated § 8(a)(3) of the Act.³⁶ Setting aside this fundamental error solely for the sake of argument, the Judge's analysis pursuant to § 8(a)(3) of the Act was flawed from start to finish. First, the Judge erred by finding that the General Counsel had "clearly met" his burden under Wright Line, 251 NLRB 1083 (1980), to show that the Respondent harbored animus against the Union, and that the change in question had an adverse effect on employees. Decision 27. The Judge's finding of animosity rests almost solely upon the Judge's findings concerning the statements allegedly made by Pozzobon and Guillemette – which, as explained above, were themselves erroneous. See Decision 27. The only other factor that the Judge cites in support of his finding that the General Counsel met its burden to establish animus is the timing of the payments to employees, roughly two months after the Union was certified. Decision 27. However, the Board has held that timing alone cannot support the General Counsel's burden under Wright

³⁶ In this regard, the Judge's erroneous findings taint his analysis of the nexus between the Respondent's alleged animosity and the alleged change to the profit-sharing plan. Namely, even if the record *did* support a finding of animosity toward the Union on the part of the Respondent, the record does not establish a connection between that animosity and Cascades, Inc. – the entity which the evidentiary record proves retained control over the profit-sharing plan, and the amounts of the payments received by the Respondent's employees, and which was not named or represented by counsel in the proceedings before the Judge.

Line. See Ronin Shipbuilding, Inc., 330 NLRB 464 (2000) (Judge's finding of animus relied too heavily upon timing and was therefore overturned by the Board). This is particularly so where the evidence demonstrates that the timing was coincidental, inasmuch as the Judge found that employees had received a profit-sharing payment at roughly the same time of the year for over twenty years. Decision 6. Finally, the General Counsel's case did not prove, as is required by Board precedent, an adverse effect on employees, as some employees received historically high payments in June of 2019. See J. Ex. 3. Accordingly, contrary to the Judge's conclusion, the record established that the General Counsel did not meet its burden under Wright Line to prove animus, and its adverse effect on employees.

Because the General Counsel did not meet its burden, the burden should never have shifted to the Respondent. However, even assuming *arguendo* that the Judge properly shifted the burden to the Respondent pursuant to Wright Line, the Judge erred by finding that any alleged changes to the profit-sharing plan that existed were not motivated by anti-Union animus. Decision 28. Here too, the Judge's prior incorrect findings return to haunt his later analysis. Specifically, the Judge's erroneous finding that the Respondent controlled the profit-sharing plan and payments to employees is a necessary underpinning to the Judge's finding that the Respondent was motivated by anti-Union animus. In reality, as proven by an objective review of the evidentiary record, it was Cascades, Inc., rather than the Respondent, who controlled the profit-sharing plan and payments to employees. There is absolutely no evidence to support the assertion that, if Cascades, Inc. had been proven to have made any changes to the profit-sharing plan, those changes were motivated by anti-Union animus. By logical extension, and by the Judge's own admission (See Decision 18), the record establishes that Cascades, Inc. would have made decisions about the profit-sharing plan regardless of the existence of the Union at the Respondent's Niagara Falls mill.

Thus, the Judge's analysis under the "second step" of Wright Line must also be rejected, and his resulting finding of a violation of the Act should be vacated.

V. Neither the Record Nor Precedent Support the Judge's Finding that the Refusal to Provide Information to the Union Violated §§ 8(a)(5) and (1) of the Act

Because the Decision failed so thoroughly to prove that the profit-sharing plan was a mandatory subject of bargaining, or a subject over which the Respondent possessed any control, the Judge's finding that the Respondent violated the Act by failing to respond to the Union's request for information regarding the profit-sharing plan and profit-sharing plan payments must also fail. The Judge's argument rests entirely upon his earlier finding that the profit-sharing plan was a term and condition of employment (Decision 31), which – as explained above – is proven demonstrably false by the evidentiary record. Furthermore, the Decision neglected to address, in any way whatsoever, the Respondent's arguments that the Union's requests were not relevant, because the Union was able to proceed in bargaining and make a proposal regarding the profit-sharing plan without the requested information. See (Tr. 82, 428); G.C. Ex. 3; R. Ex. 8. Accordingly, the record proves conclusively that the Union's request for information was not relevant, and therefore, the Respondent was not obligated to respond.

VI. Neither the Record Nor Precedent Support the Judge's Finding that the Decision to Stop Posting Facility Profits Violated § 8(a)(3) of the Act

Similarly unsupported is the Judge's holding that the Respondent violated § 8(a)(3) of the Act by ceasing to post the facility's profits at the facility.³⁷ Decision 28. The Judge's conclusion

³⁷ The Second Consolidated Complaint actually alleges that the Respondent ceased sharing "profit sharing information" with employees -which, as the record shows, is distinguishable from information about the facility's profits. G.C. Ex. 1(s). The Judge incorrectly rejected the Respondent's argument that the General Counsel had not proven the Second Consolidated Complaint allegations as written, on the grounds that the Respondent had notice of the General Counsel's "actual" contention. Decision 30, FN 29. Even if the Respondent had notice of the

is based upon multiple unsupported factual and legal findings³⁸, in combination with the Judge's inexplicable rejection of the un rebutted testimony offered by Laporte. See Decision 10-11 (Discrediting Laporte and holding him to an unforgiving standard with regard to instances of confusion he expressed during his testimony.) First, the Judge erroneously found that the Respondent, rather than Cascades, Inc., made the determination that the facility would stop posting profits. Decision 10. Contrary to the Judge's Decision, the decision to post profits was not made by the Respondent, nor was it "abrupt", as claimed by the Judge. Decision 3. Rather, the record clearly demonstrates that Cascades, Inc. made the decision to stop posting profits³⁹ only after a malicious flyer about Laporte was circulated by the Union at the facility; and that the company's decision was announced to employees in an explanatory memorandum before it went into effect.⁴⁰ (Tr. 352-353); R. Ex. 5. Furthermore, contrary to the Judge's claims, the

General Counsel's contentions, it remains the case that the General Counsel's allegation in the Second Consolidated Complaint remained unproven, and thus should have been dismissed.

³⁸ The Decision claims that the Respondent additionally ceased sharing profit information in other forms. Decision 28. This finding is unsupported by the record. Though employees testified that, when profits were being posted, they could also receive profit information orally from supervisors, none of the employees testified that this practice also ceased when the Respondent stopped posting facility profits in Marlowe's office. See (Tr. 134, 135, 138, 154).

³⁹ The Judge's alternate theory, that Cascades, Inc. only instructed the Respondent to cease sharing profit information at the behest of the Respondent itself (Decision 10), requires the Board to adopt a "cat's paw" theory of liability that the Board has never previously endorsed.

⁴⁰ In the Decision, the Judge claims that Laporte testified that the memorandum constituted the instruction that Laporte received from the corporate office to cease sharing profit information with employees. Decision 10. This finding appears to be the result of a miscommunication between the Judge and Laporte, whose first language is French. To the contrary, Laporte testified that he advised management of the Respondent's parent company, including Luc Pelletier, David Guillemette and Karen Jobin, of the flyer, and shared his concerns about the flyer with them. (Tr. 352) In response, they instructed the Laporte to discontinue the practice of sharing confidential information at the facility. (Tr. 352-354)

memorandum clearly establishes that the decision to cease sharing profit information was connected to the flyer about Laporte, rather than the Union election.⁴¹

Second, even assuming *arguendo* that the Respondent was responsible for the decision to cease sharing profit information, as explained above, the Judge erred by finding that the General Counsel met its burden to establish animus on the part of the Respondent. Decision 28. Furthermore, the Judge incorrectly concluded that the memorandum sent to employees established a nexus between the Respondent's alleged animus and the decision to cease sharing profit information. Decision 28. A review of the memorandum in question establishes that it does no such thing. First, the Judge found in his Decision that the author of the memorandum was unclear (Decision 10), and thus the Judge cannot base his finding on the premise that the Respondent wrote the flyer, or that the Respondent connected the decision to cease sharing profit information with the Union election by way of the flyer. However, even if the Judge had found that the Respondent authored the memorandum, the document itself speaks to respecting the outcome of the election, and explicitly ties the decision not to share profit information to the *Union's* personal attack on Laporte.⁴² R. Ex. 5. Thus, not only does the memorandum distributed to employees not support the Judge's finding of animus, but in fact actively contradicts it.

⁴¹ The Judge's claim that the change came "within days" of the Union's election victory (Decision 28) is additionally unsupported by the record, as Butski testified that the change took place in February (before the election); Reed testified that the change took place in May, but did not specify whether the change took place before or after the election; and Cracknell testified only that the change took place at some point after the election. (Tr. 174, 218, 136)

⁴² For the same reason - namely, because the logic in ceasing to share profits was tied directly to the Union's personal attack on Laporte rather than animus against employees supporting the Union - Laporte's alleged comment to Cracknell does not support the Judge's finding of animus. Decision 28.

Because the General Counsel did not meet its burden under Wright Line, the burden should have never been shifted to the Respondent, for the Respondent to prove that it would have stopped sharing profit information regardless of employees' support for the Union. In any event, however, the record establishes that employees' support or non-support of the Union had absolutely nothing to do with the decision that was reached to stop posting profit information. Instead, contrary to the Decision (Decision 28), the record establishes that the decision had *everything* to do with the uncalled for, false, and deeply personal attack levied against Laporte by the Union⁴³ Time and again, the Judge diminishes the content of the Union's flyer, claiming it merely "expressed skepticism" about Laporte's resume, and utilized only publicly available information to "highlight" Laporte's lifestyle. Decision 9, FN 29; Decision 29, FN 28. As the Judge well knew from Laporte's testimony, the flyer was significantly more damaging and threatening to Laporte. Specifically, the flyer implied that Laporte had falsified his resume; and disclosed his personal address, information about his personal finances, and the name of his wife. (Tr. 345, 349-351); R. Ex. 6. In fact, Laporte became so sincerely emotional during his testimony about the flyer and its effect on him, that the Judge had to adjourn the Hearing for several minutes to allow Laporte to regain his composure. (Tr. 346-347) Accordingly, the record does not support the Judge's

⁴³ The Judge claims that the record does not support a finding that the Union created the flyer, as alleged by the Respondent, and that the Respondent's assertion that it did suggests animus. Decision 9; Decision 29, FN 27; Decision 30. The Judge's finding is laughably naïve and unsupported by the record. Reed's testimony acknowledged that when Laporte told him about the flyer, Reed had heard about the flyer, and understood the flyer to have come from the Union. (Tr. 235) Furthermore, despite ample opportunity to do so, the Union never denied responsibility for the flyer, including at bargaining, when confronted directly about the flyer by the Respondent (who, contrary to the Judge's finding (Decision 29), did make efforts to engage with the Union about its defamatory flyer). (Tr. 429-430, 467-468) Indeed, the factual circumstances of the Union's ongoing organizing campaign, standing alone, would support inference that the Union, or an agent of the Union, created the flyer in support of the campaign. For all these reasons, the Judge's finding must fail.

attempts to make light of the Union's flyer, and instead illustrated that the Union, with whom the Respondent and Cascades, Inc. now had a relationship, could not be trusted.

Finally, the Judge erred by repeatedly applying the standards for employee speech to an alleged change which the record clearly proves was not made on the basis of any employees' protected, concerted activity. See Decision 29; Decision 29, FN 28. Contrary to the Judge's implication, the Respondent never asserted that the flyer was made or distributed by an employee, but has always asserted that the flyer was created and distributed by the Union. The standards for employee speech explored by the Judge's Decision are thus not applicable. Furthermore, the Judge ignored relevant Board precedent holding that employer actions taken in response to union flyers do not violate the Act. See Mid-State, Inc., 331 NLRB 1372, 1383 (2000). Accordingly, for this and all the foregoing reasons, it is clear that the Respondent did not violate § 8(a)(3) of the Act, and the Judge's finding must thus be reversed.

VII. Neither the Record Nor Precedent Support the Judge's Finding that the Layoffs Violated §§ 8(a)(5) and (1) of the Act

The Judge next erred by finding that the Respondent violated the Act by failing to provide notice and an opportunity to bargain to the Union before conducting temporary layoffs in May 2019. Decision 23. The Judge incorrectly found that the Respondent presented the Union with a *fait accompli*; or alternatively, that the Respondent's notice to the Union was insufficient; and wrongly rejected the Respondent's assertion that the Union had waived its right to bargain over the temporary layoffs by failing to respond to the Respondent in a timely manner. Decision 4, 21, 22 (FN 23). Because the Judge's findings are unsupported by the evidentiary record or legal precedent, they must be rejected by the Board.

The Decision first claims that the Respondent either presented the Union with a *fait accompli* or alternatively, that the Respondent's notice to the Union concerning the temporary

layoffs was insufficiently detailed. Decision 21, 22. The Judge’s two theories are mutually exclusive – and neither is supported by the evidentiary record. First, the Judge claims that the layoffs constituted a *fait accompli*, because the Judge claimed that Zilbauer had testified that the Respondent had already decided to conduct the layoff when it notified the Union. Decision 4, 21, 23. To the contrary, Zilbauer testified only that the Respondent was in the process of *planning* a layoff when it contacted the Union. Tr. 452-453.

Next, the Judge claims that, even if the layoff was not a *fait accompli*, the Respondent’s notice was insufficiently detailed to provide the Union notice of the layoff. Decision 22. The Judge’s holdings are illogical, in that the findings are mutually exclusive – at once the Judge claims the details of the decision were made too soon, and that the decision was not made with sufficient detail by the point in time that the Union was notified. Furthermore, the alleged “insufficiency” of the Respondent’s notice only further supports Zilbauer’s testimony that the Respondent was only in the early stages of planning the layoff when it contacted the Union, rather than the Judge’s contention that the layoffs were a *fait accompli* at that point in time. Finally, the Judge’s conclusion that the Respondent’s notice to the Union was insufficiently detailed and untimely⁴⁴ are not supported by the record or the precedents that he cites. The record demonstrates that the Respondent’s notice provided the Union with ample time to respond electronically, and moreover, that it was the Union who chose to wait and respond to the Respondent by regular mail. Furthermore, the record illustrates that the notice provided sufficient detail concerning when the layoff would occur to “get the ball rolling”, allowing the parties to meet and bargain the details

⁴⁴ The Judge’s peculiar assertion that the Respondent was obligated to provide the Union with more notice than is required in a typical case because the Union was newly certified (Decision 22) is unsupported by any precedent whatsoever.

⁴⁵, and the Union to request any more specific information it deemed necessary to bargain. ⁴⁶ Thus, it is clear that the Judge's factual findings concerning the layoffs must be reversed.

Finally, the Judge wrongly rejected the Respondent's assertion that the Union waived its right to bargain over the layoffs when it did not respond to the Respondent's letter in a timely fashion, and failed to make itself available until well after the planned layoffs were tentatively scheduled to be conducted. ⁴⁷ Decision 22, FN 23. The Judge's rejection of the Hospital's argument is based primarily upon his prior findings that the Respondent's layoffs were either a *fait accompli*, or that the Respondent's notice was untimely. *Id.* For the reasons stated above, both of these findings must be rejected, and thus, the Judge's finding that the Union had not waived its right to bargain, which rests entirely upon those findings, must also fall. For all these reasons, therefore, the Respondent respectfully asserts that the Judge's finding that the Respondent violated the Act in connection with the May 2019 layoffs must be reversed.

⁴⁵ The Judge's reliance upon the fact that none of the Respondent's witnesses testified that the Respondent would have been willing to bargain with the Union (Decision 21, 23) is specious. None of the Respondent's witnesses were asked this question, and the very fact that the Respondent sent a notice to the Union concerning the layoffs illustrates that the Respondent intended to engage the Union on the layoffs.

⁴⁶ These facts distinguish the case from those cited by the Judge, in some of which the employers began taking steps to implement the changes before notice was even given, and in others, the notice was considered insufficiently detailed, because there were substantive details that had been decided upon that the employer withheld from the union. See Comau, Inc., 364 NLRB No. 48, slip op. at 3 (2016) (Employer began effectuating change the same day it sent notice.); Washington Post Co., 237 NLRB 1493, 1498 (1978) (Employer withheld details of a program it desired to implement that had been decided upon.)

⁴⁷ Contrary to the Judge's Decision, the Respondent does not assert or attempt to argue that the Union's response to the Respondent was deficient because the Respondent was not aware of Warner or his role with the Union. Decision 5, FN 5.

VIII. Neither the Record Nor Precedent Support the Judge's Finding that the Subcontracting of Janitorial Work Violated §§ 8(a)(5) and (1) of the Act

Finally, the Judge erred by finding that the Respondent's decision to use an independent contractor to clean the mill after Jackson retired, without first providing the Union notice and an opportunity to bargain, violated the Act. Decision 25. The Judge's conclusion is based upon his having misconstrued the factual record, and rejected the longstanding Board precedent cited by the Respondent. First, the Judge misconstrued the underlying evidentiary record, by failing to recognize the historical interchange between the independent contractors, who the Respondent historically utilized to clean the facility alongside Jackson, and Jackson himself. The Judge distinguished the work performed by the independent contractors from that performed by Jackson by relying upon record evidence that Jackson typically cleaned the production area⁴⁸, and the independent contractors typically cleaned the administrative offices. Decision 3, 18. In so doing, however, the Judge ignored evidence that, historically, the independent contractors routinely cleaned the production area of the mill in Jackson's absence. See (Tr. 369-372, 409-410); G.C. Ex. 14. This evidence illustrated that the Respondent had historically used independent contractors to clean throughout the facility,⁴⁹ and thus that the Respondent's use of an independent

⁴⁸ Which the Judge described as "massive" (Decision 18), despite the fact that Jackson cleaned it by himself.

⁴⁹ The Judge also incorrectly found that the Respondent's use of independent contractors after Jackson's retirement constituted a "substantial expansion" of the Respondent's use of independent contractors. (Decision 24) This finding is unsupported by the record, which illustrates that only one person was required to complete the custodial work previously performed by Jackson.

contractor after Jackson's retirement did not constitute a "change" concerning which the Respondent was obligated to bargain, as asserted by the Judge (Decision 23, 24).⁵⁰

Furthermore, even if the Respondent's use of an independent contractor had constituted a change, the Board precedent ignored by the Judge (See Decision 24) illustrates that it was not a change concerning which the Respondent was obligated to bargain. See First Nat. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (An employer has no obligation to bargain over "a change in the scope and direction of the enterprise".) In response to the Respondent's arguments pursuant to First National Maintenance, the Judge asserted that the Respondent continued to run the same business after Jackson's retirement, and that the performance of custodial services did not go to the "heart" of the Respondent's business. Decision 24. The Judge's analysis is equally unsupported by the factual record and Board precedent. Though the change involved only one position, it represented a fundamental change in the services rendered by the Respondent's work force, and thus a change in the scope and direction of the Employer's enterprise. By opting not to fill the Janitor position, the Employer was shutting down the entire line of janitorial services which it had previously deployed. Furthermore, First National Maintenance does not support the Judge's conclusion that factors such as allocation of capital, or how "central" a service line was to an employer's business control the analysis, as the Judge has allowed in the instant case, and the Judge cites no applicable precedent for his reliance upon such factors. See Decision 24.

Finally, the Judge erred by rejecting the Respondent's arguments concerning the Union's refusal to bargain with the Respondent regarding the custodial work previously performed by Jackson. Decision 25. In circumstances where a party has made clear that they have made up

⁵⁰ The record also illustrates that the Respondent had a past practice of declining to fill every vacancy (Tr. 342, 408-409, 414), which, contrary to the Judge's findings (Decision 23-24), equally rendered the Respondent's decision not to fill Jackson's position consistent with its past practice.

their mind concerning a subject, that they have no intention of engaging in meaningful bargaining, and that bargaining will be futile since the party's position constitutes a *fait accompli*, that party's position is "inconsistent with the duty to bargain". Brannan Sand & Gravel Co., 314 NLRB 282 (1994); Ciba-Geigy Pharmaceuticals, 264 NLRB 1013 (1982)⁵¹. Contrary to the Judge's finding (Decision 19), both the evidence and Warner's testimony made clear that the Union would never accept any resolution other than the Respondent filling Jackson's position, regardless of whether the Respondent restored the status quo ante. See G.C. Exs. 10, 11, 12, 13, 14; (Tr. 101, 103). The Judge's fixation upon the question of restoration of the status quo ante (See Decision 25) is thus misplaced – given the record, it was clear that, regardless of whether the Respondent restored the status quo ante, the Union would never agree to bargain in good faith. Under such circumstances, it cannot be held that the Respondent was obligated to restore the status quo ante in order to bargain with the Union, when the Union made clear it would not engage in good faith. It is therefore additionally clear, for all of these reasons that the Respondent's decision to use an independent contractor to perform custodial work at the facility did not violate the Act.

CONCLUSION

For all the reasons set forth above, the Respondent respectfully requests that the Board reverse the Judge's Decision, and dismiss the underlying Second Consolidated Complaint in its entirety.

⁵¹ Despite the Respondent citing both these cases to the Judge, the Judge incorrectly found that the Respondent's position did not cite any precedent. Decision 25.

Respectfully Submitted,

Don T. Carmody

Don T. Carmody

Carmen M. DiRienzo

Kaitlin A. Kaseta

Counsel for the Respondent

4 Honey Hollow Court

Katonah, New York 10536

dcarmody@carmodyandcarmody.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADES CONTAINERBOARD	:	Case No. 03-CA-242367
PACKAGING - NIAGARA, A DIVISION OF	:	03-CA-243854
CASCADES HOLDING US, INC.	:	03-CA-248951
	:	
<i>and</i>	:	
	:	
INTERNATIONAL ASSOCIATION OF	:	
MACHINISTS AND AEROSPACE WORKERS	:	
DISTRICT LODGE 65, AFL-CIO	:	

CERTIFICATE OF SERVICE

The Undersigned, Don T. Carmody, Esq., being an attorney duly admitted to the practice of law, do hereby certify, pursuant to 28 U.S.C. § 1746, that I e-filed, on May 4, 2020, on behalf of Cascades Containerboard Packaging – Niagara, a Division of Cascades Holding US, Inc. (Respondent”), the original of “Respondent’s Exceptions to Decision of Administrative Law Judge Paul Bogas” (“Respondent’s Exceptions”), together with the original of “Respondent’s Brief in Support of Respondent’s Exceptions to Decision of Administrative Law Judge Paul Bogas” (Respondent’s Brief in Support of Exceptions”) *via* the National Labor Relations Board website, www.nlr.gov, with the following:

Hon. Roxanne L. Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570

As an attorney duly admitted to the practice of law, I do hereby further certify, pursuant to 28 U.S.C. § 1746, that I e-filed a copy of the Respondent’s Exceptions and Respondent’s Brief in Support of Exceptions with the following *via* the National Labor Relations Board’s website, www.nlr.gov, on May 4, 2020:

Hon. Paul J. Murphy, Regional Director,
Acting for the General Counsel
National Labor Relations Board, Region 3
130 South Elmwood Avenue
Suite 630
Buffalo, New York 14202-2465

As an attorney duly admitted to the practice of law, I do hereby further certify, pursuant to 28 U.S.C. § 1746, that I e-mailed a copy of the Respondent's Exceptions and Respondent's Brief in Support of Exceptions to the following on May 4, 2020:

Nicholas A. Scotto, Special Representative
26 Court Street
Suite 1710
Brooklyn, New York 11242
nscotto@iamaw.org

Dated: May 4, 2020
Katonah, NY

Respectfully Submitted,

Don T. Carmody

Don T. Carmody
Carmen M. DiRienzo
Kaitlin A. Kaseta
Counsel for the Respondent
4 Honey Hollow Court
Katonah, New York 10536
dcarmody@carmodyandcarmody.com