

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

TROY GROVE A DIV. OF RIVERSTONE GROUP
INC., AND VERMILLION QUARRY A DIV. OF
RIVERSTONE GROUP INC.

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150, AFL-CIO,

Cases 25-CA-234477
25-CA-242081
25-CA-244883
25-CA-246978

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted by:

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Now comes Counsel for the Acting General Counsel and respectfully submits to the Board this Answering Brief to the Exceptions to the Decision of the Administrative Law Judge filed by Troy Grove, a Division of Riverstone Group Inc., and Vermillion Quarry a Division of Riverstone Group, Inc., hereinafter referred to as the Respondent. Counsel for the General Counsel hereby requests that Respondent's exceptions be denied and that the Administrative Law Judge Decision in the instant case, which issued on January 11, 2021, be affirmed.

I. STATEMENT OF THE CASE

On January 11, 2021¹, Administrative Law Judge Olivero issued a decision correctly concluding that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, hereinafter referred to as the Act, when it changed the punch-in policy for unit employees without providing the Union with notice or an opportunity to bargain; violated Section 8(a)(3) and (1) of the Act by requiring employee Joe Ellena to sign a preferential hiring list located at its Vermillion Quarry; violated Section 8(a)(1) of the Act by removing union picket signs from public property; violated Section 8(a)(3) and (1) of the Act by disciplining and discharging employee Matt Kelly; and violated Section 8(a)(1) of the Act by interviewing employee Matt Kelly after denying his requesting for a union representative. (Decision p. 20, lines 15-35).

II. STATEMENT OF FACTS

A. Introduction

Respondent is a corporation with offices and places of business in Troy Grove and Utica Illinois and is engaged in the business of mining aggregate. The Respondent operates several quarries in Illinois, including Troy Grove Stone (hereinafter "Troy Grove") and Vermillion Quarry (hereinafter "Vermillion). These two quarries are seventeen miles apart. The drive time

¹ The Hearing in these matters was held on March 10 and 11, 2020.

from one quarry to the other is approximately twenty to twenty-five minutes. (Tr. 27). During the relevant time period in 2019, Respondent employed approximately seven employees at Troy Grove and at Vermillion. The employees held the following positions: Utility, Pit Motor Operator, Yard Loader, Secondary Operator, Clean Up, Plant Operator, Primary Loader Operator, Maintenance, and Excavator Operator. (Tr. 17-22). Scott Skerston is a superintendent for Respondent. Skerston served as the superintendent at Troy Grove and Vermillion from April 2018 to November 22, 2019. (Tr. 17, 303). Chuck Ellis is the President of Respondent and Marshall Guth is the Vice President of Operations. (Tr. 25).

The Union is the collective bargaining representative for employees at Troy Grove and Vermillion. All non-supervisory job classifications are in the bargaining unit. (Tr. 32, GC Ex. 2) The Union and Respondent entered into a collective-bargaining agreement (CBA) on July 30, 2014. The CBA expired on May 1, 2016. (GC Ex. 2). The parties began bargaining for a new contract in approximately March 2016. The parties were unable to reach a contract after the unit voted down contract proposals on two occasions. The Union met with its members to discuss Respondent's alleged unfair labor practices. The Union went out on strike in approximately March 2018. (Tr. 35, 129). On October 24, 2018, the Union notified Respondent that employee Lyle Calkins was the designated Union steward for bargaining unit employees. The letter specifically stated that the Union steward was to assist employees "during any investigatory interview(s) which might result in disciplinary action against the employee." (Tr. 36-37; GC. 3).

B. Removal of Union Picket Sign

As part of the strike, the Union set up a picket at Troy Grove. Retired employees Tom Brown and Shane Bice picketed at Troy Grove daily from August 2018 to November 2019 (Tr. 96-97). On a daily basis, Brown and Bice placed picket signs along each side of the two

driveways at Troy Grove. (Tr. 99). The picket signs read “Local 150 ON STRIKE AGAINST Troy Grove Stone Quarry a division of Riverstone Group, Inc FOR UNFAIR LABOR PRACTICES.” (Tr. 97; GC Ex. 26). The signs were laminated and attached to wooden laths that were approximately an inch and a half wide, half inch thick, and four feet long. The Union also placed a ten-inch PVC pipe into the ground so the picketers could simply place the wooden lath of the sign into the PVC pipe when they arrived at Troy Grove each morning. (Tr. 99, 115-116). After they finished picketing for the day, Brown and Bice removed the picket signs and took them home. (Tr. 100). The picket signs have never fallen out of the PVC pipes. (Tr. 121).

On January 2, 2019, Brown and Bice arrived at Troy Grove between 6:30AM and 6:45 AM and put out their picket signs. Around 1:40PM, Brown was sitting in his truck when he saw Respondent’s agent James Misercola exiting the Troy Grove facility in a white SUV. Respondent hired Misercola in 2018, during the same time period that an employee filed a decertification petition. Respondent hired Misercola to assist Respondent in securing a no-vote in the Union election. (Tr. 138). As Misercola was exiting the facility, Brown watched Misercola pull up next to the Union picket sign, back up, pull up next to sign again, and then back up. Misercola did this three times before driving away. Misercola was not on the driveway of Troy Grove, but rather a pile of sod next to the driveway. Misercola’s vehicle was rocking due to the unevenness of the sod. (Tr. 100-103, 116 -118). Immediately after Misercola drove away, both Brown and Bice noticed that the Union picket sign near where Misercola stopped his vehicle was gone. Bice had placed the picket sign in that location that morning. (Tr. 118). Bice walked over to the area and saw the tire tracks in the snow from Misercola’s vehicle. Bice looked around the area to make sure the sign was not laying on the ground. The PVC pipe was still in the ground, but the sign and wooden lath were missing. (Tr. 121-122). Bice took photos of Misercola’s tire tracks and

called Union Business Agent Steven Russo to report what he witnessed. (Tr. 118-121, 130; GC Ex. 25(a), GC Ex. 25(b)). Business Agent Russo contacted the LaSalle County Sheriff's Office and on January 3, 2019, Brown and Bice spoke to a deputy and reported that Misercola took the Union' picket sign. Misercola also spoke to a deputy on January 3, 2020. (Tr. 104, GC Ex. 24). Business Agent Steve Russo provided Bice and Brown with a replacement sign the following day. (Tr. 122, 131).

C. Unilateral Change to Punch-in Policy

Bargaining unit employees were scheduled to start work at 6:00AM and clock out at 4:00PM. (Tr. 238) Before January 22, 2019, Troy Grove employee Joe Ellena regularly punched in between 5:35AM and 5:45AM and punched out at 4:00PM. When Ellena arrived at the facility, Superintendent Skerston or Josh Weber, who had keys, would let him in the gate. Respondent paid Ellena time and a half for all hours worked over forty hours per week. (Tr. 161-162). Ellena's timecards show that he punched in more than ten minutes early on June 25, 2018, June 26, 2018, June 27, 2018, June 28, 2018, August 20, 2018, August 21, 2018, August 22, 2018, August 23, 2018, September 4, 2018, September 5, 2018, and September 6, 2018. (Tr. 297-302; GC Ex. 30; GC Ex. 31; GC Ex. 32). Vermillion employee Matthew Kelly generally punched in approximately ten to fifteen minutes prior to his shift and he received overtime compensation for the additional ten to fifteen minutes. Kelly would punch out at 4:00PM. (Tr. 186). Troy Grove Operator Jeff Bean's timecards show that he punched in fifteen or more minutes early on November 18, 2018, November 27, 2018, November 28, 2018, November 29, 2018, December 4, 2019, December 5, 2018, December 6, 2018, December 10, 2018, December 11, 2018, December 12, 2018, December 13, 2018, December 14, 2018, December 17, 2018, and December 19, 2018. (Tr. 293-297; GC Ex. 29). Employee Lyle Calkins also punched in

approximately ten to fifteen minutes prior to his 6:00AM start time. (Tr. 147). Troy Grove employee Scott Currie punched in ten minutes prior to his 6:00AM start time since he started working for Respondent in 2001. (Tr. 155). Vermillion employee Ben Gibson generally punched in fifteen minutes early and would clock out at 4:00PM. Gibson was paid for the time he worked before 6:00AM and received overtime for those hours. (Tr. 229-231).

Bradley Lower is an operator at Troy Grove. His work hours are 6:00AM to 4:00 PM. In early January 2019, Lower had a conversation with fellow employees and Union members Lyle Calkins, Scott Currie, and Joe Ellena about punching in early. Lower and the others discussed that Ellena was punching in early at Troy Grove and Jeff Bean was punching in early at Vermillion. Lower witnessed Bean punching in early. (Tr. 141). Both Ellena and Bean were receiving time and a half for time worked before 6:00AM. (Tr. 136- 139). After the discussion, Lower decided that he was going to start punching in thirty minutes before the start of his shift to see if he, too, would be paid time and a half. Lower punched in at 5:30AM for three consecutive days in early January 2019 and was paid overtime for those three days. (Tr. 138-139). In early January 2019, Superintendent Skerston found out that Lower was punching in early, Skerston posted a notice that employees could not punch in more than five minutes prior to the start of their shift after he learned that Lower was punching in early. (Tr. 242).

On Tuesday, January 22, 2019, Troy Grove employees Brad Lower and Lyle Calkins saw a notice posted by the time clock in the break room. The noticed that stated “there is to be no punching in earlier than 5 minutes prior to normal start time without superintendent authorization.” Calkins took a picture of the notice Respondent posted at Troy Grove and texted the picture to Union Business Agent Steve Russo. (Tr. 133, GC. Ex. 27). Currie saw the notice by the timeclock shortly after Lower started punching in. Troy Grove employee Joe Ellena saw

the notice prior to his layoff at the end of January 2019. Vermillion employee Matthew Kelly also saw the notice in winter 2019. (Tr. 139-140, 148, 156, 164, 185). Respondent did not have a punch in policy prior to January 22, 2019. (Tr. 148, 157, 165).

On January 22, 2019, Union Business Agent Steve Russo received a call and text messages from Union Steward Lyle Calkins regarding the posted sign and the new punch-in policy. (Tr. 132. GC ex. 27). The Union received no notice from Respondent regarding this change and was not afforded an opportunity to bargain regarding the change. The Union was previously unaware of any policies regarding employees' punching in early. After the strike began in March 2018, the Union had sent out an information request to Respondent in which it requested all policies concerning the terms and conditions of employment of employees. Respondent did not provide any rules or policies concerning employees punching in early. (Tr. 133-134).

After Respondent posted the new punch in policy, employees Brad Lower, Lyle Calkins, Scott Currie, Joe Ellena, Matthew Kelly, and Ben Gibson stopped punching in early and began punching in no more than five minutes prior to the start of their shift. (Tr. 142, 149, 157, 165, 186, and 230).

D. Joe Ellena Required to Sign Preferential Hiring List

Employee Joe Ellena began working at Respondent's Vermillion quarry on May 21, 2018 as a replacement employee after the Union commenced its strike. His immediate supervisor was Superintendent Scott Skerston. After he was hired, Ellena became a supporter of the Union. (Tr. 159). Skerston testified that he was aware of Ellena's Union support because in July 2018 Ellena showed up at Respondent's shop wearing a Union shirt and a hard hat with Union stickers on it. Ellena also had Union stickers on his lunch box and on the back windows of his truck. Ellena

told Skerston that he supported the union. Skerston also observed Ellena wearing a Union shirt, and a hard hat with union stickers on it. Skerston also saw Union stickers on Ellena's personal vehicle and lunch box. (Tr. 38-39, 159-160, 190-191, 224-225).

On May 20, 2019, Ellena joined the ongoing strike. Ellena joined the strike by providing a written strike notice to Superintendent Skerston. (Tr. 165; GC Ex. 4). On July 10, 2019, Ellena made an unconditional offer to return to work, in writing, to Superintendent Skerston and Respondent representative Marshall Guth. (Tr. 166; GC 5). On July 12, 2019, Superintendent Skerston sent a letter to Ellena informing him there were no job openings. The letter stated that Respondent had established a preferential hiring list at Vermillion which Ellena was welcomed to sign. (GC Ex. 6(a)). Ellena did not sign the list because he felt he was still employed by Respondent. No one from Respondent informed Ellena that he did not have to sign the preferential hiring list in order to be recalled. (Tr. 45, 167-168). Respondent instituted the preferential hiring list at the same time it sent the July 12, 2019 letter to Ellena. (Tr. 44). Respondent has not returned Ellena to work.

E. Respondent Disciplined and Discharged Matthew Kelly and Denied Him Union Representation

Employee Matthew Kelly began working at Respondent's Vermillion quarry as a replacement worker in May 2018. He was employed as an operator and maintenance worker. Kelly's immediate supervisor was Scott Skerston. Kelly was laid off in the winter months of the 2019 and returned to work in April of 2019. (Tr.48,183-184). During his first year of employment, Kelly was disciplined once. (Tr. 45, 187-188). On January 17, 2019, Superintendent Skerston disciplined Kelly and Joe Ellena for engaging in a snowball fight. (Tr. 45-45, 187-188, GC Ex. 7).

On May 6, 2019, Matthew Kelly arrived to work at Vermillion between 5:45AM and 6:00AM. Kelly went to the shop upon arriving to work. Employees met at the shop every morning to receive the agenda for the day from Superintendent Skerston. When Kelly first arrived at the shop there were only a few employees. Kelly punched in and waited for the rest of the employees to show up. After the rest of the employees showed up, Kelly took off his sweatshirt to reveal the Union shirt he was wearing. Kelly also placed Union stickers on his hardhat. The shirt was dark blue and said, "Fighting 150" along with a bulldog and the Union logo. The stickers were the Union logo, a pressure gauge, and a rat. Kelly had also placed stickers on his lunchbox and truck prior to arriving at the shop that morning. (Tr. 48-49,188-190, 223-225) After Kelly revealed his Union shirt, Superintendent Skerston arrived at the shop. When Skerston noticed Kelly's Union shirt, Skerston said, "Oh geez, you've got to be kidding me. Are you taking Joe Ellena's place?" (Tr. 190, 224). After May 6, 2019, Skerston saw Kelly wearing a Union shirt several times a week. (Tr. 50, 226).

On May 9, 2019, Matthew Kelly joined the strike. (GC Ex. 14) Kelly hand-delivered his strike notice to Skerston. (Tr. 255). On June 26, 2019, Kelly made an unconditional offer to return to work to Respondent. (GC Ex. 15). Respondent returned Kelly to work on July 8, 2019. (Resp. Ex. 9).

On July 10, 2019, two days after Respondent returned Kelly to work, Superintendent Skerston disciplined Kelly for a safety violation for failing to lock and tag out a machine. Skerston presented the write up to Kelly in the MCC Room at Vermillion on July 10, 2019. Kelly signed the discipline because he committed the lock out tag out violation. This was the second write up Respondent presented to Kelly during his employment. (Tr. 198-200; GC Ex.

17). The discipline does not list the previous infractions, reference the safety policy, or state when Kelly was made aware of the policy.

On August 7, 2019, Superintendent Skerston disciplined Kelly for an attendance violation. Kelly was late and spoke to Skerston about the discipline by the MCC Room at Vermillion. The discipline referenced the May 6th and May 8th written warnings for attendance violations. (Tr. 200-201, GC Ex. 18). Skerston informed Kelly that it was Kelly's final warning for attendance. (Tr. 201). Kelly refused to sign the discipline because Respondent never issued any previous disciplines for attendance to him. (Tr. 200). When Kelly asked Skerston for the previous disciplines, Skerston told Kelly that he did not have them, but the Union did. (Tr. 201). At 3:03 PM on August 7, 2019, Kelly sent a text message to Union Business Agent Russo and asked Russo if he had the disciplines. Kelly also informed Russo that Skerston never showed him any previous write ups. (Tr. 201-202; GC. 28). Skerston noted on the discipline that at 3:25 PM Kelly informed him that he was not refusing to sign the discipline but wanted to check with Union hall. (GC Ex. 18). After Kelly finished working for the day, he went the Union hall and reviewed all of the write-ups Respondent had provided to the Union.

On August 7, 2019 at the Union hall, Kelly saw for the first time the following disciplines: May 6, 2019 discipline for an attendance violation (Tr. 191-192; GC Ex. 9); May 7, 2019 discipline for a safety violation (Tr. 192; GC Ex. 10); May 7, 2019 discipline for performance (Tr. 193-194, 209-210; GC Ex. 11); May 8, 2019 discipline for an attendance violation (Tr. 194-195, GC Ex. 12); and May 9, 2019 discipline for a safety violation. (Tr. 195-196, 217-218, GC Ex. 13). Kelly was late on May 2, 2019, but Kelly was never shown or made aware of the discipline by Skerston or anyone else. (Tr. 191-192). Kelly used his cell phone on May 7, 2019, but Kelly was never shown or made aware of the discipline by Skerston or anyone

else. (Tr. 192). Kelly admitted going into the shop multiple times on May 7, 2019, but Kelly was never shown or made aware of the discipline by Skerston or anyone else. Kelly and other employees went into the shop regularly during the day. As a maintenance employee, Kelly went into the shop ten to fifteen times a day to get tools. Also, the bathroom was in the shop. Respondent never told Kelly that he was going into the shop too many times. (Tr. 193-194, 209-210). Kelly was late on May 8, 2019, and spoke to Skerston about being late, but Kelly was never shown or made aware of the discipline by Skerston or anyone else (Tr. 194-195). Kelly did damage company property on May 9, 2019 but denies wearing earbuds. Kelly was never shown or made aware of these disciplines by Skerston or anyone else. (Tr. 195-196, 217-218).

On August 14, 2019, Kelly was riding to work on his motorcycle when his tire blew. Kelly called Supervisor Skerston and informed him that he was going to be late. Kelly was scheduled to be at work at 6:00 AM, but he arrived at 11:30 AM. When Kelly arrived at Vermillion, Superintendent Skerston called Kelly into his office. Troy Grove Superintendent Tom Becker drove to Vermillion from Troy Grove to be present at the meeting. (Tr. 92, 203-204). Skerston started the meeting by informing Kelly that he had some questions for him. Kelly immediately requested that Union steward Lyle Calkins attend the meeting. Skerston denied Kelly's request stating that Calkins was too far away. After Skerston denied Kelly's request for a Union steward, Skerston asked Kelly if he wanted someone else and suggested employee Ben Gibson. Kelly agreed. (Tr. 205). Ben Gibson joined the meeting, and Superintendent Skerston began questioning Kelly about their phone conversation earlier that morning. Skerston was using a prepared questionnaire. After finishing his questions, Skerston handed Kelly a notice of suspension. (GC. Ex. 20). The notice did not reference the previous alleged attendance violations, and Skerston noted that Kelly stated he did not see any of the previous write-ups, with

the exception of the lockout tagout violation issued on July 10, and that Kelly had not signed the final warning. Kelly initially signed the notice of suspension, but then crossed out his signature because Respondent had not issued the May 2019 disciplines to him. (Tr. 228). Kelly then asked Skerston for his previous disciplines, and Skerston stated that he had received the disciplines from human resources but threw them away after Kelly said he was going to go to the Union hall to review them. Kelly asked Skerston why the disciplines were not put in a personnel folder, and Skerston did not respond. (Tr. 206-207, 227-228). Ben Gibson asked why the write-ups were not in the personnel file and asked if Skerston could get a copy. Skerston responded he could not because he had thrown them away but stated he had sent copies to the Union. (Tr. 228). Kelly requested a copy of the questionnaire and after calling counsel, Skerston refused to provide Kelly with a copy of the questionnaire. (Tr. 207-208). The meeting ended at that point and Kelly left the quarry. By that afternoon, Respondent had made the decision to terminate Kelly effective August 14, 2019. (Resp. Ex 10 at RSG CONS 0006044; GC Ex. 22).

III. ARGUMENT

A. The Administrative Law Judge Correctly Concluded that Respondent violated Section 8(a)(1) of the Act when it removed a union picket sign from public property.

Respondent violated Section 8(a)(1) of the Act when Respondent agent James Misercola removed the Union's picket sign from public property. The Board has held that an employer who removes signs that a union has placed on public property in support of a strike or its area standards, impermissibly interferes with the Section 7 rights of its employees and has therefore violated Section 8(a)(1) of the Act. Slapco, Inc., 315 NLRB 717, 720 (1994); Muncy Corp., 211 NLRB 263, 272 (1974).

In its exceptions, Respondent argues the Administrative Law Judge erred in finding Misercola not credible. Respondent also argues Misercola denied taking the picket sign, picketer Shane Bice and Thomas Brown did not like Misercola.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Here, the Administrative Law Judge correctly discredited Misercola's testimony and credited the testimony of picketers Tom Brown and Shane Bice and there is no basis to reverse these credibility findings. During the hearing Misercola could not recall with specificity the events of January 2, 2019. The picketers acknowledge they did not directly see Misercola remove the picket sign because his vehicle obstructed their view. However, Bice testified that on the morning of January 2, 2019, he placed the picket sign at on the public right away near exit of Troy Grove. Bice and Brown both testified that they watched Misercola drive up to the sign, drive back and forth in his vehicle several times before leaving, and that the sign was no longer there immediately after Misercola left. Further strengthening the picketers' credibility, the evidence indicates that the picketers took immediate action after Misercola removed the sign. Specifically, Bice immediately walked to the area of the missing sign after Misercola drove away and confirmed it was missing. Bice took contemporaneous photographs of the tire tracks caused by Misercola's vehicle and immediately called the Union Business Agent, Steve Russo who immediately called the police. In addition, both Bice and Brown both spoke to the LaSalle County Sheriff's Office and provided an account of what they observed and named Misercola in the police report. Bice testified that he did not like Misercola, but Bice also testified that he did not lie to or provide a false statement to police. The record supports the Administrative Law

Judge's credibility determinations and conclusion that Respondent's agent Misercola removed the Union's picket sign in violation of Section 8(a)(1) of the Act.

B. The Administrative Law Judge correctly concluded that Respondent violated Sections 8(a)(1) and (5) of the Act by changing the punch in policy for bargaining unit employees without giving prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent.

Respondent violated Section 8(a)(5) of the Act when about January 2019 it changed the punch-in policy without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the new punch-in policy. The Board has held that an employer's duty to bargain under Section 8(a)(5) includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' bargaining representative concerning the contemplated changes. NLRB v. Katz, 369 U.S. 736 (1962). An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the "status quo" as it pertains to terms and conditions of employment without first giving the union notice and an opportunity to bargain. The status quo consists of the terms of employment, including past practices, that occur with "such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." Sunoco, Inc., 349 NLRB 240, 244 (2007). Following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. Richfield Hospitality, Inc., 368 NLRB No. 44, slip op. at 2 (2019) (citing Triple A Fire Protection, Inc., 315 NLRB 409, 414 (1994), *enfd.* 136 F.3d 727 (11th Cir. 1998), *cert. denied* 525 U.S. 1067 (1999)).

Mandatory subjects of bargaining under the Act are those which affect "wages, hours, and other terms and conditions of employment." 29 U.S.C.A. § 158(d). An employer is barred

from taking unilateral action regarding subjects of mandatory bargaining. The hours of the day during which employees may be required to work are “subjects well within the realm of wages, hours and other terms and conditions of employment about which employers and unions must bargain.” Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 679 (1965). The Board held that the length of the workday is a mandatory subject of bargaining in Weston & Brooker Co., 154 NLRB 74 (1965). In Hedison Mfg. Co., 260 NLRB 590 (1982), the Board found that bargaining was required over a new rule which required employees to be at their departments five minutes earlier than had been the practice.

In its exceptions Respondent argues that 1) it did not make a change; 2) it was enforcing its existing work schedule; 3) the five-minute notice was not a material, substantial, and significant change. Prior to January 22, 2019, Respondent did not have a punch-in policy. In 2018, the Union made an information request for all of Respondent’s policies. The Union did not receive a copy of any policy or rule regarding punching in early. In addition, the parties never negotiated over any rules or policies concerning employees punching in early during contract negotiations. (Tr. 134).

Respondent asserts “General Counsel’s employee witnesses admitted that in December 2018 they departed from their usual practice by punching in early.” However, this is a misstatement of the record. Only one employee, Brad Lower, testified that he began punching in early in December 2018. Employees Joe Ellena, Jeff Bean, Lyle Calkins, Scott Currie, Matthew Kelly, and Ben Gibson routinely punched in more than five minutes before the scheduled beginning of their shifts prior to January 22, 2019 and received compensation for time worked prior to 6:00AM. On January 22, 2019, Respondent posted a new punch-in policy requiring employees punch in no more than five minutes before the start of their scheduled shift.

Respondent failed to provide the Union with notice or an opportunity to bargain over the new punch-in policy. After Respondent posted the new policy, employees began punching in within five minutes of the shift starting time. The record supports the Administrative Law Judge's conclusion that Respondent's conduct of instituting a new punch-in policy that changed employees' working hours and compensation without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the new punch-in policy, violated Section 8(a)(1) and (5) of the Act.

C. The Administrative Law Judge correctly concluded that Respondent violated Section 8(a)(1) and 8(a)(3) of the Act when it required employee Joe Ellena to sign a preferential hiring list in order to return to work after going on strike.

Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act when it required Joe Ellena to come to the Vermillion facility and sign a preferential hiring list after he provided Respondent with an unconditional offer to return to work after participating in a strike.

In Laidlaw, 171 NLRB 1366, 1369-1370 (1968), the Board held that if striking employees make an unconditional offer to return to work but there are no jobs available, employers are required to "maintain a nondiscriminatory recall list such that when openings become available, the un-reinstated striker could be recalled to his or her former or substantially equivalent position."

In Peerless Pump, 345 NLRB 371 (2005), the Board found that, in response to striking employees' unconditional offers to return to work, the Employer sent out a letter that stated, "[I]f you are interested in being reinstated at the earliest possible date, we need for you to come to the plant and sign the preferential rehire list." The Board concluded that the employer's conduct was an independent violation of the Act because the employer imposed "an affirmative obligation on former strikers to come to the plant to sign the [preferential hiring] list", calling it "an unlawful

infringement upon employees' Laidlaw rights" because there was no legitimate business justification. Id. at 375.

In Pirelli Cable Corp., 331 NLRB 1538 (2000), the Board found that the striking employees made an unconditional offer to return to work. In response to their offer, the employer sent a letter to the former strikers "requesting that they advise the [Employer] of their desire and availability for reinstatement as a condition precedent to their placement on the preferential hiring list." The Board held that an employer's procedure "designed to extinguish the preferential hiring rights of strikers," is "inherently destructive of employee rights" and unlawful, unless the employer can prove "legitimate and substantial business justifications" for its actions. See also Giddings & Lewis, Inc. v. NLRB, 710 F.2d 1280, 1285 (7th Cir. 1983). The Board held that the Employer violated the Act by conditioning the reinstatement of economic strikers on their submission of a letter advising the Respondent of their desire and availability for reinstatement. See Pirelli supra; Alaska Pulp Corp., 300 NLRB 232 (1990), enfd. 944 F.2d 909 (9th Cir. 1991).

In its exceptions Respondent argues that it did not require employee Joe Ellena to sign the preferential hiring list to return to work and he would have been the first person recalled if a vacancy occurred. Employee Joe Ellena went out on strike on May 20, 2019 to protest unfair labor practices. On July 10, 2019, Ellena made an unconditional offer to return to work to Superintendent Skerston and Respondent representative Marshall Guth. On July 12, 2019, Respondent established a preferential hiring list. Similar to the employers in Peerless Pump and Pirelli, Respondent sent a letter to Ellena informing him there were no job openings. The letter stated that Respondent had set up a preferential hiring list at Vermillion that Ellena was welcomed to sign. No one from Respondent informed Ellena that he did not have to sign the preferential hiring list. Respondent did not add Ellena to the list and failed to provide a legitimate

reason for its failure to do so. Respondent asserts that it never required Ellena to come to Vermillion and sign the preferential hiring list. However, if there was no requirement to sign the list to return to work, Respondent could have simply added Ellena's name to the list and it declined to do so. The record supports the Administrative Law Judge's conclusion that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act when it established and announced a signup requirement after Ellena made an unconditional offer to return to work from a strike.

D. The Administrative Law Judge correctly concluded that Respondent violated Section 8(a)(1) and 8(a)(3) of the Act when it disciplined and discharged employee Matt Kelly after he made it his union support known to Respondent.

Respondent violated Section 8(a)(1) and (3) of the Act when after employee Matt Kelly made his union support known on May 6, 2019, it disciplined Kelly on May 6, 7, 8, 9, July 10, and August 7, 2019, and discharged Kelly on August 14, 2019. Respondent argues that the Administrative Law Judge erred in finding that General Counsel met his burden in establishing that Respondent held animus toward the union and Kelly's union activity. Respondent also argues that the Administrative Law Judge erred in finding that Respondent failed to establish that it would have disciplined and discharged Kelly in the absence of his protected activity. Specifically Respondent asserts the following: 1) the ALJ erred in finding that Respondent bore animus toward the Union when it employed 'persuader' James Misercola who provided employees with information to secure no votes in union elections; 2) the ALJ erred in finding that Respondent bore animus toward Kelly when Supervisor Skerston saw Kelly wearing a union shirt at work for the first time he asked, "Are you kidding me?" and then compared him to another employee who had gone on strike; 3) the ALJ erred in finding that the timing of Respondent's disciplines of Kelly were strong evidence of animus when Respondent disciplined Kelly five times the week he showed and union support, and two days after Kelly returned from

strike; 4) the ALJ erred in finding animus when Respondent issued Kelly eight disciplines during the relevant times frame, but only twelve to all other employees. In addition, the ALJ noted that Kelly was the only employee discharged for attendance or any other reason during the relevant time period; and 5) the ALJ erred in finding animus when Respondent failed to follow its own policies in disciplining Kelly.

Despite Respondent's assertions, the Administrative Law Judge correctly concluded that Respondent violated Section 8(a)(1) and 8(a)(3) of the Act when it disciplined and discharged employee Matt Kelly after he made it his union support known to Respondent. To prove that disciplinary action, including discharge, violates the Act under Wright Line, the General Counsel must initially show that the employee's Section 7 activity was a motivating factor in the employer's decision to discipline and discharge the employee. The elements required to support this initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. 251 NLRB 1083, 1089 (1980). "The evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Mondelez Glob., LLC, 369 NLRB No. 46 (Mar. 31, 2020) quoting Tschiggfrie Properties, Ltd., 368 NLRB No. 120, slip op. at 8 (2019). If the General Counsel makes such a showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the employee's protected conduct. Wright Line, *supra*; see also Manno Electric, 321 NLRB 278, 280 fn. 12 (1996), *enfd. mem.* 127 F.3d 34 (5th Cir. 1997).

To meet its burden under Wright Line in disciplinary cases, it is not enough for an employer to show that an employee engaged in misconduct for which the employee could have been discharged or otherwise disciplined. As the Board has emphasized, the employer must

demonstrate that it “*would have*” discharged, or otherwise disciplined, the employee for the misconduct in question. Structural Composites Industries, 304 NLRB 729, 730 (1991) (emphasis original).

The Administrative Law Judge correctly concluded that proof of an employer's unlawful motivation can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. Robert Orr/Sysco Food Services, 343 NLRB 1183 (2004); Ronin Shipbuilding, 330 NLRB 464 (2000); Janus of Santa Cruz & Nat'l Union of Healthcare Workers, 2019 WL 3072670 (July 12, 2019). Circumstantial evidence such as the timing of employer's action, inconsistent or disparate treatment of employees, failure to issue disciplines to employees, and failure to follow established disciplinary policy support the inference on unlawful motivation. See Northern Wire Corp. v. NLRB, 887 F.2d 1313(7th Cir. 1989); and Carpenters Health & Welfare Fund, 327 NLRB 262, 160 LRRM 1067 (1998) (finding disparate treatment where employer offered no evidence that it had ever discharged others for violating telephone policy).

On May 6, 2019, employee Matt Kelly engaged in union activity. Specifically, Kelly came out as a Union supporter at Respondent's Vermillion shop by revealing his Union shirt, and placing Union stickers on his hardhat, lunchbox, and vehicle. Thereafter, Kelly wore his Union shirt multiple times and the Union stickers remained on his hardhat, lunchbox, and vehicle daily. Respondent was aware of Kelly's Union activity and support because Supervisor Skerston was in the shop on May 6, 2019 when Kelly made his Union support known for the first time. Skerston testified that he saw Kelly wearing his Union shirt several times after Kelly first showed his Union support.

On May 6, 2019, the same day Respondent became aware Kelly was a Union supporter, Respondent began disciplining Kelly in pattern that was inconsistent with both its past disciplinary practices and Respondent's written disciplinary guidelines. On May 6, 2019, Skerston disciplined Kelly for an attendance violation that occurred on May 2, 2019. On May 7, 2019 at 9:50AM Skerston disciplined Kelly for a safety violation for using his cell phone. Kelly admitted to using his cell phone. On May 7, 2019 at 10:00AM Skerston disciplined Kelly for a performance violation for going into the shop too many times. Kelly routinely went into the shop throughout the day as did other employees in order to get tools or use the restroom. On May 8, 2019, Skerston disciplined Kelly for an attendance violation. On May 9, 2019 Skerston disciplined Kelly for a safety violation for using ear buds and damaging company property. Kelly did damage company property but denies wearing earbuds. Kelly was not shown or informed of any of the above discipline at the time it was allegedly "issued". Based on Respondent's records, Kelly was disciplined four times in the four days after he announced his Union support. In the year Kelly worked for Respondent prior to his announcing his Union support, Kelly was disciplined a total of one time.

Kelly was on strike from May 9, 2019 until July 8, 2019 when Respondent brought Kelly back to work from strike after receiving his unconditional offer to return to work as it was required to by law. On July 10, 2019, two days after Respondent returned Kelly back to work, Skerston disciplined Kelly for a safety violation for failing to lock and tag out a machine, which Kelly acknowledged. On August 7, 2019, Skerston disciplined Kelly for an attendance violation because Kelly was late to work. On August 14, 2019, Respondent discharged Kelly for attendance.

Respondent had animus toward the Union in general and Matt Kelly specifically. Direct evidence of animus was shown by Respondent's hiring of James Misercola around the time the decertification petition was filed. Respondent hired Misercola to assist it in securing no votes for the election. Second, Misercola removed the Union's picket sign from a public right away near the exit of Troy Grove. Lastly, after Matt Kelly revealed his Union support, employees Matt Kelly and Ben Gibson, testified that Skerston said, "Oh geez, you've got to be kidding me. Are you taking Joe Ellena's place?" Skerston was referring to Joe Ellena, an active Union supporter who made his Union support known to Respondent prior to going on strike in support of the union. Joe Ellena made his union support known, in a manner similar to Matthew Kelly.

The Administrative Law Judge correctly concluded that the timing of Kelly's union activity and the Respondent's retaliatory conduct was evidence of the Employer's unlawful motive. It is well-settled Board law that "that the timing of an adverse action shortly after an employee has engaged in protected activity will support a finding of unlawful motivation." See Real Foods Co., 350 NLRB 309, 312 (2007); Davey Roofing, Inc., 341 NLRB 222, 223 (2004)). Here, the Respondent began disciplining Kelly on the same day that it became aware that Kelly was a Union supporter. Kelly revealed his Union support to Respondent on Monday, May 6, 2019 and Respondent disciplined him on May 6th, May 7th, May 8th and May 9th. Once again, it must be noted that Kelly was not shown or informed of any of this discipline at the time it was "issued". Kelly was on strike from May 9, 2019 to July 8, 2019. On July 10, 2019, two days after Respondent returned Kelly back to work, Respondent disciplined Kelly again. On August 7, 2019, Respondent disciplined Kelly again and on August 14, 2019, Respondent terminated Kelly. From May 6, 2019 to August 14, 2019, Kelly was physically at Vermillion for only six

and half weeks and he received seven disciplines during that timeframe after receiving one write-up in his first year of employment.

The Administrative Law Judge properly concluded that Respondent disparately disciplined Kelly after he engaged in union activity. Evidence of animus and unlawful motive can be inferred by Respondent's history of disparate and inconsistent disciplinary action. See Lee Builders, Inc. & Alabama Carpenters Reg'l Council-Local 1274, 341 NLRB 726, 729 (2004) (finding disparate treatment where employer failed to demonstrate it had ever discharged an employee for reason provided).

Respondent asserts that other employees received discipline for similar offenses for which Kelly was disciplined during the same time period. However, this assertion is unsupported by the record. Respondent issued only a total of seven disciplines to all of its employees from August 2017 up to May 6, 2019. (Tr. 84, 288-289, GC Ex. 23A- E, R.6). During this timeframe, Kelly had only received one discipline in January 2019 for a snowball fight. After Kelly made his union support known to Respondent on May 6, 2019 Respondent disciplined Kelly, who was working a four-day work week, five times in the week of May 6, 2019 alone. On May 7, 2019, Respondent disciplined Kelly twice in a ten-minute time span. At the time of Kelly's discharge on August 14, 2019, the Respondent had issued a total of twenty-one disciplines, Kelly had received nine disciplines, including his discharge, which is more than one-third of the total disciplines issued companywide.

Prior to May 6, 2019, Respondent had not disciplined or discharged a single employee for attendance. Kelly acknowledged that he was late on May 2nd, May 8th, August 7th, and August 14th; however, Kelly testified that he had been late before Respondent became aware of his Union support and he was not disciplined. (Tr. 209, R. 6, GC Ex. 23A- E). Kelly acknowledged

that he committed a safety violation on May 7, 2019 by using his cell phone while operating a company machine. Kelly testified that he had used a cell phone operating a company vehicle before, but Respondent did not start disciplining him for this conduct until after it found out that Kelly supported the union.

Superintendent Skerston testified that employee Ben Gibson was late to work prior May 6, 2019; however, Respondent did not issue Gibson a discipline. (Tr. 53, 59, R.6).

Superintendent Skerston testified that several employees had failed to properly lock and tag out a machine prior to Kelly's July 10, 2019 violation; however, Respondent did not issue disciplines. (Tr. 68, R.6). Kelly had driven a work truck using a cell phone prior to May 6, 2019, but there were no disciplines for this conduct. (Tr. 220-221, GC Ex 23A-E, R. 6). Kelly, along with other employees, regularly entered the shop numerous times per day to get tools. Respondent never told Kelly that he was entering the shop too many times. (Tr. 210). In addition, the bathroom was in the shop. No other employees had been disciplined for entering the shop numerous times per day. (Tr. 58, GC Ex. 23A- E, R.6).

The Administrative Law Judge properly concluded that Respondent's failed to follow its own established disciplinary procedures when it disciplined Matt Kelly is evidence of the Employer's unlawful motive. See Stody Co., 312 NLRB 1175, 1182-1183 (1993) (failure to timely document or follow established disciplinary policies); Baptist Hospital, Orange, 328 NLRB 628, 635 (1999) (failure to comply with established disciplinary procedure). On February 27, 2019, Skerston received supervisory training that included Warning Notice Guidelines that Skerston was to follow when he wrote up employees. (Tr. 243). The four categories of infractions were Safety, Performance, Attendance, and Conduct. For Safety and Conduct infractions, employees could receive a First Written Warning, Final

Warning/Suspensions, and then Termination. For Performance and Attendance infractions, employees could receive a First Written Warning, Second Written Warning, Final Warning/Suspension, and then Termination. The Warning Notice Guidelines contained an attendance note that stated that attendance would be tracked on a twelve-month period and the full picture of the employee's performance and length of service would be considered. (Tr. 244-245; Resp. Ex. 4 at RSG CONS001818). The Warning Notice Guidelines stated that supervisors should "use specific and factual description and date of infraction; explain the negative impact of the employee's actions if possible; list previous infractions chronologically and by category if this is repeated offense; if company policy is involved: state when the employee was made aware of the policy, explain the reason the policy is important, document date the employee was previously coached, if applicable." (Resp. Ex. 4 at RSG CONS001815).

Respondent failed to follow its own warning guidelines as it related to Matthew Kelly on numerous occasions. Specifically, on May 8, 2019, Skerston allegedly disciplined Kelly for an attendance violation; however, the discipline does not list the alleged May 6, 2019, attendance violation, reference the attendance policy, state when Kelly was made aware of the attendance policy, or state when Kelly was previously coached. On May 9, 2019 Skerston allegedly disciplined Kelly for a safety violation. The discipline does not list the alleged May 7, 2019 safety infraction or state when Kelly was made aware of the safety policy. On July 10, 2019, Skerston disciplined Kelly for a safety violation for failing to lock and tag out a machine. The discipline does not list the alleged May 7, 2019 or May 9, 2019 infractions, reference the safety policy, state when Kelly was made aware of the safety policy, or state when Kelly was made aware of the policy.

The Administrative Law Judge also found that Respondent failed to provide Matt Kelly with copies of his disciplines. Evidence of animus and unlawful motive can be inferred when an Employer seeks to “pad” an employee’s personnel file. See Lord Industries, Inc., 207 NLRB 419, 422 (1973) (failure to present discharged employees with copies of written disciplines contained in their personnel files supports finding of pretext). An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the employer's motive was unlawful. Johnson Freightlines, 323 NLRB 1213, 1222 (1997); K&M Electronics, 283 NLRB 279, 291 fn. 45 (1987); In Re W. Maul Resorts, 340 NLRB 846, 849 (2003).

In the current case, Respondent failed to inform Kelly of a majority of the disciplines that led up to his discharge. Specifically, Kelly denied that Respondent informed him of the disciplines for attendance on May 6, 2019; cell phone violation on May 7, 2019; performance for entering the shop too many times on May 7, 2019; attendance on May 8, 2019; and property damage and earbud usage on May 9, 2019. Respondent asserts that it issued Kelly all disciplines except for the May 9, 2019 discipline, but Kelly refused to sign.

The Administrative Law Judge properly credited Kelly’s assertion that he did not receive the aforementioned disciplines based on the subsequent actions Kelly took. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Here, the Administrative Law Judge correctly Kelly acknowledges that he received August 7, 2019 final written warning for attendance on August 7, 2019. Kelly testified that he informed Supervisor Skerston that he was refusing to sign the discipline because he had not been issued the previous warnings for the attendance. Kelly asked Skerston for the disciplines and Skerston informed him

that he did not have them but the Union did. Skerston noted on the discipline that Kelly was not refusing to sign but rather he wanted to check with the union hall that night.

Kelly's assertion that he never received the May 2019 disciplines is further corroborated by the text messages Kelly sent to Union Business Agent Steve Russo on August 7, 2019 in which he asked Russo if he had copies of all of his write-ups. Kelly also informed Russo that Skerston never showed him any of the write-ups. Skerston testified that on August 14, 2019, he called Kelly into a meeting to discharge him for attendance violations. During the meeting, Skerston presented Kelly with a notice of suspension for attendance violations. Kelly signed the notice initially but then crossed his name out and told Skerston he would not sign it because he had not received the May 2019 write-ups. When Kelly asked for copies of the disciplines, both Kelly and Ben Gibson testified the Skerston said he threw the disciplines in the trash. Respondent discharged Kelly effective August 14, 2019 without ever having even shown him the alleged May 2019 disciplines.

The record supports the Administrative Law Judge's conclusion that Respondent's failure to issue Kelly the May 2019 disciplines is evidence of Respondent's unlawful motive. Respondent relied on the May 6th and May 8th attendance violations to discipline, suspend, and ultimate discharge Kelly. Respondent's Warning Notice Guidelines instructed supervisors "to consider the full picture of the employee's performance" for third and fourth attendance discipline steps. According to its own guidelines, Respondent would have considered Kelly's two unissued May 7, 2019 disciplines, the unissued May 9, 2019 discipline, as well as the July 10, 2019 and August 7, 2019 discipline when Respondent disciplined Kelly on August 7, 2019 and discharged on him August 14, 2019.

The record supports the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) and (3) of the Act when after employee Matt Kelly made his union support known on May 6, 2019, it disparately disciplined Kelly on May 6, 7, 8, 9, July 10, and August 7, 2019, and discharged Kelly on August 14, 2019; failed to provide Kelly with copies of disciplines; and failed to follow its own disciplinary guidelines.

E. The Administrative Law Judge properly concluded that Respondent violated Section 8(a)(1) of the Act when it denied employee Matthew Kelly's request for union representation during an investigatory interview.

Respondent violated section 8(a)(1) when it denied employee Matthew Kelly's request for Union representation during his August 14, 2019 investigatory interview that led to disciplinary action. In NLRB v. J. Weingarten, 420 U.S. 251 (1975), the Supreme Court held that an employee who is being subjected to an investigatory interview has the right to request a union representative. Once an employee makes a valid request for union representation, the employer is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. Consolidated Freightways Corp., 264 NLRB 541, 542 (1982); General Motors Co., 251 NLRB 850, 857 (1980). An employer violates Section 8(a)(1) of the Act by proceeding with an investigatory interview without the union representative, after the employee has requested union representation, even if a fellow employee monitors the interview as a witness. See Williams Pipeline Co., 315 NLRB 1 (1994) (where lone union steward was unavailable at time employer conducted interview, presence of fellow employee did not satisfy employee's right to be represented by agent of exclusive representative of employees). "Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain

unrepresented after having been presented by the employer with the choice” between continuing the interview unaccompanied by a union representative or having no interview at all. Washoe Med. Ctr., Inc., 348 NLRB 361, 367 (2006).

On August 14, 2019, Superintendent Skerston called Matthew Kelly into a meeting at Vermillion. Troy Grove Superintendent Tom Becker drove from Troy Grove to Vermillion to attend the meeting. Skerston started the meeting by telling Kelly that he had questions for him. Kelly immediately asked for Union Steward Lyle Calkins. Skerston denied Kelly’s request for Union representation because Calkins was too far away. It is undisputed that Lyle Calkins was the only Union steward for the Vermillion and Troy Grove facilities. Lyle Calkins worked at Troy Grove and was working on August 14, 2019. The quarries are seventeen miles apart. The drive time is approximately twenty to twenty-five minutes. In addition, Respondent allowed time for Troy Grove Superintendent to drive to Vermillion to attend the disciplinary meeting.

After denying Kelly’s request for a Union steward, Skerston asked Kelly if he wanted someone else and ultimately Skerston suggested employee Ben Gibson and Kelly agreed. Respondent never gave Kelly choice to continue the interview with Ben Gibson or have not interview at all. Ben Gibson joined the meeting and Superintendent Skerston began questioning Kelly using a prepared questionnaire. After finishing his questions, Skerston handed Kelly a notice of suspension. The record supports the Administrative Law Judge’s conclusion that Respondent violated Section 8(a)(1) of the Act when it denied Kelly’s request for a union steward during an investigatory interview that led to disciplinary action.

CONCLUSION

For the above-stated reasons, the Counsel for the Acting General Counsel respectfully requests that Respondent's exceptions be denied in their entirety and that the Administrative Law Judge's Decision be affirmed and her recommended order adopted.

Respectfully submitted,

/s/ Ashley M. Miller

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CERTIFICATE OF SERVICE

I, Ashley M. Miller, Counsel for the Acting General Counsel, hereby certify that on February 22, 2021 at 4:00 PM CST, I served this Answering Brief to the Respondent's Exceptions to the Decision of the Administrative Law Judge by electronic mail on the parties below:

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