

**NATIONAL LABOR RELATIONS BOARD
REGION SEVEN**

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO,**
Respondent Union,

and

SHERI ANOLICK, Charging Party
(Case No. 07-CB-213726)

and

BEVERLY SWANIGAN, Charging Party
(Case No. 07-CB-213747)

and

BRIAN KELLER, Charging Party
(Case No. 07-CB-213749)

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO**

RESPONSIVE POST-HEARING BRIEF

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INTRODUCTION

The General Counsel has failed to carry his burden of proof. His opening brief, however, attempts to obscure this fact through citation to inapposite case law, the assertion of an entirely novel and baseless adverse inference – specifically, that it was the burden of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America’s (“UAW” or the “Union”) to call witnesses to dispute the General Counsel’s unsubstantiated allegations – and finally a retreat to theories of liability not alleged in the Second Amended Complaint (“SAC”). As we show in more detail below, the Administrative Law Judge should reject these efforts and dismiss the case for the reasons set forth in UAW’s opening brief.

I. The Plea Agreements Should Be Excluded as Uncorroborated Hearsay

A. A Violation of the NLRA Cannot Be Established by Uncorroborated Hearsay Alone

As UAW’s opening brief established, the General Counsel put on no admissible evidence in support of his case. Contrary to the entirely inapposite caselaw in his brief, there is no National Labor Relations Board (“Board”) law remotely suggesting that a violation of the National Labor Relations Act (“NLRA” or “the Act”) can be established by uncorroborated hearsay alone. Opening Br. at 5-8; *see also* Mot. in Limine at 2. To the contrary, as Board law establishes, the General Counsel has substantial investigatory powers precisely because he is expected to present affirmative, admissible evidence so that through the adversarial process the Board can determine whether or not the Act has been violated. Because the General Counsel’s case is entirely based upon uncorroborated plea agreements, which are not admissible on any theory advanced by the General Counsel, he cannot meet that burden and the case should be dismissed.

The General Counsel cites only one case for the proposition that it is appropriate to prosecute a case based solely on plea agreements: *Republic Steel Corp.*, 9 NLRB 219, 387-89 (1938). That case, however, actually says exactly the opposite. In *Republic Steel Corp.*, the Board found that the employer had committed multiple violations of the NLRA in suppressing a strike and firing employees. *Id.* at 220-25. In considering whether reinstatement was an appropriate remedy, the Board held that it could take judicial notice of the fact that numerous striking employees had pleaded guilty to violent crimes, noting that the Board was not well equipped to “attempt to determine the merits of allegations of several hundred various crimes.” *Id.* at 388. The Board stressed, however, that this holding depended on the fact that whether strikers had committed crimes was merely a collateral issue going to the appropriate remedy. *Id.* The Board carefully specified that “the reasons for . . . admitting pleas of guilty or convictions” instead of live testimony “*do not apply*” to the determination of whether the employer had committed violations of the NLRA. *Id.* (emphasis added). Determining whether the employer had engaged in unfair labor practices in the first instance “raises direct, not collateral issues, *which it is our proper duty to determine*” through live testimony. *Id.* (emphasis added).

Here, it is the Board’s “proper duty to determine” whether a violation of the Act has been committed, and it cannot do that based on inadmissible, uncorroborated hearsay alone. The Board has long stressed that while hearsay is admissible in some instances, hearsay must have *some* corroboration to have sufficient probative force to render it admissible evidence. *See W.D. Manor Mech. Contractors, Inc.*, 357 NLRB 1526, 1527 (2011) (refusing to find violation of Act where the General Counsel presented only uncorroborated hearsay); *see also Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229-30 (1938) (“Mere uncorroborated hearsay . . . does not constitute substantial evidence.”). Nor, of course, is it relevant that the General Counsel has proffered

several hearsay documents, because multiple pieces of hearsay cannot “be used to corroborate each other.” *Times Herald Printing Co.*, 1992 WL 1465407 (N.L.R.B. Div. of Judges Sept. 3, 1992).

The General Counsel could have and under these circumstances was obligated to call the people who signed the plea agreements as live witnesses in this case. He conceded that the reason he had not done so is that they might well have undermined his case. 9/10/20 Tr. 220:21-221:2 (“[W]e couldn’t consider them to be reliable witnesses that we could count on to call as witnesses. You know, other than having the plea agreements as possibly to use to impeach them, not exactly the kind of witnesses that we really could have relied on to call as a witness for our case in chief.”). Moreover, the General Counsel could have presented documentary evidence to corroborate the plea agreements, but he did not do so. Because he decided not to make even these minimal efforts, he left the factfinder with no information as to whether there is corroborating factual support for the hearsay statements in the plea agreements.

As far as our research discloses, the Board has never allowed proof of a violation based exclusively on uncorroborated written hearsay (let alone hearsay from witnesses that were concededly unreliable). Nor should the Board do so here, as allowing the General Counsel to prove a violation of the Act using only written hearsay statements would completely foreclose the Respondent’s ability to cross-examine the evidence against it, and would raise grave due process concerns. As UAW showed in its Motion in Limine, this is hardly a theoretical or abstract concern. There are serious reasons to question the accuracy of core themes of the plea agreements – to take just one example, there are many reasons to doubt Iacobelli’s repeated statements that he was acting on behalf of his employer FCA rather than in his own financial interest – and UAW simply had no ability to confront these issues. Mot. in Limine at 14-15.

The ALJ should reject the General Counsel's attempt to avoid a meaningful adversarial proceeding by relying only on written hearsay, and should dismiss the SAC.

B. The General Counsel's Specific Arguments for Why the Plea Agreements Are Admissible Fail Utterly

In his brief, which includes his response to UAW's Motion in Limine, the General Counsel offers a scattershot defense of admitting the plea agreements *in toto*, arguing variously that UAW adopted the plea agreements, that the signatories were agents of UAW and so their statements are attributable to UAW, that the agreements are admissible under the residual hearsay exception, that the agreements are admissible under Fed. R. Evid. 803(22), or that the plea agreements are admissible because UAW could have chosen to subpoena and cross-examine the individuals who pled guilty. All of these arguments are unsupported by any relevant caselaw, and none of them excuses the General Counsel's failure to put on a case with admissible evidence.

1. UAW Did Not Adopt the Statements in the Plea Agreements

The General Counsel argues that UAW somehow adopted as true all of the statements in all of the plea agreements by implementing systematic anti-corruption reforms over the last several years. The General Counsel can cite no case that is remotely on point for this bizarre proposition. The cases he cites involve situations where the party has affirmatively represented that a document is true in one instance, then later attempts to claim it is unreliable. *See, e.g., United States v. Kattar*, 840 F.2d 118, 130-31 (1st Cir. 1988). UAW, of course, has never taken the position that the plea agreements as a whole (much less every statement within the plea agreements) are true.

UAW does not (and never has) denied that some misuse of National Training Center ("NTC") funds occurred, regardless of whether the plea agreements describe it correctly; and in

view of the seriousness of such misuse, it was obviously appropriate for UAW to take strong measures to ensure that it could not happen again. But there is a world of difference between acknowledging that some misuse of NTC funds occurred and affirmatively adopting statements in plea agreements about precisely what misconduct occurred, particularly when UAW is in no position to even know whether each statement in the plea agreements is true (indeed, as UAW pointed out in its Motion in Limine, some of the statements in the plea agreements directly contradict each other). *See* Mot. in Limine at 16. Moreover, it would be contrary to sound and longstanding evidentiary principles to allow the General Counsel to use subsequent remedial measures to prove *wrongdoing*, which is in effect what he is trying to do here. *See* Fed. R. Evid. 407 (“When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove . . . culpable conduct”); *VOCA Corp.*, 329 NLRB 591, 596 n.1 (1999) (excluding evidence “from consideration as, in effect, a subsequent remedial measure”). Neither law nor logic support the idea of punishing a party for acting vigorously to prevent future corruption.

2. The Signatories to the Plea Agreements Were Not Agents of UAW When They Signed Those Agreements

The General Counsel also argues that people who signed the plea agreements were agents of UAW, so the statements in the agreements are attributable to UAW. In the first place, this is obviously not true of any of the former Fiat Chrysler Automobile (“FCA”) employees. Moreover, UAW explained in its opening brief (and *infra* at 11-16) that the former UAW officers and employees were not agents of UAW, but rather agents of the NTC, a separate entity, in spending NTC funds. *See* Opening Br. at 9-12.

Most pertinent here, the General Counsel has not shown (and cannot show) that any former UAW officer or employee was acting as an agent of UAW *at the time of making the statements in the plea agreement*, which is the critical moment for purposes of establishing agency. *U.S. Ecology Corp.*, 331 NLRB 223, 229 n. 12 (2000) (in order for employee’s statement to be admissible against employer as nonhearsay, it must be made “during the existence of the [agency] relationship”). Here, there is no record evidence that any of these individuals was still employed by UAW at that time of making the statements in the plea agreement (in actual fact, *none* of the individuals were employed by UAW at the time they entered their pleas). Because it is the General Counsel’s burden to establish the agency relationship, this defect is fatal. *Longshoremen ILWU Local 6 (Sunset Line & Twine)*, 79 NLRB 1487, 1508 (1948).

3. The Plea Agreements Are Not Admissible Under the Residual Exception

The General Counsel also argues that the plea agreements are admissible under the residual hearsay exception. The residual exception requires that “the statement is supported by sufficient guarantees of trustworthiness – after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” Fed. R. Evid. 807. The Rule also requires that the proponent of the evidence give notice *before* the case that he intends to use the evidence. Merely stating these requirements demonstrates the General Counsel’s failure here, as none of them are met.

For all the reasons set forth in UAW’s opening brief and its Motion in Limine, the plea agreements are not inherently trustworthy – in fact, quite the opposite. *See* Opening Br. at 6-7; Mot. in Limine at 5-6. There is no “evidence, if any, corroborating the statement[s]” in the plea agreements because the General Counsel chose not to put on any. Further, the General Counsel

has *not* shown that he could not have obtained better evidence through “reasonable efforts.” The General Counsel could indisputably have subpoenaed the relevant witnesses, all of whom were plainly identified as a result of the Department of Justice investigation – indeed, the General Counsel’s later argument that UAW had an obligation to subpoena the witnesses is premised on his assertion that they were readily available. *See* GC Br. at 31. Similarly, the General Counsel could have attempted to corroborate the plea agreements with other documents, but he did not do so. Finally, the General Counsel did not give notice of his intent to use these agreements before trial, so although UAW expected that he would do so, UAW did not have the certainty called for by Fed. R. Evid. 807. The rule requires actual notice, and is not excused if Respondent is a good guesser.

In sum, the General Counsel’s failure to use basic due diligence in prosecuting this case hardly constitutes the “exceptional circumstances” in which the residual exception is to be used, *see K & K Transportation Corp.*, 254 NLRB 722, 734 (1981), and allowing the General Counsel to prosecute his case entirely through hearsay evidence does not serve the interests of justice or afford Respondent the opportunity to mount a defense that due process requires. *Gruma Corp.*, 350 NLRB 336, 348 (2007).

4. The Plea Agreements Are Not Admissible Under Fed. R. Evid. 803(22)

The General Counsel makes a perfunctory argument that the plea agreements should be admitted under Fed. R. Evid. 803(22), GC Br. at 26-28, but he once again fails to even identify the portions of the plea agreements that should be admitted, much less offer any analysis or argument supporting the admission of particular statements. As shown in UAW’s Motion in Limine, even where Fed. R. Evid. 803(22) applies, it strictly limits the portions of plea agreements that are admissible. In conspiracy cases, for example, the rule is not a license to admit every statement in the agreements, as the General Counsel seems to assume. *See* Mot. in

Limine at 8-11. Given that the General Counsel has not – despite many opportunities – identified any specific portions of the plea agreements that he believes to be admissible under Fed. R. Evid. 803(22), and explained why those portions are admissible, he has not justified the admission of this uncorroborated hearsay evidence.

5. The General Counsel Cannot Rely on Adverse Inferences to Fill Gaps in His Own Case

The General Counsel ends with the incredible argument that an adverse inference should be drawn against *UAW* because *UAW* did not call the signatories to the plea agreements. But it is well established that the General Counsel may not fill key evidentiary gaps (here, evidentiary chasms) in his case through adverse inferences. *Riverdale Nursing Home, Inc.*, 317 NLRB 881, 882 (1995) (where General Counsel had put on little competent evidence of his case, inappropriate to rely on adverse inference to establish a violation); *NLRB v. Louis A. Weiss Mem'l Hosp.*, 172 F.3d 432, 446 (7th Cir. 1999) (reversing Board's decision as unsupported by substantial evidence where part of General Counsel's case rested on adverse inferences, because “[a]n absence of evidence does not cut in favor of the one who bears the burden of proof on an issue [and the] failure of General Counsel to create a factual record in no way supports a finding that General Counsel met its burden of proof.”). Further, a party's failure to call a *former* officer or employee is not an appropriate basis for drawing an adverse inference in any event. *Nat. Life, Inc.*, 366 NLRB No. 53 n.1 (Mar. 30, 2018); *NLRB v. Howell Automatic Mach. Co.*, 454 F.2d 1077, 1083 (6th Cir. 1972) (reversing Board's decision as not supported by substantial evidence where Board's decision rested in part on adverse inference drawn against party for failing to call a former employee).

Indeed, if any inference should be drawn here, it is against the General Counsel. The General Counsel conceded at trial that he did not attempt to obtain live testimony from the

witnesses whose plea agreements he seeks to introduce because of his fear that their testimony would be unreliable – and since the only purpose he would be proffering those witnesses would be to corroborate the statements in their plea agreement, his failure to call them must be premised on a concern that they would contradict the plea agreement statements. *See Queen of the Valley Hosp.*, 316 NLRB 721, 721 n.1 (1995) (“the judge may properly consider the failure to call an identified potentially corroborating witness as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred”).

The General Counsel also makes an even weaker version of this argument, namely, that the hearsay evidence is somehow reliable and admissible because UAW had the opportunity to subpoena and cross-examine the individuals who pled guilty. As usual, the General Counsel cites no on-point caselaw supporting this argument; and his reliance on *Richardson v. Perales*, 402 U.S. 389 (1971), only shows how backwards his theory is. *Richardson* concerned whether a doctor’s report should be admitted in a social security benefits hearing even though it was hearsay. In holding that the report could be admitted, the Supreme Court stressed primarily that there were numerous independent reasons to find the report reliable, and secondarily that the social security claimant – who carried the burden of proof in the case – knew for certain long before the hearings occurred that that report was at issue, and therefore had ample time to subpoena the doctor. *Id.* at 396, 402-05. The Supreme Court also noted that given the unique context of social security hearings, refusing to admit reports from impartial doctors would make hearing costs unacceptably high. *Id.* at 406. None of those factors apply here.

First, and critically, it is the General Counsel’s burden, not UAW’s, to prove that the allegations of the SAC are true. Second, the plea agreements lack the many indicia of reliability

that were crucial to the Supreme Court’s decision in *Richardson*. Third, while UAW suspected the plea agreements would be used, UAW had no way of knowing what the General Counsel’s case would be and whether he would call witnesses until the day of the hearing – NLRB trials are “trial by ambush” – so unlike the *Richardson* claimant, UAW could not evaluate the General Counsel’s case before deciding whether to subpoena these individuals. Fourth, as the Board noted in *Republic Steel*, the Board has the responsibility to *properly* adjudicate claims of a violation of the Act. In short, *Richardson* is about the responsibility of the party with a burden of proof, in a far different procedural context, to address highly reliable evidence. *Richardson* provides no justification for the General Counsel, as the party with the burden of proof here, to *avoid* presenting reliable evidence.

At the end of the day, the General Counsel’s burden was to “establish facts” that showed UAW’s liability, not to make “mere assertions.” *P*I*E Nationwide*, 297 NLRB 454, 455 (1989) (finding hearsay evidence insufficient to carry party’s burden of proof) (internal quotation marks and citation omitted). The General Counsel instead made “mere assertions” without live witnesses that UAW had no meaningful ability to contest. Because of the quality of the evidence the General Counsel chose to present, he has failed to meet his burden, and the case should be dismissed.

II. The General Counsel Has Not Proved the Factual or Legal Violations Alleged in the SAC

Even if the plea agreements were to be admitted in full, the General Counsel has not proven the two core allegations of the Second Amended Complaint – that UAW agents charged personal expenses to the National Training Center (“NTC”), and that NTC funds were used to pay the salaries of individuals who were not assigned to work at the NTC, but rather served on UAW’s national negotiating committee.

As to the first point, the General Counsel argues for the first time that the former UAW officers and employees had “apparent authority” to act on behalf of UAW, but the “apparent authority” caselaw cited has no application in a situation like this. As to the second point, the General Counsel apparently recognizes that the plea agreements do not support the allegations of the SAC, and so he attempts to shift the focus to whether NTC funds were ever improperly used to pay *anyone’s* salary. But it is far too late to amend the SAC for a third time, and in any event, as we show below, the record and the law do not support the General Counsel’s new theory of the case.

A. *The General Counsel Has Not Proved the Factual Allegations in Paragraph 11 of the SAC*

1. The Individuals Who Charged Personal Expenses to Credit Cards Were Not Acting as Agents of UAW

The first key factual allegation is that UAW agents made personal purchases on NTC credit cards. SAC ¶ 11(a). However, as shown in UAW’s opening brief, there are two separate reasons the people in question were not acting as agents of UAW in making lavish personal purchases: first, they were not acting in UAW’s interest, and second, they were acting in their NTC roles rather than their UAW roles. The General Counsel does not rebut either showing.

1. The General Counsel does not even try to explain why it was in UAW’s interest for its officers to make lavish personal purchases that they hid from union leadership, so he has not carried the burden of establishing agency under the traditional test.¹ Seeming to recognize this obstacle, the General Counsel pivots to the argument that these individuals were acting with

¹ Separate from the credit card charges, the General Counsel argues that UAW benefitted from NTC reimbursements of union employees’ salaries. Without regard to whether there was any benefit from such payments, for the reasons explained in UAW’s opening brief at 12-13 and 16-19, the General Counsel has not proved the factual allegations of the SAC regarding these reimbursements, nor has he shown that the reimbursements make out a legal violation.

apparent authority, and thus their actions can be attributed to UAW. But this is a fundamental misapplication of the doctrine of apparent authority.

“Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management.” *Ready Mix, Inc.*, 337 NLRB 1189 (2002) (citation omitted). In other words, if an employee reasonably believes because of the union’s actions that an individual is acting as the union’s agent, it is appropriate to bind the union to the putative agent’s actions. The prototypical case is one in which the union is bound by the actions of its apparent representatives on a picket line, or acting as shop stewards, regardless of the extent of those individuals’ actual authority. *SEIU Local 87 (West Bay Maintenance)*, 291 NLRB 82, 82-83 (1988); *Teamsters Local 705 (K-Mart)*, 347 NLRB 428, 441 (2006). The point of the apparent authority doctrine is to protect “the reasonable expectations of third parties with whom an agent deals.” Restatement (Third) of Agency, § 7.08, cmt. b (2006).

Here, however, the General Counsel cannot explain why anyone – much less the FCA officials who were themselves deeply involved in the alleged bribery scheme – would have reasonably thought that the UAW officials were acting *on behalf of UAW* in using NTC funds to buy designer clothes or to pay off home mortgages. As the General Counsel correctly notes, apparent authority must be established “with respect to the specific conduct at issue,” GC Br. at 14, so the question of what authority the former UAW officials had in other areas is irrelevant. Whatever those officials’ actual job duties, there is simply no reason to think the FCA officers and employees believed UAW officials had authority to accept personal goods paid for by NTC

funds, and there is certainly no evidence supporting any after the fact speculation by the General Counsel. The fact that then UAW-President Bob King was unable to get information about the NTC's spending emphasizes the point. 9/10/20 Tr. 176:11-177:10. The doctrine of apparent authority is intended to protect honest and reasonable reliance, and there was self-evidently no honest and reasonable reliance by FCA officials on the idea that the involved individuals were acting within the scope of their authority as UAW officials in making extravagant personal purchases.

2. The General Counsel does not directly address the argument that the people who charged personal expenses to NTC credit cards were acting on behalf of the NTC, not UAW. He does, however, make an amorphous argument that the NTC is not independent from UAW because (1) UAW and FCA collectively bargain over NTC issues, (2) UAW and FCA appoint the NTC's board members, and (3) UAW has an interest in NTC programs that benefit UAW members. *See* GC Br. at 16-17. The General Counsel never explains exactly what the implications of this argument are or why it helps him establish a violation of the NLRA, but to the extent he is arguing that the NTC's board members were merely creatures of UAW or FCA and could never have been acting in their NTC capacities, the caselaw makes clear that he is wrong.

It is very common to have pension, health, or other trust funds established and maintained by collective bargaining agreements between a union and an employer. Section 302(c) of the Labor Management Relations Act ("LMRA") specifically sets forth the type of trust funds that an employer and a union can maintain cooperatively, including pension funds, health benefit funds, funds for "training programs," and trust funds establishing "area or industrywide labor management committee[s]" focused on improving organizational effectiveness, reducing

problems that inhibit economic development or reduce competitiveness, and expanding and improving the relationships between workers and managers, among other goals. 29 U.S.C. §§ 186(c)(6), (c)(9); 29 U.S.C. §§ 175(a). The union naturally has an interest in the work of any such trust fund, since one goal is to benefit represented employees. *Id.*

The Supreme Court has addressed such LMRA § 302(c) funds repeatedly (typically focusing on pension funds or health benefits funds). As relevant here, the Supreme Court has made clear that employer- or union-appointed trustees for such funds are *not* considered party representatives when they are serving as trustees: “[A]lthough § 302(c)(5)(B) requires an equal balance between trustees appointed by the union and those appointed by the employer, nothing in the language of § 302(c)(5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed.” *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 330 (1981) (holding that employer-appointed trustees of a pension fund were not considered “representatives” of employer for purposes of NLRA § 8(b)(1)(B)).

The Board has correspondingly recognized that employer- or union-appointed trustees of a 302(c) funds are not agents of the union, except where one of three narrow exceptions apply. *Garland-Sherman Masonry*, 305 NLRB 511, 514 (1991) (trustees are not agents of the union except “[w]here provisions of a collective-bargaining agreement remove the discretion to administer the funds solely for the benefit of the employees,” “[w]here the trustees' actions were in fact directed by union officials,” or “[w]here the trustees' acts were undertaken in their capacities as union officials rather than as trustees”). Because the General Counsel has the burden of proving agency, it is the General Counsel’s burden to establish that one of these exceptions applies. *Id.*; see also *Longshoremen ILWU Local 6 (Sunset Line & Twine)*, 79 NLRB

1487, 1508 (1948). And *Amax Coal Co.* makes clear that the General Counsel cannot simply say that NTC board members were UAW agents because UAW collectively bargains over the NTC, appoints some of its board members, and has an interest in its programs – that is true of all the LMRA 302(c) funds addressed in *Amax Coal Co.*, and so the General Counsel’s argument would represent a radical departure from this settled caselaw. Because the General Counsel makes no argument except the one foreclosed by *Amax Coal Co.*, he has not established that the NTC board members were acting as UAW agents.

We note also that the record evidence is in accord with the caselaw in showing that the NTC was an independent entity, and the individuals who misspent NTC funds did so in their NTC capacities. The testimony is that NTC board members, whether appointed by the Union or by FCA, acted on behalf of the NTC with respect to their NTC duties, including spending NTC funds. 9/10/20 Tr. 173:22-176:10. There is no record evidence whatsoever that the Union directed the use or misuse of NTC funds; to the contrary, the Union president was unable to get information on the use of these funds when he sought it. 9/10/20 Tr. 176:11-177:10. The General Counsel has thus not met his burden to establish that the NTC board members were acting as agents of UAW in misusing NTC funds.²

2. The General Counsel Has Not Shown that the NTC Reimbursed the Salaries of Any Individuals Who Did Not Work at the NTC, But Instead Served on the Union’s National Negotiating Committee

² In addition, as set forth in UAW’s opening brief, the NTC’s status as an independent entity permitted under 302(c) means that the NTC funds cannot be considered the equivalent of FCA funds, and that misuse of NTC funds cannot establish an NLRA § 8(b)(1)(A) violation. Rather than directly address this argument, the General Counsel suggests that the degree of control FCA (and UAW) exercised over elements of the NTC, GC Br. at 16-17, renders the legal distinctions between the entities meaningless. Such a result would not only be contrary to the authorities cited, Opening Br. at 17-19, but would swallow the exceptions expressly permitted under LMRA 302(c), see *supra* at 13-15.

The second (and last) factual allegation of the SAC relates to NTC funds paying union officials' salaries. The allegation of the SAC is simple: "Respondent Employer, by its agents, including Iacobelli, Durden and Brown, gave financial inducements to agents of Respondent Union, including Holiefield, King, Mickens, Jewell, and Johnson, by . . . [p]aying the salaries of Respondent Union officials who were not assigned to work at the NTC, but rather served on Respondent Union's National Negotiation Committee." SAC ¶ 11(b). To prove this allegation, the General Counsel must show that NTC funds were used to pay salaries of officials who (1) served on the Union's national negotiating committee and (2) did not work at the NTC (3) during the relevant time period, 2010-2015, set out in SAC ¶¶ 10-11. But – possibly recognizing he cannot do this – the General Counsel implies throughout his brief that he only needs to show that NTC funds were *ever* used to improperly reimburse *any* union official's salary. *See* GC Br. at 31 ("Respondent failed to call any witness to . . . even address any allegations that Respondent's actors, including Holiefield, King, Mickens, Jewell, or Johnson . . . accepted chargebacks to the Respondent for salaries of other persons who were not working for NTC") (emphasis omitted); *see also* GC Br. at 21 ("the payments to Respondent's coffers, including the unlawful chargebacks for Respondent's employees and friends who were not performing work for NTC . . . violated Section 8(b)(1)(A)").

The General Counsel's *sub silentio* attempt to amend the SAC to plead a different and broader allegation should be emphatically rejected. First, of course, the General Counsel has not actually moved to amend his complaint, and for that reason alone he cannot expand his theory of the case to encompass unpled allegations. But even if he had moved to amend his complaint, the caselaw regarding late-stage amendments makes clear how inappropriate and prejudicial it would

be to allow the General Counsel to now pivot to arguing about an unpled allegation, instead of the allegation the parties actually litigated at the hearing.

In *Stagehands Referral Services, LLC*, 347 NLRB 1167, 1171 (2006), the Board rejected the General Counsel's belated attempt to expand the scope of the case halfway through trial, as the General Counsel is implicitly seeking to do here (but at an even later stage of the case). In *Stagehands*, the General Counsel had pled a charge of discrimination involving one discriminatee, then moved mid-trial to add an allegation that the respondent had operated an illegal hiring hall that discriminated against numerous additional people. *Id.* at 1171. The Administrative Law Judge rejected the motion to amend, finding that granting an amendment at that juncture would not be "just." *Id.* The Board explained that in ruling on a motion to amend, the Board evaluates three factors: "(1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated." *Id.* The Board found that none of those factors were met. First, the Board observed, "the complaint names only Foti as a discriminatee, and the Respondents were certainly not given notice that the field of discriminatees might be thrown wide open and the operation of the hiring hall placed in issue." *Id.* Second, "the General Counsel did not move to amend as soon as the [additional evidence] 'came to light,' but only after all of the witnesses had testified and the Respondents had rested." *Id.* at 1172. Citing past cases, the Board held that a delay in moving to amend is particularly problematic after the respondent has rested its case, because "it could not be 'glibly assumed' that respondent's handling of its case would have been unchanged" if it had had proper notice of the General Counsel's new theory of the case. *Id.* (citing *Consol. Printers*, 305 NLRB 1061, 1064 (1992)).

The logic of *Stagehands* applies in full here. UAW had no notice that the question of salary reimbursements “might be thrown wide open” to encompass *anyone* whose salary was ever reimbursed, rather than just those who served on the national negotiating committee. Accordingly, although UAW *did* put on evidence to rebut the actual allegation in the SAC, UAW did not put on exculpatory evidence regarding the broader issue of salary reimbursements, as it certainly would have if the SAC had contained any allegation regarding broader salary reimbursements. *See Desert Aggregates*, 340 NLRB 289, 293 (2003) (denying motion to amend in posthearing brief where issue was not “fully litigated” because the respondent “would have altered the conduct of its case at the hearing, had a specific allegation been made”) (internal quotation marks and citation omitted).

Moreover, the General Counsel can offer absolutely no excuse for his failure to conform the SAC allegations to the case he is now trying to make. This is hardly a situation in which testimony at trial came as a surprise to the General Counsel. He had the plea agreements for years before the trial, and it is immediately evident from reading the plea agreements that even if they are accepted as true, they do not support the allegation that NTC funds were used to pay salaries of individuals who did not work at the NTC, but rather served on the national negotiating committee. *See* Opening Br. at 12-13 & n.3.³ In short, the General Counsel simply neglected to amend the SAC to make the case he is now trying to make, and UAW would be prejudiced in the extreme if the General Counsel were now permitted to prove a violation quite different than the

³ When UAW cites the plea agreements in its briefing, UAW is not taking the position that the statements in the plea agreements are true. UAW is merely arguing that *even if* the statements in the plea agreements are accepted as true, the General Counsel has not made out his case. *Cf. Detroit Newspapers Agency*, 330 NLRB 524, 526 (2000) (on motion to dismiss, the judge takes all allegations as true and determines whether the General Counsel has carried his burden of proof).

one the parties litigated at the hearing. Thus, the General Counsel's attempt to undermine the hearing, and broaden the issues to those that were not actually litigated, should be rejected.⁴

B. The General Counsel Has Not Established the Legal Violations in Paragraphs 15-16 of the SAC

The General Counsel's discussion of why the factual allegations of Paragraph 11 establish the *legal* violations of Paragraphs 15-16 is very limited and largely refuted by the discussion in UAW's opening brief. With respect to the duty of fair representation, we note that in every case cited in the General Counsel's brief, some harm to the employees was established. *Miranda Fuel Co., Inc.*, 140 NLRB 181 (1962) (union caused company to reduce employee's seniority); *Vaca v. Sipes*, 386 U.S. 171, 173 (1967) (employee was fired); *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 70 (1991) (pilots harmed by strike settlement); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 331 (1953) (seniority reduced by collective bargaining agreement); *Mine Workers District 5 (Pennsylvania Mines)*, 317 NLRB 663, 663-64 (1995) (arbitration award money not distributed to employees). In other words, the General Counsel offers no support for

⁴ Although the ALJ need not reach this issue, the record evidence on the question of whether anyone was *ever* improperly charged back to the NTC is insufficient to establish a violation. UAW explained in its opening brief why the statements in the plea agreements regarding chargebacks are uniquely untrustworthy. Opening Br. at 13 n.3. The testimony at trial is no more clear. When counsel for the General Counsel asked a UAW witness whether employees "improperly had their salaries paid although they were not doing work for NTC," the witness said that UAW made reimbursements to the NTC in instances where "we could not verify that work was being performed by some individuals that were charged back, that's correct." 9/10/20 Tr. 194:19-195:5. When asked the same question again, he said that "[w]e identified some problems. We took a very conservative look at that and – but yes." 9/10/20 Tr. 195:9-196:1. This testimony does not establish *when* the putatively improper reimbursements were made, how extensive they were, or whether they were actually improper or were just problematic under a "very conservative standard" where UAW could not verify what work the involved individuals had been doing. What *is* clear from the limited testimony is that UAW repaid the NTC for salary reimbursements when issues were identified. 9/10/20 Tr. 195:1-5. All of these points could have been fully and fairly litigated had UAW had notice about the General Counsel's revised theory of the case, but with the limited record evidence now available, the General Counsel cannot show a violation of the Act.

the idea that a duty of fair representation can exist entirely unconnected to any actual harm to employees. It is a duty of fair “*representation*,” and so some failure in “*representation*” must be demonstrated to make out a violation. No such failure by UAW with regard to any representational activity has been demonstrated.

With respect to the allegation that the Union has engaged in conduct inherently destructive to employee rights, the General Counsel fails to grapple with the fact that whether conduct is “*inherently destructive*” of employee rights is an evidentiary inference used as a substitute for actual evidence of antiunion bias – it is not a cause of action in and of itself. The General Counsel cites only one case in which the phrase “*inherently destructive*” is used in a prosecution of a union, *see Oil Workers Local 4-23 (Gulf Oil Corp.)*, 274 NLRB 475 (1985). Because *Gulf Oil Corp.* represents departure from the Board’s caselaw making clear that judging whether employer conduct is “*inherently destructive*” is a “*mode of analysis*” to determine the employer’s antiunion motivation, *see, e.g., Swift Ind. Corp.*, 289 NLRB 423, 429 (1988), it should be narrowly construed, and the facts of the case show that it is readily distinguishable.

Gulf Oil Corp. dealt with a situation where an employee’s union membership was revoked specifically for participating in a grievance-arbitration process; in other words, he was actually discriminated against for exercising rights related to union representation. *Id.* at 476. Each of the other cases cited by the General Counsel likewise involves concrete, negative effects on employees. *See* GC Br. at 19-21. By contrast, the General Counsel has never shown that anyone was discriminated against or that any part of the collective bargaining process was actually affected by the conduct alleged here. When the General Counsel amended the original complaint and decided to proceed with the SAC, he abandoned the idea of alleging (much less proving) any impact on represented employees. He cannot now use a novel “*inherently*

destructive” theory to go far beyond existing case law to claim no such proof is necessary; the “inherently destructive” precedent he cites cannot be stretched from a rule concerning evidentiary inferences about antiunion animus to a new theory for prosecuting unions.

III. The Charges Must Be Dismissed Because They Were Untimely Served

As explained in UAW’s opening brief, UAW seeks here only a determination that the Charging Parties had actual or constructive knowledge of the basis of their claims on July 26, 2017. However, UAW also addresses briefly the General Counsel’s substantive arguments on timeliness. More specifically, the General Counsel’s argument that the Charging Parties did not have the information to file their charges until January 2018 is incredible, and should be rejected, in light of the fact that the Charging Parties *did* file initial charges well before that time.

In arguing that the charges here were timely, the General Counsel repeats his previous argument that the Charging Parties did not know the *purpose* of the unlawful payments until Iacobelli’s January 2018 plea agreement, and that “the July 2017 indictments merely raised a suspicion of corruption; they did not suggest that any particular unfair labor practices had been committed.” GC Br. at 13. This argument has multiple fatal flaws. First, the General Counsel has dropped the allegation about the purpose of the bribes from the SAC; if indeed he is correct that there is no violation here unless it can be shown that the purpose of the alleged bribes was to influence collective bargaining, he necessarily loses the case and has essentially confessed judgment for UAW. Second, a “suspicion of corruption” is precisely what is required to start the 10(b) clock running. *Safety-Kleen Corp.*, 279 NLRB 1117, 1117 n.1 (1986). Third, the record evidence makes clear that the July 2017 indictments convinced the Charging Parties that an unfair labor practice had occurred. All three Charging Parties testified that they suspected as soon as they learned about the indictments that the purpose of the bribes was to influence

collective bargaining; all three Charging Parties filed charges alleging unfair labor practices on that basis months before Iacobelli's January 2018 plea agreement. *See* Opening Br. at 21-24. It thus defies belief – and is contrary to the known facts – to say that the Charging Parties did not have the information they needed to file unfair labor practices charges until January 2018.

The General Counsel makes the additional argument that the 10(b) clock did not start to run until the Charging Parties knew about the NTC salary reimbursements in addition to the charges to NTC credit cards, but he cites no authority that supports the point. GC Br. at 13. First of all, it bears noting that if the General Counsel were correct that the Charging Parties had no reason to believe the Act was violated until the NTC reimbursement issue became public, then that would mean that the information about the credit card charges alone does not establish a violation of the Act, and the General Counsel cannot prevail on that part of his case. Moreover, a Charging Party need not know every detail of an alleged unfair labor practice in order for the statute of limitations to start running; all that is required is “notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred.” *Amalgamated Transit Union, Local Union No. 1433 (Phoenix Transit Sys.)*, 335 NLRB 1263, 1263 n.2 (2001). In particular, a Charging Party need not know the “specific circumstances of the payoffs” in a suspected bribery scheme to start the statute of limitations clock. *Teamsters, Local 814 (Cirker Moving and Storage)*, 15 NLRB Advice Mem. Rep. 25013 (July 29, 1987). Thus, once the parties knew the basic form of the alleged bribery scheme – if not every manifestation of detail – they had a responsibility to file charges.

The one case cited by the General Counsel, *Morgan's Holiday Markets*, 333 NLRB 837 (2001), completely undermines his argument. As *Morgan's Holiday Markets* explained, in deciding whether later-acquired evidence can toll the 10(b) period, the question is whether the

later-acquired evidence “so significantly alters the total mix of information available that, for the first time, there is reasonable cause to believe that the Act has been violated” once the new evidence is considered. By contrast, if the new evidence “strengthens the case, [but] is simply incremental,” the 10(b) period will not be tolled. *Id.* at 840. Here, the fact that the parties actually filed unfair labor charges before learning about the NTC reimbursement issues makes clear that evidence on that issue is “simply incremental” and does not change the date the 10(b) time period began to run. In short, independent of the many substantive flaws in the General Counsel’s case, the SAC should also be dismissed because the charges were filed too late. For purposes of this proceeding, however, UAW requests only that the ALJ make a finding that the Charging Parties had actual or constructive notice of their claims as of July 26, 2017.

CONCLUSION!

Despite having years to develop his case and the Board’s full subpoena power at his disposal, the General Counsel did not put on admissible evidence allowing him to carry his burden to show that a violation of the Act occurred. Moreover, even the hearsay evidence on which he relies does not support the allegations of the SAC or show that a violation of the Act occurred.

Seeking to escape these failures, the General Counsel says that FCA employees “desperately need . . . assurance of their rights.” GC Br. at 29. But in reality, the General Counsel has not established any need, much less a desperate need, for any “assurance of rights.” Even setting aside the General Counsel’s failures of proof, this prosecution comes two collective bargaining cycles after the alleged misconduct, after extraordinarily widespread publicity about the Department of Justice’s investigation, after UAW’s immediate denunciation of the wrongdoing, after criminal punishment of the implicated wrongdoers, and after what the General

Counsel characterized as UAW's "numerous and extreme reforms" to ensure that the wrongdoing could not be repeated. GC Br. at 25. In light of the General Counsel's failure to prove his case or demonstrate any current need for the remedy he proposes, the Second Amended Complaint must be dismissed.

Respectfully submitted,

/s/ Abigail V. Carter

Abigail Carter

(acarter@bredhoff.com)

Elisabeth Oppenheimer

(eoppenheimer@bredhoff.com)

BREDHOFF & KAISER P.L.L.C.

805 15th Street N.W.

Suite 1000

Washington D.C. 20005

Tel: (202) 842-2600

Counsel to UAW

Dated: November 5, 2020

NATIONAL LABOR RELATIONS BOARD

REGION SEVEN

FCA US LLC, Respondent Employer,
and
SHERI ANOLICK, Charging Party (Case No. 07-CA-213717)
and
BEVERLY SWANIGAN, Charging Party (Case No. 07-CA-213746)
and
BRIAN KELLER, Charging Party (Case No. 07-CA-213748)

-AND-

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO**, Respondent
Union,
and
SHERI ANOLICK, Charging Party (Case No. 07-CB-213726)
and
BEVERLY SWANIGAN, Charging Party (Case No. 07-CB-213747)
and
BRIAN KELLER, Charging Party (Case No. 07-CB-213749)

STATEMENT OF SERVICE

On November 5, 2020, I served copies of UAW's Responsive Post-Hearing Brief via email on the following:

Leigh M. Schultz
Brian M. Schwartz
Miller, Canfield, Paddock and Stone, P.L.C.
277 South Rose Street, Suite 5000
Kalamazoo, MI 49007
schultzl@millercanfield.com
schwartzb@millercanfield.com

Raymond J. Sterling
James C. Baker
Brian J. Farrar
Sterling Attorneys at Law, PC
33 Bloomfield Hills Parkway, Suite 250
Bloomfield Hills, MI 48304
rsterling@sterlingattorneys.com
jbaker@sterlingattorneys.com
bfarrar@sterlingattorneys.com

Julia M. Jordan
Jacob E. Cohen
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.,
Suite 700 Washington, D.C. 20006-5215
jordanjm@sullcrom.com
cohenja@sullcrom.com

Terry Morgan
National Labor Relations Board
Region 7
477 Michigan Avenue
Detroit, MI 48226
terry.morgan@nlrb.gov

Larry A. "Tony" Smith
National Labor Relations Board
McNamara Federal Building
477 Michigan Avenue, Room 05-200
Detroit, MI 48226
Larry.Smith@nlrb.gov

/s/ Mahlet Hiruy
Mahlet Hiruy, Paralegal
Bredhoff & Kaiser, PLLC