

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

**MONDELÉZ GLOBAL LLC,**

**Respondent,**

**-and-**

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

**Union.**

**Case Nos. 22-CA-174272, 22-CA-178370,  
22-CA-178591, 22-CA-179007, 22-CA-  
180206, 22-CA-180213, 22-CA-181423,  
and 22-CA-183609**

---

**RESPONDENT MONDELÉZ GLOBAL LLC'S BRIEF IN SUPPORT OF ITS  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

---

**TABLE OF CONTENTS**

	<b>Pages(s)</b>
TABLE OF AUTHORITIES .....	iii-v
INTRODUCTION .....	1
I. BACKGROUND FACTS .....	3
II. PROCEDURAL HISTORY .....	3
III. FACTS RELEVANT TO THE SECTION 8(a)(3) ALLEGATIONS .....	4
A. Respondent’s Independent Overtime Analysis .....	4
B. The Results of Melgar’s Overtime Study .....	7
1. Nafis Vlashi .....	7
2. Bruce Scherer .....	9
3. Nove Koroskoski and Claudio Gutierrez .....	9
4. John Maneveski .....	10
5. Zoran Naumoski .....	11
6. Christian Barreto .....	11
C. Melgar Shares The Results of His Overtime Study .....	12
D. Respondent Interviews The Alleged Discriminatees .....	13
1. Nafis Vlashi .....	13
2. Bruce Scherer .....	14
3. Claudio Gutierrez .....	14
E. Respondent’s Decision To Discharge Vlashi, Scherer, and Gutierrez .....	15
F. The ALJ’s Section 8(a)(3) Findings .....	16
IV. IN FINDING A VIOLATION OF 8(a)(3) AND (1) CONCERNING THE THREE DISCHARGES, THE ALJ MISAPPLIED THE WRIGHT LINE STANDARD AND IMPROPERLY IGNORED EVIDENCE [Exceptions 29-73, 75-81] .....	19
A. The ALJ Misapplied The Wright Line Standard .....	20
B. The ALJ Ignored Respondent’s Lack of Knowledge of Protected Activity [Exceptions 29-35, 37] .....	22
C. The ALJ’s Finding of Animus Toward The Union Is Belied By The Record Facts and Contrary to Controlling Board Precedent [Exceptions 36, 38-40] .....	23

1. Respondent’s Good Faith Belief Concerning Melgar’s Report.....	23
2. General and Non-Threatening Statements Do Not Satisfy Wright Line .....	24
3. The ALJ Contravened Board Precedent to Find That The Timing of The Discipline Showed Animus.....	27
4. The ALJ Ignored Evidence of Respondent’s Nondiscriminatory Treatment of Known Union Supporters .....	28
5. The ALJ Disregarded The General Counsel’s Burden To Establish A Causal Connection Between The Protected Activity And The Adverse Employment Actions [Exceptions 41-73] .....	29
6. The Record Evidence Shows That Respondent Would Have Taken The Same Action Regardless of Any Union Activity.....	34
V. FACTS RELEVANT TO THE SECTION 8(a)(5) ALLEGATIONS .....	38
A. Joint Orientations.....	38
B. Process for Returning to Work from Short Term Disability.....	39
C. Work Schedules For B & R Processors .....	41
D. The Union’s Information Requests .....	42
E. The ALJ’s Section 8(a)(5) Findings .....	43
VI. RESPONDENT DID NOT VIOLATE SECTION 8(a)(5) OF THE ACT [Exceptions 1-28, 74, 77-81].....	43
A. The ALJ Erred In Finding a Violation For Respondent’s Presence in Its Own New Employee Orientation [Exceptions 7-14] .....	43
B. The ALJ 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 Respondent’s Reasonable Interpretation of Its Existing Policy [Exceptions 1-6].....	46
C. Work Schedules for B&R Processors - The ALJ Misapplied Board Precedent By Engaging In Improper Contract Interpretation And Choosing His Own “Reasonable Reading” Over The Employer’s “Sound Arguable Basis” [Exceptions 15-16] .....	47
D. The ALJ Erred By Failing to Address The Reasonableness of The Delay And That Respondent Provided The Requested Information [Exceptions 17-28] .....	48
CONCLUSION.....	50

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<u>Alan Ritchey, Inc.</u> , 346 NLRB 241 (2006) .....	20
<u>Alpers’ Jobbing Co.</u> , 231 NLRB 449 (1977) .....	35
<u>Anheuser-Busch, Inc.</u> , 351 NLRB 644 (2007) .....	35
<u>Children’s Mercy Hospital</u> , 311 NLRB 204 (1993) .....	35
<u>Classic Truck Rental Corp.</u> , 251 NLRB 443 (1980) .....	35
<u>Crittenton Hosp.</u> , 342 NLRB 686 (2004) .....	43
<u>Decaturville Sportswear Co.</u> , 205 NLRB 824 (1973) .....	35
<u>Detroit Newspaper Agency v. NLRB</u> , 435 F.3d 302 (D.C. Cir. 2006) .....	31, 33
<u>Earthgrains Co.</u> , 338 NLRB 845 (2003) .....	20
<u>Framan Mech., Inc.</u> , 343 NLRB 408 (2004) .....	35
<u>Guardian Ambulance Service</u> , 228 NLRB 1127 (1977) .....	35
<u>Hawaiian Dredging Construction Co. v. NLRB</u> , 857 F.3d 877 (D.C. Cir. 2017) .....	27
<u>LM Waste Service Corp.</u> , 357 NLRB No. 194 (2011) .....	29
<u>Nat’l Express Corp.</u> , 341 NLRB 501 (2004) .....	33

National Security Technologies, LLC,  
356 NLRB No. 183, slip op. (2011).....28, 29

NLRB v. Lampl,  
240 F.3d 931 (11th Cir. 2001) .....25

In re NRC Corp.,  
271 NLRB 1212 (1984) .....44

Obars Mach. & Tool,  
322 NLRB 275 (1996) .....24

Pacesetter Corp.,  
307 NLRB 514 (1992) .....28

Paramount Metal & Finishing Co.,  
225 NLRB 464 (1976) .....32

Peerless Food Prods.,  
236 NLRB 161 (1978) .....43, 45

Pepsi-Cola Bottling Co. of Fayetteville,  
315 NLRB 882 (1994), enf'd in part, 96 F.3d 1439 (4th Cir. 1996) .....48

Raysel-Ide, Inc.,  
284 NLRB 879 (1987) .....24

Sasol N Am. Inc. v. NLRB,  
275 F.3d 1106 (D.C. Cir. 2002) .....21, 34

Shearer’s Foods, Inc.,  
340 NLRB 1093 (2003) .....20, 23, 30

Snap-on Tools,  
342 NLRB 5 (2004) .....27, 28

Steel-Tex Manufacturing Corp.,  
206 NLRB 461 (1973) .....19

Sutter E. Bay Hosps. v. NLRB,  
687 F.3d 424 (D.C. Cir. 2012) .....34

Syracuse Scenery & Stage Lighting Co.,  
342 NLRB 672 (2004) .....27, 28, 34

Taos Ski Valley, Inc.,  
332 NLRB 403 (2000) .....28

<u>Tejas Elec. Servs.</u> , 338 NLRB 416 (2002) .....	24
<u>United States Postal Service</u> , 310 NLRB 530 (1993) .....	35
<u>Valley Health System, LLC</u> , 352 NLRB 112 (2008) .....	29
<u>Wal-Mart Stores</u> , 341 NLRB 796 (2003) .....	20
<u>West Pak, Inc.</u> , 248 NLRB 1072 (1980) .....	22
<u>West Penn Power Co.</u> , 339 NLRB 585 (2003), <u>enfd. in part and remanded</u> 394 F.3d 233 (4th Cir. 2005) .....	49
<u>Westinghouse Elec. Corp.</u> , 313 NLRB 452 (1993) .....	44
<u>Winkle Bus Co., Inc.</u> , 347 NLRB 1203 (2006) .....	25
<u>Wright Line</u> , 251 NLRB 1083 (1980), <u>enf'd</u> , 662 F.2d 899 (1st Cir. 1981), <u>cert. denied</u> 455 U.S. 989 (1982).....	<i>passim</i>
<u>WXON-TV</u> , 289 NLRB 615 (1988), <u>enfd. mem.</u> 876 F.2d 105 (6th Cir. 1989).....	49
<b>Statutes</b>	
29 U.S.C. §§ 151–169.....	<i>passim</i>

## INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board’s (“NLRB” or the “Board”) Rules and Regulations, Respondent Mondelēz Global LLC (“Mondelēz” or “Respondent” or “Employer”) submits this Brief in Support of its Exceptions to the January 7, 2019 Decision and Order (“Decision”) of Administrative Law Judge (“ALJ”) Kenneth W. Chu. Respondent Mondelēz excepts to the ALJ’s findings that it violated Sections 8(a)(3), (5) and (1) of the National Labor Relations Act (“NLRA” or “Act”). (D. 45:30-46:40).<sup>1</sup>

With respect to the Section 8(a)(3) allegations, the ALJ concluded that Respondent violated the Act when it suspended and later terminated three employees, Claudio Gutierrez (“Gutierrez”), Bruce Scherer (“Scherer”), and Nafis Vlashi (“Vlashi”) (collectively “Discriminatees”), for time theft and intent to conceal time theft. The ALJ’s findings evince his attempt to dispense his own brand of industrial justice. First, the ALJ improperly engaged in his own second guessing into Respondent’s overtime analysis and corresponding investigation while ignoring the undisputed fact that the study began in September 2015, four months before any alleged union activity at issue. The ALJ also ignored the impetus for the study -- to determine why Fair Lawn employees worked so much overtime, more than three times the amount of overtime at any other facility. The study in no way targeted the Discriminatees. Moreover, the Decision incorrectly presumed that merely because the overtime analysis revealed the Discriminatees’ transgressions, these individuals were somehow targeted because of their union activities. Second, the ALJ ignored that the key decision maker in the disciplinary determinations lacked specific knowledge of the Discriminatees’ purported union activities. The General Counsel failed to allege any anti-union animus on the part of that decision maker. In fact, the

---

<sup>1</sup> “(D. \_\_)” references the Decision by page and line numbers.

supposed animus relied upon by the ALJ is limited to non-decision makers' general non-contextualized statements, which were not even temporally proximate to the discipline at issue. Third, the ALJ disregarded the General Counsel's failure to establish a causal connection between the Discriminatees' purported union activities and the adverse employment actions they suffered.

The ALJ also ignored key facts which critically undermine his conclusions, including that: (1) employees other than the alleged Discriminatees were scrutinized in connection with the same overtime analysis and ultimately discharged for the same time theft transgressions, and it was not alleged that they were unlawfully examined and terminated; and (2) no action whatsoever was taken against 34 other shop stewards and Union officials, many of whom likewise engaged in the same union activity as the alleged Discriminatees.

Even assuming General Counsel did in fact satisfy its initial burden establishing that the disciplinary determinations violated the Act, Respondent met its rebuttal burden to show that it would have suspended and discharged the three Discriminatees regardless of their union activities. They were discharged because they committed time theft and sought to conceal their indiscretions. As discussed below, the ALJ relied exclusively on red herring points and improperly substituted his judgment for Respondent's, which the Board should not countenance.

With respect to the Section 8(a)(5) allegations, the ALJ found that Respondent unlawfully made unilateral changes concerning the: (1) new hire orientation; (2) protocol for employees returning from short-term disability leave; and (3) Broken and Refused ("B&R") processors' work schedules. However, the ALJ ignored that the changes at issue were either not sufficiently material to even necessitate bargaining or that Respondent had a sound arguable basis for its contractual interpretations which neither the Board nor the ALJ are permitted to second guess.

Finally, the ALJ determined that Respondent improperly failed to furnish information requested by the Union. However, the ALJ ignored the record evidence which unequivocally demonstrates that Respondent ultimately fulfilled the Union's information requests which, in any case, were impermissibly interposed to aid discovery in the prosecution of then-pending unfair labor practice charges.

Accordingly, the ALJ's findings of fact are without support in the record and his legal conclusions contravene Board precedent. As a result, the Board should reverse the ALJ's Decision and Recommended Order to the extent it found Respondent violated the Act and dismiss the Consolidated Amended Complaint.

## **I. BACKGROUND FACTS**

Respondent operates a bakery and warehouse facility in Fair Lawn, New Jersey producing Ritz crackers, Oreo cookies, and other snack products. Charging Party, The Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 719, AFL-CIO, Local 719, ("Union" or "Charging Party") represents the baking, packing, warehouse, environmental, maintenance and repair, distribution, and garage employees working at the facility. (Tr. 46:16-47:5). Respondent's predecessor in interest, Kraft Foods Global, Inc., and Local 719 were parties to a collective bargaining agreement, effective February 29, 2012 through February 29, 2016 ("CBA"). (GC Ex. 3). To date, a successor agreement has not been reached. (Tr. 52:16-17).

## **II. PROCEDURAL HISTORY**

Between April 2016 and September 2016, the Union filed ten unfair labor practice ("ULP") charges alleging over 32 separate violations of the Act. (GC Ex. 1(a)-(p)). The vast majority of these allegations were withdrawn or dismissed by the Region prior to the hearing. (GC Ex. 1(a)-(p)). On December 30, 2016, Region 22 issued a Consolidated Complaint alleging

various violations of Sections 8(a)(3) and (5) of the Act. The Complaint did not allege any independent violations of Sections 8(a)(1) of the Act. (GC Ex. 1(aa)). Rather, the allegations arose from three employee discharges; one employee suspension; four alleged unilateral changes; two alleged failures to respond to requests for information; and one alleged failure to deduct union dues. (GC Ex. 1(aa)). Between November 28, 2017 and March 14, 2018, a seven-day trial was held before the ALJ. Thereafter, the parties submitted post-hearing briefs.

### **III. FACTS RELEVANT TO THE SECTION 8(a)(3) ALLEGATIONS**

On July 1, 2016, Respondent terminated Gutierrez, Scherer, and Vlashi, as well as Nove Koroskoski and John Manevski,<sup>2</sup> all for time theft and intent to conceal time theft. (CP Exs. 7-9; R. Ex. 14).

#### **A. Respondent's Independent Overtime Analysis**

In September 2015, Respondent transferred one of its employees, Rogelio Melgar Moron (“Melgar”), from its Australian operations to the Fair Lawn facility to work as the Continuous Improvement Engineer. (Tr. 803:21-805:4). In this role, Melgar sought to “maximize production output on the lines” and to ensure operations ran smoothly and safely. (D. at 21; Tr. 803:21-805:4). As soon as he arrived at Fair Lawn, Melgar found that overtime costs at the facility were over three times higher than any of Respondent’s other facilities across North America and other parts of the world. (D. at 21). He found that a significant number of employees were working 80 to 100 hours per week, and “he was concerned that excessive overtime was affecting productivity and safety.” (D. at 21). Melgar brought his concern about overtime to the Plant Manager, Charlotta Kuratli (“Kuratli”). (*Id.*). Kuratli, in turn, instructed Melgar to study overtime at the Fair Lawn plant. (D. at 21-22).

---

<sup>2</sup> Although they were terminated under the same circumstances and for the same reasons as the others, neither the Charging Party Union nor the Counsel for the General Counsel ever alleged that the termination of Koroskoski or Manevski was unlawful.

Around October 2015, six months before any alleged unfair labor practice transpired, Melgar began his assessment by creating, for the first time “in the history of the plant,” a database correlating employees’ payroll and security turnstile records. (Tr. 809:13-19). Once the data was compiled, Melgar began to analyze it to “understand [] the drivers of that overtime.” (Tr. 808:20-21). He noticed that “people [with] high levels of overtime . . . [had a] high level of manual punches,” meaning that “someone [left the] facility without punching out and the payroll record [was] adjusted manually.” (Tr. 809:24-25).<sup>3</sup>

Beginning in November 2015, Melgar began reviewing the security video for days with particularly high rates of overtime to see “what happened that day.” (Tr. 983:18-984:11). According to Melgar’s testimony, no one directed him to view any video, explaining that “I didn’t [] pick [] video of certain workers. I picked [] videos of certain days.” (Tr. 984:3-4). Around December 2015, Melgar began sampling and studying overtime accruals during particular weeks. Ultimately, he chose 16 weeks from late September 2015 through the end of May 2016 to study. (GC 19 at 4). The selections were random except that he aimed to account for all of the seasonal variations at the Fair Lawn facility. (Tr. 812:3-11). From those 16 weeks, Melgar filtered out employees who worked fewer than 80 hours per week in any of the selected weeks, leaving 59 employees who satisfied the criteria. (Tr. 813:17-20).<sup>4</sup>

---

<sup>3</sup> To enter or leave the Fair Lawn facility, employees swipe in or out of security turnstiles with their employee ID cards, the same card the employee uses when clocking in/out. (Tr. 710:20-711:1). Employees are not expected to clock out for break times. However, if they leave the work area, they must swipe out of the turnstile with their badge. (Tr. 164:9-13).

<sup>4</sup> Around November 2015, Melger recommended, as a first step in remedying the abnormally high levels of overtime, that Respondent centralize the manual process for employees to clock in and out. (Tr. 810:13-20). However, by the middle of the first quarter of 2016, Melgar discovered that centralization had not served to decrease the amount of overtime incurred by employees at the Fair Lawn bakery. (Tr. 810:1 – 811:2).

Melgar also closely reviewed records of consecutive turnstile “in’s” or “out’s” or instances where there were “out’s” followed by “in’s” recorded only seconds later or vice versa. Either occurrence potentially indicated to Melgar that an employee was either physically or digitally evading the turnstile in order prevent a record of: (1) the employee’s entries or exits from the facility or; (2) in some cases, a record of the amount of time an employee was outside the facility altogether. (Tr. 827:5-828:15). On the other hand, according to Melgar, a double “out” or “in” could be purely innocuous, like when an employee let a visitor/contractor enter or exit with his ID card. (Tr. 949:4-17).

Melgar also reviewed security video as part of this analysis, which exonerated employees whose time entries may have initially raised suspicions. (Tr. 886:5-887:6). For example, one employee had three consecutive “in’s” on a particular date. Melgar reviewed the security video for this particular day and found that the employee manually signed “out” at the security desk each time he left the facility, and thus was not trying to evade the turnstiles. (Tr. 886:5-887:6).

Melger also examined “individual ... key performance indicators” and “ratios.” (Tr. 811:7-8, 812:10-25). For example, Melger calculated “turnstile ratios” for each of the 59 employees by “check[ing] how many times [the 59 employees were] coming in or out of the facility per each day that they have worked. And that would basically [] help as a measure of elapsed time in the facility.” (Tr. 812:17-25). A turnstile ratio of 2.0 indicated that a particular employee had a per day average of two sets of “in/out’s”, meaning that they left the facility twice and returned twice. (Tr. 814:7-9).

For outliers, Melgar checked the security turnstile records to determine how many times the particular individuals left the facility and analyzed any discrepancies between the security turnstile entries and the corresponding payroll records. (Tr. 811:25-814:2; 909:17-24). Melgar verified that all the security turnstiles were functioning properly. (Tr. 915:2-12). He also

reviewed the 59 employees' schedules, as well as their payroll and turnstile records. (Tr. 985:19-986:21). Melgar flagged and further investigated instances of employees who swiped out but who had no record of swiping in, and vice versa. (Tr. 984:12-986:20). Additionally, for a five-month period beginning in December 2016, Melgar reviewed all available security video for days with particularly high levels of overtime. (Tr. 983:23-984:11; 987:16-20; 988:21-24).

Melgar formulaically followed the data where it led him and held no predispositions during his review based upon who the employee was or what position they held. (Tr. 957:21-23). Melgar testified that he did not speak to his supervisor (Kuratli) or the facility's human resources department about the study while he was preparing his report, (Tr. 880:2-21), and had no knowledge whether any of the 59 employees had engaged in union activity. (Tr. 872:11-25). In fact, Melgar was so removed from any other information about the employees associated with the data, he studied security turnstile data of individuals no longer employed and the reason for their separations was totally unknown to Melgar. (Tr. 856:10-18).

## **B. The Results of Melgar's Overtime Study**

Melgar's resulting report showed all employees for whom he found evidence of intent to circumvent the time tracking and security systems. (GC Ex. 19; Tr. 980:3-22; 817:21-24). The results are summarized below.

### **1. Nafis Vlashi**

During the week of September 28, 2015, the first week of 16 that Melgar sampled, Vlashi and Paul Moser were the only two employees out of the 59 who worked over 100 hours. (GC 19 at 4). Vlashi had an average turnstile ratio of 3.67, while Moser's turnstile ratio was only 0.92 (GC 19 at 3) (meaning that Vlashi had an average of almost four sets of in/out on average per day while Moser had only one set, 0.92). A review of all turnstile data for the first two days (September 28 and 29) of the sample week showed discrepancies for Vlashi – namely that he

appeared to be out of the building, while being paid at an overtime rate, for four and three hours respectively. (GC 19 at 16-17).

On September 28, 2015, Vlashi's records showed an exit and entry within a seconds-long period – “out” at 3:09:30 PM, then “in” seven seconds later; and then another “in” at 5:42 PM. Melgar testified that this was the type of suspicious pattern which caused him to investigate a particular employee further. He determined that Vlashi was using the turnstile to pretend he was in the building, when he was really away for almost four hours. (Tr. 826:8-828:15; 829:21-25).

On September 29, 2015, Vlashi's records showed an “out” at 9:50:51, then an “in” at 9:50:55, and another “in” 55 minutes later; then an “out” at 4:51 PM, an “in” three seconds later, followed by another “in” 48 minutes later; Vlashi did the same again at 7:40 PM, this time out of the building for 70 minutes. (GC Ex. 19 at 17). Thus, Vlashi was out of the building for nearly three hours that day. (Tr. 829:2-19; 830:1-5). Further, Vlashi swiped “out” of and went through the security turnstile and then almost immediately thereafter swiped back “in” without actually going through the turnstile (a fact Melgar confirmed via security footage). (Tr. 964:10-17). As a result, Melgar concluded that Vlashi intentionally concealed his absence from the facility.

Melgar also found discrepancies in Vlashi's time records for May 2016. On May 5, 2016, the records reflected that Vlashi left the building at 9:22 PM, but remained on the clock through 11:30 PM (GC Ex. 19 at 19; Tr. 843:22-844:13). On May 6, 2016, the records established that Vlashi: (1) entered at 7:25 PM; (2) left at 10:04:02 PM; (3) entered again at 11:17 PM; and (4) left again at 11:30:31 PM (GC Ex. 19 at 20; Tr. 845:9-846:13). Thus, Vlashi was out of the building for 73 minutes, but was paid for that entire time at an overtime rate. (Tr. 847:3-6). On May 12, 2016, the records reflected that Vlashi was out of the building from 12:34 PM to 1:27 PM and from 6:53 PM to 11:11 PM, but remained on the clock for both of these periods, returning at the end of his shift to simply clock out. (Tr. 850:14-851:8). On May 21, 2016, while

being paid for Saturday work at overtime rates, Vlashi was unaccounted for, outside of the building, from 6:19 PM to 8:55 PM (Tr. 851:22-852:9). Finally, on May 22, 2016, while being paid for Sunday work at a double-time rate, Vlashi was unaccounted for, out of the building, from 2:31 PM to 6:06 PM (GC Ex. 19 at 31; Tr. 852:10-17). Melgar reviewed video footage for these entire periods to confirm that Vlashi did not enter through the turnstiles during the periods he was suspected of being out of the facility. (Tr. 964:10-17).

## **2. Bruce Scherer**

Scherer also worked 80 or more hours in a week during the pertinent period between October 2015 and May 2016. Melgar studied Scherer's time records and security video footage because of his consecutive security turnstile "out's" on May 5 and 6, 2016. On this point, Melgar testified that "I was already investigating the previous pattern which was consecutive ins. And I wanted to see what consecutive outs entail." (Tr. 857:2-5). Melgar reviewed the entire period of the video evidence to try to determine when Scherer left on those two days. (Tr. 918:1-919:2). Melgar's review of the video and records revealed that Scherer deliberately bypassed the security turnstile, under circumstances evidencing his intent to hide being out of the facility. (Tr. 943:15-22). Specifically, a review of May 5 and 6, 2016 security video showed Scherer deliberately squeezing around the security turnstile on May 5, 2016 to enter the building without using his ID card (which in Melgar's view evinced an intent to hide how long he was outside of the building). (GC 19 at 36). Melgar explained that Scherer did not use his ID card to enter the facility at 7:45 PM even though Scherer had used the ID card at 5:36 PM. (Tr. 857:23; 858:3). Melgar noted that on May 6, 2016, Scherer had over four hours of unaccounted time. (Tr. 856:19-859:11).

## **3. Nove Koroskoski and Claudio Gutierrez**

Nove 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. (Tr. 817:24-25; 860:5-8; 988:3-4). 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. (Tr. 819:19-820:3).

During the review process, the assigned security captain paused the video and identified Koroskoski as the person who the turnstile scan recorded as Gutierrez. (Tr. 820:4-10; 821:8-10). There was no security footage of Gutierrez exiting the building that night. (Tr. 822:5-18). In studying the records further, Melgar found that 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. (Tr. 822:19-823:1; 823:21-824:8). The payroll system showed that both Koroskoski and Gutierrez were being paid at an overtime rate during this period. (Tr. 824:19-21). Evidence of Gutierrez engaging in time theft while working overtime was particularly problematic as he testified at the hearing that, given his position, “[he] g[a]ve out the overtime,” including even his own. (Tr. 665:23-666:1). Melgar noted a pattern of two consecutive “in’s” and no “out’s” on the turnstile records, so he was trying to understand how these employees were exiting the building. (Tr. p. 825:2-8). Melgar concluded that Koroskoski used Gutierrez's card to punch out in the payroll system, and swipe out at the turnstile. (Tr. 825:18-25). This apparent conspiracy between Koroskoski and Gutierrez was how Gutierrez became a subject in Melgar's Report. (Tr. 826:1-5).

#### **4. John Maneveski**

According to Melgar, around May 2016, the Fair Lawn facility's Human Resources (“HR”) Manager, Erica Clark-Muhammad (“Clark-Muhammad”), approached him about John Maneveski. (Tr. 861:20-24). Maneveski was not one of the 59 employees studied in the original report. (Tr. 862:22-24). Melgar testified that Clark-Muhammad explained to him that one of Respondent's supervisors, Jerry Luchanski, caught Maneveski taking excessive breaks. (Tr.

861:16-862:11). Clark-Muhammad wanted Melgar “to verify if that particular instance ha[d] been an isolated incident, or if it was occurring multiple times.” (Tr. 861:22-24). 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.” (Tr. 862:8-11). Melgar reviewed his records which showed Maneveski was paid overtime rates while being absent from the facility for 23 hours spanning over six shifts – nearly four hours per shift. (Tr. 860:2-15; 863:3-864:18).

#### **5. Zoran Naumoski**

Melgar also reviewed data and records related to Zoran Naumoski, the employee with the highest turnstile ratio average during the 16 sampled weeks. (GC Ex. 19 at 3). Over the weeks sampled, Naumoski logged, on average, 5.81 in/out sets per day. Melgar’s analysis showed Naumoski was out of the building for 95 minutes on October 13, 2015, and 59 minutes on October 14, 2015. (GC Ex. 19 at 33; Tr. 853:15-855:-21). Melgar noted in his report that because Naumoski was the line attendant for his shifts, during the periods of time Naumoski was outside, the production lines were left unattended. (GC. Ex. 19 at 33). However, by the time Melgar completed his review, Naumoski no longer worked at the Fair Lawn facility. (Tr. 856:10-15).

#### **6. Christian Barreto**

Melgar also examined the records of Christian Barreto even though he was not one of the 59 employees identified in the original report. (Tr. 866:13-21; 867:22-24). Around June 2016, Clark-Muhammad asked Melgar to review Barreto’s records because there was a particular date on which Barreto had excessive “in’s” and “out’s.” Melgar reviewed the security video and determined that every time Barreto exited the building, he signed a book at the security window to indicate that the time he was out of the building. (Tr. 868:4-18). Accordingly, Melgar did not find any evidence of Barreto exiting the building without acknowledging his absence. (Tr. 869:9-

19; 886:4-17; 887:1). The security video footage likewise never depicted Barreto bypassing the turnstiles. (Tr. 887:4-21). Melgar reported his findings about Barreto and was not asked to modify or supplement his report. (GC Ex. 19; Tr. 871:5-872:3). Ultimately, Barreto was suspended for three days for time abuse and the Union did not file a grievance over this suspension. (Tr. 774:13-15). Melgar was not involved in the decision to discipline Barreto. (Tr. 872:4-10).

### **C. Melgar Shares The Results of His Overtime Study**

Ultimately, by early summer 2016, Melgar had completed his detailed 37-page report of all employees for whom he found evidence of an intent to circumvent the security and time and attendance systems, (Tr. 980:3-22; 817:21-24; 1169:25; GC Ex. 19), including a supplemental report for Maneveski. (R. Ex. 11; Tr. 1165:3-12). Melgar gave his report to Clark-Muhammad, who in turn conducted a further investigation into the suspected misconduct. (Tr. 1007:5-7).

Thereafter, Clark-Muhammad notified Michael Keenan, the Regional Business and Integrity Officer and Security Director for North America, of Melgar's report, and explained to Keenan that four individuals may have engaged in time theft. (Tr. 1000:8-10;1001:12). Clark-Muhammad provided Keenan with Melgar's report (GC Ex. 19). (Tr. 1003:1-25). Keenan reviewed the report and told Clark-Muhammad that, under corporate policy, such matters must be tracked by his department – the Business Integrity Department. Id. As a result, Keenan participated in Respondent's investigation. (Tr. 1006:12-15). However, Keenan did not participate in the disciplinary decisions. (Tr. 1012:17-19).

Clark-Muhammad also provided the report to Pamela DiStefano, ("DiStefano"), Respondent's Director of Labor Relations for the North America Region. (Tr. 1160:7-9). Thereafter, Clark-Muhammad, Keenan, Kuratli, and DiStefano met with Melgar to review the report to understand how the data revealed the employees' transgressions. (Tr.1163:25-1164:18).

At the hearing, Melgar was asked why he never achieved his initial goal of determining why Fair Lawn employees were working so much overtime. (Tr. 878:10-12). 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.” (Tr. 900:12-18). Nevertheless, Melgar testified that “[t]he database continue[d]” and that he continued to provide overtime expense reports to the Kuratli, the Plant Manager. (Tr. 901:3-13).

#### **D. Respondent Interviews The Alleged Discriminatees**

After reviewing the report, DiStefano directed Clark-Muhammad and Keenan to interview the Discriminatees, Koroskoski, and Maneveski, along with their Union representatives, to ask for their explanations, if any, for the discrepancies identified in Melgar’s report. (R. Ex. 12; Tr. 1165:13-19). The interviews occurred on or around June 15, 2016, and each employee was suspended at the end of the interview. (Tr. 556:20-22; 1007:8-12; 1010:20-22; 1012:6-9).

##### **1. Nafis Vlashi**

During his interview on or around June 15, 2016, Clark-Muhammad asked Vlashi to explain the ten hours of unaccounted time paid at a premium rate, as well as three hours of unaccounted time paid at a double time rate on May 22, 2016. (Tr. 852:10-17). Vlashi did not offer an explanation because he could not remember. (Tr. 424:24-427:6; 428:13-15).

However, Vlashi testified that he conducted union business on Tuesdays, Wednesdays, and Thursdays during the first shift, and that if he needed to leave the building to perform such duties that it would take “[t]wo, three times a day. . . [for] [f]ive, 10 minutes. At most.” (Tr. 516:10-23). Accordingly, theoretically, Vlashi would be out of the facility for union business on a Tuesday, Wednesday or Thursday for, at most, forty-five minutes. Nevertheless, on Thursday, May 12, 2016, Vlashi was out of the building for a total of five hours. (Tr. 850:14-851:8). 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. (Tr. 851:22-852:17). Significantly, during his investigatory interview meeting, Vlashi never contemporaneously raised the fact that he was purportedly on union business as a reason for his absence, a critical fact he admitted during the hearing. (Tr. 520:1-3; 520:13-16).

## **2. Bruce Scherer**

During his June 15, 2016, interview with Clark-Muhammad, Keenan, and a shop steward, Scherer admitted to evading the turnstiles on May 5, 2016, because it “wasn’t a big event.” (Tr. 570:9-13; 603:6-10). He also claimed that it was impossible for him to leave the building because he was on the production line; that it was impossible for him to take a two hour break and that he never did. Throughout the investigatory interview, Scherer never raised union business as a reason for his extended time outside of the building. (Tr. 622:19 - 623:12). For example, Scherer never explained in the interview or testified as to what union business he was conducting outside of the facility on May 6, 2016, a Friday night, when security video captured Scherer leaving the building at 5:36 PM and not returning until 7:11 PM. (GC Ex. 19 at 37).

## **3. Claudio Gutierrez**

Gutierrez testified that, during his interview, he learned that he was being investigated for “falsifying records” and “stealing time from the company.” (Tr. 684:19-21). Gutierrez also explained that, during his interview, he was asked for an explanation as to why someone else had his card at the security turnstiles and that he denied any such allegation. (Tr. 725:2-6; 728:23-729:8; 729:18-20). He admitted telling Clark-Muhammad that he did not leave the building that day after 3:24 PM, acknowledged he claimed to be in the facility the entire time, and that he wished he could go home and get paid. (Tr. 740:19-741:21; 742:14-19). Gutierrez testified that Clark-Muhammad expressly told him that Koroskoski used his card. (Tr. 687:19-22). However,

even after knowing that it was Koroskoski who used his card, at the interview, Gutierrez did not recall the story he later recounted at the hearing. (Tr. 688:1-3) (testifying that at the interview he could not “remember anything actually at that time.”). Then, later at the hearing, Gutierrez remembered a time when he left the building without his ID card to go to the pharmacy and that he asked Koroskoski to bring him his wallet with the ID card. Ultimately, Gutierrez stated “somebody used my card to get in and out. Yes, I did.” (Tr. 687:10-11).

#### **E. Respondent’s Decision To Discharge Vlashi, Scherer, and Gutierrez**

After the interviews were completed, DiStefano reviewed the notes from the interviews (R. Ex. 12; Tr. 1167:8-19) and discussed with Clark-Muhammad the explanations, or lack thereof, from the Discriminatees and other implicated employees, the appropriate level of discipline, and any additional factors to consider based on their explanations. (Tr. 1168:2-12). DiStefano decided that, except for Barreto and Naumoski, the other individuals would be discharged based on the intentional and deceptive nature of their acts.<sup>5</sup> (Tr. 1169:10-13).

On July 1, 2016, Gutierrez, Scherer, Vlashi, Koroskoski and Maneveski were terminated. DiStefano made the decision to terminate these five employees, although Clark-Muhammad effectuated the discharges. (CP Exs. 7-9; R. Ex. 14; Tr. 1171:16-1174:20). DiStefano based her decision on what she learned from Melgar’s report and the notes from the individual interviews. (Tr. 1165:13-19). DiStefano also relied upon Article 34 of the CBA, which states:

The full power of discharge and discipline lies with the Company. It is agreed that this power shall be exercised with justice and with regard for the reasonable rights of the employee[.][GC Ex. 3 at 37).]

---

<sup>5</sup> Barreto was suspended, and not discharged, because he never concealed the fact he was leaving the building as evidenced by his signing in and out in the employee log. (Tr. 1169:10-13). No action was taken as to Zoran Naumoski, as he had already left the Company by that time. (Tr. 1169:17-24).

Further, under Article 40 of the CBA, Respondent reserved its right to exercise discretion in evaluating any violation of its rules and policies and in determining the appropriate discipline.

Article 40 states in relevant part:

The Company reserves the absolute right to determine the level of discipline and the seriousness of each incident. This will apply for all employees in the Bakery, Distribution Center, and the Sales Branches.

By entering into this agreement, the Company does not waive its right to determine and/or implement appropriate disciplinary actions for violations or [sic] company policies, rules and regulations. [(Id. at 48).]

While DiStefano knew that Vlashi held a position with the Union because she previously saw him at a negotiations session, she had no knowledge of Vlashi, Gutierrez or Scherer's union activities. (Tr. 1175:5-17). DiStefano was clear that Vlashi's position with the Union did not factor into the Company's decision to discharge an employee who could not explain over ten hours of unaccounted time. (Tr. 1175:18-21). There is no evidence that Melgar made the decision to terminate, and there is no evidence of Melgar having any union animus or knowledge of any purported protected activity. (Tr. 872:11-25).

#### **F. The ALJ's Section 8(a)(3) Findings**

With respect to the 8(a)(3) allegations, the ALJ found that Vlashi, Scherer, and Gutierrez engaged in union activity known to Respondent and that Respondent harbored antiunion sentiments against all three union officials namely because "[v]arious supervisors made antiunion comments to Vlashi, Scherer, and Gutierrez." (D. 32:42-47).<sup>6</sup>

Specifically, the ALJ found anti-union animus toward Vlashi because, "John Laten told employees that 'You guys have no contract' in March 2016 and Supervisor Mike Goodin made a

---

<sup>6</sup> The ALJ dismissed the 8(a)(3) allegation concerning a three-day suspension of Richard Nazzaro finding that "Respondent was not motivated by Nazzaro's union status and/or his activity in support of the Union and that the same action would have been taken absence Nazzaro's protected status and activity." (D. at 45).

similar remark about the workers not having a contract in April. Vlashi was suspended in June and discharged on July 1.” (D. 33:15-17). Vlashi’s testimony with respect to the encounter with Laten was, around March 2016:

I got word from the workers on the floor, the shop stewards came and said, hey, supervisor [John Laten] is throwing out these words [you guys have no contract]. I said all right, no problem. I went over there and approached John. I said, John, why are you throwing out these words[?]

...  
He [John Laten] said, I apologize. I won’t say that again. [(Tr. 413:14-414:40).]

After this encounter, Vlashi said he just “went about [his] business.” (Tr. 414:4-5).

As for the Goodin exchange, which the ALJ found supported a finding of anti-union animus against Vlashi, Vlashi testified that, around April 2016, Supervisor Mike Goodin made a remark about workers not having a contract. (D. at 33). Vlashi testified:

[M]y shop steward in that department is Alex Naumoski. Called me up and said there are some terms being thrown around here. I said, what are those terms? He goes, you have to do what I say. You have no contract. I said, really. I said I’ll be right upstairs. I went upstairs. I said, Mike, what’s going on. You’re a veteran in this place. You’ve been working here so long. Why you throwing out these words? . . . . **He goes, I’m sorry. No. Got caught up in the heat of the moment. Won’t be said again. We walked out.**

Then I went and grabbed Nicholas Giulianelli [head supervisor] which is one of the old timer supervisors here over 42, 43 years working that facility. He saw me. I was a little agitated by this. Can I speak to you for a minute? He said, sure what’s up. I said, why your supervisors throwing out these words you have no contract, you do as I say? That’s above me, you and everybody else in this place. He goes, **I will speak to them. I will talk to them. I will make sure nobody else says it.** [(Tr. 414:14-415:12) (emphasis added).]

According to his testimony, when Vlashi was acting in his role as shop steward speaking to the head supervisor about the rumored “you have no contract” statement, all of the supervisors (including the head supervisor, Giulianelli) responded by apologizing and stating they would make sure such statements stopped. Vlashi confirmed that supervisors listened to Giulianelli.

Notably, when the ALJ asked, “[Giulianelli] gives an order instruction to the supervisors? . . . They follow him?” Vlashi said, “Correct. . . They follow him.” (Tr. 416:10-15).

As for Scherer, the ALJ found animus because, “[i]n spring 2016, Cal[i]brese told Scherer that the workers do not have a contract. Scherer was suspended in June 2016 and discharged on July 1, 2016.” (D. 33:25-27). Scherer’s recollection about Calibrese’s response pertaining to an overtime issue was consistent with Scherer’s general impression that when the shop stewards approached supervisors concerning employees working within their classification, “for the most part they relented and they allowed us to get someone for the overtime or get somebody in to cover the work.” (Tr. 564:20-22).

For Gutierrez, the ALJ found anti-union animus based on the “you have no contract” remarks and requests that Gutierrez return his T-shirt and take down the “United We Stand” flag. (D. 33:38-40). The ALJ specifically recounted that, “Gutierrez testified that he argued with [HR Supervisor] Dawn Sprague, who told employees they had no contract.” (D. 33:35-36). Gutierrez was suspended in June 2016 and discharged on July 1, 2016. (D. 33:41). However, at the hearing, when asked if anyone from the Company ever said anything to him about his union activity, Gutierrez replied, “Never said anything to me at all.” (Tr. 737:13-15).

With respect to the Sprague encounter, Gutierrez testified that, in March or April 2016, he approached her about a rumor he heard from an unnamed Union member concerning the unremarkable principle that employees could be discharged if they did not follow supervisory instructions. (Tr. 672:24-673:19). Critically, Gutierrez never testified that Sprague told him anything or that he would be fired. No witnesses testified that they felt threatened by the statement, “You have no contract.”

Nevertheless, after finding the General Counsel met its initial burden, the ALJ rejected Respondent’s defense, finding, “the so-called nondiscriminatory reason for the discharge of

Vlashi, Scherer, and Gutierrez [w]as clearly baseless. The attempt by the Respondent to reduce overtime hours is laudable but the study conducted by Melgar was applied in a disparate and discriminatory manner to single out the top union echelon.” (D. at 34). The ALJ found that the investigation conducted by Clark-Muhammad once she was presented with the analysis conducted by Melgar on Vlashi, Scherer, and Gutierrez was “a sham” and “fell short of a fair and full investigation.” (D. at 35:45-47). On this point, the ALJ ignored Board precedent and found an unlawful motivation based on the fact the “discharged employees were never provided with the employer’s form 101,” (D. at 35), and “Respondent presented no conclusive evidence that Vlashi, Gutierrez, and Scherer were treated similarly to other employees disciplined for bad behavior.” (D. at 39). However, Vlashi testified that supervisors issue the 101 form. (Tr. 423:15-20). The misconduct at issue in this case was found not by a supervisor but by Melgar who was analyzing both payroll and security turnstile data for the first time “in the history of the plant.” (Tr. 809:13-19). On the other hand, the notes from the interview of Maneveski, whose misconduct was discovered by his supervisor, Jerry Luchanski, indicate that the 101 form was issued for him. (Tr. 861:25-862:4; R. Ex. 12).

**IV. IN FINDING A VIOLATION OF 8(a)(3) AND (1) CONCERNING THE THREE DISCHARGES, THE ALJ MISAPPLIED THE WRIGHT LINE STANDARD AND IMPROPERLY IGNORED EVIDENCE [Exceptions 29-73, 75-81]**

As discussed herein, the ALJ relied upon an incorrect reading of the standard elucidated by the Board in Wright Line, 251 NLRB 1083 (1980), enf’d, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) and its progeny. Moreover, the ALJ ignored and misconstrued uncontroverted evidence which: (1) refuted the elements of the General Counsel’s prima facie burden; and (2) established Respondent’s defenses. The ALJ improperly found that the General Counsel met the Wright Line burden by relying upon unsupported inferences. The Board has long held that “inferences must be founded on substantial evidence upon the record as a whole”

and, since an inference is not substantial evidence, “an inference based on an inference” is impermissible. Steel-Tex Manufacturing Corp., 206 NLRB 461, 463 (1973). There is no probative evidence that Respondent’s decision to discharge the alleged Discriminatees was attributable to their union activity. Rather, the record evidence overwhelmingly shows that Respondent: (1) discharged Vlashi, Scherer, and Gutierrez based upon transgressions revealed during an unbiased overtime analysis; and (2) took legitimate business steps (unrelated to union or any other arguably protected concerted activity) to end the deception. Therefore, the ALJ’s finding that the three discharges violated the Act should be reversed.

#### **A. The ALJ Misapplied The Wright Line Standard**

In Section 8(a)(3) mixed-motive cases, the Board applies the burden-shifting framework articulated in Wright Line pursuant to which the General Counsel must first “prove, by a preponderance of the evidence, that the employee’s protected activity was a *motivating factor* in the employer’s adverse action.” Alan Ritchey, Inc., 346 NLRB 241, 242 (2006) (emphasis added); Wright Line, 251 NLRB at 1089. To establish unlawful motivation, the General Counsel must show: (1) the employee engaged in protected concerted union activity; (2) the employer had knowledge of the protected activity; (3) evidence of union animus; and (4) a link or nexus between the protected activity and the adverse employment action. See Shearer’s Foods, Inc., 340 NLRB 1093, 1094, n. 4 (2003) (“Wright Line [is] a causation test”); Wal-Mart Stores, 341 NLRB 796 (2003) (Wright Line requires a “link or nexus between the protected activity and the adverse employment action.”); Earthgrains Co., 338 NLRB 845, 849 (2003).

In The New Otani Hotel, 325 NLRB 928, 931 (1998), the Board addressed a nearly identical set of facts to the present case – the termination of three employees for time theft based on the employer’s investigation and report into suspected time card abuse, or “proxy-punching.” Id. The Board found that the record demonstrated, as here, that the employer had no reason to

doubt the report and this finding, “shift[ed] the contest, and the nature of the General Counsel’s burden, to a different arena, where, to prevail even at the threshold, the General Counsel must make a showing by a preponderance of credible evidence that, despite [the employer’s] honest belief of their misconduct, his decision to fire the three was nevertheless tainted in some manner by their prior union activities.” Id.

Presuming the General Counsel meets its burden by a preponderance of credible evidence, the employer may rebut the General Counsel’s showing by establishing it would have made the same decisions regardless of the protected concerted union activity. “The employer in a section 8(a)(3) discharge case has 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. It is well settled that “the weaker a prima facie case against an employer under Wright Line, the easier for an employer to meet his burden . . . of proving the employer’s action would have occurred regardless of protected activity.” Sasol N Am. Inc. v. NLRB, 275 F.3d 1106, 1113 (D.C. Cir. 2002) (internal quotes and citations omitted). Nevertheless, “the General Counsel’s burden is actually one that remains with the prosecution throughout the trial, and does not shift.” The New Otani Hotel, 325 NLRB at 938.

In the present case, the ALJ ignored: (1) that the decision maker who ultimately effectuated the three Discriminatees’ suspensions and terminations lacked specific knowledge of the employees’ union activities; (2) numerous individuals who engaged in the same union activities as the Discriminatees were not disciplined; (3) the purported anti-union animus was generalized and unrelated to the Discriminatees; and (4) there was no causal nexus whatsoever between the Discriminatees’ union activities and Respondent’s disciplinary decisions. Moreover, the ALJ substituted his own judgment for Respondent in concluding that Respondent would not have terminated the Discriminatees regardless of their protected concerted activities.

**B. The ALJ Ignored Respondent's Lack of Knowledge of Protected Activity [Exceptions 29-35, 37]**

First, the ALJ incorrectly found that the General Counsel satisfied its burden of proving that Respondent was aware that Vlashi, Scherer and Gutierrez were engaged in protected activity. The present case does not involve “a situation in which an employee [was] discharged based on an adverse report or recommendation by a low level supervisor, which report or recommendation the evidence shows was discriminatorily motivated.” West Pak, Inc., (1980). In West Pak, a high-level manager decided to terminate an employee, as opposed to the supervisor found to exhibit anti-union animus. Id. As a result, in West Pak, the Board found insufficient evidence of the decision maker's union animus for the General Counsel to satisfy its initial Wright Line burden.

West Pak is particularly apt. Here, the ALJ ignored that DiStefano made the ultimate decision to discharge the three Discriminatees and that there was a paucity of evidence establishing *her* knowledge of their purported union activities the ALJ identified in this case. (CP Exs. 7, 8, 9; R Ex.14; Tr. 1171:16-1174:20). Rather, DiStefano based her decisions on what she learned from Melgar's reports and the notes from the individual interviews. (Tr. 1165:13-19). While DiStefano knew that Vlashi had a position with the Union (only because she saw him at a negotiation session), she had no knowledge of any of the others being shop stewards with the Union. (Tr. 1175:5-17). More importantly, DiStefano was clear that Vlashi's position with the Union did not factor into the Company's discharge decision. (Tr. 1175:18-21). Further, there is no evidence Melgar had any knowledge of the Discriminatees' union activities, (Tr. 872:11-25), much less that he sought or was directed by anyone to target Union supporters.

Despite the overwhelming evidence to the contrary, the ALJ nevertheless found that the General Counsel satisfied the Wright Line knowledge element in wholly conclusory fashion:

Milewski believed that Respondent's management and supervisors had knowledge of the rallies since they were held in front of the plant." (D. 5:9-10).

First, addressing the counsel for the General Counsel's burden of proof, I find, and it cannot be reasonably disputed, that Nafis Vlashi, Bruce Scherer, and Claudio Gutierrez engaged in union activity well known to the Respondent before their respective discipline was taken. (D. 32:40-42).

At best, this finding shows the ALJ relied on Respondent's (but not DiStefano specifically) supposed mere knowledge of shop steward status to satisfy this particular Wright Line element. However, the knowledge element under Wright Line is "knowledge of the union activity", not mere knowledge of union status. See Shearer's Foods, Inc., *supra*, 340 NLRB at 1094. Further, such finding, that shop steward status is sufficient to establish the Wright Line knowledge element, is undermined by the fact that Respondent has had knowledge of, for example, Gutierrez's and Vlashi's time on union business for years and not taken any adverse action against them prior to finding evidence that these employees stole overtime. (D. at 25). Accordingly, the ALJ's finding as to the Wright Line knowledge element should be reversed.

**C. The ALJ's Finding of Animus Toward The Union Is Belied By The Record Facts and Contrary to Controlling Board Precedent [Exceptions 36, 38-40]**

The ALJ likewise erred in finding that the General Counsel satisfied the third element of the Wright Line test, that Respondent exhibited substantial anti-union animus.

**1. Respondent's Good Faith Belief Concerning Melgar's Report**

In The New Otani Hotel & Garden, 325 NLRB at 928-931, the General Counsel sought to show that a report resulting from an investigation into employee proxy-punching time cards traced from some anti-union animus against the discharged discriminatees. *Id.* However, the ALJ, and in turn the Board, completely rejected this argument and found no unlawful motive because, as here, the record unequivocally showed that it was the unsolicited report that triggered the employer's investigation. The ALJ found that this report, whether truthful or not, was, in fact,

believed and relied upon by the decision makers as a central consideration in their common judgment that the trio was guilty of proxy-punching. Id. at 930.

All evidence in the record points to the same conclusion here – that Respondent: (1) initiated an investigation into overtime; (2) generated a report that showed time theft and intent to conceal, and (3) relied on the report to make the decision to terminate five employees, three of whom happened to also hold union leadership positions. It is nonsensical to conclude that the Company would transfer an employee from Australia to New Jersey to conduct a months’ long in-depth study and spend countless hours reviewing data solely to target these three employees. The ALJ totally disregarded the record to conclude that Melgar engaged in an elaborate and discriminatory sham. (D. at 35).

## **2. General and Non-Threatening Statements Do Not Satisfy Wright Line**

In Raysel-Ide, Inc., 284 NLRB 879, 880 (1987), the Board held that the anti-union animus element of Wright Line requires that “the hostility or opposition to the union manifested is strong enough to support a conclusion that the Respondent was willing to violate the law, by discriminating against employees, in order to keep the Union out.” Id.; see also, Obars Mach. & Tool, 322 NLRB 275 (1996) (Board affirming dismissal of 8(a)(3) allegation where a supervisor’s statement to laid off employee that his layoff was due to union activity was not sufficient evidence of union animus). In addition to requiring animus to be substantial, established Board precedent requires more than general statements of animus about the union. In Tejas Elec. Servs., 338 NLRB 416, 416 (2002), the Board held that the employer’s statement that it “did not care for unions” did not “as a legal matter [] establish animus.”

This case law applies with equal force to the present case. The mere fact that the Union pressured Respondent during negotiations for a successor collective bargaining agreement and, in response, Respondent exercised its lawful right to resist such pressure, does not establish anti-

union animus. Thus, the fact that, on February 23, 2016, many bargaining unit employees wore Union t-shirts throughout the bakery (Tr. 108:15-17) or that there were Union rallies on April 25 or 26, 2016 with 70 people protesting on the facility's front lawn (Tr. 110:7-10; 111:24-25), simply does not establish that the Company harbored anti-union animus. The same is true for the ALJ's finding that "Vlashi's allies and union events were posted on Facebook and ostensibly seen by several supervisors who were friends on social media." (D. at 33). Mere observations do not equate to unlawful anti-union animus.

Similarly, the Union's attempt to hang two Union flags saying "United We Stand" within Respondent's facility, and the Company asking them to remove the flags, also does not evidence anti-union animus. (Tr. 678:18-679:4; 679:12-16; 702:8-12). Respondent's response (exercising its Section 8 rights) is not unlawful and cannot be used as a basis for finding animus. Winkle Bus Co., Inc., 347 NLRB 1203, 1208 (2006); NLRB v. Lampi, 240 F.3d 931, 936 (11th Cir. 2001). Moreover, since others besides the Discriminatees also engaged in union activity, it is illogical to conclude that there was union animus against Vlashi, Scherer and Gutierrez in light of the fact it is undisputed others were left unscathed. For example, Leon Koroskoski and Mark Sickles testified they participated in Union rallies, picketing, and wore the Union t-shirt without incurring any discipline. (Tr. 367:6-16; 383:12-20).

The record further shows that the ALJ's anti-union animus finding boils down to nothing more than general, non-threatening remarks. Accordingly, the generalized statement, "you guys have no contract," relied upon by the ALJ, simply does not meet the Wright Line burden as a matter of law.<sup>7</sup> Significantly, according to their own testimony, which the ALJ evidently ignored,

---

<sup>7</sup> Vlashi testified that he heard rumors of the "no contract" comments and when he approached supervisor Laten and Goodin, each apologized for whoever made the statements and assured Vlashi that the comments would not be made again. (Tr. 413:12-415:12). Scherer testified that he argued with a supervisor about overtime and the supervisor said, "you have no contract."

many, if not all, of the non-specific statements were never made directly to Vlashi, Scherer, and Gutierrez.<sup>8</sup> Moreover, any inference of animus is critically undermined by the fact that the supervisors who uttered the supposedly hostile statements promptly retracted them and provided assurances that any such statements would stop.<sup>9</sup> In fact, none of the General Counsel's witnesses testified that they felt threatened by the statement. When asked if anyone from the company ever said anything to him about his union activity, Gutierrez confessed, "Never said anything to me at all." (Tr. 737:13-15).

Further, the ALJ erroneously concluded Respondent exhibited anti-union animus based on nothing more than a miscommunication between Milewski and Clark-Muhammad, which Clark-Muhammad promptly corrected. (D. 5:12-18). To reach his conclusion, the ALJ misattributed statements allegedly made by an HR Assistant, Tasha McCutchen, to Clark-Muhammad, and mischaracterized the exchange. According to the ALJ:

Milewski recalled an incident when he was refused attendance by Erica Clark-Muhammad (Clark-Muhammad), the human resources director, at labor management meeting on March 20 because Milewski was wearing a union logo shirt to the meeting. Milewski was told to take off his shirt for the meeting and when he refused, a guard escorted Milewski out. Milewski said that a guard later told him that he could return to the meeting after Clark-Muhammad said the shirt was not offensive to management. [(Id.).]

However, according to the transcript, Milewski testified that on March 24, 2016, McCutchen, *not Clark-Muhammad*, told Milewski that the labor management meeting would not happen unless he changed out of his Union t-shirt or put on a jacket. Milewski chose to leave.

---

However, Scherer explained that, "for the most part they relented and they allowed us to get someone for the overtime or get somebody in to cover the work." (Tr. 564:20-22). Gutierrez also testified that HR supervisor, Sprague never said, "you have no contract," rather, when he approached her, she "walked away. (Tr. 672:24-673:19).

<sup>8</sup> Gutierrez testified that Respondent "Never said anything to me at all" about his union activity. (Tr. 737:13-15).

<sup>9</sup> According to Vlashi, Goodin said, "I'm sorry. No. Got caught up in the heat of the moment. Won't be said again . . . I will make sure nobody else says it." (Tr. 414:14-415:12). John Laten said, "I apologize. I won't say that again." [(Tr. 413:14-414:40).]

(Tr. 116:13-17). Minutes later, Clark-Muhammad called Milewski back into the building to have the meeting. At that point, according to Milewski's own testimony, it was Clark-Muhammad, the HR Director, who said, "Your shirt is not offensive to us. And we don't find it offensive. We would like nothing more than for you to come back and have a meeting." (Tr. 118:14-16).

Additionally, these interactions hardly qualify as threats of retaliation. The "no contract" remarks merely represented a good faith belief on the part of some employees that they were permitted, for example, to assign employees from the Packaging Department to clean a spill in the Mixing Department because the CBA had expired. (Tr. 565:13-566:6) (supervisor Calibrese argued with Scherer and claimed that he could make such assignments because there was no contract). Under Wright Line, evidence of an employer's good faith belief establishes a defense even if the belief is incorrect. Hawaiian Dredging Construction Co. v. NLRB, 857 F.3d 877 (D.C. Cir. 2017). Accordingly, the record facts do not support finding antiunion animus toward Vlashi, Scherer, and Gutierrez.

### **3. The ALJ Contravened Board Precedent to Find That The Timing of The Discipline Showed Animus**

The ALJ also erred by ignoring critical facts showing that the timing of the discharges did not align with union activity; rather, the disciplinary decisions aligned with the completion of an eight-month study and resulting investigation into undisputed misconduct (theft of time).

In Syracuse Scenery & Stage Lighting Co., 342 NLRB 672, 675 (2004), the Board reversed the ALJ's finding of unlawful motivation when the timing of the discipline occurred weeks after the employee began his open union activities. The Board held the ALJ committed reversible error by ignoring the identical relationship between the timing of the discipline and reports to management regarding the employee's misconduct. In these circumstances, the Board has held that "the factor of timing is too weak a foundation upon which to base a finding of

pretext.” Id.; see also, Snap-on Tools, 342 NLRB 5 (2004)(union activity occurring more than two months from discharge too remote to establish animus based on timing); Pacesetter Corp., 307 NLRB 514, 521-522 (1992) (same).

The ALJ found that, “Vlashi, Gutierrez, and Scherer were discharged in July” and that they engaged in union activity during March and April of 2016. (D. at 40). According to the ALJ, this “timing represent[ed] significant evidence of unlawful motivation.” Id. In fact, six months before any alleged unfair labor practice transpired, Respondent’s Continuous Improvement Engineer (Melgar) began his assessment. (Tr. 809:13-19). Moreover, the ALJ ignored that: (1) three or four months elapsed between the union activity in question and the discipline; and (2) the Discriminatees’ time theft (and attempt to conceal such transgression) qualified as intervening misconduct breaking any causal chain. Specifically, the ALJ found that supposedly hostile anti-union statements made in March 2016 supported a finding Respondent was unlawfully motivated to discharge the Discriminatees in July 2016. However, pursuant to Snap-on Tools, this timing is simply too remote. Further, Respondent suspended and then discharged Vlashi, Scherer and Guitierrez in June and July respectively for intervening misconduct occurring as late as May 2016. (GC Ex. 19). See Syracuse Scenery, Pacesetter Corp. Finally, it is noteworthy the Complaint failed to allege any independent violations of 8(a)(1) of the Act which critically undermines a causation finding. See Taos Ski Valley, Inc., 332 NLRB 403, 407 (2000). Thus, the ALJ erred by finding that timing alone showed “significant evidence” of an unlawful motivation.

#### **4. The ALJ Ignored Evidence of Respondent’s Nondiscriminatory Treatment of Known Union Supporters**

The ALJ also ignored evidence of Respondent’s “nondiscriminatory treatment of [known union supporters]” which the Board views as showing an employer’s “lack of animus toward

union activity.” National Security Technologies, LLC, 356 NLRB 1438, 1448, n. 1 (2011). In fact, such evidence is entirely appropriate to show the “General Counsel[] fail[ed] to meet his initial burden.” Id.; LM Waste Service Corp., 357 NLRB 2234 (2011) (finding no 8(a)(3) violation the Board stated, “[w]e note particularly . . . that the Respondent discharged Cardona approximately 2 months after union activity commenced at the facility and without concurrently discharging other employees[.]”).

Here, Vlashi testified that there were a total of 37 union officials and shop stewards. (Tr. 470:7-12; 472:4-9; 474:11-19). No disciplinary action was taken against 34 of the 37 union officials and shop stewards. Further, according to Vlashi’s subjective judgment, the “strong” shop stewards were “Claudio Gutierrez, Bruce Scherer, Joe Bush, but he’s deceased now [,] Randy Rocco, [and] Richard Nazzaro.” (Tr. 546:12-15). There is no allegation of any adverse action ever taken against Bush or Rocco. More importantly, there is no evidence of these “strong” (whatever that actually means) shop stewards violating Company policies like the Discriminatees in this case. On the other hand, non-shop steward employees — Nove Koroskoski and John Maneveski — were discharged at the same time for the same offenses (time theft and subsequent attempts to evade detection) that the Discriminatees committed. (Tr. 175:19-20). The ALJ improperly disregarded this evidence, which critically undermined the General Counsel’s ability to satisfy its prima facie burden.

**5. The ALJ Disregarded The General Counsel’s Burden To Establish A Causal Connection Between The Protected Activity And The Adverse Employment Actions [Exceptions 41-73]**

In this case, the ALJ found that protected activity was a motivating factor for the adverse employment action based on Respondent’s purported knowledge of the Discriminatees’ protected activity and anti-union animus. However, the ALJ erred by failing to link these concepts to the adverse employment actions under review. In Valley Health System, LLC, 352

NLRB 112, 112 fn. 2 (2008), Member Schaumber noted that the Board and courts may characterize the initial Wright Line burden as “adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action.” Likewise, in Shearer’s Foods, Inc., 340 NLRB 1093, 1094 (2003), the Board found that the presence of evidence of protected activity, employer knowledge and anti-union animus:

[M]ay not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action. For example, the 8(a)(1) conduct of a supervisor, while imputed to the employer, may have no relation to adverse employment action taken by another supervisor against an employee who happened to be engaged in Sec. 7 activities. [(Id.)]

In Atlantic Veal & Lamb, Inc., the employer advised that if the Union “came in”, it would “close the business and move to Indiana” and that if the employer found out “who was signing the cards for the Union, they would get fired[.]” Id. at 425. Nevertheless, even in light of such strong and threatening anti-union statements, the Board found “insufficient facts to show that the Respondent’s animus against [the employee’s] union activity was a motivating factor in the decision not to recall him.” Id. at 419.

Here, as outlined above, the only conduct which could be construed as anti-union animus is too general and remote in time to satisfy the General Counsel’s prima facie Wright Line burden. As a result, it was absolutely incumbent on the General Counsel to show some link between the slim, if any, showing of animus and the decision to terminate three individuals who admitted violating time and attendance rules and attempted to hide their misconduct. However, even in light of such innocuous and vaguely anti-union comments, the ALJ built his own bridge out of thin air in order to connect the alleged animus to the decision to terminate.

Despite the glaring lack of evidence establishing a link between Respondent’s decision to terminate the three Discriminatees and anti-union animus, the ALJ seemingly cast himself in the role of personnel manager and inserted his own judgment to replace Respondent’s decision based

on a months-long, in-depth analysis into overtime usage which revealed employee time theft. Contrary to the testimony, the ALJ found Melgar, “only reviewed the turnstile ratios and the recorded camera pictures of Vlashi, Scherer, and Gutierrez.” (D. at 35). Further, the ALJ wrote, he was “trouble[d]” because of the “multiple entries of the 59 employees that were not investigated further by the HR department.” (D. 38:32-34). As a result, the ALJ concluded that the study was a “sham” “conducted . . . to single out the top union echelon.” (D. 34:35-36).

This finding is contradicted by the record, as Melgar testified that he reviewed available video for all 59 employees in his study. (Tr. 980:3-22). Moreover, there is simply no evidence that Melgar focused on, or singled out, any particular employee because of his purported union activity. Further, this method of finding discriminatory intent ignored controlling Board precedent stating “employers are not obligated 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 of Appeals for the District of Columbia Circuit 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 that 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.

Moreover, the ALJ exceeded his mandate and improperly found that the “investigation conducted by Clark-Muhammad once she was presented with the analysis performed by Melgar on Vlashi, Scherer, and Gutierrez fell short of a fair and full investigation.” (D. 35:45-47).

Namely, the ALJ reached this conclusion because the “discharged employees were never provided with the employer’s form 101,” (D. at 35), and because “Respondent presented no conclusive evidence that [the Discriminatees] were treated similarly to other employees disciplined for bad behavior.” (D. at 39). However, Board law teaches that “absent independent proof of the employer’s antiunion animus, even evidence of actual, conscious disparity of treatment by an employer [] when it comes to rule-enforcement is not a reasonable basis for inferring that the employer’s enforcement of the rule in a given instance against an employee who has engaged in union activities known to the employer was motivated in any way by the employee’s union activities.” The New Otani Hotel & Garden, 325 NLRB 928, 942 (1998). The Act “does not require that an employer act wisely, or even reasonably; only, whether reasonable or unreasonable, that it not act discriminatorily.” Paramount Metal & Finishing Co., 225 NLRB 464, 465 (1976).

Also, the ALJ incorrectly found that Clark-Muhammad was unlawfully motivated in her investigation because she did not extend the “same benefit of doubt of Gutierrez’s explanation that he too, like Barreto, forgot his wallet and that Koroskoski inadvertently used Gutierrez’ badge to swipe him out.” (D. 39:1-3). This finding is chronologically impossible and completely contradicted by the record as Gutierrez did not testify that he ever told Clark-Muhammad about forgetting his wallet. Gutierrez testified that at the interview he did not remember his story of the forgotten wallet and that he could not “remember anything actually at that time” (Tr. 688:1-3), even though Clark-Muhammad expressly told him that Koroskoski used his card. (Tr. 687:19-22). There is no evidence in the record to show that Clark-Muhammad ever knew the story about Gutierrez going to the pharmacy and forgetting his wallet. On the other hand, Barreto testified that in his interview, he “explained to [Clark-Muhammad] that I had left -- I had lost my wallet that day outside when I went break.” (Tr. 673:11-12). Accordingly, it was not possible at the

time of the discharge for Clark-Muhammad to give Gutierrez the “benefit of the doubt” when she only knew about Barreto losing his wallet. Thus, not only was it error for the ALJ to engage in his own personal review in the first instance, the error was compounded by the fact that the ALJ found discriminatory intent on the part of Clark-Muhammad based upon facts she could not have known at the time.

Further the ALJ wrote, “It is unclear to me how DiStefano could testify that Barreto had no intentions to deceive since she was not present during the interview of Barreto to ascertain his state of mind.” (D. 39, n. 16). This finding ignores the fact that Melgar gave DiStefano his study which showed security video of Barreto signing the security log book every time he exited the building to indicate that the time he was out of the building. (Tr. 868:4–18). In making its determination, the Board cannot substitute its judgment for that of an employer and decide what would have constituted an appropriate investigation. See, e.g., Nat’l Express Corp., 341 NLRB 501, 502 (2004). Additionally, the Union filed several charges alleging Section 8(a)(5) violations but never asserted that this purported deviation from past practice violated the Act.<sup>10</sup>

Here, there is no evidence to show that DiStefano, Keenan, Kuratli or Clark-Muhammad believed that the Report was flawed or incomplete or failed to establish that the alleged Discriminatees and other implicated employees violated the Company’s policies repeatedly. Nevertheless, the assertion that Respondent did not follow some prescribed procedure (e.g., filling out a Form 101 or following progressive discipline used with less severe rule violations) is of no moment because under Detroit Newspaper Agency, the failure to follow “guidelines,” or “neglect[ing] to adhere to [a] ‘progressive discipline policy[,]’” are “red herring[.]” arguments which should be ignored. Id. at 310. Accordingly, the ALJ’s finding of discriminatory intent was

---

<sup>10</sup> The ALJ’s pre-ordained determination is further evidenced by his suggestion that Respondent should have disciplined Barreto more severely because of his prior disciplinary history. Significantly, the Union did not challenge Barreto’s discipline.

improperly rooted in his belief as to how Respondent should have conducted an investigation that it was not obliged to conduct in the first place.

**6. The Record Evidence Shows That Respondent Would Have Taken The Same Action Regardless of Any Union Activity**

Even assuming that the General Counsel met its prima facie burden under Wright Line, which it did not, the ALJ misstated and misapplied Respondent'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. Moreover, "the weaker a prima facie case against an employer under Wright Line, the easier for an employer to meet his burden . . . of proving the employer's action would have occurred regardless of protected activity." Sasol N Am. Inc. v. NLRB, 275 F.3d 1106, 1113 (D.C. Cir. 2002) (internal quotes and citations omitted). Finally, "[a]n employer who holds a good-faith belief that an employee engaged in the misconduct in question has met its burden under Wright Line." Sutter E. Bay Hosps. v. NLRB, supra, 687 F.3d at 434 (citations omitted). "This is true even if the employer is ultimately mistaken about whether the employee engaged in the misconduct. The good-faith belief demonstrates that the employer would have acted the same even absent the unlawful motive." Id.

In Syracuse Scenery, 342 NLRB at 673-75, discussed supra, the Board reversed an ALJ on similar grounds to the present case. Specifically, the ALJ there:

[D]etermined that each of the four crew members attempted to steal wages for work not actually performed, left work early without permission in violation of the policy, and then lied about their misconduct, [but] nonetheless found that the Respondent failed to meet its burden of demonstrating that the discharges would have occurred even in the absence of the crew members' protected activity.

The Board reversed the ALJ, finding instead:

[T]he nature of the Respondent's business requires that the Respondent rely on the honest timekeeping of its employees. During the period of surveillance, the Respondent discovered that the crew members were not worthy of their employer's

trust or good faith. For these reasons, we find that the Respondent's monitoring of the crew does not warrant the inference of unlawful motivation.

Similarly, in Children's Mercy Hospital, 311 NLRB 204, 205-06 (1993), the Board found the employee's falsification of company records regarding work performed were "aggravating circumstances warranting the bypassing of the steps of the discipline program" and sufficient to show that the employer was not unlawfully motivated. See also, United States Postal Service, 310 NLRB 530, 535-36 (1993) (same).

Further, it is well-settled that "the Act is not a shield protecting employees from their own misconduct or insubordination." Guardian Ambulance Service, 228 NLRB 1127, 1131 (1977); Alpers' Jobbing Co., 231 NLRB 449, 450 (1977) ("an employee's union activity does not insulate him from discharge for engaging in conduct for which he would have been terminated even if he had not been a union proponent."); Decaturville Sportswear Co., 205 NLRB 824, 831 (1973). Likewise, union conduct is not a free pass to violate time and attendance rules or to engage in time theft. Anheuser-Busch, Inc., 351 NLRB 644, 647-648 (2007) (holding that protected activity is not "a license to loaf, wander about the plant, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct."); see also Classic Truck Rental Corp., 251 NLRB 443, at fn. 1 (1980) (lawful suspension of alleged discriminatee where the Board found the employee's "misconduct, particularly his 'stealing time,' provided sufficient cause for disciplinary action up to and including discharge.").

Moreover, as noted above, the ALJ's disagreement with Respondent's decision-making process is irrelevant. It is "well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful." Framan Mech., Inc., 343 NLRB 408, 412 (2004).

Each Discriminatee admitted to conduct subjecting 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. (Tr. 480:14-24; 608:21-609:13; 709:3-710:10). Further, each Discriminatee admitted that the Company had right to determine the level of discipline depending on the circumstances of the violation (Tr. 481:6-11; 482:4-21; 651:7-9; 705:17-21; 706:10-707:3). They also agreed that, when clocked in, they were expected to be performing work for the Company. (Tr. 610:4-7; 711:22-25).

The misconduct is not disputed. Scherer admitted that he squeezed his body between the wall and the turnstile bar in order to get through without causing the bar to rotate. (GC Ex. 19 at 36; Tr. 617:19-618:7; 603:6-10). Gutierrez admitted all of the allegations against him and admitted that he lied to the Company during its investigation. (Tr. 684:19-21; 685:23-25; 687:10-11; 689:16-691:2; 692:2-9; 691:20-24). Further, the ALJ made an express finding with respect to the basis for Melgar's belief that Scherer engaged in misconduct. The ALJ wrote "Melgar believed his assumption was correct about Scherer after he reviewed a security camera screen shot 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." (D. at 26:29-31; GC Ex. 19 at 36).

As for Vlashi, even though he denied his misconduct, his denials are simply not credible. Vlashi denied that he left the building on the occasions identified by Melgar, despite the mountain of evidence to contradict his denials. (GC Ex. 19 at 15-31). Vlashi's union business excuse, raised for the first time well after his discharge (Tr. 520:1-3; 520:13-16), is not credible because many of the dates and times of his violations are not when he would have been engaged in union business. For example, the ALJ completely ignored the fact that May 21 and 22, 2016 were a Saturday and a Sunday, when union business was not generally conducted, as Vlashi expressly testified "my Union business days were Tuesday, Wednesday and Thursday." (Tr.

399:1-2; 513:1-4; 513:15-21; 851:22-852:9; 852:10-17; 1113:21-1114:10). Further, Vlashi testified that his union business required him to leave the facility, only “Two, three times a day. . . [for] [f]ive, 10 minutes. At most.” (Tr. 516:10-23). Accordingly, theoretically, 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. (Tr. 850:14-851:8). 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. (Tr. 851:22-852:17). Significantly, during his interview with HR, Vlashi never contemporaneously raised the fact that he was purportedly on union business as a reason for his absence, a critical fact he admitted during the hearing. (Tr. 520:1-3; 520:13-16).

Further, even at the hearing, Vlashi never explained what union business took him outside of the Fair Lawn facility for two to five hours at a time. Although he claimed that Elaine Borrero supervised him while on union business (Tr. 396:16-18) and he was allowed to leave the building during his shifts, these claims were directly contradicted by Borrero. (Tr. 1113:6-20; 1114:11-25; 1115:1-18; 1116:1-9) (testifying that she did not know where union business took place and that it was not her job to give union stewards permission to leave the building and never did so). The ALJ ignored this testimony which completely contradicted Vlashi’s testimony. In any event, as established Board precedent teaches, Vlashi’s union work was not his free pass to violate time and attendance rules or to engage in time theft. Finally, Vlashi’s absence from the facility for extended periods without any credible excuse while being paid at an overtime rate was particularly egregious because he was “responsibl[e] for determining how overtime is distributed.” (Tr. 434:7-8). Accordingly, the ALJ erred in finding that Respondent failed to satisfy its Wright Line burden and his conclusions should be reversed.

## V. FACTS RELEVANT TO THE SECTION 8(a)(5) ALLEGATIONS

As discussed below, the ALJ also erred in finding Respondent violated Section 8(a)(5) concerning purported changes to its participation in its new hires' orientation as well as its short-term disability and B & R scheduling practices. Additionally, the ALJ incorrectly disregarded that Respondent was under no obligation to fulfill the Union's information requests which were improperly interposed as pre-hearing discovery devices. Regardless, the ALJ ignored that Respondent ultimately complied with the Union's information requests.

### A. Joint Orientations

The CBA contains a provision entitled "New Employee Joint Orientations." (GC Ex. 3 at 42). According to the CBA:

The Company and Union agree to utilize a job orientation presentation for newly hired employees that will encompass, but not be limited to, the parties' commitment to quality, productivity, attendance, and the BCT-Nabisco Brand partnership. The details surrounding said presentation will be discussed and resolved on a local basis and will be implemented no later than January 1, 1991. [(Id.)]

New employees at the Fair Lawn facility attend a new employee orientation in a classroom setting. (Tr. 64:19-21). Milewski explained that at some point during Respondent's New Employee Orientation, the Union met with the new hires for one hour to "collect information, application, dues checkoff, political action cards. . . . [and] provide a Welcome to the Union Booklet[.]" (Tr. 64:22-65:1; 1180:25-1181:15). With respect to the joint nature of the orientations, DiStefano testified concerning the existence of various practices over time, some of which involved the Union meeting with new hires separately and some with Respondent's management representatives present. (Tr. 1176:6-16; 1177:11-1178:2). DiStefano testified that, around 2013, she "became aware that the Union was having closed-door meetings with new hires

who were not member[s] of the Union.” (Tr. 1179:12-14). At that time, she gave the “direction to go back to the contract practice, and to do a joint orientation.” (Tr. 1179:20-25).

However, according to DiStefano, different HR managers had varying degrees of success when they “attempted to reset” the orientations to joint orientations pursuant to the CBA. (Tr. 1180:1-5). After the CBA expired in February 2016, DiStefano advised Clark-Muhammad to discuss with the Union that, going forward, Respondent would follow the letter of the CBA regarding new hire orientation, and that any past practice inconsistent with the CBA did not survive expiration. (Tr. 1180:9-24). As a result, the Company never denied the Union access to new employees. Instead, it offered joint orientations to the Union similar to what had been done at times in the past. (Tr. 1176:6-16; 1177:11-1178:2).

On May 12, 2016, a joint orientation was conducted. (Tr. 68:23; 69:6-7). According to Milewski, during that orientation, he provided all of the usual information, as well as his business card to enable the new employees to contact him. (Tr. 218:23-219:6; 220:14-221:1). After May 2016, Milewski chose not to participate in employee orientations. (Tr. 69:15-18).

#### **B. Process for Returning to Work from Short Term Disability**

Respondent maintains a short-term disability (“STD”) policy requiring an employee on a medical leave of absence of five (5) days or more to present a medical note indicating the employee is able to resume work without restrictions. (GC Ex. 4). Work schedules are posted on Thursdays for the ensuing week commencing Monday. (Tr. 185:12-186:20). Respondent’s original notice stated that “You are required to ‘clear’ through the Medical Department at least twenty four (24) hours before the beginning of your scheduled shift.” Id.

Because employees on STD leave do not have a scheduled shift (Tr. 188:15-16), the revised notice sought to clarify when an employee without a shift scheduled would have to

“clear” in order to be placed on the next schedule. Accordingly, on March 15, 2016, Respondent issued a notice stating:

When you are coming back to work, your doctor’s note must be brought in to our Medical Department BEFORE 10:00 a.m. on the Wednesday prior to the week that you are cleared to return to work. Failure to bring your note to Medical before 10 a.m. will result in you not being added back to the schedule for the following week. (GC Ex. 5).

The Union alleged this clarifying notice constituted a change to the STD policy. (Tr. 180:15-181:1). Milewski testified that before March 2016, Respondent had required employees who were returning from STD leave to provide 24 hours’ notice before their next scheduled shift of their intent to return to work, but this usually just meant that the employee was cleared the day before and then would be placed back on the schedule. (Tr. 54:6-55:10; 55:25-56:3). However, Milewski admitted employees on STD leave are not on the production schedule and do not have a next scheduled shift. (Tr. 184:9-25). Thus, the language of the first paragraph of the March 15, 2016 notice, (GC Ex. 4), was changed to reflect the reality that employees returning from STD do not have a scheduled shift and must be included in the new weekly schedule before it is created. (Tr. 187:6-17). Milewski also acknowledged that a scheduled shift means a shift actually scheduled for that employee, and that while on STD, the employee does not have a scheduled shift. Milewski agreed that to be on a scheduled shift, an employee would have to be put on the schedule posted on Thursday; and 24 hours before that would be Wednesday. (Tr. 188:6-25).<sup>11</sup>

---

<sup>11</sup> After the clarification was issued in March 2016, Milewski recalled that he spoke with Clark-Muhammad on a Wednesday specifically regarding an employee seeking to return to work from STD. (Tr. 449:15-451:12). According to Milewski, after this alleged change, this employee spoke to Respondent’s nurse, Lisbel Rosato, on a Wednesday and returned to work the next day. (Tr. 451:10-12). Other than that incident where the employee returned to work the next day, Milewski testified that no other employees were impacted by this alleged change. (Tr. 540:8-25). Gutierrez also testified vaguely about an employee coming back from a short term disability in April 2016. (Tr. 733:18-21). He could not remember the employee’s name or any details. (Tr. 734:3-18). Gutierrez testified that shop stewards do not receive notice of when an employee returning from a short term disability is placed back on the schedule. Further, Gutierrez conceded

### **C. Work Schedules For B & R Processors**

Around April 2016, Respondent hired Joe Bevacqua as the Business Unit Leader of the Distribution Center and Warehouse to oversee daily operations. (Tr. 1140:6-17). Shortly into his tenure, Bevacqua became aware that the start times for employees working in the warehouse were different from other departments. (Tr. 1140:24-1141:2). For example, the shift start times for the B&R processors in the warehouse were 6:00 AM, 2:00 PM, and 10:00 PM (Tr. 1141:21-1142:2), but the shifts in operations started at 7:30 AM, 3:30 PM, and 11:30 PM. (Tr. 1142:3-6).

Shortly after arriving at Fair Lawn in April 2016, Bevacqua met with leadership in operations and Human Resources and determined that in order for the B&R Processor shift start time to be more uniform, the shift should start later - 7:00 AM, 3:00 PM and 11:00 PM. (Tr. 1141:7-1142:11). Thereafter, Bevacqua, Human Resources, and members of the operations team reviewed the CBA. (Tr. 1142:12-18). In particular, they reviewed Article 6, Section 2 which requires Respondent to keep schedules “as uniform as possible, consistent with the operation of the bakery.” (GC Ex. 3 at 11). Based on these CBA provisions, Bevacqua believed that a change toward making start times more uniform would be in line with the CBA. (Tr. 1143:5-11; 1144:5-15). As such, on or around June or July 2016, he effectuated the change (Tr. 1145:6-8), and then in November or December 2016, after the Union filed a ULP charge, the start times were changed back. (Tr. 1145:14-22; 1154:9-13).

---

that if the Company followed the procedure of requiring medical clearance by Wednesday in order to be placed on the schedule the following week, the Union would not know the practice unless an employee raised an issue with the Union directly. (Tr. 754:18-755:9). The only testimony concerning any purported past practice concerning this issue came from Vlashi who testified that on two occasions, five years apart, “he returned to work on a Friday and was allowed to begin working on Monday.” (D. at 8). On the other occasion in 2014, “he was cleared by the medical department on a Wednesday, and returned to work the following day on Thursday.”

#### **D. The Union's Information Requests**

On May 13, 2016, the Union made a request for information ("RFI") for all disciplinary instances for clock in/out violations for a ten (10) year period. (GC Ex. 12; Tr. 221:6-10). The Union allegedly sought this information in reference to a grievance (GC Ex. 13) referenced in the RFI that alleges a unilateral change to the clock in/out policy. (Tr. 222:20-223:7). Prior to May 13, 2016, however, the Union also had filed a ULP charge for the same alleged change to Respondent's clock in/out policy. (Tr. 223:8-224:3; GC Ex 1(a)) (April 15, 2016 ULP Charge). Despite the pendency of the ULP and the fact that the CBA had expired (so there could not be any arbitration of the Union's grievance), the Company fully responded to this RFI by way of CP 1 (response to clock in/out RFI), received by the Union on September 9, 2016. (Tr. 224:5-14). The Union never alleged that this response was in any way deficient. (Tr. 224:23-225:1).

On July 7, 2016, the Union made a separate RFI for new hire information (GC Ex. 9). (Tr. 225:2-14). The Union purportedly requested new hire information for union dues purposes. (Tr. 227:9-14). On June 14, 2016, the Union filed an unfair labor practice ("ULP") charge over the union dues issue. (GC Ex. 1(c)). Milewski testified that the Company did not respond to this RFI. (Tr. 228:8-18). In fact, the Union received all information in response to the July 2016 RFI by September 2, 2016 (Tr. 235:19-24). On September 2, 2016, the Company provided to the Union information for all employees hired in June and July 2016. (Tr. 234:11-25). This response was a supplement to an April 12, 2016 email wherein the Company provided Milewski with the names and addresses of all employees as of that date. (R. Ex. 4; Tr. 232:23-233:11). The very next day, April 13, 2016, the Company supplemented its April 12 response with phone numbers for all employees. (R. Ex. 4). Prior to these responses, in March 2016 the Company emailed Milewski a list of all hires from January 1, 2014 to March 24, 2016. (R. Ex 4). Respondent also provided the same information to the Union in January 2017. (R. Ex. 3).

**E. The ALJ's Section 8(a)(5) Findings**

As for the Section 8(a)(5) allegations, the ALJ found Respondent unlawfully implemented unilateral changes concerning Joint Orientations, the STD Policy, and the B&R Processors' work schedules. As to the "New Employee Joint Orientation" allegation, the ALJ found that "the contract language only calls for the company and union to hold a job orientation [and] [n]othing in the language in this section suggests that the meetings must be held jointly in the presence of the employer and the Union." (D. at 13). As for the STD Policy, the ALJ found that Respondent unlawfully changed an established past practice because, "in my opinion, a reasonable reading of this policy means that a worker, who had a scheduled shift before being placed on STD, could return to that same shift upon being medically cleared to work, which was the past practice." (D. at 9). The ALJ also found that Respondent violated the Act by changing the shift start time for B&R Processors. (D. at 15). Finally, the ALJ found Respondent unlawfully failed to furnish requested information to the Union.<sup>12</sup>

**VI. RESPONDENT DID NOT VIOLATE SECTION 8(a)(5) OF THE ACT [Exceptions 1-28, 74, 77-81]**

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

**A. The ALJ Erred In Finding a Violation For Respondent's Presence in Its Own New Employee Orientation [Exceptions 7-14]**

It is well-established that unions are afforded an opportunity to bargain only over "material, substantial, and significant" changes to mandatory subjects of bargaining. Peerless Food Prods., 236 NLRB 161 (1978) (internal citations omitted). The materiality and significance

---

<sup>12</sup> The ALJ dismissed the charge related to an alleged unilateral change in order of layoffs because, "Respondent had a 'sound arguable basis' for its interpretation of the contract." (D. at 12). Further, the ALJ dismissed the charge relating to Respondent's alleged delay in remitting union dues from May 2016 because by November 2016, the Union had "most if not all of the dues[.]" (D. at 21).

of such change “is measured by the extent to which it departs from the existing terms and conditions affecting employees.” Crittenton Hosp., 342 NLRB 686, 686 (2004).

Further, whether the General Counsel alleges an 8(a)(5) violation based on a contract modification or a unilateral change, when the unfair labor practice determination depends solely on the interpretation of the collective bargaining agreement, the appropriate standard for the Board to apply is the sound arguable basis standard. See NRC Corp., 271 NLRB 1212, 1213 (1984); see also Westinghouse Elec. Corp., 313 NLRB 452, 452 (1993) (dismissing an 8(a)(5) allegation “[w]here . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or intent to undermine the union” (internal quotations omitted)). This is because the Board has only limited authority to interpret labor contracts and should not act as an arbitrator in contract interpretation disputes. NRC Corp., 271 NLRB at 1213. This standard preserves for the courts and arbitrators the authority to interpret labor contracts, while permitting the Board to find an unfair labor practice when the employer has not fulfilled its duty to bargain. Finally, even assuming *arguendo* that the ALJ’s interpretation of the contract interpretation of the contract was controlling, such finding would not prove that Respondent “refused to bargain within the meaning of the Act because a mere breach of the contract is not in itself an unfair labor practice.” NCR Corp., 271 NLRB at 1213, fn. 6.

Here, the ALJ found that Respondent’s representatives’ presence at the new employee orientation during the Union’s presentation constituted an unlawful unilateral change. This finding is flawed because: (1) even if the matter did involve a mandatory subject of bargaining, there was no material change to the status quo; and (2) Respondent had a sound arguable basis for its conduct.

Assuming that the Union’s meeting with new employees to discuss internal union matters was a mandatory subject of bargaining because it involved an internal union matter, which

Respondent does not concede, the ALJ incorrectly found that Respondent made a material change to terms and conditions of employment. The ALJ ruled:

Respondent also argued that the ‘change’ was not material, substantial, and significant. I disagree and credit Milewski’s testimony that the effect of having a management representative attend meetings held by the Union with the new hires had a chilling effect on soliciting contributions to the Union’s political action activities and other union-related discussions.” (D. 14, n. 7).

Notably, the ALJ did not cite to any authority to support this point. However, Peerless Food Prod., Inc., 236 NLRB 161 (1978) is particular apt. There, the Board held:

[T]he net effect of the change in policy is to remove [the representative’s] former “right” to engage unit employees in conversations on the production floor when those conversations are unrelated to contract matters. While we do not minimize the value of employee access to union business representatives, the change effected here (which does not apply to the job steward) does not materially, substantially, or significantly reduce that value. We shall, therefore, dismiss the complaint.”

Here, like in Peerless, Milewski wanted to insist on private access to employees during work time for matters not related to contract enforcement. Further, the purported change at issue is even less material than in Peerless because Respondent never told the Union it could not meet with the new hires. Rather, Respondent sought only to be present during the Union’s presentation as had been the case at times in the past. The ALJ disregarded that 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 that he “advised the Company that as long as the Company representative was going to be participating in th[e] orientation, that [he] would not appear for the orientation[.]” (Tr. 218:2-9). As a result, there was no material change in this regard.

Moreover, the record does not support that such private union access during work time was an established past practice in the first place and it was error for the ALJ to find so. DiStefano testified that prior to the expiration of the contract, joint and separate meetings had

occurred. Specifically, she testified that soon after she became the Director of Labor Relations, 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.” (Tr. 1179:11-25).

Finally, the ALJ disregarded Respondent’s sound arguable basis for its interpretation of Article 40 of the CBA which states, “The Company and Union agreed to utilize a job orientation presentation for newly hired employees[.]” (GC Ex. 3 at 42). The ALJ substituted his own judgment in concluding:

The contract never called for joint meetings. The section in Article 40-Miscellaneous Clauses of the expired contract is captioned “New Employee Orientation,” but the contract language only calls for the company and union to hold a job orientation. Nothing in the language in this section suggests that the meetings must be held jointly in the presence of the employer and the Union. [(D. 13:35-39).]

By analyzing the CBA in this manner to find a violation of the Act, the ALJ improperly acted as “judge [of] which party’s interpretation is correct” in total contravention of established Board precedent. Therefore, the ALJ’s finding should be reversed.

**B. The ALJ 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 Respondent’s Reasonable Interpretation of Its Existing Policy [Exceptions 1-6]**

The ALJ next erred in finding Respondent violated the Act with respect to a purported change to the procedure for employees returning to work from an STD leave of absence. First, the record shows 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, GC Ex. 4 to GC Ex. 5) (emphasis added).

Here, Milewski admitted that employees on STD leave are not on the production schedule and do not have a next scheduled shift. (Tr. 184:9-25). Accordingly, the ALJ’s finding

that the “policy means that a worker, who had a scheduled shift before being placed on STD, could return to that same shift upon being medically cleared to work, which was the past practice,” (D. 9:20-22), was not only an improper exercise of his discretion, but is not supported by the record in light of Milewski’s testimony that employees returning from a STD do not have a “scheduled shift.” By contrast, Respondent had a sound and arguable basis for its interpretation of the existing policy, as it recognized the employees who are on an STD leave are not on the schedule, and need to be put on the schedule in order to return. Because the schedules are posted on Thursday, requiring clearance notification by Wednesday was a logical reading of the purpose and intent of the prior language. More significantly, however, is that the change was not material as the testimony at the hearing showed that this language “change” did not alter the practice for how employees were allowed to return from STD leaves. Respondent still allowed employees to return to work the following day once a return to work note was presented. Thus, the ALJ erred in finding that Respondent violated the Act in this regard.

**C. Work Schedules for B&R Processors - The ALJ Misapplied Board Precedent By Engaging In Improper Contract Interpretation And Choosing His Own “Reasonable Reading” Over The Employer’s “Sound Arguable Basis” [Exceptions 15-16]**

The ALJ also erred in disregarding Respondent’s sound and reasonable interpretation of the CBA when it aligned the shift start time of the B&R Processors to the start time of all other departments. (D.15:15-16). Further, the ALJ erred by failing to assess Respondent’s contract-based defense for its purported unilateral change. See NRC Corp., 271 NLRB at 1213.

In light of this precedent, and the plain language of the parties’ CBA, the change in the shift start times for the B&R Processors in the warehouse by 30 minutes to more closely align with the shift starting times for other departments was more than a “sound” interpretation. 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.” (GC Ex. 3 at 11) (emphasis added). Moreover, Article 6 required Respondent to keep the starting time of all unit employees uniform, and Article 28 specifically granted Respondent the right to schedule production. Accordingly, Respondent had a sound arguable basis to implement a uniform shift start time in light of the CBA provisions both requiring Respondent to keep start times uniform and granting Respondent authority to direct the production schedule. Thus, the Company’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 ALJ Erred By Failing to Address The Reasonableness of The Delay And That Respondent Provided The Requested Information [Exceptions 17-28]**

Finally, the ALJ erred in finding a violation when Respondent properly declined to respond to the Union’s requests for information because the requests were improper attempts to obtain discovery in support of the Union’s pending unfair labor practices. (GX-1(a); GX-1(c)). Moreover, the ALJ ignored controlling precedent which holds that an employer does not violate the Act by reasonably delaying a response to overbroad and burdensome requests such as the requests in this case.

First, the ALJ improperly found that 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. (D. at 17). 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), enf’d in relevant part, 96 F.3d 1439 (4th Cir. 1996). In Pepsi-Cola, the Union requested information concerning the

terminations of two employees. 315 NLRB at 882. The day after it sent its letter to the employer, the Union filed unfair labor practice charges with the Board concerning the discharges of these employees. Id. 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.

In WXON-TV, 289 NLRB 615 (1988), enfd. mem. 876 F.2d 105 (6th Cir. 1989), the union submitted a request seeking information pertaining to the employer’s termination of unit employees and assignment of unit work to supervisors. On the same day, the union signed an unfair labor practice charge (which it filed the next day) alleging as unlawful the same employer conduct. The employer refused to comply with the union’s information request due to the pendency of the unfair labor practice charge. The Board dismissed the portion of the complaint alleging that the employer had violated Section 8(a)(5) and (1) by failing to provide the information. The Board found that the union’s information request “was akin to a discovery device pertinent to its pursuit of the unfair labor practice charge rather than to its duties as collective-bargaining representative.” Id. at 617-618.

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 that the requests for information concerned the same subject matter of the ULP charges filed by the Union and therefore constituted impermissible pre-hearing discovery. Thus, the ALJ improperly ignored that Respondent was within its rights to

refuse to provide the requested information. See, WXON-TV, 289 NLRB at 617-618. Nevertheless, as noted above, Respondent 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 ALJ’s finding that Respondent unlawfully refused or failed to respond to the Union’s requests for information has no merit and should be reversed.

**CONCLUSION**

For the foregoing reasons, the Board should reverse the ALJ’s Decision and Recommended Order and dismiss the Consolidated Amended Complaint in its entirety.

Respectfully submitted,

By: /s Philip B. Rosen  
JACKSON LEWIS P.C.  
Philip B. Rosen  
Daniel D. Schudroff  
Megann K. McManus  
666 Third Avenue, 29<sup>th</sup> Floor  
New York, NY 10017  
(212) 545-4000  
Counsel for Respondent

Dated: April 4, 2019

**CERTIFICATE OF SERVICE**

The undersigned affirms that on April 4, 2019, Respondent's Brief in Support of Exceptions to Administrative Law Judge Kenneth W. Chu Decision was filed with the National Labor Relations Board using the e-filing system at [www.nlr.gov](http://www.nlr.gov), and that copies were served on the following individuals by electronic mail:

Tara Levy Esq.  
National Labor Relations Board, Region 22  
[tara.levy@nlrb.gov](mailto:tara.levy@nlrb.gov)  
*Counsel for the General Counsel*

Joshua B. Shiffrin, Esq.  
Bredhoff & Kaiser, PLLC  
805 Fifteenth Street, NW, 10<sup>th</sup> Floor  
Washington, DC 20005  
[jshiffrin@bredhoff.com](mailto:jshiffrin@bredhoff.com)  
*Attorney for Charging Party*

Dated: April 4, 2019

By: /s Daniel D. Schudroff  
JACKSON LEWIS P.C.  
Philip B. Rosen  
Daniel D. Schudroff  
Megann K. McManus  
666 Third Avenue, 29<sup>th</sup> Floor  
New York, NY 10017  
(212) 545-4000  
Counsel for Respondent