

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

ST. LOUIS CARDINALS, LLC

and

Case 14-CA-213219

JOE BELL, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

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Counsel for the General Counsel (General Counsel), pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, files the following answering brief opposing St. Louis Cardinals, LLC's (Respondent) exceptions.

I. Statement of the Case

This case was heard before Administrative Law Arthur J. Amchan (ALJ) on August 21-22, 2018. The ALJ issued a Decision and Order on October 17, 2018, finding that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The ALJ concluded that Respondent retaliated against James Maxwell by discharging or failing to recall him to work, failing to recall Eugene Kramer and Joe Bell, and not recalling Thomas Maxwell in a timely manner (jointly, the discriminatees). The ALJ further found that Director of Facility Operations Hosei Maruyama violated Section 8(a)(1) by telling Thomas Maxwell that actions have consequences and implying that Maxwell and others were receiving adverse employment actions due to protected union activity. On November 14, 2018, Respondent filed exceptions to the ALJ's Decision and Order.

On January 3, 2020, the National Labor Relations Board (Board) issued a decision. In its decision, the Board affirmed the ALJ's findings with regard to Joe Bell, dismissed the allegations with respect to Thomas Maxwell, and remanded to the judge the allegations with respect to James Maxwell and Eugene Kramer so that the ALJ could properly analyze whether the Respondent met its *Wright Line* defense with respect to James Maxwell and Kramer. The parties submitted supplemental briefs to the ALJ in May 2020 and, on May 15, 2020, the ALJ issued a Decision on Remand in which he found that Respondent violated Sections 8(a)(3) and (1) in discharging or

failing to recall James Maxwell to work in 2018 and (2) in failing to recall Eugene Kramer in 2018. On June 12, 2020, Respondent filed exceptions to the ALJ's Decision on Remand.¹

II. Statement of Facts

The ALJ's findings of fact are supported by evidence in the record and are free from error. Accordingly, Counsel for General Counsel will not restate the facts here.

III. The ALJ Properly Used *Wright Line* to support his findings with regard to James Maxwell and Eugene Kramer.

The Respondent has argued that the ALJ erroneously contradicted and subverted the Board's decision in his *Decision on Remand*; however, this argument is not supported by the facts or the ALJ's *Decision on Remand*. As explained above, the Board remanded the instant case to the ALJ so he could further analyze whether the Respondent carried its *Wright Line* defense with regard to James Maxwell and Eugene Kramer. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The parties filed supplemental briefs on this narrow issue and the ALJ issued his decision on this issue based upon *Wright Line*. On page 7 of his decision, the ALJ writes,

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation*

¹ On April 8, 2020, the ALJ issued an *Order* rejecting a settlement between Respondent and General Counsel regarding Eugene Kramer. On April 16, 2020, Respondent filed a *Motion for Reconsideration of Order Rejecting Settlement and Request to Postpone Supplemental Briefing Deadline*. Counsel for General Counsel opposed Respondent's *Motion for Reconsideration* and agreed to abide by the ALJ's decision. On April 16, 2020, the ALJ denied Respondent's *Motion for Reconsideration*. In its exceptions, Respondent has included arguments excepting to the ALJ's refusal to approve the settlement between the Respondent and General Counsel pertaining to Eugene Kramer. Counsel for General Counsel believes the ALJ properly issued his *Order* and agrees that the proper forum to determine whether Kramer's backpay is tolled is an evidentiary hearing during the compliance stage of these proceedings.

Management Corp., 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

The ALJ then properly applied the *Wright Line* standard, and subsequent cases applying *Wright Line*, to the facts on the record and determined that the Respondent failed to meet its *Wright Line* burden and failed to establish a plausible affirmative defense. Any argument that the ALJ failed to follow the current law is contradicted by the plain writing of the ALJ in his decision.

IV. The record supports the ALJ's credibility determinations and finding of facts regarding Respondent's discharge or failure to recall James Maxwell and failure to recall Eugene Kramer.

Respondent contends the ALJ erred by finding the Respondent's *Wright Line* rebuttal insufficient. Despite Respondent's arguments, the ALJ correctly found that Respondent's reasons for discharging or failing to recall James Maxwell and failing to recall Eugene Kramer were pretext.

The analytical framework found in *Wright Line* is appropriate in mixed motive cases such as this one. *Wright Line*, 251 NLRB 1083 (1980). The General Counsel has the initial burden to prove that the employees' protected activities were a substantial motivating factor in the employer's decision to take the adverse employment action. Once the General Counsel makes that showing, the burden then shifts to the employer to show that it would have taken the same action absent the protected activity. See *T&J Trucking Co.*, 316 NLRB 771, 771 (1995); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

The Board has affirmed the finding from the original ALJ Decision that James Maxwell and Kramer were engaged in protected activity when they filed internal union charges against foreman Barrett. Additionally, the Board affirmed the finding that the General Counsel sustained the initial burden of showing that the discriminatees' protected activities were a motivating factor in Barrett's decision not to employ them. The only remaining question is whether Respondent

carried its *Wright Line* defense burden with regard to James Maxwell and Kramer. Respondent's affirmative *Wright Line* defense rests entirely on foreman Patrick Barrett's assertion that he primarily based his employment decision for Kramer and James Maxwell on his assessment of their work quality and on their history of workplace misconduct.

Respondent cannot carry its burden of showing that it would have taken the same action absent the discriminatees' protected activities for several reasons. First, Director of Stadium Operations Hosei Maruyama's own words lay bare the fact that Respondent's supposed reasons for not employing the discriminatees is just a *post hoc* justification. Second, the evidence clearly establishes that Respondent intended to retain the discriminatees and never intended to rely on Barrett's impression of the discriminatees' work quality in making employment decisions. Third, Barrett's own testimony about why he terminated the discriminatees is full of holes and is not credible. Finally, Respondent's position after the termination that the discriminatees were eligible for rehire establishes that Respondent did not have a good-faith basis for its actions.

A. The ALJ correctly found that Hosei Maruyama's comments supported a finding that Respondent's reasons for failing to recall or discharging James Maxwell and failing to recall Eugene Kramer were pretextual.

The ALJ correctly did not credit Barrett's testimony that Respondent would have taken the same action against James Maxwell and Kramer absent protected activity because Barrett's testimony is directly contradicted by Haruyama's own words. In January 2018, two of the painters called Hosei Maruyama on separate occasions to talk about their jobs. Maruyama told each painter that actions have consequences; which is a clear reference to the discriminatees' protected activities. If Respondent based its hiring decision only on the discriminatees' work histories, Maruyama would not have linked the adverse employment actions to the protected activity and only the protected activity. Maruyama's contemporaneous statements about Respondent's

motives establish that Barrett should not be credited in his testimony that he had legitimate, non-discriminatory reasons for not hiring Kramer and James Maxwell. The ALJ's findings are correct.

B. The ALJ correctly found that Barrett did not intend to remake the painting crew until Kramer and James Maxwell engaged in protected activity.

The ALJ correctly found that Respondent did not give Barrett the authority to select painters until after he knew that the discriminatees filed internal union charges against Barrett. Respondent's *Wright Line* defense rests on the claim that Barrett was originally vested with the authority to make hiring decisions. Barrett's assessments of Kramer and James Maxwell would only establish a defense if Respondent planned from the start to give Barrett full hiring authority to create his own crew based only on his subjective opinions. However, if Barrett was not originally vested with such authority but only demanded hiring authority after the internal union charges, that would render his testimony about taking the same actions absent that activity non-credible.

The evidence clearly establishes that Respondent originally planned to employ the discriminatees in 2018, before they engaged in protected activity. This can be inferred from Respondent's established practice of retaining the same employees or it can be definitively established by the "Intent to Return" letters it gave to Kramer and James Maxwell in November 2017. If Respondent intended to bring in a new crew, it would not have gone through the effort and expense of completing background checks for Kramer and James Maxwell. If Barrett truly had authority from the beginning to hire an entirely new crew, he would not have told James Maxwell in December that he would have a job with Respondent as long as he wanted.

It is reasonable to conclude that Respondent's hiring plans changed only because Barrett decided he could no longer work with Kramer and James Maxwell after they filed successful union charges against him. If Respondent was not going to give Barrett hiring authority from the start, then there is no basis on conclude that it would have taken the same action absent the protected

activity. Barrett demanded the authority only because of the charges against him. He would not have done this absent the protected activity. This, in turn, discredits his testimony about taking the same action absent that activity. The clear and abrupt change in Respondent's hiring plans is powerful evidence that Barrett did not testify credibly about his reasons for not recalling Kramer and James Maxwell.

C. The ALJ correctly found that Barrett's shifting explanations for failing to recall James Maxwell and Kramer were pretextual.

The ALJ was correct when he found that Barrett's testimony about his claimed reasons for not employing Kramer and James Maxwell was not credible. The ALJ pointed out that uncontradicted testimony is usually credited; however, the ALJ further explained that he was under no obligation to credit Barrett's uncontradicted testimony when other circumstances indicate that it is unreliable. *See, Aero, Inc.*, 237 NLRB 455, fn. 1 (1978); *Operative Plasterers' & Cement Masons International Association, Local 394 (Burnham Bros., Inc.)* 207 NLRB 147 (1973). Barrett's testimony is replete with contradictions, omissions, and inaccuracies; the ALJ was correct when he found that Barrett was an unreliable witness and not credible.

Barrett said that he did not recall Kramer due to his marijuana use and because of his poor quality of work. Barrett then provided three different reasons for ending James Maxwell's employment: (1) that he witnessed James Maxwell use marijuana six years earlier; and (2) that James Maxwell was a poor performer, and (3) that he could not trust James Maxwell because Maxwell initially said that he could not work with Barrett.

Barrett's testimony about all of these purported reasons was not credible and the ALJ's findings are correct.

1. Marijuana use

Barrett testified that he provided a Board affidavit in which he explained under oath why he did not want to employ Kramer and James Maxwell. In this affidavit, Barrett did not mention marijuana use as a factor in his decision about Kramer and James Maxwell's employment. (Tr. 381). If Barrett was testifying truthfully about his reasons for not employing the two painters, it follows he would have mentioned it in his earlier affidavit when he discussed why he did not want to employ Kramer and James Maxwell. Respondent also failed to raise marijuana in defending Kramer and James Maxwell's termination grievance. (Resp. Exh. 9; Resp. Exh. 10). If marijuana use really factored into Barrett's decision making at the time, it likely would have been prominently mentioned during either the grievance proceeding and/or Barrett's affidavit to a Board agent.

Nor are the facts surrounding Barrett's testimony about marijuana use credible. Barrett testified that he saw James Maxwell and Kramer smoke marijuana in a car while working for Respondent in 2012 or 2013. (Tr. 323-327). Setting aside how Barrett could visually identify marijuana use in a car, Kramer did not work for Respondent in 2012 or 2013. Barrett testified that he started in 2014, so Barrett could not have seen him smoking marijuana when he said he did. (Tr. 149). This inconsistency raises serious questions about Barrett's credibility, which the ALJ correctly pointed out.

2. Work quality

As for Barrett's claim that he refused to employ Kramer and James Maxwell because of their work quality, the only example he could give of either's actual work performance was Kramer's performance for a different employer in 2012. Despite working alongside Kramer and James Maxwell for years, Barrett did not provide any examples of any work performed at the

stadium that was not up to Respondent's standards. At most, Barrett did not like how James Maxwell went about his work, testifying that he saw James Maxwell painting while seated and one time found him sleeping at work. Barrett admitted that he did not look at James Maxwell's personnel file to see if there were any medical reasons that would explain why he would be allowed to paint while seated. (Tr. 357-58). Barrett had no examples of Kramer or James Maxwell failing to finish an assignment on time or performing subpar work. Barrett's generalized conclusion about "poor work quality" reeks of an excuse fabricated after the fact.

Further, Barrett's testimony about his subjective assessment of Kramer and James Maxwell's abilities is extremely self-serving. Barrett himself told James Maxwell in December 2017 that he would have a job with Respondent. Whatever problems Barrett may have had with James Maxwell's "work ethic," he was considered a sufficiently productive employee to be invited to interview for the foreman position just weeks earlier. It is incongruous for Respondent to interview James Maxwell for a promotion in November and then terminate him a month and a half later for a poor work ethic. At a minimum, this establishes that Respondent considered James Maxwell to be a valuable employee and not a poor performer as Barrett claimed. This in turn raises serious questions about whether Barrett testified truthfully about his real motivations for not hiring Kramer and James Maxwell.

Barrett's assertions about the quality of Kramer's work also do not withstand scrutiny. Barrett said that there were "two different things" that caused him to conclude that Barrett's work was subpar. (Tr. 327). The first was a job Kramer has performed for another employer in 2012 and the second was Kramer's performance at the stadium. (Tr. 326). Kramer testified that his work at Busch Stadium received only praise. None of Kramer's work at the stadium had ever needed to be redone. Even though Barrett and Kramer worked together at Busch Stadium since 2014, Barrett

provided no specific examples of problems with Kramer's work there. The only problem with Kramer's work that Barrett could recall occurred in 2012 and happened for an entirely different employer. Even Barrett's memory of this alleged 2012 event is questionable. Barrett claimed he personally repainted an area that Kramer had painted poorly. (Tr. 296). However, Robert Shamel claimed that he and his brother repainted the area. (Tr. 251). Barrett could not point to any evidence that Kramer's work for Respondent was anything other than excellent. Therefore, it can only be pretext to end Kramer's employment with Respondent because of one bad job from six years earlier for a different employer.

If Barrett had legitimate examples of Kramer or James Maxwell performing poorly in the years working for Respondent, he would have presented them. His failure to do so supports the ALJ's determination that Barrett's explanation is not credible.

3. James Maxwell's statement

The final purported justification Barrett gave for not hiring James Maxwell was Maxwell's statement that he could not work with Barrett. This reason is pretext. Barrett did not mention James Maxwell's statement when Barrett provided his affidavit with the Board agent to explain why he did not hire Maxwell. Barrett testified that he told the Board agent that "factors such as [the discriminatees] work performance" were determinative in deciding who to hire. (Tr. 396). There is no reasonable way to construe James Maxwell's statement about not wanting to work with Barrett as an issue of work performance. Barrett's failure to mention this statement during the underlying investigation shows that it did not factor in Barrett's decision-making process at the time. Further, one intemperate outburst is certainly not a sufficient cause to end the employment of a 30-year employee. Thus, the ALJ was correct when he did not credit Barrett's

testimony that he would have terminated James Maxwell absent the protected activity because of this lone outburst.

D. The ALJ correctly found that Respondent's statement at a grievance proceeding that the painters were eligible for rehire discredits Barrett's testimony.

In February 2018, Respondent's representative told a grievance panel that the discriminatees were eligible for rehire. (Resp. Exh. 10 ("Employer representative, Matt Gifford, said the grievance are eligible for rehire at this point.")). If Respondent would have taken the same adverse action absent the protected activity, Respondent's grievance representative would not have said that Kramer and James Maxwell could be rehired. Employees let go due to performance issues or drug abuse are not held out as eligible for rehire. Respondent's statement that the discriminatees were eligible for rehire supports the ALJ's decision to discredit Barrett's testimony about why he failed to recall or discharged James Maxwell and failed to recall Kramer.

V. Conclusion

For the forgoing reasons, the General Counsel respectfully submits that the Judge's factual findings are supported by the weight of the evidence and that credible evidence and relevant precedent support the Judge's conclusions that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act when it unlawfully discharged or failed to recall James Maxwell and when it failed to recall Eugene Kramer. Accordingly, Counsel for the General Counsel respectfully requests the Board to affirm the administrative law judge's findings, conclusions, and recommended Order.

Dated: June 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the *Counsel for The General Counsel's Answering Brief to Respondent's Exceptions* was served by **electronic mail** upon the following persons on this 26th day of June, 2020.

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