

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

THE BOEING COMPANY

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, AFL-CIO

Cases: 10-CA-204795  
10-CA-226718  
10-CA-227191  
10-CA-229378  
10-CA-229979  
10-CA-231035  
10-CA-231815  
10-CA-231853  
10-CA-231888  
10-CA-232626  
10-CA-233509  
10-CA-234519  
10-CA-245435

**RESPONDENT THE BOEING COMPANY’S REPLY MEMORANDUM IN SUPPORT  
OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respondent The Boeing Company (“Boeing”), pursuant to §102.24(c) of the Rules and Regulations of the National Labor Relations Board (“Board”), submits this *Reply Memorandum in Support of its Motion for Partial Summary Judgment* on four untimely allegations (“the untimely allegations”) in the Consolidated Complaint.<sup>1</sup>

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<sup>1</sup> Boeing filed the instant Motion for Partial Summary Judgment on August 3, 2020. Counsel for the General Counsel filed an Opposition on August 10, 2020. As noted by the Counsel for the General Counsel in its Opposition, the hearing in this matter is currently scheduled to open on September 1, 2020, exclusively via videoconference over the Respondent’s objection. That issue is the subject of Respondent’s Request for Special Permission to Appeal, filed on August 10, 2020; and, which the General Counsel has not opposed.

## I. INTRODUCTION

In its Opposition to Respondent’s Motion for Partial Summary Judgment, Counsel for the General Counsel (“General Counsel”) concedes both the legal standards set forth in Respondent’s motion papers and the dispositive facts. Notably, the generic opposition papers fail to identify a single piece of potentially admissible evidence to dispute the dispositive facts set forth in Respondent’s motion -- *many of which are predicated on the agency’s own paperwork*. Indeed, the General Counsel grounds its entire opposition on the notion that because it might base its case on some unknown “facts not yet established,” “likely in dispute,” that it is somehow excused from its undisputed disregard of Section 10(b). GC Oppo. at 5.<sup>2</sup> Because the General Counsel has not identified a single material *fact* in dispute, the Board should grant summary judgment on the four untimely allegations.

## II. THE GENERAL COUNSEL FAILS TO IDENTIFY A GENUINE DISPUTED ISSUE OF FACT REGARDING WHETHER THE UNTIMELY ALLEGATIONS WERE CONTAINED IN TIMELY FILED CHARGES.

The General Counsel asserts casually in a footnote that the untimely allegations “were, in fact...covered by timely filed charges,” before expressly declining to brief the issue. GC Oppo. at 1, fn. 1. That bald assertion cannot be taken seriously. As established entirely by documents maintained and/or issued *by the Region and the General Counsel themselves*, it is undisputed that:

- the Complaint allegation that John Volmert told employees the Employer would enforce work rules more strictly if employees voted for the Union in about May 2018 was not set forth in a charge **until July 24, 2019 -- over 13 months later**;
- the Complaint allegation that Clarence “CJ” Smith told employees that the Employer would replace them with contractors if they voted for the Union on about May 30, 2018 was not set forth in a charge **until July 24, 2019 -- over 13 months later**;

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<sup>2</sup> References to the Counsel for General Counsel’s Opposition to Respondent’s Motion for Partial Summary Judgment shall be cited herein as “GC Oppo. at \_.”

- the Complaint allegation that Josh Epling threatened employees that they would be disciplined for complaining about a supervisor's actions in about October 2018 was not set forth in a charge until July 24, 2019 -- over eight (8) months later; and
- the Complaint allegation that the Employer issued a verbal warning to employee Cody Bunch in March 2018 was not set forth in a charge until January 2, 2019 -- over nine (9) months later.

These un rebutted facts are set forth in the Consolidated Complaint (paragraphs 20-22, 30); the *Charge, NLRB Case No. 10-CA-227191* (Bolt Decl. Exh. A); *October 11, 2018 letter from Region* (Bolt Decl. Exh. B); *First Amended Charge, NLRB Case No. 10-CA-227191* (Bolt Decl. Exh. C); *February 25, 2019 Letter from Region* (Bolt Decl. Exh. D); *Second Amended Charge, NLRB Case No. 10-CA-227191* (Bolt Decl. Exh. E); *Charge, NLRB Case No. 10-CA-231035* (Bolt Decl. Exh. F); *First Amended Charge, NLRB Case No. 10-CA-231035* (Bolt Decl. Exh. G); and, *January 25, 2019 Letter from Region* (Bolt Decl. Exh. H).

The General Counsel makes no effort to rebut the facts laid out on the face of *the agency's own documents*, instead simply suggesting they are somehow disputed or untrue. There is no genuine disputed issue of fact as to whether these allegations were included in timely filed charges, and accordingly summary judgment is appropriate.

**III. THE GENERAL COUNSEL FAILS TO IDENTIFY A GENUINE, DISPUTED ISSUE OF FACT REGARDING WHETHER THE UNTIMELY ALLEGATIONS WERE “CLOSELY RELATED” TO TIMELY FILED CHARGES UNDER THE CONCEDED APPROPRIATE LEGAL STANDARD.**

Again, in footnote 1 of its Opposition papers, the General Counsel concedes that *Carney Hospital*, 350 NLRB 627 (2007) and *Redd-I*, 290 NLRB 1115 (1998) govern the outcome of Respondent's summary judgment motion. GC Oppo. at 1, fn. 1. But once again, the General Counsel expressly declines to brief the issue.

Setting forth the applicable test for determining whether otherwise untimely allegations might be considered sufficiently “closely related” to timely allegations permitting their inclusion in litigation, the Board explained in *Redd-I*:

In applying the traditional “closely related” test in this case, we will look at the following factors. First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

290 NLRB at 1118.

The first two prongs are mandatory -- “the allegations must...” -- and only the third is permissive -- “[w]e may look at....” *Id.*

- A. There is no genuine, disputed issue of fact as to whether the untimely allegations are closely related to the allegations set forth in the timely filed charges because, on their face, they involve different legal theories.**

In the instant matter, it is undisputed that the untimely allegations fail the first prong of the *Redd-I* standard. Three of the four untimely allegations on their face are of a different class, and involve different legal theories, than the timely allegations set forth in their respective charges. *See* Respondent’s Motion at 10, and cases cited therein. The isolated untimely alleged threats in violation of 8(a)(1), do not involve “the same section of the Act” as the timely alleged 8(a)(3) disciplinary reprisals against union activity set forth in their respective charges. *Redd-I*, 290 NLRB

at 1118. Once again, all the undisputed facts necessary to decide this issue are set forth on the face of the agency's own documents. *See, supra*, II, at 2-3.

In light of these circumstances, after conceding the legal standard applies, the General Counsel notably declines to address the first prong of the *Redd-I* test -- ***at all***. Insofar as there is no genuine, disputed issue of fact that the untimely allegations *are not* of the same class as the timely allegations, the General Counsel cannot meet the *Redd-I* standard and the Board should grant summary judgment on the untimely allegations.

**B. There is no genuine, disputed issue of fact as to whether the untimely allegations are closely related to the allegations set forth in the timely filed charges because they arise from the same factual situation or sequence of events.**

The Board need not proceed past the General Counsel's failure on the first prong of the *Redd-I* test, as set forth above, but the opposition papers are no stronger on the second prong. For the reasons set forth in detail in Respondent's motion papers, the untimely allegations are not factually related to the timely allegations in the respective charges. Specifically, the untimely alleged threats are by different supervisors, were directed to different employees,<sup>3</sup> pertain to issues unrelated to the timely alleged disciplines and took place at significantly different times than the timely allegations. These facts are nearly all laid out on the face of the agency's own documents. *See, supra*, II at 2-3. And so once again, instead of identifying *a single material fact in dispute* on this issue, the General Counsel submits a generic, conclusory response.

In that response, the General Counsel misreads *Carney Hospital* and *Redd-I* to the extent it suggests that either case precludes summary judgment. Interestingly, the General Counsel spends

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<sup>3</sup> The exception is the one untimely allegation regarding employee Cody Bunch's alleged March 2018 verbal warning, which obviously does involve the same employee as his July 2018 verbal warning. Yet, these verbal warnings, months apart -- one months before the election, one months after -- were issued by different supervisors involving different types of misconduct. *Compare N. Wolfe 4/18/18 email exchange with C. Bunch*, (Kelly Decl. Exh. A), *with K. McDonald 7/20/18 e-mail exchange with C. Bunch*, (Kelly Decl. Exh. B).

most of his time trying to explain that it *could* meet the various standards in the cases it concedes are applicable -- without identifying a single actual disputed fact that might support that claim.<sup>4</sup> *Carney Hospital* and *Redd-I* set forth a clear standard for determining if untimely asserted allegations are closely related to timely allegations. When, as here, the non-movant has failed to identify any genuine disputed issues of fact, summary dismissal of the untimely allegations is entirely appropriate.

**IV. WHILE THE BOARD SHOULD GRANT SUMMARY JUDGMENT UNDER EXISTING LAW, AS SET FORTH ABOVE, THE BOARD SHOULD CLARIFY THE OBLIGATION OF A NON-MOVANT TO IDENTIFY MATERIAL FACTS THAT ARE GENUINELY IN DISPUTE TO DEFEAT SUMMARY JUDGMENT UNDER SECTION 102.24(B).**

The opposition papers filed by the General Counsel here reflect the “inappropriate” approach repeatedly chastised by former Member Miscimarra: “to presume that the Board will deny motions for summary judgment... merely because the General Counsel disagrees with the respondent’s version of events.” *See Trinity Technology Group, Inc.*, 364 NLRB No. 133, slip op. 1-2 (Member Miscimarra, concurring) (2016); *see also L’Hoist North America*, 362 NLRB 958, 958 (Member Miscimarra, concurring) (2015). Section 102.24(b) of the Board’s Rules and Regulations states:

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<sup>4</sup> The General Counsel suggests that *Carney Hospital*’s citation of *Well-Bred Loaf, Inc.*, 303 NLRB 1016 (1991) stands for the proposition that it can satisfy the second prong of the *Redd-I* test by establishing that the untimely allegations and timely allegations are “part of an overall employer plan to undermine ... union activity.” GC Oppo. at 4, *quoting Carney Hosp.*, 350 NLRB at 630. But the General Counsel fails to cite a single material, disputed *fact* that would suggest *Well-Bred Loaf* applies to the instant matter. Moreover, *Well-Bred Loaf* is entirely distinguishable from the undisputed facts herein: the untimely allegations and timely allegations all involved the same legal theory -- 8(a)(1) and (3); the untimely allegations all took place between the earliest timely alleged discipline and the latest timely alleged discipline -- a period of approximately two months; and, at least one supervisor was involved in both the untimely and timely allegations. 303 NLRB 1016 (1991). In the instant case, by contrast, according to the Region’s and the General Counsel’s own allegations: three of the four untimely allegations involve different theories -- discrete, isolated 8(a)(1) threats, as opposed to 8(a)(3) retaliatory discharge; three of the four untimely allegations took place before the May 31, 2018 election; and all of the timely allegations took place months after the election; and, all of the untimely allegations involved different supervisors than the timely allegations. *See, supra*, II at 2-3.

The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist. If the opposing party files no opposition or response, the Board may treat the motion as conceded, and default judgment, summary judgment, or dismissal, if appropriate, will be entered.

29 C.F.R. §102.24(b). The General Counsel has submitted a vague, generic response, without specifically identifying a single material fact in dispute. While it is true that Section 102.24(b) does not require that an opposition be “supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing,” GC Oppo. at 3, *quoting* Leukemia and Lymphoma Society, 363 NLRB No. 124, slip op. at 1, fn. 1 (2016), the General Counsel must be required to do *something* to identify there is a material fact in dispute if Sec. 102.24(b) is to mean anything. *See Leukemia and Lymphoma Society*, 363 NLRB No. 124, slip op. at 2 (Miscimarra, dissenting) (2016).

Former Chairman Miscimarra criticized the approach taken by the General Counsel here in a well-reasoned series of opinions which the Board should expressly adopt here to prevent abuse of the relevant standard. *See, e.g., L’Hoist North America*, 362 NLRB 958, 958 (Miscimarra, concurring) (2015); *see also Leukemia and Lymphoma Society*, 363 NLRB No. 124, slip op. at 2 (Miscimarra, dissenting) (2016); *Trinity Technology Group, Inc.*, 364 NLRB No. 133 (Miscimarra, concurring) (2016); *Flight Services & Systems, Inc.*, 2017 WL 5476775 (NLRB), slip op. at 1, fn. 2 (not reported in Board volumes) (November 13, 2017). In this line of opinions, Member Miscimarra labeled the General Counsel’s submission of general, conclusory opposition papers, to be “deficient,” and warned that the approach would waste the Board’s time<sup>5</sup> and resources:

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<sup>5</sup> “The Board’s Rules provide for summary judgment to permit a decision without a hearing in appropriate cases, which also makes it possible to more quickly resolve cases where a hearing is necessary. Therefore, summary judgment should be ‘properly regarded not as a disfavored procedural shortcut,’ but ‘as an integral part’ of a process

It is the Board's job to decide whether a pending motion for summary judgment has merit, and it requires *more* of the Board's time, not less, to assess the merits of a respondent's summary judgment motion when the General Counsel contents himself with conclusory assertions that summary judgment should be denied and refuses to make any reasonable effort to identify what genuine disputes as to material facts, if any, warrant a hearing.

*L' Hoist*, 362 NLRB at 958-59 (emphasis in original). Moreover, as if foreshadowing the General Counsel's opposition papers in this case, Member Miscimarra noted:

When opposing a motion for summary judgment, I believe it does not "suffice" to promise that "evidence to be adduced at trial" will "demonstrate" that the complaint's allegations have merit.

*Id.* at 959. Member Miscimarra criticized this presumptuous approach:

In short, under our rules, I believe it is inappropriate for the General Counsel or other parties to presume that summary judgment should never be granted, or that a hearing is always necessary merely because one party argues the other party incorrectly maintains there is no dispute as to material facts.

*Trinity Technology Group*, 364 NLRB No. 133, slip op. at 1-2 (Miscimarra, concurring) (2016).

In order to ensure the full application of Section 102.24 of the Board's Rules, Member Miscimarra concluded:

[I]n response to a motion for summary judgment, I believe that the General Counsel at least must explain in reasonably concrete terms why a hearing is required. Under the standard that governs summary judgment determinations, this will normally require the General Counsel to identify material facts that are genuinely in dispute.

*L'Hoist*, 362 NLRB at 960 (Member Miscimarra, concurring); *see also Trinity Technology Group, Inc.*, 364 NLRB No. 133, slip op. at 1-2 (2016) (Member Miscimarra, concurring); *Leukemia & Lymphoma Society*, 363 NLRB No. 124, slip op. at 2 (2016) (Member Miscimarra, dissenting).

The General Counsel has not done so here, failing to meet the standard set forth in Section 102.24.

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designed "to secure the just, speedy and inexpensive determination of every action." *L'Hoist*, 362 NLRB at 960 (Member Miscimarra, concurring), quoting *Celotex Corp. v. Catrett*, 477 U.S. 371, 327 (1986).

Instead the General Counsel has just baldly asserted that Respondent's motion "raises numerous issues of fact" -- without identifying them -- and that there are some unspecified "facts not yet established" that are "likely in dispute." GC Oppo. at 5. If there are any material issues of fact in dispute, it would seem easy enough for the General Counsel *to identify a single one*, let alone to present some piece of evidence that establishes the dispute.<sup>6</sup> Because the General Counsel has chosen not to do so here, the Board should grant summary judgment on the untimely allegations. 29 C.F.R. §102.24(b).

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<sup>6</sup> The Board's summary judgment standard is identical to the summary judgment standard set forth in the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56(a). Under the Federal Rules, to defeat summary judgment, the non-movant must go beyond the pleadings and "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To be sure, the Board rule imposes a lesser burden on non-movants. Compare 29 C.F.R. §102.24(b) and Fed. R. Civ. P. 56(c). But if Section 102.24(b) is to mean anything, it does impose a burden all the same -- one the General Counsel fails to meet here.

**V. CONCLUSION**

Boeing respectfully requests that the Untimely Allegations in Cases 10-CA-227191 and 10-CA-231035 be dismissed.

Respectfully submitted this 17th day of August, 2020.

By:  \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I certify that a copy of **Respondent The Boeing Company's Reply Memorandum in Support of Its Motion For Partial Summary Judgment** was electronically filed with the Executive Secretary and was served via-email on:

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