
Nos. 20-1616 & 20-1701

In the
United States Court of Appeals
for the **Seventh Circuit**

MONDELÉZ GLOBAL LLC,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN
MILLERS INTERNATIONAL UNION, LOCAL 719, AFL-CIO,

Intervenor-Respondent.

Agency Case Nos. 22-CA-1742725, 22-CA-178370, 22-CA-178591,
22-CA-180206, 22-CA-180213, 22-CA-181423, 22-CA-183609 and 22-CA-179007.
National Labor Relations Board.

REPLY BRIEF OF PETITIONER CROSS-RESPONDENT
MONDELÉZ GLOBAL LLC

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SUMMARY OF REPLY

Mondelēz Global LLC's ("MG") Petition for Review should be granted and the National Labor Relations Board's ("Board") Cross-Application should be denied. With respect to the Board's Section 8(a)(3) findings, the Board and Intervenor, The Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 719, AFL–CIO, Local 719, ("Union") erroneously attempt to convince this Court that MG initiated a study of its excessive overtime costs and terminated five employees for time theft as a ruse to rid itself of three of those employees – Claudio Gutierrez ("Gutierrez"), Bruce Scherer ("Scherer"), and Nafis Vlashi ("Vlashi") (collectively "Discriminatees") – because of their purported union activities. The Board and Union conveniently disregard several critical facts which collapse such conspiracy theories and demonstrate the Board's Order is not derived from substantial evidence:

- Rogelio Melgar Moron ("Melgar"), the Continuous Improvement Manager at the Fair Lawn Bakery initiated and designed the overtime study, and he had no knowledge of the Discriminatees' union positions or purported union activities when he discovered their transgressions. (R. 887) (Melgar testifying the report "wasn't commissioned. It was a series of databases that I put together for my own understanding[.]");¹

¹ The Board's brief states, "Kuratli [] requested that Melgar study overtime." (Board Br. at 11). The Board cited only to DiStefano's testimony, but she did not know how the investigation started as she testified the study was conducted, "I guess, at the request of

- There is no evidence any MG official instructed Melgar to single out the three Discriminatees;
- MG terminated two other individuals, and suspended another, not known to be Union supporters, at the same time for committing similar misconduct;
- Other Union supporters who engaged in similar purported union activities as the Discriminatees were not disciplined.²

Incredibly, the Board and Union gloss over this Court's explicit instruction that the *prima facie* burden under the Board's *Wright Line* framework requires a showing of a causal connection between *union animus* and an ensuing adverse employment action. Here, the record is devoid of evidence establishing the critical causation element.

Rather, all evidence in the record points to the same conclusion – that MG: (1) initiated an investigation into overtime use; (2) generated a report revealing time theft and intent to conceal time theft, and (3) relied on the report in deciding to terminate five employees, three of whom also happened to hold union leadership positions. Moreover, the evidence demonstrates MG would have terminated the Discriminatees regardless of

the plant manager and the HR manager.” (R.1177). However, Melgar explained he did not notify Kuratli about the study until much later in the process. (R.887).

² There are over 30 other shop stewards at the Fair Lawn Facility. (R.615).

their union activities. As discussed below, the Board disregarded evidence that would have undermined its ultimate conclusions.

With respect to the Section 8(a)(5) findings, the Board continues to ignore the purported unilateral changes were not sufficiently material to necessitate bargaining. Additionally, the Board disregarded MG ultimately fulfilled the Union's information requests which were impermissibly interposed to aid discovery in the prosecution of then-pending unfair labor practice charges.

Accordingly, because substantial evidence does not support the Board's findings, MG's Petition for Review should be granted, and the Board's Cross-Application for Enforcement should be denied.

ARGUMENT

I. THE BOARD'S SECTION 8(a)(3) FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND LACK REASONABLE BASIS IN LAW

A. Substantial Evidence Is Lacking That MG Had Knowledge of The Discriminatees' Union Activity

The Board and Union claim MG's purported knowledge of union activity should be imputed to Pamela DiStefano based upon two other managers' recommendations. (Board Br. 29, Union Br. 41) The fact DiStefano may have relied upon information from these two managers in ultimately aligning on the decision to terminate the five individuals who engaged in time theft (including the three Discriminatees) does not establish DiStefano had knowledge of their union activities. And, DiStefano provided

uncontradicted testimony that Vlashi's Union position did not factor into MG's discharge decision and that she did not know of the others being union shop stewards. (R. 1189).

This Court cautioned against "[a]utomatically imputing ... knowledge to a company [because it] improperly removes the General Counsel's burden of proving knowledge." *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 685 (7th Cir. 2000). The Board and Union seek to bypass this authority which should not be countenanced.

B. The Board's Animus Findings Are Devoid of Substantial Evidence and the Board Never Found A Causal Connection Between The Non-Existent Union Animus And The Discriminatees' Suspensions and Discharges

In its opening brief, MG cited the correct standard this Court uses to establish whether the Board's General Counsel has established a *prima facie* case of discrimination under the *Wright Line* standard. *Wright Line, Wright Line Div.*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). In *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015), this Court held "[t]here must be a 'causal connection between the animus and the implementation of the adverse employment action.'" And, as explained in *AutoNation*, "an abstract dislike of unions is insufficient." *Id.*

The Union misconstrues MG's argument concerning *AutoNation*. Although this Court noted in *AutoNation*, there is "no need to prove additional animus beyond whatever animus lay behind the contested action..," *id.* at 775, the Union ignores that

“pretext, standing alone, does not support a conclusion that a firing was improperly motivated.” *Union-Tribune Pub. Co. v. NLRB*, 1 F.3d 486, 491 (7th Cir. 1993).

In this case, neither the Board nor the ALJ found a *causal connection* between the non-existent *union animus* MG purportedly exhibited during the spring of 2016 and the Discriminatees’ ensuing suspensions and discharges. Such failing is reversible error. Otherwise, any evidence of supposed animus or employer knowledge of union activities would give rise to a finding that a termination was improperly motivated. But, that is not the law. *See AutoNation*. As such, as detailed below, the Board’s findings concerning “expressions of union hostility” (Board Br. 31-32) and the Union’s claims the Board’s decision properly relied upon temporal proximity, purported unfair investigations, disparate treatment, the alleged pretextual nature of the overtime study, and supposed unlawful unilateral changes are unavailing (Board Br. 43, Union Br. 54-56).³

³ The Union contends MG is barred from asserting “its conduct in instructing the union officials to take down two American flags they hung inside the facility cannot be evidence of animus under NLRA Section 8(c)” because the argument was not raised below. (Union Br. at 56, n. 24). The Union is wrong. MG raised this argument in its Brief in Support of Its Exceptions to the Administrative Law Judge’s Decision. *See*, ECF Doc # 38-3 at 25 (Exhibit A to MG’s Motion for Permission to File a Supplemental Document). Thereafter, the General Counsel in its answering brief to MG’s exceptions acknowledged this argument was raised below and wrote, “The Employer then argues that there was no animus shown by Management when it asked Union activists to remove their Union flags from Fair Lawn.” (R.2107). *See* Section 10(e).

1. Evidence of Indirect Conduct and Generalized Statements Is Insufficient To Establish Animus

The Board's Brief takes issue with MG's correct statement that "non-decisionmakers uttered only general, non-threatening statements." (Board Br. 33). The Board contends there was no sole decisionmaker and the statements at issue could not be divorced from their context. (Board Br. 33). But, this contention, even if correct, fails to cure the missing link between and purported animus and the ensuing discipline, as required by *AutoNation*.

The Board also incorrectly found the Section 8(a)(5) allegations at issue in this case somehow evince animus. However, the Board never explained any causal connection between those purported violations to the Discriminatees' suspensions and discharges as required by *AutoNation*.

2. The Board's Temporal Proximity Finding Is Erroneous

The Discriminatees' July 2016 discharges were based on Melgar's overtime study, which began in September 2015 (R.886), long before the Discriminatees engaged in union activity. In addition to insufficient temporal proximity between events, the Discriminatees engaged in intervening misconduct which continued as late as May 2016. (R.1469-1506).

To argue animus may be inferred from the timing of the terminations, the Union relies upon inapposite authority where the temporal proximity between the union activity and termination was much closer in time than in the present case and where there

was no evidence of intervening misconduct. *See e.g. 1621 Route 22 W. Operating Co., LLC v. NLRB*, 825 F.3d 128, 146 (3d Cir. 2016)(union activists disciplined 11 days after the election).

The Board and Union claim there was less than a two-month period of time between union activity and discipline, relying upon the May 2016 rallies. (Board Br., 36). That misconstrues MG's opening brief which referred to the union activity "in question," not just any union activity.⁴ (Opening Brief, 33). This Court has held "neither an employee's union activism nor an employer's knowledge of that activism constitutes sufficient evidence for a finding of antiunion animus." *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717-718 (7th Cir. 1992). And, while it is true "coincidence in time between union activity and discharge or discipline is one factor the Board may consider ..., mere coincidence is not sufficient evidence of antiunion animus." *Id.*

The Board and Union do not meaningfully distinguish the authority MG cited where there was an insufficient temporal nexus between employees' union activities and

⁴ In the section of the ALJ's decision entitled, "The Local 719 union activities in Spring 2016 and the Respondent's antiunion animus," the ALJ referenced rallies in May 2016 only with respect to Richard Nazzaro's union activity. (R.2174). And notably, the ALJ specifically found, and the Board affirmed that, "Gutierrez was aware of the union rallies but did not participate in them." (R.2174). When addressing antiunion animus specifically directed toward the Discriminatees, the Board adopted the ALJ's antiunion animus finding based solely on union activity from January 2016 to April 2016. (R.2184-2187). While, the ALJ referenced an incident involving Mike Goodin as occurring in May 2016, the record shows it actually happened in April 2016. (R.423). Accordingly, such criticism is unfounded.

subsequent adverse employment actions. (Union Br. 45-46, Board Br. 36-37). In *Sears-Roebuck v. NLRB*, 349 F.3d 493 (7th Cir. 2003) and *NLRB v. Stor-Rite Metal Products*, 856 F.2d 957, 965 (7th Cir. 1988), this Court never set a minimum bright-line time limit between an employer's discovery of union activity and discipline for purposes of establishing causation. In fact, this Court explained in *Sears-Roebuck*, to "hold that substantial evidence of antiunion animus exists merely when an employer knows of a worker's union activities and later fires that employee, would be tantamount to making union activism a shield against discharge, which is a result that would be incompatible with the statute." *Id.* at 506 (internal citations omitted). However, that is exactly what the Board and ALJ did in this case.

Here, the Board and Union point to the union rallies in May 2016 to argue sufficient temporal proximity, but there is no showing that MG, and particularly Melgar, evinced any animus towards that activity. Also, the ALJ expressly found Gutierrez did not attend any of the Union rallies in question. (R.2174). As explained in footnote 4 above, the ALJ's decision focused almost exclusively on purported union activity transpiring in March and April 2016 and noted that supervisors disputed knowledge of union activities. (R.2191-2192). Accordingly, the Board erred by ignoring critical facts showing the timing of the discharges did not align with union activity as opposed to the completion of an eight-month study and resulting investigation into the Discriminatees' theft of time.

3. MG Conducted Appropriate Investigations Into The Discriminatees' Misconduct Which The Board Improperly Second Guessed

The Board and Union claim MG conducted a “sham” and “truncated” investigation which evinces union animus. However, the Board and Union are merely seeking to substitute their judgment as to how MG should have investigated the Discriminatees’ misconduct. However, this “Monday morning quarterbacking” method of finding discriminatory intent ignores that employers are not “obliged to ‘investigate’ [employee misconduct] in any particular way,” and it is not the Board’s province to “function as a ubiquitous ‘personnel manager,’ supplanting its judgment on how to respond to [employee misconduct] for those of an employer.” *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (D.C. Cir. 2006) (internal citations omitted). There, the court held that the Board’s finding of discriminatory intent based on the employer’s failure “to ‘thoroughly’ investigate the incident leading to [] suspension and discharge, thereby contravening its own ‘guidelines,’ and neglect[ing] to adhere to its ‘progressive discipline policy[,]’” were red herring[] arguments.” *Id.* at 310. The court found the employer “was not obliged to ‘investigate’ [the] case in any particular way, and further, the Board offer[ed] nothing material that the employer would have uncovered had it investigated the matter differently.” *Id.*

Although the Union takes issue with *Detroit Newspaper Agency*, it does not dispute the applicable finding here concerning an employer’s ability to conduct an investigation as it deems fit. In fact, the problem with the Board’s and Union’s logic here is that the

concept of what qualifies as “fair” is entirely subjective. Therefore, neither this Court nor the Board should comment on whether an investigation was proper or not. Moreover, conspicuously absent from the Board and Union’s briefs is any explanation of how Melgar – who initially identified all three Discriminatees as committing misconduct – could have demonstrated any animus when there is no evidence he was aware of their union roles while performing his study, which was undertaken well before the purported union activity at issue. The Board and Union likewise do not and cannot point to any evidence suggesting anyone instructed Melgar to focus on these three Discriminatees.⁵

The Union also objects that the Discriminatees were not given an opportunity to explain their actions during their interviews. However, the record shows MG asked each of the Discriminatees to explain their actions. (R.1590-1602). If, as the Union contends, these Discriminatees were “strong” stewards, they certainly could have raised “union business” as a credible explanation for their suspicious whereabouts. But none of them did. (R.1590-1602, 1729-1748).

Rather, at their respective interviews, each Discriminatee simply denied being out of the building for extended periods of time despite documentary evidence contradicting such denials. *Id.*; (R.1475-1508). Further, even when guided by Counsel for the General Counsel at the ALJ hearing, the Discriminatees still could not satisfactorily explain their

⁵ The Union’s reliance upon *Gossen Co. v. NLRB*, 719 F.2d 1354, 1359 (7th Cir. 1983) is misplaced. Unlike here, the employer in *Gossen* did not provide the impacted employee with any reason for his discharge.

whereabouts. Vlashi admitted at the hearing he never contemporaneously raised union business as a reason for his absence, and never explained what union business would take him out of the facility for extended periods of time. (R.530). Scherer admitted during his interview and testified he evaded the turnstiles because it “wasn’t a big event,”(R.580, 613), but he never explained what union business took him outside of the facility for hours at a time. (R.1506). Gutierrez never claimed to be on union business when asked why he had been missing from the facility; similarly, at the hearing, he never explained his absence. (R.751-753). Accordingly, the Board and Union’s contentions should be disregarded.

4. The Board and Union Overemphasized Purported Disparate Treatment Of Others Identified In Melgar’s Report

There is also insufficient record evidence of disparate treatment to show animus. The Board and Union pointed to other employees with irregular time entries whom MG allegedly failed to further investigate. But this claim is not true. Melgar testified his analysis included security video review which exonerated employees whose time entries may have initially raised suspicions. (R.898-899). In fact, Melgar reviewed all available security video for all 59 employees in his study. (R. 992, 995-1001). On the other hand, the Board failed to offer any proof to suggest any other employee was similarly situated to the Discriminatees (i.e. they had the same supervisor, engaged in the same misconduct, etc.). The Board recognizes in such cases that utilizing a “stricter standard than that utilized by some other supervisors,[] does not establish blatant disparity from which [the

Board] can infer unlawful animus.” *Meritor Automotive, Inc.*, 328 NLRB 813, 816 (1999).
See also, Pontiac Osteopathic Hospital, 284 NLRB 442, 465 (1987) (same).⁶

The Board and Union also contend MG purportedly withheld information from the Union concerning the alleged Discriminatees and deviated from its disciplinary practices. For the reasons discussed in MG’s initial brief, there were no such improprieties. (Opening Brief, at 40-41). The Union claims “a decision to keep a union in the dark regarding the specific reasons for a termination is ‘alone . . . enough to support an inference that the [terminations were] discriminatory.’” (Union Br. 49; *quoting M.J. Mech. Servs., Inc.*, 324 NLRB 812, 817 n.37 (1997); and *citing NLRB v. Griggs Equipment, Inc.*, 307 F.2d 275, 278 (5th Cir. 1962)). However, these cases have nothing to do with an employer withholding information from a union and do not involve the discharge of union supporters.⁷ As a result, these cases are inapposite because MG notified each Discriminatee his termination stemmed from time theft.

Also, the Union and/or Board’s General Counsel could have asserted these purported procedural irregularities as independent unilateral changes in violation of

⁶ The Union incorrectly relies upon *Beverly Enters.*, 272 NLRB 83, 89-90 (1984) because in that case, unlike here, the employer never conducted an investigation into employee misconduct.

⁷ In *M.J. Mech. Servs., Inc.*, the first time the employer asserted the employee was terminated for “falsification of time or any other company records” was in its post-hearing brief to the ALJ. *Id.* at 817. Likewise, *Griggs Equipment, Inc.*, involved the discharge of an employee without any reason stated. These fact patterns are wholly dissimilar.

Section 8(a)(5). The failure to do so demonstrates these contentions are truly red herrings. Further, the Union cites to no evidence suggesting MG *intentionally* withheld information from the Discriminatees or how that evinced animus. Therefore, this contention is without merit.

The Board and Union would have this Court believe that MG transferred an employee from Australia to Fair Lawn, New Jersey for the specific purpose of targeting these three individuals for time theft. However, there is no evidence Melgar evinced any animus in the first place. This glaring omission is a critical flaw because it was Melgar's idea to compile and study the data in the first instance. (R.818-821, 887).

Additionally, it is surprising the Board and Union suggest MG should have delved deeper into other employees flagged for similar unusual overtime patterns. The consequences of doing so could have caused more unit members to be disciplined. It appears the Board and Union seek to take the untenable position that to save these three Discriminatees who engaged in unequivocal time theft MG should have been predisposed to take more adverse actions against those employees the Union also represents.

5. The Board and Union Continue To Disingenuously Ignore The Concurrent Terminations Of Two Non-Union Supporters Arising Out Of The Same Circumstances

The Board and Union claim MG disparately treated the Discriminatees in connection with the overtime study. But then the Board and Union downplay the

significance of two employees who engaged in the same misconduct and were discharged at the same time as the Discriminatees.⁸ It cannot be both ways. The Union cites several cases standing for the proposition that antiunion animus is not disproved where some “innocent” employees are also discharged. (Union Br. 52). However, neither Koroskoski nor Manevski were “innocent” employees. In fact, Koroskoski’s termination stemmed from the same incident which led to Gutierrez’s discharge.

On this point, *Sears-Roebuck* is particularly instructive. There, this Court noted the Board relied upon the “‘blatant disparity’ between the treatment of [a discriminatee] and that of other employees who engaged in similar work infractions.” 349 F.3d at 506. Before the Board, the employer “point[ed] to one other employee who committed basically the same conduct for which [the discriminatee] was fired.” *Id.* at 507. This Court explained “the Board (and the ALJ, for that matter) did not even mention [the comparator’s] name before concluding that there was a ‘blatant disparity’ between [the employer’s] treatment of the [discriminatee] and other employees who had committed similar misconduct, but were not involved with the Union.” *Id.* This Court further stated “[i]t would have been

⁸ The Board misstated that, “Melgar’s study found that just two other employees, Koroskoski and Zoran Namauski, neither of whom was a union official, falsified time records.” (Board Br. at 14). In addition to the Discriminatees, MG terminated Nove Koroskoski and John Manevski for time theft and intent to conceal time theft. (R.1606 – 1611). MG likely would have terminated Namauski but for the fact he retired prior to the decision to terminate. (R.1185). In total, MG found seven employees engaged in time theft. (R.1747-1448). It terminated five and Namauski voluntarily left the Company before his likely termination. (R.1183).

error merely for the Board to select and discuss only the evidence that favored its conclusion (that [the employer] fired [the discriminatee] because of the prohibited animus), while failing to articulate its reasons for rejecting a line of countervailing evidence.” *Id.* But, this Court explained that what the “Board did in [*Sears*] was much worse ... [because] ... [t]he Board not only ignored [the employer’s comparator]-related evidence; it also failed to select and discuss the evidence that would have shown that [the employer] treated at least one similarly-situated employee differently than it treated [the discriminatee].” *Id.* As a result, this Court held that “substantial evidence did not underlie the Board’s disparate treatment theory.” *Id.*

Here, the Union claims MG’s investigation into Koroskoski and Manevski was “highly suspect.” (Union Br. 53). However, Koroskoski had four 80 plus hour weeks out of the 16 studied and a higher than expected turnstile ratio (1.53) over that period. Melgar focused upon Koroskoski because there was no record of his departure from the facility on May 6, 2016. (R.829-830, 872, 1000). As a result, Melgar reviewed May 6, 2016, security footage to determine how Koroskoski departed the building around the time he clocked out around 11:30 PM. (R.931-932).

During the review process, the assigned security captain paused the video and identified Koroskoski as the person who the turnstile scan recorded as Gutierrez. (R.832-833). There was no security footage of Gutierrez exiting the building that night. (R.834). Melgar also found Koroskoski swiped himself out on the time clock at 11:30:02 PM, and

then swiped out with Gutierrez's card at 11:30:04 PM – two seconds later at the same terminal. (R.834-836). The payroll system showed both Koroskoski and Gutierrez were being paid at an overtime rate during this period. (R.836). Melgar noted a pattern of two consecutive "in's" and no "out's" on the turnstile records, so he reviewed the video to understand how these employees were exiting the building. (R.837). Melgar concluded Koroskoski used Gutierrez's card to punch out in the payroll system and swipe out at the turnstile. (R.837, 1475-1483). This apparent conspiracy between Koroskoski and Gutierrez was how Gutierrez became a subject in Melgar's Report. (R.838). So, the Union is simply wrong to contend that MG "searched for an excuse to terminate Mr. Gutierrez and happened to ensnare Mr. Koroskoski through those efforts." (Union Br. 53). If anything, Melgar focused on Koroskoski and discovered Gutierrez's misconduct and both were suspended and terminated.

The Union also ignores critical facts about Maneveski, who was not one of the 59 employees studied in the original report. (R.874). Melgar testified Clark-Muhammad explained to him that one of MG's supervisors, Jerry Luchanski, caught Maneveski taking excessive breaks. (R.873-874). Clark-Muhammad wanted Melgar "to verify if that particular instance ha[d] been an isolated incident, or if it was occurring multiple times." (R.873). As a result, Melgar went through a "similar type of exercise where [he] use[d] database, the payroll and the turnstile records to determine if there was any conduct similar to the one described by the other in the videos and records." (R.874). Melgar

reviewed records showing Maneveski was paid overtime rates while being absent from the facility for 23 hours spanning over six shifts – nearly four hours per shift. (R.872; 875-876).

Here, the Union baselessly suggests MG ensnared Koroskoski and Maneveski as part of a scheme to hide its true discriminatory aim, i.e., that they were the white sheep who suffered along with the black. However, Maneveski engaged in similar misconduct to the three Discriminatees and was suspended and later terminated at the same time. But, the circumstances leading to his separation likewise do not fit the Board and Union's narratives so his case was swept under the rug. Finally, there is no evidence disciplinary action was taken against other union officials or shop stewards. *See Sears-Roebuck*. As a result, these contentions are without merit.

C. The Board Improperly Found MG Evinced A Pretextual Rationale For Discontinuing Its Overtime Study

The Board incorrectly found MG's decision to discontinue its overtime study was pretextual. That finding is belied by the record because Melgar pointed to the time theft trends, as well as "personal changes which didn't allow [him] to continue [to] focus on th[e] study." (R.912). Other than to suit its own narrative, the Board did not advance any rationale as to why Melgar's statement was false, particularly where there is no evidence he had knowledge of any individual's union activity. That fact alone defeats the Board's animus finding in this regard. Moreover, as noted *supra*, it simply does not make sense for MG to have moved Melgar across the globe to Fair Lawn solely to target the

Discriminatees, especially where two other non-union supporters were also terminated, and another one suspended, for the same misconduct (which, as noted *supra*, the Board disregarded). Further, the Board was wrong to adopt the ALJ's pretext finding based on his erroneous assumption that Melgar did not review available video beyond that of just the Discriminatees when Melgar testified that he reviewed all available video for the 59 employees in his study. (R.992, 995-1001). Accordingly, this pretext finding thus is unsupported by substantial evidence and should be set aside.

Moreover, as noted *supra*, this Court has held that, "[a] finding of pretext, standing alone, does not support a conclusion that a firing was improperly motivated." *Union-Tribune Pub. Co. v. NLRB*, 1 F.3d 486, 491 (7th Cir. 1993). Rather, the Board cannot infer anti-union animus based on pretext without adducing "evidence of additional supporting circumstances to establish that the actual reason for the discharge or discipline was animus toward union activities." *Electrolux Home Prods.*, 368 NLRB No. 34, *12 (2019). In this case, the Board improperly injected its faulty pretext finding into the *Wright Line*, *prima facie* analysis instead of evaluating such evidence after MG advanced its legitimate reasons for the Discriminatees' suspensions and discharges. By bolstering its *prima facie* case, the Board turned *Wright Line* on its head. As a result, because there is no substantial evidence to support the Board's conclusion that the *Wright Line prima facie* burden had been satisfied, the Petition for Review should be granted and the Cross-Application for Enforcement should be denied.

D. The Board Incorrectly Ignored MG Would Have Terminated The Discriminatees Regardless of Their Purported Union Activities

As explained in MG's opening brief, even assuming the Board correctly found the General Counsel met its prima facie burden under *Wright Line*, which it did not, the Board rubber-stamped the ALJ's misstatement and misapplication of MG's rebuttable burden which is "no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel." *Wright Line*, 662 F.2d at 905. See e.g. *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 673-675 (2004)(Board reversed ALJ's findings that employer improperly terminated employees who engaged in time theft). And, as noted *supra*, union conduct does not give an employee freedom to violate time and attendance rules. See *Anheuser-Busch, Inc.*, 351 NLRB 644, 647-648 (2007) (explaining that protected activity is not a license to loaf or break rules).

Here, the Board and Union claim MG mischaracterized the Discriminatees' testimony concerning their misconduct. That is not true. Critically, it is undisputed each Discriminatee acknowledged that the following conduct could subject him to discipline: (1) falsifying company records; (2) leaving the work area without authorization; and/or (3) using the badge of another employee or allowing their badge to be used by another employee. (R.490, 618-619, 720-721). Further, each Discriminatee admitted MG had the right to determine the level of discipline depending on the circumstances of the violation (R.491-492; 661; 716-718). They also agreed that, when clocked in, they were expected to be performing work for MG. (R.620, 722).

Additionally, the Discriminatees' hearing testimony revealed their misconduct. First, Scherer admitted he squeezed his body between the wall and the turnstile bar in order to get through without causing the bar to rotate. (R.613, 627-628, 636; 1505). The Union claims even though Scherer admitted his misconduct, it should be excused because the turnstiles "often had mechanical issues and employees frequently slid past the turnstiles." (Union Br. 62). This post-hoc explanation does not explain why the turnstile always seemed to malfunction in the middle of his shift, but work properly when Scherer initially entered and exited the building at the beginning and end of his shifts on May 5 and 6. Further, it does not change the fact that Scherer flouted MG's rule, and it certainly does not show MG's disciplinary decision was motivated by unlawful animus. In any event, Union Business Agent, Stan Milewski, testified if the turnstiles did not work, the employee was required to sign in or out with security, which Scherer did not do. (R.174-175, 629-630).

Further, the ALJ expressly noted "Melgar believed his assumption was correct about Scherer after he reviewed a security camera screenshot that showed Scherer squeezing between the turnstile bar and the wall in order to bypass the turnstile and not use his card to enter the plant on May 5." (R.1505,2185). And there was no reason for MG to doubt Melgar's finding because although Scherer later testified that May 5 (Friday) and 6 (Saturday) were technically union business days, he never raised this point to MG, even during the two-week period between his suspension and termination. (R.633-635).

In the hearing, Scherer never explained what union business took him out of the building for hours on end. In fact, Scherer testified he told Clark-Muhammad he typically performed cleaning work on Saturdays and would go home during his shift to take a shower. (R.631-632). Finally, Scherer testified it was possible for him to take a two-hour break “[w]hen you're on Union business, it is. Not that I did. What I'm saying, when on Union business, it's possible.” (R.633).

Second, Gutierrez acknowledged during his investigatory interview that he “knew somebody used his card” which contravened applicable rules. (R.695-696, 698; 700; 702-703). Specifically, Gutierrez testified Clark-Muhammad asked him whether anyone, specifically Nove Koroskoski, swiped his card and he acknowledged he “knew somebody used his card.” Nevertheless, Gutierrez also testified that during the interview he flatly denied any wrongdoing, telling Clark-Muhammad he had not “done anything like that, falsifying records, you know, doing manual punches and this and that.” (R.698). Gutierrez also acknowledged that he falsely denied Clark-Muhammad’s question about being out of the building on May 6, 2016 from 10:30-11:30 p.m. after magically remembering he went to CVS that evening. (R.740).

At the hearing, Gutierrez detailed that shortly after his interview with Clark-Muhammad, he spoke to Koroskoski and conveniently remembered an elaborate story about being outside the plant without his wallet. (R.700-701). According to Gutierrez, he asked Koroskoski to “bring me the wallet so I can go in, [and] punch my card. And he

didn't do that obviously." *Id.* And that day, according to Gutierrez he "left the building without punching out." *Id.* But Gutierrez's hearing testimony demonstrates this story was clearly a ruse because on re-cross examination, Gutierrez admitted Koroskoski told him on the evening in question that he had used Gutierrez's timecard. (R.767).

As a result, Gutierrez' testimony shows he was aware of other employees using his card but was not fully forthcoming or honest with Clark-Muhammad during his interview. Likewise, he never raised the Koroskoski incident prior to the hearing. Thus, contrary to what the Union asserts, Koroskoski was thus not an "innocent" employee who was also discharged. (Union Brief at 52).

Third, Vlashi falsely denied he left the building on the occasions identified by Melgar, despite the mountain of evidence to contradict his denials. (R.1484-1500). Vlashi's union business excuse, raised for the first time well after his discharge (R.530), is not credible because many of the dates and times of his violations are not when he would have been engaged in union business. Significantly, during his investigatory interview, Vlashi never contemporaneously raised the fact he was purportedly on union business as a reason for his absence, a critical fact he admitted during the hearing. (R.530). If union business was truly the motivator behind Vlashi's absence, he would have no difficulty remembering his activities that day.

Additionally, the ALJ completely ignored that May 21 and 22, 2016 were a Saturday and a Sunday, even though Vlashi expressly testified "my Union business days

were Tuesday, Wednesday and Thursday.” (R.408, 523, 863-864, 1126-1127). Further, Vlashi stated his union business required him to leave the facility, only “Two, three times a day. . . [for] [f]ive, 10 minutes. At most, 15.” (R.526). Accordingly, Vlashi would be out of the facility for union business on a Tuesday, Wednesday or Thursday for, at most, forty-five minutes. Nevertheless, Vlashi was out of the building on Thursday, May 12, 2016, for a total of five hours. (R.850-851,1490-1499). On May 21 and 22, 2016, a Saturday and Sunday, Vlashi was outside of the building for two and one-half hours and three and one-half hours respectively. (R.863-864, 1500).

Accordingly, the Board’s and Union’s claim that MG mischaracterized the record is completely unfounded. Rather, in light of the above, the Board and ALJ erred in finding MG would not have terminated the Discriminatees for this misconduct even absent their union activities. It is also noteworthy that, as discussed *supra*, MG terminated two other individuals, and would have terminated another, but for retirement, who did not engage in union activity for the same type of infraction, which further demonstrates MG would have terminated them regardless of their union activity. (R.1607-1611). Because the Board incorrectly failed to find the Discriminatees were discharged for cause, the Board’s reinstatement and back pay remedies contravene Section 10(c) of the NLRA. As a result, the Petition for Review should be granted and the Cross-Application for Enforcement should be denied.

II. THIS COURT SHOULD REVERSE THE BOARD'S FINDINGS THAT MG VIOLATED SECTION 8(a)(5) OF THE ACT

As discussed herein, the Board and ALJ's findings are erroneous and should be reversed.

A. The Board Erred In Affirming The ALJ's Finding That MG Was Not Permitted To Attend Its Own New Employee Orientation

The Board rubber-stamped the ALJ's finding that MG's representatives' presence at the new employee orientation during the Union's presentation constituted an unlawful unilateral change.

Here, Milewski sought private access to employees during work time for matters unrelated to contract enforcement. MG sought only to be present during the Union's presentation as it had done in the past. The Board's Answering Brief does not cite to any authority establishing this type of conduct amounts to a mandatory subject of bargaining in the first instance. Even if it did, the Board and ALJ disregarded the Union's business representative had the same access to the new employee orientation as before the alleged change. In fact, Milewski admitted that in May 2016, he made a decision to stop attending the new hire orientations and conceded he "advised [MG] that as long as the [MG] representative was going to be participating in th[e] orientation, that [he] would not

appear for the orientation[.]” (R.226). As a result, there was no material change in this regard.⁹

B. The Board Erred In Finding a Violation for the Change in Procedures For Returning to Work from a Short Term Disability Because Any Change Was Immaterial and The Result of MG’s Reasonable Interpretation of Its Existing Policy

The Board and ALJ next erred in finding MG unlawfully changed the procedure for employees returning from an STD leave of absence. The Board’s Answering Brief ignores this change was immaterial because there was no real change as the policy had always required 24 hours’ notice before the next scheduled shift. (*Compare*, R.1408 to 1410) (emphasis added).

Here, Milewski admitted employees on STD leave are not on the production schedule and do not have a next scheduled shift. (R.192). The Board’s Answering Brief argues “[t]his ‘admission’ does nothing to undermine the underlying facts showing a change in past practice and has no bearing on the Board’s ultimate finding.” (Board Br. 55). However, Milewski’s testimony highlights that employees returning from a STD do

⁹ Moreover, the record does not support that private union access during employees’ working time was an established past practice in the first place and it was error for the ALJ and then the Board to find so. The Board’s Answering Brief improperly attacks DiStefano’s testimony on the grounds she worked at a different facility and never testified concerning the details of the orientation meeting. However, that ignores DiStefano’s role with MG as the Director of Labor Relations. She testified that prior to the expiration of the contract, joint and separate meetings had occurred, but that around 2013 or 2014, she became aware of “the Union [] having closed-door meetings with new hires who were not member[s] of the Union[.]” and that at that time, she gave “direction to go back to the contract practice, and to do a joint orientation.” (R.1193).

not have a “scheduled shift.” Therefore, contrary to what the Board’s Answering Brief asserts, it does not necessarily follow that an employee returning from STD would be denied any pay. More significantly, however, is the change was not material because it did not alter the method by which employees were allowed to return from STD leaves. MG still allowed employees to return to work the following day once a return to work note was presented. Thus, the Board and ALJ erred in finding MG violated the Act in this regard.

C. The Board Improperly Found MG’s Change To B&R Processors’ Shift Times Violated The Act

The Board improperly affirmed the ALJ’s finding that MG violated the Act by aligning the B&R Processors’ shift start times to those of other departments. (A.14-15). Article 6, Section 2 of the CBA provides, “The Company will endeavor to keep the starting time of all employees as uniform as possible, consistent with the operation of the bakery and other locations covered by this Agreement.” (R.1372). Moreover, Article 6 required MG to keep the starting time of all unit employees uniform, and Article 28 specifically granted MG the right to schedule production. Accordingly, MG’s decision to align the shift start times of the B&R Processors to the same start time in all other departments did not constitute an impermissible unilateral change.

D. The Board Incorrectly Affirmed the ALJ's Erroneous Failure to Address The Reasonableness of The Delay In Furnishing Information And That MG Provided The Requested Information

Finally, the Board erroneously adopted the ALJ's erroneous finding rejecting MG's contention that the Union's information requests were improper. First, the ALJ improperly found the Union's information requests could not have been discovery devices because the Union filed ULP charges after the Union submitted its requests for information regarding new hires and discipline for violating clock in/out procedures. (R.2181). The ALJ ignored that information need not be supplied to help a union prove an unfair labor practice even if the unfair labor practice charge is filed after the information was requested. *Pepsi-Cola Bottling Co. of Fayetteville*, 315 NLRB 882 (1994), *enfd in relevant part*, 96 F.3d 1439 (4th Cir. 1996). The Board in *Pepsi-Cola* held "it is well established that the Board procedures do not include pretrial discovery. For that reason, the Board has held that when information is sought that relates to pending ... charges, it generally will not find that a refusal to provide such information violates the Act." *Id.*; see also, *WXON-TV*, 289 NLRB 615, 617-618 (1988), *enfd. mem.* 876 F.2d 105 (6th Cir. 1989).

Moreover, only "unreasonable" delay violates the Act. *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001). The Board evaluates the reasonableness of an employer's delay in supplying information based on the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information. *West Penn Power Co.*, 339 NLRB 585, 587 (2003), *enfd. in relevant part* 394 F.3d 233 (4th Cir. 2005).

Here, the record establishes the requests for information concerned the same subject matter of the Union's then pending charges and therefore constituted impermissible pre-hearing discovery. Thus, the ALJ improperly ignored MG was within its rights to refuse to provide the requested information. Nevertheless, as noted above, MG provided the Union with all of the requested information in a timeframe that was reasonable in light of the burdensome and overly broad nature of the requests – the Union sought ten years' worth of employee records, which was not readily obtainable. Consequently, the Petition for Review should be granted on this point as well.

CONCLUSION

For the reasons stated herein and its opening brief, the Board's Decision and Order is not supported by substantial evidence and deviates from well-established precedent. As a result, MG's Petition for Review should be granted in its entirety and the Board's Cross-Application for Enforcement should be denied.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

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Dated: December 14, 2020

/s/ James D. Thomas

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I hereby certify that on December 14, 2020, the Reply Brief of Petitioner Cross-Respondent was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ James D. Thomas _____

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