

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

MORGAN CORP.

and

Case 10-CA-250678

RUSSELL PAUL BANNAN, an Individual

**COUNSEL FOR GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS TO DECISION AND ORDER OF  
ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT THEREOF**

Dated: November 3, 2020

Respectfully submitted,

/s/ Joel R. White  
Joel R. White  
Counsel for General Counsel  
National Labor Relations Board, Subregion 11  
4035 University Parkway, Suite 200  
Winston-Salem, NC 27106-3275  
joel.white@nlrb.gov  
Phone: 336-582-7144  
Fax: 336-631-5210

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## **A. Introduction**

Pursuant to Section 102.46(d) of the Board’s Rules and Regulations, as amended, Counsel for General Counsel hereby submits his Answering Brief to Respondent’s Exceptions to Decision and Order of Administrative Law Judge and Brief in Support Thereof. As Counsel for General Counsel will demonstrate, Respondent’s exceptions are without merit and should be rejected.

## **B. Statement of the Case<sup>1</sup>**

The Complaint and Notice of Hearing, which the Acting Regional Director issued on January 30, 2020, was based upon an unfair labor practice charge that Charging Party Russell Paul Bannan filed in Case 10–CA–250678 on October 28, 2019.<sup>2</sup> Administrative Law Judge Sharon Levinson Steckler presided over the hearing in this case which was held from July 14 to July 15 over videoconference technology.

In her decision on September 25, 2020, the ALJ recommended finding that Respondent violated Section 8(a)(1) of the Act by discharging Bannan for discussing wages with other employees.

The ALJ’s decision should be adopted. Based on her observation of witnesses, credibility determinations, a review of the record evidence, and Board precedent, the ALJ correctly concluded

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<sup>1</sup> In this answering brief, the following citations apply: “ALJD” designates the Administrative Law Judge’s Decision, “R” designates the Respondent’s Brief on Exceptions, “T” designates the transcript from the July 14-15 hearing, “GC Ex.” designates a General Counsel Exhibit from the hearing, and “R. Ex.” designates a Respondent Exhibit from the hearing.

<sup>2</sup> Unless otherwise specified, all dates took place in 2019.

that Bannan engaged in protected concerted activities when he discussed his raise with other employees. Although Respondent argued that it discharged Bannan for reasons unrelated to his raise discussion, including his alleged poor work performance and attendance issues, the ALJ appropriately determined that Respondent's proffered explanation was pretextual. Respondent's exceptions are without merit and do not justify reversing the ALJ's decision.

### **C. Answer to Respondent's Exceptions**

Respondent submitted 23 exceptions to the ALJ's decision. Though Respondent did not organize its brief using its 23 exceptions, Respondent generally broke down its exceptions into 5 different arguments. Below, Counsel for General Counsel addresses Respondent's exceptions<sup>3</sup> in five responses that correspond to Respondent's brief, addressing each Respondent exception in the most logical section.<sup>4</sup>

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<sup>3</sup> Respondent Exception 1 relates to alleged due process issues with conducting the hearing by videoconference. For the reasons articulated by the ALJ in her decision, Deputy Chief Judge Arthur Amchan in his denial of Respondent's motion on June 19, 2020, and the Board in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), Respondent's exception fails. (ALJD 2:4-19)

<sup>4</sup> Respondent Exception 16 relates to the Judge's findings regarding whether Project Manager/Estimator Ben Boland was a Section 2(11) supervisor or 2(13) agent. Respondent claims that the Judge's decision was "flawed and incoherent" regarding Boland since the ALJ's decision states that Boland is an agent, before later stating that he is not an agent. (ALJD 10:12; 10:48) The discrepancy is clearly a typo. Read in context, the ALJ's finding regarding Boland is clear: the ALJ disagreed with Counsel for General Counsel and found that Boland was not a Section 2(11) supervisor or a 2(13) agent under the Act.

**1. The ALJ's Finding That Bannan Engaged in Protected Concerted Activity is Supported by a Preponderance of the Evidence**

(Respondent's exceptions 17, 18, and 19)

At hearing, Bannan credibly testified that between October 14 and 25, he discussed his raise with several employees, including Leon (last name unknown), Danny Locklear, and Jeremy Elsenpeter. (T. 100-105; 145-147) Furthermore, Bannan encouraged his coworkers to seek raises for themselves, telling Leon to "make some noise and that...you should ask management" about obtaining a raise and telling Elsenpeter that "he should ask for a raise." (T. 101, 103-104) Accordingly, the ALJ found that Bannan's discussions with coworkers concerned a protected subject and were concerted in nature. (ALJD 12:11, 13:2)

In finding that Bannan's raise discussions concerned a protected subject, the ALJ correctly applied Board law. The Board generally protects employees' rights to discuss wage information with their coworkers. See *Brookshire Grocery Company*, 294 NLRB 462, 463 (1989). In finding Bannan's discussions protected, the ALJ noted that "[f]ew topics are of such immediate concern to employees as the level of their wages." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978).

Respondent argues that the ALJ erred in finding the subject of pay sufficient in and of itself to rise to protected concerted activity, citing *Alstate Maintenance*. 367 NLRB No. 68 (2019) (R. 6) Respondent misconstrues the ALJ's finding. The ALJ did not find that the subject of pay alone was sufficient to establish protected *concerted* activity, only that wage discussions were a protected *subject* of discussion under Board law. (ALJD 12:48) The ALJ rightfully distinguished the present case from *Alstate Maintenance*, citing that Bannan "was discussing a raise he received from Respondent, not a third party, and that raise was within Respondent's control" unlike the pay issue of tips at issue in *Alstate Maintenance*. See *Alstate Maintenance*, 367 NLRB slip op. at 8-9. The ALJ's analysis is appropriate.

Moreover, the ALJ found that Bannan's discussions also satisfied the second prong under *Meyers*: concert. *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (ALJD 14:16) By encouraging other employees to seek raises for themselves, Bannan "enlist[ed] the support of other employees in a common endeavor" to obtain higher wage rates for Respondent's employees. *Meyers Industries*, 281 NLRB at 887. The ALJ found that Bannan had "encouraged other employees to seek pay raises, which was the common grounds for group action." (ALJD 14:14)

Respondent excepts to the ALJ's findings, claiming that the ALJ erred in her analysis of concert as espoused by *Alstate Maintenance* and *Plastics Composites Corp.*, 210 NLRB 728 (1974). Respondent argues that the ALJ erroneously relied on wage discussions being "inherently concerted," and that the ALJ erred by finding that Bannan's wage discussions with his coworkers sought to initiate, induce, or prepare for group action and were not "brief" and "casual" like the charging party's discussions in *Plastics Composites*. (R. 23) However, the ALJ specifically addressed Respondent's concerns in her decision. Although the ALJ correctly cited Board law in stating that "discussions of wages are inherently concerted" under *Novelis Corp.*, 364 NLRB No. 101 (2016), enf. in. rel. part 888 F.3d 100 (2d Cir. 2018), her analysis did not end there. The ALJ also relied on Bannan and Elsenpeter's hearing testimony to show that Bannan sought to induce further action through his raise discussions. (ALJD 14:13) Specifically, the ALJ cited that Bannan encouraged others to seek a raise and that Elsenpeter, "peeved" about Bannan's raise, followed through on their conversation by approaching Superintendent Kenneth Weston about a raise. (ALJD 14:10-14; T. 101, 147-148) The ALJ correctly stated that Bannan's discussions involved employee protests and a change that affects a group of employees; both scenarios amount to concert under the *Alstate Maintenance* standard. See *Alstate Maintenance*, 367 NLRB slip op. at

8. Moreover, in finding that Bannan’s discussions were concerted, the ALJ specifically rejected Respondent’s arguments that Bannan’s 45-minute conversation with Elsenpeter was brief and casual like that in *Plastics Composites*. (ALJD 14:14, fn. 15) Respondent’s exceptions fail to show that the ALJ misapplied *Alstate Maintenance* and *Plastics Composites* to the relevant evidence.

**2. The ALJ Correctly Found that Respondent’s Proffered Non-Discriminatory Reasons for Discharging Bannan Were Pretextual**

**and**

**3. The ALJ Correctly Applied the Proper Legal Analysis and Found that Respondent Violated the Act by Discharging Bannan**

(Respondent’s exceptions 2-14, 16, 20, and 21)

In finding that Respondent’s proffered non-discriminatory reasons for discharging Bannan were pretextual, the ALJ correctly applied Board law. “The Respondent’s defense burden under *Wright Line* is not to identify legitimate grounds for which it *could* impose discipline, but to persuade that it *would* have disciplined the employee even absent his or her protected activity.” *Wendt Corporation*, 369 NLRB slip op. at 3. “When “the reasons advanced [for a discharge] are not persuasive, the [protected activity] may well disclose the real motive behind the employer’s action.” *Wright Line*, 251 NLRB at 1097; citing *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 699 (8<sup>th</sup> Cir. 1965) Further, as cited by the ALJ in her decision, inconsistent rationales are probative of animus. See *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 2 (2020); citing, e.g., *GATX Logistics, Inc.*, 323 NLRB 328, 335-336 (1997), *enfd.* 160 F.3d 353 (7<sup>th</sup> Cir. 1998)

At hearing, Respondent’s Superintendent Weston admitted that Bannan’s raise discussions were “the final straw that made [him] call Mr. [Vice President Bill] Heape” about Bannan. (T. 185) Heape testified that he conducted Bannan’s discharge meeting based on what Weston told

him about Bannan, including Bannan's raise discussions. (GC Ex. 6; T. 39-40) Moreover, Heape's own decisional documents, including a handwritten document entitled "[e]xplanation for letting Russell go," described what motivated his decision to discharge Bannan: that Bannan "spread the word of the raise and we now have problems on the job site." (GC Ex. 7) Based on these clear, unequivocal admissions by Respondent's own witnesses and supervisors, the ALJ correctly found that Respondent violated the Act by discharging Bannan because of his protected concerted activities. (ALJD 15:10-23)

Unable to dispute its supervisors' testimony and documentary evidence regarding its unlawful motive, Respondent instead excepts to the ALJ's findings by claiming that she "fail[ed] to consider" its proffered reasons. Respondent further contends that the ALJ did not consider evidence that it would have taken the same actions notwithstanding his concerted activities, including evidence regarding Bannan's management aspirations, his probationary work status, his attendance, and work performance. (R. 1-5) Even a cursory reading of the ALJ's decision proves that Respondent's exceptions fail.

Contrary to Respondent's exceptions, the ALJ considered its evidence regarding alleged non-discriminatory reasons for Bannan's discharge. As Respondent admits in its brief, the ALJ's decision cites testimony that Bannan's goal was to be in management position, that he requested a meeting with Heape on October 4 to discuss his management progression, that he was to be re-evaluated in 90 days for management, and that he was hired to learn the business from the bottom up. (ALJD 3:35-4:23; R.1) The ALJ later considered this evidence when discussing Respondent's pretextual arguments, concluding that "at the time of termination, Bannan was a truck driver, not in management...was not a supervisor," and "Respondent never offered Bannan the option to stay as a truck driver but determined an employee who shared pay information was not an asset to the

organization.” (ALJD 17:49-18:2) Respondent cannot claim that the ALJ did not consider its evidence just because the ALJ did not agree that its evidence was persuasive.

Similarly, the ALJ considered Respondent’s contentions regarding how Bannan’s attendance and work performance issues played into its discharge decision. (R. Ex. 1, 2) As Respondent admits in its brief, the ALJ’s decision discusses testimony that Bannan missed several workdays prior to October 15, that Heape was initially unaware of Bannan’s missed workdays, that Weston assessed Bannan as being at the bottom of his drivers in terms of experience and performance, and that Weston and Heape first discussed Bannan’s attendance, work performance, and raise discussions during their October 24 call. (ALJD 3:31-37, 4:44-46; 5:23-26, 6:32-34, 7:3-5; R. 1-2) The ALJ also stated that Bannan had signed for his Employee Conduct and Work Rules handbook, which included rules about attendance and workplace conduct. (ALJD 3:44; R. 1, 2) The ALJ later considered the above evidence when discussing Respondent’s pretextual arguments, concluding that Respondent demonstrated animus toward Bannan’s concerted activities by embellishing how many times Bannan had a no-call no show, by its disparate tolerance of Bannan’s attendance<sup>5</sup> before and shortly after his raise discussions, and through its contradictory views of Bannan’s value to the organization both before and shortly after his raise discussions. (ALJD

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<sup>5</sup> Respondent Exception 7 contends that the ALJ erred by characterizing Bannan’s October 15 write up as progressive discipline “when the uncontradicted evidence is to the contrary.” The ALJ did not err. In arguing its exception, Respondent conveniently ignores the plain language of the October 15 write up itself, which classifies Bannan’s write up as a “first warning,” includes boxes for further progressive discipline should the attendance issues continue, and states that the consequences for any further infraction is “time off without pay.” On its face, the October 15 write up disproves Respondent’s exception, showing that when Weston issued Bannan the write up on October 15, Respondent considered it to be a normal part of its progressive discipline policy. Respondent only considered Bannan’s attendance issues as a fireable offense *after* it found out about his raise discussions with other employees.

17:16-46) Again, Respondent considered Respondent's evidence and arguments, but found them unpersuasive.

Regarding the October 24 meeting between Weston and Heape, the ALJ considered all relevant testimony about what the men discussed. (ALJD 6:32-33) Logically, the ALJ compared that testimony to the documentary evidence on record, including Heape's own notes about the conversation. (ALJD 6:32-33; GC Ex. 6) In doing so, the ALJ found Respondent's proffered reasons for discharge Bannan to be pretextual. (ALJD 17:14) The ALJ also correctly stated that, where Respondent's reasons for discharging an employee are pretextual, the Board need not analyze whether those reasons could have been a legitimate reason for discharge under *Wright Line*. See *Airgas USA*, 366 NLRB No. 104, slip op. at 1, fn. 2 (2018), enfd. 916 F.3d 555 (6<sup>th</sup> Cir. 2019) Here, the ALJ did not err by finding that Respondent's purported reasons for discharging Bannan, including his attendance and work performance, are clearly pretextual and do not mitigate Respondent's unlawful action.

Further, Respondent argues that the ALJ failed to consider all of the reasons listed in Heape's decisional documents as motives for Bannan's discharge<sup>6</sup>, rather than "cherry picking" the reasons that favored her decision. However, the Board has consistently found that a discriminatee's concerted activities need not be the sole motivating factor in an employer's decision to discharge the employee, only that the concerted activities were a motivating factor in the decision. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1<sup>st</sup> Cir. 1981), cert. denied,

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<sup>6</sup> Respondent Exception 14 contends that the ALJ erred by not recognizing that Heape, not Weston, decided to discharge Bannan. Respondent's contention is wrong, since the ALJ repeatedly references Heape's involvement in Bannan's discharge. (ALJD 15:21, 16:24, 17:44) Notwithstanding Weston's involvement, Heape's decisional documents make clear that he was aware of Bannan's raise discussions and that those discussions were a motivating factor in Bannan's discharge. (GC 7)

455 U.S. 989 (1982) Regardless of what other reasons Heape included in his decisional documents, Heape's document entitled "Explanation for letting Russell go" expressly states that part of Heape's motivation for discharging Bannan was that he "[s]pread the word of the raise and we now have problems on the job site." (GC 7, T. 45) The ALJ correctly found that Respondent's own decisional documents contradict its denial of animus toward Bannan's raise discussions. (ALJD 15:22)

Finally, Respondent argues that, by not simply accepting Respondent's proffered reason for discharging Bannan, the ALJ errantly substituted her own judgement for that of Respondent. (R. 32) Specifically, Respondent seems to argue that Heape's denial to Bannan that he was not "being fired because he discussed his hourly rate with others," should control. (R. 4) Respondent's assertion is patently ridiculous.

Respondent is correct that the Board does not second-guess management decisions, thereby substituting its judgment. See, *Sams Club*, 349 NLRB 1007, 1009, fn. 10 (2007)(where the Board refused to find that the employer could have given the discriminatee time to "cool off" instead of issuing her a suspension) However, in this case, the ALJ did not pass judgment regarding Respondent's managerial discretion in applying lawful policies like attendance or work performance rules. Instead, based on the totality of the evidence, the ALJ found that Respondent was unlawfully motivated by Bannan's raise discussions when discharging him. (ALJD 15:17-24, 16:47-50) Further, the ALJ found that Respondent's proffered non-discriminatory reasons were pretextual, negating her need to analyze whether Respondent would have discharged Bannan for legitimate reasons. See *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1205 (2014) (ALJD 17:14) As in this case, when pretext is found, "there is no need to perform the second part of the *Wright Line* analysis. *Airgas USA*, 366 NLRB slip op. at 1, fn. 2.

It would be unjust for the Board to simply take an employer at its word regarding its reason for discharging an employee. Few employers would ever openly admit to a violation. That is why proof of animus and discriminatory motive may be based on direct evidence or inferred from circumstantial evidence. See *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019); *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op at 30 (2019), citing *Robert/Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004) and *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-1429 (11<sup>th</sup> Cir. 1985). Heape had a clear motive for not telling Bannan the truth about why he was being discharged – to avoid an unfair labor practice under the Act. Not only do we have strong circumstantial evidence of animus based on Weston’s testimony, we also have direct evidence. Heape’s decisional documents state specifically that Heape considered Bannan’s raise discussions when discharging Bannan. (GC Ex. 4, 6, 7; T 176-178, 182) The ALJ rightfully found that Respondent’s alleged non-discriminatory reasons were pretextual and correctly applied Board law by finding that Respondent did not satisfy its rebuttal burden under *Wright Line*.

**4. The ALJ’s Credibility Determinations Were Proper and Supported by a Preponderance of the Evidence**

(Respondent’s Exception 15)

In her decision, the ALJ made several credibility findings. The ALJ credited Bannan’s recollection of his October 24 discharge meeting, including that Heape told Bannan that he had a mutiny on his hands. (ALJD 8:40-42) The ALJ discredited Heape’s denial that Bannan’s raise discussions with other employees were a motivating factor in his discharge. (ALJD 8:44-45) The ALJ also partially credited Elsenpeter’s testimony, including crediting his testimony detailing his wage discussions with Bannan where it differed from his prior, Respondent-obtained witness statement. (ALJ 9:3-29) In its brief, Respondent argues that the ALJ erred by crediting Bannan’s

regarding the October 24 discharge meeting, discrediting Heape that he did not discharge Bannan for discussing wages, and discrediting Elsenpeter's written statement while crediting his testimony at hearing. (R. 5)

As to witness credibility, the Board gives an ALJ great deference, choosing only to overrule an ALJ's credibility resolutions where the clear preponderance of all the relevant evidence convinces the Board that the ALJ's resolution was incorrect. See *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), *enfd.* by 188 F.2d 362 (3d Cir. 1951).

The ALJs credibility findings are appropriate under Board law and sufficiently based on the evidence. First, Respondent argues that Bannan's testimony about the October 24 discharge meeting cannot be credited because he could not recall specific details about what he, Heape, and HR Recruiter Jeff Fields discussed about raises during the meeting. (R. 31) Respondent seems to argue that if a witness cannot recall every detail about a conversation, then the witness' testimony about the conversation cannot be credited at all. Respondent's argument is patently incorrect. Even if Bannan could not recall every detail of the conversation, other evidence substantiates Bannan's account. For example, Respondent surreptitiously ignores that Bannan's testimony about the discharge meeting is largely supported by Respondent's own decisional documents. (GC Ex. 4-7) Bannan testified that Heape told him that he "had a mutiny on his hands," after Bannan "had spoken with at least one person about [his] wages." (T. 111) Heape's contemporaneous notes about the discharge meeting mirror this discussion, including that Heape told Bannan that he had received a report that Bannan "told a more tenured operator the specifics of his [Bannan's] hourly rate increase. [And that] [t]his knowledge created unrest with our tenured operator." (GC Ex. 4; T. 43, 199). As cited by her decision, the ALJ did not err by crediting Bannan's testimony but relied on the established and admitted facts and reasonable inferences drawn from the record, including

Weston's testimony and Heape's decisional documents, to credit Bannan's testimony. See *Double D Construction Group*, 339 NLRB 303, 303-305 (2003) (ALJD 2:24, fn. 2)

Regarding the ALJ discrediting Heape's testimony, Respondent again demonstrates a selective memory. Respondent argues that the ALJ should believe Heape's testimony that Bannan's raise discussions played no role in his discharge, all while conveniently ignoring that Respondent's own decisional documents authored by Heape closer in time to the events at issue refute Heape's post hoc testimony. The facts cannot be clearer: in a document entitled "Explanation for letting Russell go," Heape states that Bannan "[s]pread the word of the raise and we now have problems on the job site." (GC 7, T. 45) In contrast, the ALJ would have erred if she had credited Heape's hearing testimony, since such overwhelming documentary evidence proved that Bannan's concerted activities were a motivating factor.

Finally, the ALJ properly credited Elsenpeter's witness testimony at hearing where it differed from his prior statement. Respondent obtained Elsenpeter's written statement on November 12, when he was still employed with Respondent and after it had discharged Bannan. (R Ex. 19) Elsenpeter also testified before the ALJ on July 14, 2020. At hearing, Elsenpeter testified that Bannan told him about his raise and that the two had discussed how it was "messed up that [Bannan] was making more than [he was]." (T. 100-101) Elsenpeter's testimony contradicted his earlier statement that Bannan had never discussed wages with him. (R Ex. 19) The ALJ chose to discredit Elsenpeter's earlier, Respondent-obtained statement because it was taken "while in Respondent's employ and contains inconsistencies." (ALJD 9:28). Such a finding, based on the context of the witness testimony and reasonable inferences, was appropriate. See *Double D Construction Group*, 339 NLRB at 303-305. In addition, the ALJ was entitled to discredit Elsenpeter in some respects and not in others, as "nothing is more common in all kinds of judicial

decisions than to believe some and not all” of a witness’ testimony.” *Daikichi Sushi*, 335 NLRB 622, 623 (2001)

**5. The ALJ Appropriately Ordered Respondent to Reinstate Bannan and Pay Him Back Wages, in Accordance with Board Precedent**

(Respondent Exceptions 22, 23)

Respondent’s argument that Bannan is not entitled to reinstatement and backpay is without merit. Respondent contends that Bannan was discharged because “he could not meet the standards for attendance, adherence to policy and professionalism required of our managers.” (R. 34) Respondent argues that since it discharged Bannan “for cause,” then a make whole remedy is inappropriate. (R. 33)

Respondent’s exceptions regarding the ALJ’s ordered remedy are erroneous. Respondent claims that the Supreme Court in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) and the Board in *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007) and *Taracorp Industries*, 273 NLRB 221 (1984) support its position. However, *Fibreboard* specifically states that “[t]here is no indication, however, that [Section 10(c) of the Act] was designed to curtail the Board’s power in fashioning remedies when the loss of employment stems directly from an unfair labor practice as in the case at hand.” *Fibreboard*, 379 U.S. at 217. Similarly, the *Anheuser-Busch* and *Taracorp* Boards refused to reinstate employees who were discharged for illegal drug possession or insubordination respectively, and not for the underlying unfair labor practices at issue in those cases. See *Anheuser-Busch*, 351 NLRB at 645-646; *Taracorp*, 273 NLRB at 223. *Fibreboard*, *Anheuser-Busch*, and *Taracorp* do not support Respondent’s position.

Here, Respondent’s unfair labor practice was that it discharged Bannan because of his concerted activities. The ALJ found that Respondent violated Section 8(a)(1) of the Act by

discharging Bannan for discussing wages with other employees. (ALJD 18:32) Bannan's discharge was not a naturally discovered byproduct of Respondent's unfair labor practices as in *Anheuser-Busch* or *Taracorp*. Instead, Bannan's loss of employment stemmed directly from the unfair labor practice. Respondent's argument wholly ignores that the ALJ found Respondent's cited failures of Bannan to be entirely pretextual. Moreover, reinstatement and backpay are standard Board policies in cases like this, most notably cited in *Wright Line*, the Board's perennial, standard-bearing protected concerted activities case. *Wright Line*, 251 NLRB at 1098.

#### **D. Conclusion**

The record evidence and extant Board law demonstrate that Respondent violated Section 8(a)(1) of the Act by discharging Bannan because of his concerted activities. Counsel for General Counsel respectfully requests that Respondent's exceptions be rejected as without merit.

Respectfully submitted this 3<sup>rd</sup> day of November 2020.

/s/ Joel R. White  
Joel R. White  
Counsel for General Counsel  
National Labor Relations Board, Subregion 11  
4035 University Parkway Ste 200  
Winston-Salem, NC 27106-3275  
joel.white@nrlb.gov  
Phone: 336-582-7144  
Fax: 336-631-5210

**Certificate of Service**

I hereby certify that copies of the foregoing Counsel for General Counsel's Answering Brief to Respondent's Exceptions to Decision and Order of Administrative Law Judge and Brief in Support Thereof have this date been served by electronic mail and first-class mail upon the following parties:

Bill Heape, Vice President  
Morgan Corp.  
1800 E. Main Street  
Duncan, SC 29334

Russell Paul Bannan  
110 Edgebrook Court  
Spartanburg, SC 29302

Richard J. Morgan, Esq.  
Burr & Foreman, LLP  
PO Box 11390  
Columbia, SC 29211-1390

Jake Erwin, Attorney  
906 N. Church Street  
Greenville, SC 29601

Dated at Winston-Salem, NC, November 3, 2020

/s/ Joel R. White  
Joel R. White  
Counsel for General Counsel  
National Labor Relations Board  
Region 10, Subregion 11  
Republic Square, Suite 200  
4035 University Parkway  
Winston-Salem, North Carolina 27106-2235