

**United States Court of Appeals  
for the District of Columbia Circuit**

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**No. 20-1319**

(Consolidated with 20-1328)

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WENDT CORPORATION,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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*On Appeal from the National Labor Relations Board in Nos. NLRB-03CA212225,  
NLRB-03CA220998, NLRB-03CA223594.*

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**PROOF BRIEF FOR PETITIONER**

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**CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW  
AND RELATED CASES**

Petitioner, Wendt Corporation (“Wendt”) designs unique, engineer-to-ordered systems used in the scrap metal recycling industry. Wendt is a private family owned corporate entity, and there is no parent corporation or any publicly held corporation that owns 10% or more of the stock of Wendt.

Wendt has petitioned the Court to review and set aside the National Labor Relations Board’s Decision and Order in *Wendt Corporation and Shopmen’s Local Union No. 576*, Case Nos. 03-CA-212225, 03-CA-220998 and 03-CA-223594, entered on July 29, 2020 and reported at 369 N.L.R.B. No. 135 (July 29, 2020). The National Labor Relations Board (the “Board”) filed a Cross-Application for Enforcement. By Order dated August 27, 2020, the Court consolidated Wendt’s Petition and the Board’s Cross-Application.

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## GLOSSARY

“ALJ” shall mean administrative law judge Ira Sandron.

“ALJD” shall mean the February 15, 2019 decision by ALJ Ira Sandron.

“Decision” or “Decision and Order” means the National Labor Relations Board’s Decision and Order in *Wendt Corporation and Shopmen’s Local Union No. 576*, Case Nos. 03-CA-212225, 03-CA-220998 and 03-CA-223594, entered on July 29, 2020 and reported at 369 N.L.R.B. No. 135 (July 29, 2020).

“GC Ex.” shall refer to General Counsel’s hearing exhibits.

“NLRA” or the “Act” means Section 8 (a)(1) of the National Relations Act.

“NLRB”, the “Board” or “Respondent” means Respondent National Labor Relations Board.

“R Ex.” shall refer to Respondent’s hearing exhibits.

“TR,” unless otherwise noted, including page/line transcript citations, refers to the Hearing Transcript<sup>1</sup> from the unfair labor practice hearing which took place on September 10-14, 2018 and November 5 -7, 2018.

“Wendt” shall mean Petitioner the Wendt Corporation.

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<sup>1</sup> Petitioner will be submitting a Deferred Appendix pursuant to the Court’s briefing scheduling and will submit a brief with cites to the pages in that compendium at that time.

## JURISDICTIONAL STATEMENT

Wendt has petitioned for review and set aside of the National Labor Relations Board's Decision and Order in *Wendt Corporation and Shopmen's Local Union No. 576*, Case Nos. 03-CA-212225, 03-CA-220998 and 03-CA-223594, entered on July 29, 2020 and reported at 369 N.L.R.B. No. 135 (July 29, 2020). The Board's Decision and Order is final and appealable. The Court has jurisdiction pursuant to 29 U.S.C. § 160 (f).

## STATEMENT OF THE ISSUES

### A. February 2018 Layoff

1. An employer does not violate Section 8 (a)(5) of the Act by failing to bargain when it takes action consistent with its past practices. *NLRB v. Katz*, 369 U.S. 736 (1962). Under both *Katz* and Board law, a past practice is one that occurs with sufficient regularity and frequency, such that employees recognize the practice and expect the practice to reoccur. *Mike-Sell's Potato Chip Company*, 368 N.L.R.B. No. 145 (Dec. 16, 2019); *see also Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161 (Dec. 15, 2017). The first issue with respect to the layoff is whether the Board's finding that Wendt did not have a past practice of laying off shop employees was contrary to the prevailing law and was not supported by substantial evidence, which demonstrated that: (a) during past economic slowdowns, Wendt laid off employees; and (b) Wendt's employee handbook contained specific provisions with respect to both layoff and recall, alerting employees that they should expect layoffs to occur.

2. Further, during initial contract negotiations, employers without past layoff practices, are nonetheless permitted to proceed with a layoff without reaching overall impasse if: (a) prompt action is needed that cannot not await a final contract; (b) the need for the layoff is compelled based on factors beyond the employer's control; and (c) the employer has bargained to impasse with the Union

with respect to the layoff's terms. *RBE Electronics of S.D., Inc.*, 320 N.L.R.B. 80 (1995). The second layoff related issue is whether the Board's determination that Wendt was required to demonstrate that "economic exigencies" necessitated the need for the layoff, was an error of law and inconsistent with its own precedent and whether the Board's determination that Wendt had failed to demonstrate the need for prompt action was not supported by substantial evidence.

## **B. Employee Raises and Reviews**

1. After this matter was submitted, the Board issued a decision in *MV Transportation, Inc.*, 368 N.L.R.B. No. 66 (Sept. 10, 2019) which abandoned the "clear and convincing" waiver standard and adopted the "contract coverage" doctrine in determining whether an employer is required to bargain with respect to matters covered by an agreement reached between the employer and the union. The first issue with respect to the retroactivity of the agreed upon wage increase is whether the Board committed an error of law when it found that the Union did not waive further bargaining regarding retroactivity, by failing to apply the contract coverage standard rather than the clear and convincing waiver standard in accordance with its recent decision in *MV Transportation*.

2. The Board is prohibited from imposing remedies which dictate or compel the outcome of the bargaining process. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). Additionally, "make-whole" remedies

imposed by the Board must approximate what employees would have received absent the violation and cannot be speculative. *Daily News of L.A. v. NLRB*, 73 F.3d 406, 413 (D.C. Cir. 1996). If the Court determines that the contract coverage standard did not preclude future bargaining with respect to the retroactivity of the agreed-upon wage increase, the second issue is whether the Board exceeded its authority and was arbitrary and capricious when it both ordered Wendt to “make employees whole” for the delay in bargaining and also ordered Wendt to continue to bargain as to further retroactivity of the agreed upon wage increase.

**C. The Transfer of Bargaining Unit Work in Connection with the Promotion of Three Unit Employees to Supervisory Positions**

1. As set forth above, under the Supreme Court’s decision in *Katz* and the Board’s decision in *Raytheon*, an employer may continue past practices during initial contract negotiation. The first issue with respect to the promotion of the three unit employees is whether the Board failed to follow *Raytheon* when it determined that Wendt’s past practice of having supervisors and non-bargaining employees perform the same work as unit members, did not apply to the three newly promoted supervisors—one of whom replaced an existing supervisor—based solely on the fact that two of the three supervisory positions in question were newly-created positions.

2. Under *Raytheon*, a change to a past practice must be material and substantial to trigger an employer’s obligation to bargain. Thus, the second issue

with respect to the promotion of three unit employees, is whether the Board's determination that—following the promotion of three supervisors—a material and substantial change occurred in the amount of unit work being performed by non-unit employees and whether such determination was supported by substantial evidence when the record evidence demonstrated that the total loss of unit work was less than one full time position and no evidence of any change to Wendt's practices with respect to the use of either temporary employees or subcontractors, existed.

**D. Hudson's Temporary Reassignment and Denial of Overtime**

1. Claims for violation of Section 8 (a)(3) are subject to the burden shifting analysis under *Wright Line*, 251 N.L.R.B. 1083 (1980). Under *Wright Line*, in determining whether an employer's action is motivated by union animus, the burden is first on the General Counsel to establish that the employee's protected activity was a substantial or motivating factor in the employer's decision. If this burden is met, only then does the burden shift to the employer to demonstrate that the same action would have been taken in the absence of the protected conduct. The first issue as to Hudson's temporary reassignment and denial of overtime is whether the Board properly determined that the General Counsel had met its initial burden, when the evidence failed to link any evidence of

union animus to the decisions pertaining to Hudson and, in fact, the evidence contradicted the Board's finding that Hudson was subject to disparate treatment.

2. If the Court determines that the General Counsel met its initial burden, the second issue concerns Hudson's temporary reassignment and denial of overtime and whether the Board's determination that Wendt had failed to demonstrate that it would have taken these same actions, was supported by substantial evidence, when, the evidence showed that other employees were reassigned at the same time; that Hudson did receive overtime; and that other union supporters were assigned overtime during the same period.

**E. The Discipline of Fricano and Whether Union Representation at the Disciplinary Meeting was Required**

The decision to discipline Fricano was made prior to the disciplinary meeting at which Fricano requested a union representative. An employee is not entitled to a union representation for a meeting called merely to inform the employee of disciplinary action already decided upon. *See, e.g., NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-260 (1975). The issue as to Fricano and his management meeting is whether, by asking an employee to acknowledge receipt of discipline that already has been decided upon, the employer creates a reasonable belief by the employee that he may be subject to further discipline, thereby entitling the employee to a union representative at the meeting.

## **PRELIMINARY STATEMENT**

The issues presented raise fundamental questions which directly affect the ability of an employer to conduct business during the negotiation of an initial collective bargaining agreement.

## **STATEMENT OF THE CASE**

This Statement of Case consists of three parts. Part I briefly sets forth the relevant background facts that provide the context in which the issues which are the subject of this appeal arose. Part II sets forth the relevant facts and testimony regarding the specific portions of the Board decision that are the subject of this appeal. Part III briefly summarizes the proceedings below, including those portions of the Board's Decision and Order that are relevant to this appeal.

### **Part I: BACKGROUND FACTS**

Wendt has been a family-owned company for over forty years. At the time of the hearing, Wendt employed approximately 100 employees, of which approximately 30 were employed in its manufacturing operation. Wendt designs unique, engineered-to-order systems, integrating its own branded equipment with equipment manufactured by third parties for custom solutions in the scrap metal recycling industry. (TR 1075, lns. 5-23). The vast majority of the products Wendt sells under the "Wendt" brand are produced through subcontracting. Products entirely built by Wendt comprised only 3% to 5% of its sales. (TR 1079, lns. 1-15;

1082, ln. 23 to 1083, ln. 7; Decision at note 21). Beginning in 2015, Wendt began using temporary workers to address the changing nature of the shop work available at its Walden Ave facility, resulting from recycling market fluctuations and the corresponding timing of customer orders and cancellations. (TR 1633, ln. 18 to 1634, ln. 25). Temporary worker numbers varied widely from a few in 2015, increasing in 2016 and 2017, and then falling off to less than two temporary workers by November of 2018. *Id.*

The Union was certified on June 23, 2017 (GC Ex. 2) to represent specific job classifications at Wendt's facility. It is significant to this appeal that the Union was well aware at the time of certification that individuals in other job classifications—including supervisors, service technicians and temporary employees—performed the same work as unit employees and that exclusive “bargaining unit work” did not exist. (GC Ex. 2; TR 121, ln. 22 to 123, ln. 9).

After certification, the parties entered into negotiations for an initial agreement. Negotiations were protracted. In late 2017 and early 2018, the Union began holding rallies and picketing both outside of the facility and at trade shows, and distributed various flyers and mailings. (R Ex. 24; TR 1591, ln. 16 to 1593, ln. 10). In addition, the Union filed a significant number of unfair labor practices charges (“ULPs”) many of which the NLRB's Regional Office found meritless.

*Compare* GC Ex. 1 (u) (Amended Consolidated Complaint) with GC Ex. 1 (a)–(f) and (j)–(p) (Charges filed by Union).

Notably, as discussed in Part II, despite the foregoing Union activities and ULPs, the Regional Office did not bring to complaint the charge that Wendt had manufactured the need for the February 2018 layoff in order to break the Union. (GC Ex. 1 (j)). Likewise, as also discussed below, the sole evidence of union animus submitted in support of the subsequent ULPs related to the discipline of Bush and the denial of overtime to Hudson and consisted **only** of statements allegedly made by a single employee—Daniel Voigt. (ALJD 9:15 to 12:3; Decision at 1).

## **Part II: FACTS RELEVANT TO EACH ISSUE ON APPEAL**

### **A. Consistent with Wendt’s Employee Handbook and its Fluctuating Shop Workload, the Evidence Demonstrated That Wendt Had a Long History of Layoffs**

Wendt’s business is highly cyclical and tied to the scrap recycling industry. Therefore, it cannot guarantee employees that work will be available. (TR 1095, ln. 10 to 1096, ln. 23). This fact is expressly communicated to employees in Wendt’s employee handbook which contains specific provisions addressing layoffs (GC Ex. 23, p. 57) and call-backs (GC Ex. 23, p. 15). *See also*, (GC Ex. 23, p. 13, stating that employment is at-will). Consistent with the employee handbook—which clearly communicated to employees that layoffs during slowdowns were possible

and in fact part of Wendt's employment practices—Wendt had a history of layoffs during slow-downs. (TR 1631, ln. 19 to 1632, ln. 11; R Exs. 25-27). This long history included layoffs in 2001, 2002, 2003, 2009 and 2015—all of which were based on decreases in customer orders and/or a decrease in available work. *Id.*

Wendt's shop required about 1300 work hours per week to keep employees busy. (TR 1199, lns. 19-21; R Exs. 25-27). In September of 2017, Richard Howe, Wendt's Operations Director, had discussions with the management team regarding the fact that there were no sales booked for the first quarter of 2018 and that the company would be "running off the cliff" in the shop. (TR 1201, lns. 12-25). The sales force was instructed to increase efforts to close more sales during 2017's fourth quarter. (TR 1202, lns. 7-23). At that time, the shop was extremely busy because certain projects were behind schedule and other projects had firm delivery deadlines and liquidated damage provisions tied to delivery dates in various contracts and customer needs prohibited stretching out this work. (TR 1200, lns. 8-18).

While Wendt first identified in September of 2017, that there might be a need for an early 2018 layoff, it was not until the end of the year, when sales force efforts to close contracts were unsuccessful, that a layoff became necessary. (TR

1202, lns. 7-25). It was not until early January that the need for layoffs became certain and the impacted employee numbers were known. *Id.*

This need for temporary layoff was communicated to the Union on January 24, 2018. (TR 104, ln. 22 to 105, ln. 7). The parties negotiated on January 24, 2018, February 6, 2018, February 7, 2018 and February 8, 2018 regarding the layoff. (TR 152, lns. 4-15). Layoff proposals were exchanged, including Wendt's proposal to eliminate the use of temporary employees during the layoff. (TR 106, ln. 24 to 107, ln. 7; R Ex. 2, p. 1). The company made significant concessions during these negotiations, including its agreement to abandon its past practice of selecting employees for layoff based on skill and ability. *Compare* R Ex. 2, p. 5 with Ex. 23, p. 57. As the deadline for layoff approached, the Union regressively bargained by adding two significant provisions to their February 7, 2018 proposal: "no subcontracting and no overtime during the layoff." (R Ex. 2, p. 4, handwritten notes adding new conditions on 2/8/2018). The Union was aware that 95% of Wendt's work was subcontracted as it had neither capacity nor capability to internalize it. Wendt made its final proposal on February 8, 2018—the night before the layoff—and stated this proposal was its last and final. The Union presented another proposal, but Wendt re-emphasized that it had made its last and final proposal. (TR 153, ln. 10 to 155, ln. 12; 1234, ln. 7 to 1236, ln. 1; R Ex. 2). When no agreement was reached, Wendt implemented the layoff in accordance with its

last and final proposal. (TR 112, ln. 6 to 114, ln. 2; GC Ex. 40). The layoff saved Wendt \$60,000 to \$70,000 in labor costs—funds which otherwise would have been expended to pay non-working employees. (TR 1636, lns. 4-5, Decision at note 21).

**B. The Union Agreed to Both Wage Increases and a Retroactive Date and that the Results of Employee Reviews Were No Longer Tied to the Performance Reviews**

Wendt had a past practice of conducting annual performance reviews and granting periodic wage increases to both bargaining unit and non-bargaining unit employees. (ALJD 28:39 to ALJD 29:20). The wage increase for each employee was based on a number of factors, including his/her performance reviews, productivity, longevity, pay comparison with other employees and attendance. While supervisors made initial recommendations on the amount of each employee's raise, the ultimate decision on the each employee's increase was made by Wendt's senior management. (ALJD 29:36 to ALJD 30:2).

Employee reviews historically took place in February or March. (TR 182, lns. 17-23; 246, lns. 7-12). Salaried employee reviews were conducted before the reviews of the production workers. (TR 247, lns. 1-9). Pay increases were effective upon the completion of performance evaluations. Wendt had no past

practice of providing retroactive wage increases. (TR 249, lns. 3-11; 508, lns. 8-11; 1638, lns. 4-9).

On November 6, 2017, the Union made a demand that Wendt bargain with respect to both “the process and the wage increases...” (ALJD 30:10-22; GC Ex. 6). Under then extant Board law, Wendt was in a “Catch 22” situation---it was both prohibited under Section 8 (a)(5) from granting wage increases where there was any ability to exercise discretion without first bargaining with the Union, while at the same time, Board law compelled it to keep paying the wage increases under Section 8 (a)(3). *See, e.g., Advanced Life Systems Inc. v. NLRB*, 898 F.3d 38, 48 (D.C. Cir. 2018); *Winn-Dixie Raleigh, Inc.*, 267 N.L.R.B. No. 43 (Aug. 19, 1983) (noting that—under then-existing Board law—upon the election of a union, an employer may neither grant nor withhold wage increases without bargaining with the union). Because the Union demanded bargaining, Wendt determined that it could not unilaterally increase wages without bargaining.

Shop employees’ reviews were conducted when laid off employees returned to work in April of 2018. (TR 38, lns. 22-39; 1259, lns. 3-8; 1643, ln. 24 to 1644, ln. 3). Prior to this date, the Union had made no proposals either regarding the performance reviews or wages. (ALJD 30:21 to 26). After shop employee reviews were completed, Wendt proposed a generous wage increase of 3.42% for all employees, retroactive to April 8, 2018. (TR 39, lns. 3-10; GC Ex. 8). The Union

proposed a 4% increase—unconnected to reviews—retroactive to October of 2017. (TR 40, lns. 14-16). The Union’s proposed October 17, 2017 retroactive date bore no relationship to the date on which non-bargaining unit employees received either reviews or wage increases. On May 24, 2018, Wendt reiterated its offer to the Union and expressly stated that “retroactivity was a negotiated term.” (GC Ex. 9, TR 41, lns. 1-13; 1260, lns. 18-23).

Wendt’s wage proposal contained a sunset provision stating that, if the Union did not accept 3.42% retroactive to April 2018 by the date listed, the proposal would be withdrawn. (GC Ex. 9). Neither party proposed continuing Wendt’s past practice of individualized wage increases or connecting an employee’s performance review to his/her wage increase. (GC Exs. 8-9; TR 41, lns. 1-13). Wendt’s financial officer testified that the raise would have been less than 3.42% if the Union had continued to press for a longer retroactive period. (TR 1261, lns. 14-21).

The record contained garbled and contradictory testimony by the Union’s witness regarding the Union’s response to Wendt’s proposal. The Union’s chief negotiator at first testified that the Union agreed to accept Wendt’s proposal, stating: “because it’d been a long time since the employees had received a wage increase, and they needed it, **but that we felt that the amount should be higher, and it should be retroactive to October of 2017...**” (TR 41, lns. 7-13).

(Emphasis added). After prodding from the ALJ, the Union representative ultimately testified that the Union had both simultaneously accepted and rejected Wendt's offer. (TR 41, ln. 16 to 42, ln. 9). The other Union witnesses gave similarly confused testimony to the effect that they did not know what had been agreed to by the Union's negotiator. (TR 970, ln. 12 to 971, ln. 12). No contemporaneous documents were provided to support the Union's belated claim that "retroactivity" had been "left open" for further negotiation. (TR 140, lns. 1-22).

Consistent with Wendt's understanding that the Union had accepted its proposal, Wendt processed the wage increase consistent with the agreement reached, and the bargaining unit received a 3.42% wage increase retroactive to April 8, 2018. (TR 157, lns. 6-17). The Union made no further proposals regarding retroactivity. (TR 1030, lns. 3-6).

**C. There Was No Change in Wendt's Prior History of the Performance of the Same Work by Supervisors, Non-Unit Employees and Members of the Bargaining Unit or Wendt's Use of Temporary Workers or Subcontracting**

**1. Exclusive Bargaining Unit Work did not Exist and Wendt had a Long-Established Practice of Supervisors Performing the Same Work as Unit Members**

The certified unit was based entirely on discreet job classifications—and not on type of work that any individual performed. (GC Ex. 2). Wendt had a long-standing past practice of using service technicians, as well as supervisors, non-

bargaining unit temporary workers and even senior managers to perform the same work as that traditionally also performed by bargaining unit employees. *See, e.g.*, R Exs. 18 and 14; TR 121, ln. 22 to 122, ln. 17; 129, ln. 15 to 130, ln. 10; 259, lns. 8-22; 476, ln. 21 to 477, ln. 9; 536, ln. 13 to 537, ln. 14; 582, ln. 17 to 583, ln. 22; 659, lns. 1-22; 1124, ln. 2 to 1126, ln. 13; 1130, lns. 2-15; 1180, lns. 17-21; 1476, lns. 19-25; 1481, ln. 19 to 1482, ln. 7. The Union intentionally excluded from the bargaining unit, over Respondent's objections, field service technicians who, at various times of the year spent up to 50% of their time working side by side, performing the same tasks as those performed by the unit members. (R Ex. 19; see also testimony cited above). Thus, the bargaining unit in this case is not based upon the work performed and no concept of exclusive "bargaining unit work" exists.

Prior to certification, Wendt had a long history of supervisors spending at least a portion of their time performing the same work as the shop employees. (GC Ex. 33 (list former supervisors) and testimony cited above regarding performance of shop work by these supervisors). In addition, Mike Horner, Shipping/Receiving Supervisor, daily performed the same work as unit members after 3:30 PM, both with the knowledge and insistence of the Union. (R Ex. 12; TR 984, ln. 12 to 985, ln. 10; 1476, lns. 19-25; 1481, ln. 19 to 1482, ln. 7).

## **2. The Reorganization and Promotion of Fess, Garcia and Norway**

Prior to the late summer of 2017, Wendt's manufacturing organizational structure included Richard Howe as the Operations Director, with three statutory supervisors, two of whom held the title "foreman" as well as the Shipping/Receiving Supervisor. (R Ex. 9, p. 3). The manufacturing area physically consists of four distinct bays or areas and a shipping/receiving area. (TR 1103, ln. 2 to 1116, ln. 6; R Ex. 9, p 3). In the summer/early fall of 2017, a decision was made to reorganize supervision to comport with the physical space—with an emphasis on material flow, housekeeping, cleanliness and clear lines of responsibility. (TR 1163, ln. 3 to 1164, ln. 6).

Based on the October 2017 review, Wendt undertook a reorganization which renamed the foreman positions to "supervisor;" maintained the Shipping/Receiving Supervisor; and added two supervisor positions to correspond to the physical layout of the facility. (R Ex. 9, p. 4). Consistent with its past practices, Wendt anticipated that each of the supervisors would continue to perform some shop work and Wendt had the expectation that each supervisor would spend between 10% to 20% of his or her time performing shop work. (TR 1128, ln. 18 to 1129, ln. 19).

One of the existing foreman/supervisors, Quarcini, left Wendt before the reorganization occurred. (TR 385, ln. 21 to 386, ln. 4). On or about September 1, 2017, Wendt posted the two new supervisory positions and added a third posting to

replace Quarcini. (GC Ex. 26). On September 25, 2017, three individuals were selected to fill these positions: Fess, who had been a leadman; Garcia, who had been an assembler; and Norway, who had been a welder. (GC Exs. 26 and 30).

As noted previously, while the shop was busy, absent additional orders—the need for a layoff loomed for the first quarter of 2018. See discussion *supra* at 11.

**3. There Was No Material Change in The Amount of Work Assigned to the Unit Following the Promotions of Fess, Garcia and Norway**

Prior to the existence of the bargaining unit, there was little or no data maintained regarding the amount of time spent by its then three supervisors in performing shop production work. As a result, the only information regarding the amount of time non-bargaining unit members spent performing shop work consists of time records showing the percentage of direct labor hours worked by the three supervisors at issue and by service technicians in 2017 through August 2018. (R Ex. 14 and R Ex. 18). Respondent's Exhibit 14 demonstrates in 2018—the first year after the promotions of Fess, Garcia and Norway—the percentage of time spent by these three supervisors in performing direct labor represented about 22% of their time. This represents approximately 1,372-man hours or slightly more than ½ of a full-time position. (Decision at p. 7; R Ex. 14).

The undisputed record evidence was that Wendt had a long history of subcontracting work based on project needs. Less than 3% of total sales were

generated by shop work. (TR 1079, lns. 10-15; 1082, ln. 23 to 1083, ln. 4; Decision at note 21). The record evidence further showed that the number of temporary workers employed by Wendt depended on the workload in the shop and varied widely—ranging from relatively few temporary employees in 2015, increasing in 2016 to 2017 to approximately ten and then falling off again in 2018 so that by February 2018 no temporary employees existed. In November of 2018 there were only two temporary employees. (TR 1634, lns. 16-25).

There was no record evidence of any change in Wendt’s subcontracting use after Fess, Norway and Garcia’s promotions. (Decision at note 21). No record evidence exists regarding the workload in the shop either prior to or subsequent to the promotion of Fess, Garcia or Norway. Nor does evidence exist to demonstrate that the relationship between the levels of production and number of temporary workers changed after the promotion of Fess, Garcia and Norway.

What the evidence did show was that immediately after the promotion of these supervisors in the fourth quarter of 2017, Wendt’s shop was extremely busy. (TR 1200, lns. 5-18). At the same time, the evidence showed that Wendt was aware by the first quarter of 2018 that the workload would “fall off the cliff” and that there was a possibility of the need for a layoff. *See supra* 11. The evidence also showed that there was no change after the promotions of Fess, Garcia and Norway in the number of temporaries in either shipping and receiving or in

Norway's department. (TR 1580, lns. 3-10, 1474, lns 2-11 and 1299, ln 16 to 1300 ln. 7). While there was general testimony that there were additional temporary employees hired in other parts of the shop following these promotions, there was no testimony regarding the number of employees who were hired, the work they performed or how long they were employed by Wendt. (TR 534, lns. 7-10). The evidence also showed that, consistent with Wendt's deployment of temporary employees to address workload peaks, Wendt eliminated temporary employees in February 2018 during the layoff and by November 2018 Wendt had only two temporary employees in shipping and receiving – and none in the departments in which Fess, Garcia and Norway previously worked. (R Ex. 2; TR 1634, lns. 16-25).

**D. There Was No Evidence that Decisions Regarding Hudson Were in Any Way Motivated by Union Animus**

**1. Hudson Was Reassigned Temporarily Based on Business Needs and to Provide Him with the Opportunity to Expand Skills**

The ALJ and the Board determined that Wendt temporarily reassigned Hudson from welding to the saw and denied him overtime following the February 2018 layoff, based on his union activities. This conclusion was reached by the ALJ and Board despite the lack of any direct evidence that union animus motivated these decisions. (Decision at p. 3-4; ALJD 20:31 to 40). Instead, the only evidence of union animus cited by the Board and ALJ were alleged statements by a single

individual—Voigt—which were made by him to other employees months earlier.

*Id.*

Furthermore, Wendt introduced evidence of its business need to briefly reassign Hudson; that Hudson in fact worked overtime on several days following the layoff; and that other union supporters were offered overtime. Specifically, the record evidence showed that Charles Braswell (the previous saw operator) did not return from layoff and there was a saw backlog. (TR 835, lns. 6-23; 1407, ln. 23 to 1408, ln. 20). In deciding how to address the workflow post layoff and in making work assignments, Wendt considered the need to provide employees with cross-functional training. (TR 1405, ln. 1 to 1407, ln. 20). Hudson had been previously rated a “zero” (no experience) on the saw about which he complained. (R Ex 6; TR 1214, ln. 5 to 1215, ln. 27).

Based on workflow needs and Hudson’s complaints, the decision was made to reassign Hudson from welding to the saw for approximately seven weeks. (TR 813, lns. 5-9). Notably, it was not uncommon when needed to assign welders rather than fitters to the saw because fitters are much more versatile and skilled. (TR 367, ln. 1 to 368, ln. 18; 542, ln. 18 to 543, ln. 6). While Hudson was active in supporting the Union, others were also active. (TR 1238-1240). Moreover, post layoff other employees were reassigned—not just Hudson—including both union

supporters and employees whose union sympathies were unknown. (TR 1406, ln. 23 to 1407, ln. 20).

**2. Lack of Evidence that Any Denial of Overtime Was Motivated by Union Animus**

Wendt has no set overtime policy. Overtime procedures include “wide open overtime” (entire facility is on overtime) where employees simply need to report that they want to work to their supervisor. “Discreet area overtime,” specifically for an order completion and/or “task completion overtime” (employee is specifically approached about working overtime to complete a task.)are also used (TR 1240, ln. 17 to 1241, ln. 6).

Employees were recalled from layoff on April 6, 2018. Hudson testified that he made a general request for overtime following the layoff and was denied. An overtime report covering the period from January 2017 through August of 2018 indicates that, on five days in April and May of 2018, Hudson worked more than eight hours. (GC Ex. 64, pp. 926-929). Hudson did not identify the specific time, the dates or number of his requests for overtime that were denied because of his union activities. (TR 897, ln. 1-16). Nor was any evidence offered as to whether the overtime Hudson requested was in response to the availability of wide open overtime or the more limited discrete area or task completion overtime.

Additionally, other known union supporters were assigned overtime during the period that Hudson claims he was denied, such as Domaradzki, a Union

bargaining team member and Thompson, an individual whom the ALJ found was subjected to Section 8 (a)(1) violations. (TR 357, lns. 9-11; 809, ln. 17 to 810, ln. 3; 897, lns. 15-16).

#### **E. Fricano's Discipline was Decided Prior to the Meeting**

Both the ALJ and the Board expressly found that—as soon as Fricano entered the conference room—he was handed a notice of discipline and was told that “management had already made the decision and that he could do nothing about it.” (ALJD 17:10 to 16; Decision at 6). While Fricano was asked to note whether he agreed or disagreed with the proposed discipline, there was no evidence cited by the ALJ or the Board that Wendt had ever disciplined anyone based upon any comments or denial of wrong doing.

#### **Part III: Procedural History and the Decision Below**

Multiple ULPs brought by the Union, including claims that Wendt had violated Section 8 (a)(1)(3)—were investigated by the Regional Office and not brought to Complaint (*compare* GC Ex. 1 with 1 (a)-(f) and (j) to (p)) including charges that Wendt had manufactured the need for the February 2018 layoff in order to break the Union and that Wendt had selected employees for layoff based on Union support. *Compare* GC Ex. 1 (u) with (j).

The Complaint alleged various Section 8 (a)(1) violations, which were all based on statements made by a single employee Dan Voigt, during September of

2017 and January of 2018. (GC Ex. 1 (u), para. 6). The Complaint also alleged Section 8 (a)(5) violations including the following; (a) the February 2018 layoff; (b) the negotiation of wage increases and performance reviews; and (c) the performance of unit work by supervisors following the promotion of unit employees to supervisory positions. (GC Ex. 1 (u), para. 11). Finally, the Complaint alleged several violations of Sections 8 (a)(1) and 8 (a)(3) in connection with the discipline of Bush and the assignment of work and overtime to Hudson. (GC Ex. 1 (u), para. 8 to 10 (d) and (e)).

The hearing was held during September and November of 2018. Over 100 exhibits were entered into evidence. During the hearing, the Regional Office attempted to amend the Complaint to allege that Wendt's counsel's cross-examination of a witness was a violation of the Act. The ALJ permitted the amendment and Wendt took an emergency appeal to the Board, which was granted, thereby denying the proposed amendment of the Complaint. (R Volume III, Request file appeal and Decision).

On February 15, 2019, the ALJ issued his decision. ALJD *passim*. Despite the fact that the Complaint did not contain a count alleging that Wendt's February 2018 layoff was carried out in violation of Section 8 (a)(1)(3) of the Act, the ALJ, in a gross violation of Wendt's due process rights, nonetheless ruled that the 2018 layoff violated Section 8 (a)(1)(3). (ALJD 26:30 to 27:35).

Despite the fact that the three most significant issues before the ALJ—(a) the layoff; (b) wage increase; and (c) performance of bargaining unit work—involved Wendt’s past practices, the ALJ’s decision did not evaluate the evidence under *Raytheon*. Moreover, in finding that the reassignment of Hudson and denial of overtime to Hudson violated Section 8 (a)(3) of the Act, the ALJ erred in his application of *Wright Line* by not relying on any evidence that union animus motivated these specific decisions and instead simply relying on the aged statements made by Voigt to support the Section 8 (a)(1) violation. Ironically, Voigt’s statements were made months earlier to entirely different individuals on substantially different subject matters.

Wendt filed exceptions to the ALJ’s Decision and the Regional Office filed cross-exceptions. In its response to Wendt’s exceptions, the Regional Office took no position on the ALJ’s violation of Wendt’s due process rights by finding a violation of the Act that had not been included in the allegations of the Complaint. After objection from Wendt, the Regional Office subsequently notified the Board that it agreed that the ALJ’s finding that the February 2018 layoff violated Section 8 (a)(3), should be set aside.

The Board’s decision issued in July 2020. While the Board reversed the Section 8 (a)(3) layoff decision, as well as the finding that Wendt was required to bargain regarding individual discipline, it upheld the remainder of the ALJ’s

decision. While the Board purported to apply *Raytheon*, as discussed below, it ignored *Raytheon*'s central tenet, that under the dynamic status quo, an employer is free to continue past practices, so long as there is no material or substantial change in the types of actions it previously took. Moreover, the Board's affirmance of the ALJ's findings of violations of Section 8 (a)(3) misapplied the Board's precedent and ignored substantial record evidence.

### STANDARD OF REVIEW

While the Board is generally entitled to deference, Courts will not affirm decisions that are not supported by substantial evidence, nor will they act as a "rubber stamp" for Board decisions or affirm decisions where the law was applied incorrectly. *Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011). Board orders will not survive review when the decision has no reasonable basis in law or when the Board has failed to apply the proper legal standard. *Titanium Metals Corporation v. NLRB*, 392 F.3d 439, 444 (D.C. Cir. 2004). Board decisions that depart from established precedent, without reasoned justification, will be set aside. *Id.* (citing *Am. Freight Sys., Inc. v. NLRB*, 722 F.2d 828, (D.C. Cir. 1983) ("Although the Board has considerable discretion in deciding whether to defer ... a failure to follow its own standards of deference is an abuse of that discretion").

## SUMMARY OF ARGUMENT

The Board's decisions which are the subject of this appeal fundamentally involve its failure to apply its own precedents and its disregard of substantial record evidence that failed to support its factual findings. Nowhere is this more evident than in the Board's findings that Wendt did not have past practices of layoffs when there was a lack of work and non-unit members, including supervisors performing the same work as unit members.

Despite the Board's recent decisions in *Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161 (Dec. 15, 2017) and *Mike-Sell's Potato Chip Company*, 368 N.L.R.B. No. 145 (Dec. 16, 2019) which emphasized that under *Katz* an employer is free to continue what it has done in the past, the Board concluded that Wendt was not free to continue its long-standing practice of laying off employees when there was a lack of work or having non unit employees, including supervisors perform unit work. In concluding that Wendt did not have a past practice of either layoffs or supervisors performing bargaining unit work, the Board ignored both the Supreme Court's decision in *Katz*, and its own decision in *Mike-Sell's* that a past practice exists when an employer under similar circumstances in the past to the same actions such that employees would recognize and expect that action to reoccur. *Katz*, 369 U.S. at 747-748.

The Board further compounded this error of law by disregarding substantial evidence both as to the existence of these past practices, as well as evidence that in the case of supervisors performing bargaining unit work, that there was no material change to the past practice. In doing so the Board disregarded its own holding in *Raytheon*, that the Board evaluate past practices in light of the dynamic status quo and the employers “**do not materially vary in kind or degree from** what has customarily been done in the past...” *Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161, slip op. at p 16 (2017).

The Board, similarly, in finding that Wendt violated Section 8 (a)(3) by delaying bargaining regarding wage increases and performance reviews, failed to apply its recent decision in *MV Transportation Inc.*, 368 N.L.R.B. No. 66 (Sept. 10, 2019) which adopted the contract coverage standard, rather than the clear and convincing waiver standard in determining that the Union was foreclosed from seeking further bargaining with respect to the retroactivity of wage increases. The result was that the Board’s decision-imposed remedies which exceeded the Board’s authority by both dictating that Wendt bargain as to the retroactivity – and the outcome of that bargaining – make the union whole. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).

Finally, the Board’s finding that Wendt violated Section 8 (a)(3) in reassigning Hudson and denying him overtime misapplied the burden shifting

testing under *Wright Line*. The Board’s finding that the General Counsel can meet its initial burden based on general union animus without any causal connection to any protected activity of Hudson and the adverse employment action is contrary to *Wright Line*. *Meco Corp. v. NLRB*, 986 F.2d 1434 (D.C. Cir. 1993). The Board then compounded this error by concluding that Hudson was subject to “disparate treatment” despite the extensive record evidence to the contrary. The Board made similar factual and legal errors in finding that Fricano was denied his rights under *Weingarten*.

## ARGUMENT

### **POINT I: THE BOARD’S DETERMINATION THAT THE FEBRUARY 2018 LAYOFF VIOLATED SECTION 8 (a)(5) WAS NEITHER SUPPORTED BY SUBSTANTIAL EVIDENCE NOR EXISTING LAW**

#### **A. The Board’s Determination That Wendt Did Not Have A Past Practice of Layoffs Was Not Supported by Substantial Evidence**

Under *NLRB v. Katz*, 369 U.S. 736 (1962) and the Board’s decisions applying *Katz*, an employer’s past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that “**do not materially vary in kind or degree** from what has customarily been done in the past...” *Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161, slip op. at p 16 (2017). (Emphasis added). As the Supreme Court held in *Katz*, whether a bargaining obligation exists turns on whether the employer in making similar decisions in the past “acted consistently such that union and employees would

know whether or not there had been a substantial departure from the past practice.” *Katz*, 369 U.S. at 747-748. Consistent with *Katz* and the Board’s own decision in *Raytheon*, in 2019 the Board held that an employer has demonstrated past practice when it can show that the action it took was sufficiently regular and consistent with what it did in the past such that **“the employee would expect and recognize the contested [action] as a continuation....”** of what the employer had done in the past. *Mike-Sell’s*, 368 N.L.R.B. No. 145, slip op. at p. 3 (2019). (Emphasis added).

The employer in *Mike-Sell’s* had periodically sold various driver routes. The sales had occurred irregularly over several years. The ALJ had concluded that because the sales did not occur on a regular basis, the employer had failed to demonstrate a past practice. In reversing the ALJ’s decision, the Board concluded that whether there is a past practice **is not dependent on whether the practice occurred in a regular and recurrent pattern.** *Mike-Sell’s, supra*, 368 N.L.R.B. 145, slip op. at p. 3 (2019). Instead, the Board held that a past practice is sufficiently definite to become a term and condition of employment, if the employer acted consistently and regularly in making similar decisions in the past so that **“the employee would expect and recognize the contested [action] as a continuation....”** of the past practice. *Id.* (Emphasis added).

Inexplicably, the Board failed to follow its own precedent in *Mike-Sell’s* and failed to analyze what actions Wendt took in the past when shop work diminished.

Instead, the Board focused exclusively on the number of layoffs in the past with no reference to how frequently the need for a layoff arose, or whether the employees knew and expected that they would be subject to layoff when there was a lack of work. (Decision at p. 6). Thus, the Board—while acknowledging that Wendt had a history of implementing economic layoffs both permanent and temporary when there was a lack of work—illogically concluded that this was insufficient to establish a past practice on the ground that the need for a layoff arose only infrequently. (Decision at p. 6).

In reaching this unusual result, the Board actually acknowledged that—focusing exclusively on the number of layoffs, rather than on whether Wendt had acted consistently with how it had acted in the past when confronted with a lack of work—was contrary to the Board’s own decision in *Mike-Sell’s*. (Decision at p. 6). Yet, no justification was offered for its departure from this established precedent. Nor did the Board reconcile how its focus on the number of layoffs—rather than Wendt’s practice when faced with a lack of work in the past—was consistent with its decision in *Raytheon* which emphasized that an employer was free to do what it has always done without the obligation to bargain. *Raytheon*, 365 N.L.R.B. No. 161, slip op. at p. 11 (2017).

Also absent from the Board’s analysis is any consideration of the evidence in the record showing that, even though layoffs only occurred when there was a

lack of work, Wendt's employees expected and recognized that in the event of a lack of work, they would be subject to layoff. In particular, the Board failed to consider the provisions of Wendt's employee handbook which expressly notified employees that layoffs were possible and which outlined the criteria Wendt would use for selecting specific employees for layoff. (GC Ex. 23 at p. 13 and 57). The Board also ignored evidence that although the need for layoffs occurred sporadically, Wendt had instituted layoffs whenever there was a lack of work and there was no evidence in the record of any time when Wendt failed to lay employees off when there was no work for them to perform. (R Exs. 25-27; *see also, supra* 10).

To the extent the Board found that the 2018 layoff was a "departure" from Wendt's past practice of laying off both shop employees and office employees, this conclusion was unsupported by substantial evidence and constituted an error of law. While in some past layoffs, both shop and office employees were subject to layoff, those were instances in which there was a lack of work **both** in the shop and the office. Moreover, the record evidence included other instances when only shop employees were laid off. (R Ex. 25 and 27 (layoffs of shop employees only in 2001, 2002 and 2003)). As the Board acknowledged, during the 2018 layoff, Wendt's design and engineering division (the office) remained busy, but the shop lacked work. (Decision at p. 6). Thus, the layoff in 2018 was entirely consistent

with Wendt's past layoffs in that employees working in the areas where there was a lack of work were the specific employees subject to layoff.

Applying *Katz* and the Board's decisions in *Raytheon* and *Mike-Sell's*, the only evidence before the Board demonstrated that, in deciding to implement a layoff in February 2018, Wendt did precisely what it had always done when faced with a lack of work—and what it informed employees it would do in the employee handbook. Namely, Wendt proposed layoffs based on skill and ability. (R Ex. 2, p. 1). While Wendt ultimately selected individuals for layoff based on the criteria negotiated with the Union during the unsuccessful bargaining sessions (R Ex. 2, p. 5), Wendt's decision to implement the layoff was entirely consistent with what it had done in the past when confronted with a lack of work. As the Board found in *Raytheon*, the Board's prior law which prevented employers “from doing precisely what they have done in the past until everything is resolved in contract negotiations was both **contrary to *Katz* and to the Board's obligation to foster stable labor relations, and it was clearly not intended by Congress.**” *Raytheon, supra*, 365 N.L.R.B. No. 161, slip op. at 172 (2017). (Emphasis added). Under *Raytheon*, Wendt more than satisfied its obligation to bargain by bargaining to impasse on the terms of the layoff.

Accordingly, the Board's finding that Wendt did not have a past practice of layoffs must be reversed on grounds that the Board's decision was contrary to

*Katz*, and the Board's own precedents and that its findings were not supported by substantial record evidence.

**B. The Board Misapplied its Own Precedent in Requiring Bargaining to Overall Impasse**

Regardless of whether Wendt had a past practice of layoffs, this Court must reverse the Board's finding that Wendt violated Section 8(a)(5) on grounds that this finding is inconsistent with the Board's decision in *RBE Electronics of S.D., Inc.*, 320 N.L.R.B. 80 (1995). The Board held in *RBE Electronics* that an employer can act unilaterally as to layoff where negotiation of an initial contract has not been completed and prompt action is required. The employer must provide the Union with adequate notice of the urgency and an opportunity to bargain as to the terms of layoff. The Board in *RBE Electronics* expressly stated: "In that event, consistent with established Board law in situations where negotiations are not in progress, the **employer can act unilaterally** if either the union waives its right to bargain or the parties reach impasse **on the matter proposed.**" *RBE Electronics of S.D., Inc., supra*, 320 N.L.R.B. 80, slip op. at 82 (1995). (Emphasis added).

In order to demonstrate that there is a need for "prompt action" under *RBE Electronics*, an employer must show that there was a need to take the action promptly and it **could not wait until the completion of negotiation of a full contract**. To show that an action was compelled, the employer must demonstrate that the need for the action was beyond its control. As the Board explained, this

rule maintains the delicate balance between a union's right to bargain and an employer's need to operate the business.

In this case, the Board both misapplied its holding in *RBE Electronics* and ignored the record evidence. First, the Board misapplied the promptness requirement in *RBE Electronics* by focusing on when Wendt first determined that a layoff might be necessary rather than on whether Wendt needed to act before a final agreement could be reached. (Decision at p. 6 (finding that Wendt knew of the need for the layoff without any reference to whether Wendt needed to act before the parties could reach an overall agreement)). Second, the Board ignored the record evidence that, while Wendt had earlier identified the **possibility** that a layoff might be necessary, it was not until late December—six weeks before the layoff—that it became clear that certain customer orders would not materialize, and it was not until then that the need for a layoff became certain once all pending shop work was completed. (TR 1202, lns. 21-25).

Here, applying the correct standard with respect to promptness, as explained above, the record evidence shows that the need for the layoff did not become certain until late December of 2017—approximately six weeks prior to the layoff. The record also shows that the parties were nowhere near reaching agreement on an overall contract and significant issues, including issues as to subcontracting and even the identification of “bargaining unit work” were still outstanding. (R Ex. 25;

R Ex. 37, p. 26, 13). Thus, the Board’s finding that Wendt had failed to satisfy the “promptness” and impasse requirement under *RBE Electronics* was both contrary to its own decisional law and was not supported by substantial evidence.

Also contrary to the Board’s decision, *RBE Electronics* does not require that an employer show economic compulsion, but only that the need to take action was beyond its control. As the Board explained, this rule maintains the delicate balance between a union’s right to bargain and an employer’s need to operate the business. Notably, *RBE Electronics* was decided precisely to insure an exception to the “economic exigency” requirements under the Board’s 1991 decision in *Bottom Line Enterprises*, 302 N.L.R.B. 373 (1991).

Here, the Board reversed the ALJ’s findings that no business need existed for the layoff, a charge which the Regional Office investigated and elected not to bring to Complaint, thus negating any claim that Wendt “created” the need for the layoff. (Decision at p. 2). The evidence showed that Wendt could not avoid the need for the layoff by, for example, moving work from the last quarter of 2017 when the shop was busy or spreading out work. *See supra* 10-11. Thus, contrary to the Board’s decision in this case, nothing in *RBE Electronics* required a showing of either dire economic circumstances or significant losses.<sup>2</sup> Finally, the evidence

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<sup>2</sup> While not “enterprise threatening,” the Board’s cavalier conclusion that loss of \$60,000 to \$70,000 is of no small import to a family-run business is indicative of the Board’s failure to appreciate both the economic realities of operating a small

showed that the parties had reached impasse as to the terms of the layoff, when the day before the scheduled date for the layoff, the Union added new proposal terms. (TR 153, ln. 10 to 155, ln. 12; 1234, ln. 7 to 1236, ln. 1; R Ex. 2). In summary, the Board's determination that, in the absence of past practice, Wendt was required to bargain to overall impasse before implementing the layoff was contrary to the Board's own decision in *RBE Electronics* and was not supported by substantial evidence.

**POINT II: THE BOARD'S FINDING THAT WENDT VIOLATED THE ACT BY NOT PROVIDING WAGE INCREASES AND PERFORMANCE REVIEWS IS CONTRARY TO BOARD LAW AND THE RECORD EVIDENCE AND RESULTS IN CONFLICTING AND CONTRADICTORY REMEDIES**

**A. The Board Failed to Apply its Recent Decision Adopting the Contract Coverage Standard to the Facts in this Case**

After this matter was submitted in July of 2018, but before the decision issued, the Board abandoned the clear and unmistakable waiver standard and adopted—in *MV Transportation Inc.*, 368 N.L.R.B. No. 66 (Sept. 10, 2019)—the contract coverage standard for determining whether a party is precluded from further bargaining on an issue where an agreement had been reached. Despite this change in the applicable standard, the Board inexplicably simply noted in a

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business as well as the need for employers to be able to run their business and make decisions while negotiating an initial contract. *See* Decision at p. 6 and note 21. During the course of negotiating a first contract there could be more than one need for a layoff, compounding the losses.

footnote that it agreed with the ALJ's determination that the Union had not "waived" its rights to further negotiation with respect to the retroactivity of the wage increases.<sup>3</sup>

In light of the Board's abandonment of the waiver standard, the Board's failure to apply the contract waiver standard was clear error. Indeed, as the Board noted in *MV Transportation Inc.*, when failing to apply the contract waiver standard, the Board impermissibly sits in judgment on the contract terms and such action undermines contractual stability. *MV Transportation Inc.*, *supra*, 368 N.L.R.B. No. 66, slip op. at p. 5 (2019). As the Board now recognizes, under the contract waiver standard, the Board and the Court must first determine "whether **the matter is covered by the collective bargaining agreement** [and whether] **the union has exercised its bargaining right. If so, then the contract governs and the question of waiver is irrelevant.**" *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936-937 (7th Cir. 1992). (Emphasis in original). When a dispute exists, as here, as to whether a matter is covered by an agreement reached between the parties, the issue is one of contract interpretation and the courts and Board now must look to

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<sup>3</sup> As set forth in Wendt's Brief in support of its Exceptions, and again in this brief, the ALJ's findings that the Union had not waived further bargaining was contrary to the fundamental principles of contract law—which is the precise analysis applied under the contract waiver standard.

whether the subject matter is within “the compass of the terms of the agreement.” *Wilkes-Barre Hospital Company, LLC*, 857 F.3d 364 (D.C. Cir. 2017).

Under principles of contract construction, Wendt made an offer by written proposal which stated that “retroactivity was a negotiated term” and that it would withdraw its offer to provide retroactive wage increases “... in 30 days if not accepted by the Union.” (GC Ex. 9). The union conceded that it “accepted” this proposal despite being unhappy with the retroactive date. (TR 41, Ins. 7-13). Wendt provided the unit members with the agreed upon wage increase and the bargaining unit members accepted those payments. (ALJD 31:6-9).

Applying the contract coverage standard to these facts, the Board committed clear error in finding that Wendt violated Section 8 (a)(5) by failing to continue to bargain with the Union regarding additional retroactivity of wages. The agreement reached expressly provided the date for retroactive wage increases and, thus, the issue of retroactivity was within the subject matter covered by the agreement reached by the parties. Therefore, the Union was foreclosed from demanding further bargaining on this issue. *Wilkes-Barre Hospital Company, LLC, supra*, 857 F.3d 364.

**B. The Board’s Proposed Remedy for the Violation of Section 8 (a)(3) Impermissibly Dictates the Outcome of the Bargaining Process**

If the Court somehow determines that the contract coverage standard does not apply, then, as the Board found, the remedy is to direct the parties to continue

to bargain regarding any additional retroactive payments to the union members. (Decision at p. 8, para. 2 (g)). This finding and remedy—that the retroactive date for wages was the subject of additional bargaining—precludes the Board’s “make-whole” remedy based on its finding that Wendt delayed bargaining in violation of Section 8 (a)(3). Not only are these two remedies contradictory and contrary to the Board’s own ruling, but also the proposed Section 8 (a)(3) remedy impermissibly dictates the outcome of that bargaining. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).

Inexplicably, in finding that Wendt violated Section 8 (a)(3) by delaying in providing the employees with performance reviews, the Board makes no reference to its decision in *Raytheon* and the Board’s findings therein that, even when a past practice exists, an employer is required to refrain from implementation upon request by a union to bargain. *Raytheon, supra*, 365 N.L.R.B. No. 161, slip op. at p. 16 (2017). As a result, once the Union demanded bargaining with respect to both performance reviews and wage increases, under well-settled Board law, Wendt was entitled to defer providing those raises to bargaining unit members while still granting them to non-bargaining unit members. *Winn-Dixie Raleigh, Inc.*, 267 N.L.R.B. No. 43 (Aug. 19, 1993). *Accord, In Re Shell Oil Co.*, 77 N.L.R.B. 1306, 1310 (1948) (holding that an employer may offer different benefits to bargaining unit employees and also may provide wage increases to non-

bargaining unit employees “at a time when his other employees are seeking to bargain collectively through a statutory representative...”).

**POINT III: THE BOARD FAILED TO FOLLOW ITS OWN PRECEDENT  
IN FINDING THAT WENDT VIOLATED SECTION 8 (a)(5) BY  
TRANSFERRING UNIT WORK**

Although both the ALJ<sup>4</sup> and the Board refer to “unit work” in this case, it is undisputed that the unit was not certified based on the type of work performed but rather by the positions of the unit members. (GC Ex. 2). No exclusive bargaining unit work existed as supervisors, service technicians and managers had performed the same work as bargaining unit members both before and after certification. *See* R Ex. 18 and 14; GC Ex. 2; *supra* 8 and 16-17, (citing testimony of past practice of supervisors and others performing the same work as unit members). Despite the extensive history of non-unit employees performing the same work as unit employees, the Board inexplicably held that Wendt had failed to demonstrate a past practice of non-unit employees performing this work. In reaching this conclusion, the Board relied on the fact that the three employees in question were promoted as part of a reorganization and that a similar reorganization had not occurred in the past. (Decision at p. 7).

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<sup>4</sup> The Board recognized that the ALJ committed clear error again when he concluded that the advent of the Union prevented Wendt from continuing its past practice of having non-unit members and supervisors perform the same work as unit members. (ALJD 42:20 to 26).

This finding misstates both the nature of the bargaining unit and the past practice claimed. The Complaint alleged and the Board found that Wendt had transferred bargaining unit work to supervisors and non-bargaining unit employees<sup>5</sup> in violation of Section 8 (a)(5). (GC Ex. 1 (u), para. 11 (b)). Thus the issue before the Board was **not** the creation of the three supervisory positions, but instead whether or not Wendt had a demonstrated past practice of supervisors or other non-unit employees performing bargaining unit work, and whether there had been a material and substantial change in the amount of bargaining unit work performed by non-unit employees.

As set forth above under *Katz and Raytheon*, an employer may continue to do what it has always done in the past and an employer modification "...consistent with what it had done in the past is not a change in working conditions at all." *Raytheon*, 365 N.L.R.B. No. 161, slip op. at 167-168 (2017). As the Board itself stated in *Raytheon*: "the **only relevant factual question** [in determining whether an employer has a duty to bargain] is whether the employer's actions are similar in kind and degree to what the employer did in the past." *Raytheon*, 365 N.L.R.B. No. 161, slip op. at 13 (2017). In this case, of course, Wendt had a long-standing practice pursuant to which individuals in positions outside the unit performed the

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<sup>5</sup> As the Board noted no party objected to the ALJ's finding that Wendt did not violate Section 8 (a)(5) when it promoted Fess, Garcia and Norway and removal of them from the unit. (Decision at note 23).

same work as that performed by unit employees. Nothing in this past practice was contingent or based on any of the following: (1) whether the position in question was new or pre-existing; (2) the reasons the position existed or was created; or (3) even whether the position was a supervisory or non-supervisory position. (R Ex. 18 and 14; GC Ex. 2; *supra* 8 and 16-17 (citing testimony of past practice of supervisors and others performing the same work as unit members).

Accordingly, it is readily apparent that the Board's focus on the reasons for the creation of the two **additional supervisory positions**<sup>6</sup> is directly in conflict with its own decision in *Raytheon*—the governing Board precedent—which limits the Board to consideration only of whether Wendt took the same kind of actions in the past. Importantly, the “kind” of action at issue was Wendt's past practice pursuant to which supervisors performed the same kind of work performed by the employees who became bargaining unit employees post-certification. The Board concedes that it is undeniable that this past practice under which supervisors performed bargaining unit work existed long before certification. Thus, the only

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<sup>6</sup> Contrary to the Board's factual finding, the reorganization created only two additional supervisory positions not three. (R. Ex. 9, p. 4). In addition, the Board's finding of a lack of a pattern of supervisors performing bargaining unit work ignores the record evidence that the Union has never raised any objection to the incumbent Shipping/Receiving Supervisor performing “bargaining unit work.” (R Ex. 12; TR 984, ln. 12 to 985, ln. 10; 1476, lns. 19 to 25; 1481, ln. 19 to 1482, ln.7).

remaining issue was whether or not there was a change in the degree or amount of work previously performed by unit members following the promotion of Garcia, Fess and Norway.

As the Board recognized in *Raytheon*, the duty to bargain with respect to changes in the terms and conditions of employment **only arises** if an employer makes **material, substantial and significant changes** to the terms and conditions of employment of the bargaining unit members. Under *Raytheon*, as well as under pre-*Raytheon* Board law, once an employer establishes the existence of a past practice, the General Counsel has the burden of coming forth with evidence that there has been a material and substantial change so as to require bargaining. *Outboard Marine Corp.*, 307 N.L.R.B. 1333, 1338-1339 (1992); *Alan Ritchey, Inc.*, 354 N.L.R.B. 628, 629 (2009).

When, as here, no exclusive bargaining unit work exists, the General Counsel has the burden of demonstrating—both in terms of the number and the percentage of total hours worked by non-bargaining unit employees—that the supervisors are performing the same tasks as being performed by bargaining unit employees. *North Star Steel Co.*, 347 N.L.R.B. 1364, 1367 (2006). Moreover, for the change to be material and substantial, the General Counsel must demonstrate a causal connection between the alleged harm to the bargaining unit and its members. *Outboard Marine Corp.*, 307 N.L.R.B. 1333, 1338-1339 (1992); *Alan*

*Ritchey, Inc.*, 354 N.L.R.B. 628, 629 (2009); *North Star Steel Co.*, 347 N.L.R.B. 1364, 1367 (2006); *see also*, *Alamo Cement Co.*, 281 N.L.R.B. 737, 738 (1986).

The Board paid lip service to this standard in its decision. Its determination that the change was “material and significant” disregarded its own precedents and was not supported by substantial evidence. The Board acknowledged that—with respect to the three newly-appointed supervisors—the evidence *at best* showed that collectively these supervisors spent only 26 hours per week more than the previous supervisors in performing so called “unit work.” (Decision at p. 7). The Board then simply concluded that this was a “material” change. (Decision at p. 7). Notably, the Board offered no explanation for this conclusion even though there was no evidence that Wendt had ever hired part-time employees.

Apparently recognizing that the loss annually of ½ of a single full-time position, in fact was not a “material and significant” change, the Board cited to general testimony that Wendt utilized subcontracting to manage its workflow and hired temporary workers in one area shortly after promoting the three supervisors. The Board then asserted that “the record as whole supports that the Respondent removed from the unit the work of three positions.” (Decision at p. 7). Significantly, however, the Board did not cite to any quantifiable evidence to support this finding and instead relied on the generalized testimony that Wendt

utilized subcontracting and temporary workers to manage workflow. (Decision at p. 7).

This generalized testimony, however, is wholly insufficient to support the precise findings made by the Board that the work of three positions actually was removed from the unit. As to subcontracting, there was **no evidence** that there was any change or increase in the volume of subcontracting following the promotion of Fess, Norway and Garcia. Indeed, the Board itself found that historically only three to five percent of the goods sold by Wendt were built in the shop in the first instance. (Decision at note 21).

As to the use of temporary workers, while there was general testimony that additional temporary workers were hired in the Fall of 2017, this general testimony was insufficient to support the Board's finding. Norway testified that the number of temporary workers in his former department remained unchanged after his departure and the number of temporary workers in shipping and receiving also was unchanged. *Supra* 19-21. While there was general testimony that additional temporary workers were hired elsewhere in the shop, this testimony did not identify the number of employees, the work they performed or even how long these individuals were employed by Wendt.

Moreover, the Board simply ignored the evidence that in the Fall of 2017, when these additional temporary employees were brought on, the shop was

extremely busy. Thus, the hiring of additional temporary workers during a busy period was consistent with Wendt's past practice of using temporary workers to manage the peaks and valleys of production. *See* discussion *supra* at 19-21. Significantly, when this busy period ended, the evidence shows that Wendt eliminated temporary employees entirely in February 2018 and even by November 2018 it had only two temporary employees. *See* discussion *supra* 19-21. Thus, far from demonstrating the use of temporary employees to replace the bargaining unit work performed by Fess, Garcia and Norway, the actual evidence demonstrated that Wendt's use of the temporary employees was short lived and consistent with practice of using temporary workers to manage the peaks and valleys of its work load.

In summary, the record evidence before the Board simply did not support either its findings that Wendt did not have a past practice of having supervisors perform bargaining unit work or that there was a material and substantial change in the amount of unit work being performed by non-unit employees.

**POINT IV: THE BOARD MISAPPLIED WRIGHT LINE IN FINDING THAT WENDT VIOLATED SECTION 8 (A)(3) BY TRANSFERRING HUDSON AND DENYING HIM OVERTIME**

An employer only violates Sections 8 (a)(1) and (3) of the Act when the employer takes disciplinary or other action because of the employee's protected activity. *Circus Circus Casino Inc. v. NLRB*, 961 F.3d 469 (D.C. Cir. 2020). To

establish a violation under Sections 8 (a)(1) and (3), the employer's knowledge of an employee's union activities or sympathies is not enough and an "unfair labor practice occurs only when the employer's knowledge of its **employee's** pro union activities is a motivating factor in its decision..." *Schaeff Inc. v. NLRB*, 113 F.3d 264 (D.C. Cir. 1997). (Emphasis added).

Claims for violation of Section 8 (a)(3) are subject to the burden shifting analysis under *Wright Line, supra*, 251 N.L.R.B. 1083 (1980). Under the *Wright Line* test, the burden is first on the General Counsel to establish that the employee's protected activity was a substantial or motivating factor in the employer's decision. If the General Counsel meets this burden, then and only then does the burden shift to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct.

In concluding that the General Counsel met its initial burden that the decision to reassign Hudson and to deny him overtime was violative, the Board relied on: (a) the statements made by Wendt's plant manager—made four months earlier to **different employees on different subject matters**—as the only evidence that Wendt possessed general animus towards the union; and (b) that Hudson had been "singled out" for reassignment and denial of overtime. (Decision at p. 3-4). Not only were these determinations by the Board an error of law, but the record evidence before the Board also demonstrated that—far from being

singled out—Hudson was treated no differently than the other Wendt employees in the bargaining unit. Indeed, as discussed below with respect to the denial of overtime, **another union supporter** received overtime at the same time Hudson claims he was denied overtime—which directly contradicts the factual finding by the Board that Hudson was “singled out” due to his union support for a denial of overtime.

This Court has previously held that “the first prong of the *Wright Line* test requires proof not only that the employee knew of the employee’s pro-union activities, but also that the timing of the alleged reprisal was proximate to the protected activities and that there was anti-union animus to link the factors of timing and knowledge to the improper motivation.” *Meco Corp. v. NLRB*, 986 F.2d 1434 (D.C. Cir. 1993). Here, other than Wendt’s knowledge (which dates back over a year) that Hudson—along with numerous other individuals—supported the union, no evidence exists that Hudson engaged in any specific protected activity which motivated the decision to reassign him, when he returned from layoff in April of 2018 or to deny him overtime. (TR 138, ln. 9 to 1240, ln. 14). Nor did the Board cite to any evidence linking the statements Voight made to entirely different employees in September of 2017 and January of 2018 to the decision made to reassign Hudson and deny him overtime in April and May of 2018. In short, simply no evidence exists either linking any specific protected conduct by

Hudson or Wendt's alleged general union animus, to the decision by Wendt to either reassign Hudson or deny him overtime. Accordingly, it was error to find that the reassignment of Hudson and/or the alleged denial of overtime to him constituted a violation of Section 8 (a)(3).

Indeed, the Board itself implicitly recognized in its decision the need for such a link by concluding that the disparate treatment of Hudson was sufficient to establish that his protected activities were a motivating factor for these decisions. (Decision at p. 4). This finding of disparate treatment by the Board, however, was directly contradicted by the record. Far from being treated differently, Hudson was only one of several employees—including both union supporters and those whose sympathies were unknown to Wendt—who were reassigned when they returned from the layoff. (ALJD 16:21 to 26) (stating that Bush, Krajewski, and Rojas also were transferred temporarily). As to the assignment of overtime, the evidence showed that other union supporters actually were assigned overtime—including Thompson, to whom Voigt made three of the statements found to violate Section 8 (a)(1). (ALJD 24:1 to 6; *see also supra* 23, both Thompson and member of bargaining committee received overtime). The assignment of the overtime to Thompson, standing alone, demonstrates that the Board's finding that Hudson was subject to disparate treatment was not based on substantial evidence, but was arbitrary and capricious.

If the Court were to determine that the General Counsel had met its initial burden, the Board's conclusion that Wendt failed to demonstrate it would have taken the same actions even absent its general union animus was not supported by substantial evidence. As set forth above, Hudson was not the only employee who was reassigned following the layoff. As to the specific decision to assign Hudson temporarily to the saw, the evidence showed that the saw operator had not returned from layoff and that Hudson had complained about his low rating on the saw. (R Ex. 6; *supra* 22 (testimony regarding reasons for reassignment)). As to Hudson's claim of denial of overtime, Hudson did not identify the specific dates on which he was refused overtime. Moreover, the record evidence shows that he was, in fact, granted overtime on at least a few occasions in the weeks following the layoff—undisputed evidence that supports a finding that, if Hudson was denied overtime, Wendt did so either because there was no overtime available for him to work or because the available overtime was assigned to other employees including, as discussed above, other union supporters.

In summary, the Board determination that Wendt violated Section 8 (a)(3) by reassigning Hudson to the saw for a few weeks and denying him overtime constitutes error in that the Board failed to properly apply the burden shifting

analysis under *Wright Line* and the determination was not supported by substantial evidence and must be reversed.

**POINT V: A REQUEST THAT AN EMPLOYEE ACKNOWLEDGE  
RECEIPT OF A DISCIPLINARY ACTION DOES NOT TRIGGER  
WEINGARTEN RIGHTS**

An employee is not entitled to a union representation at a meeting called merely to inform the employee of disciplinary action already decided upon. *See, e.g., NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-260 (1975). The Board found that Wendt had already decided to discipline Fricano when he was called into a meeting and requested a union representative. Despite this finding, the Board found that—because the disciplinary document contained an option for Fricano to check a box to indicate whether he agreed or disagreed with the discipline—this converted the meeting into a *Weingarten* interview. (Decision at note 6). While the Board cited to its 1979 decision in *Baton Rouge Water Works' Company*, 246 N.L.R.B. 995 (1979) to support this conclusion, the Board cited no evidence or facts that Fricano was under a reasonable belief that he would be subject to any further discipline as a result of any response he might provide on the form.

It is well-settled—as the Board itself acknowledged in its decision in *Baton Rouge Water Works' Company*—that an “employee’s *Weingarten* rights only apply to investigatory interviews in which the risk of discipline reasonably inheres.” *Weingarten*, 420 U.S. 251, 262 (1975). Indeed, as the Board stated in *Baton Rouge*

and quoted in its decision in this matter, a request that an employee sign or acknowledge a discipline only triggers the employee's rights under *Weingarten* if the disciplinary form seeks facts or evidence *in support of the decision* or to have the employee admit his wrong doing or sign a form to that effect. (Decision at note 7).

Nowhere did the Board cite any evidence that Fricano believed, reasonably or otherwise, that—simply by being provided with an option to agree or disagree with the discipline or provide comments—he would be subject to any further discipline. Indeed, there was no evidence in the record that Wendt had ever imposed additional discipline on an employee either for failing to complete this form or based upon any response given by an employee on a disciplinary form. As the Board itself acknowledged, Fricano merely was given the “option” of agreeing or disagreeing with the discipline and there was nothing that would lead a reasonable person to conclude that he or she might be subject to additional disciplinary action.

Accordingly, it was an error of law for the Board to determine that, by simply providing a standard disciplinary form to Fricano, the meeting was converted to an investigatory interview, triggering Fricano's *Weingarten* rights.

### **CONCLUSION**

For the reasons set forth above, Wendt's Petition to set aside and vacate the Board's July 2020 Decision and Order should be granted.

Dated: January 7, 2021

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# ADDENDUM

**ADDENDUM : STATUTES AND REGULATIONS**

29 U.S.C. § 158

(a) It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) .....

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
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Dated: January 7, 2021

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