

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

WISMETTAC ASIAN FOODS, INC.

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 630

and

ROLANDO LOPEZ

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 630

Cases 21-CA-207463
21-CA-208128
21-CA-209337
21-CA-213978
21-CA-219153
21-CA-212285

**WISMETTAC ASIAN FOODS, INC.'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION ON REMAND**

Respectfully Submitted By:

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I. INTRODUCTION

On October 14, 2020, the Board issued its decision in *Wismettac Asian Foods, Inc.*, 370 NLRB No. 35. As part of that decision, the Board remanded to the Administrative Law Judge the issue of whether or not Respondent had unlawfully disciplined employee Rolando Lopez for engaging in protected concerted activities. The Board in *General Motors LLC*, 369 NLRB 127 (2020) had revised its approach to concerted activities cases, applying the “*Wright Line*” test¹. Because Board law had changed subsequent to the factual record being developed in this matter, the Board allowed the parties to brief the applicability of *Wright Line* to the facts developed before the Administrative Law Judge.

On December 31, 2020, the parties briefed the issue to the Administrative Law Judge who issued her DECISION ON REMAND (the “Decision”) on January 19, 2021. Submitted herewith are exceptions to that decision with this brief in support of those exceptions.

It is Respondent’s position that whether the facts of this case are analyzed under the Board’s new *Wright Line* approach and/or whether past precedent is used, Rolando Lopez’ conduct was extremely disruptive of the routinely called safety meeting and was not protected concerted activity, no matter what analysis is used.

II. FACTS OF THE CASE

Respondent called witnesses Susan Sands, Anthony Vasquez and Frank Matheu, who offered testimony as to the events involving Rolando Lopez.²

A. Discipline of Rolando Lopez

¹ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

² For the purposes of this position statement, citations to witnesses testifying shall be referenced by the transcript page number and line(s.) Citations to the transcript shall be referred to as “Tr.”. All exhibits referenced shall be noted by the party that introduced it. Respondent’s exhibits shall be referred to as “R Exh.”; the General Counsel’s exhibits shall be referred to as “GC Exh.”; and the Union’s exhibits shall be referred to as “U Exh.”.

Respondent issued a warning notice to Mr. Lopez based on what it considered to be insubordinate conduct. In its Complaint, the GC alleged that Mr. Lopez's conduct was protected as concerted activity. See GC Exhibit 1(ae), paragraph 7. The testimony regarding the conduct of Mr. Lopez was as follows:

1. *Testimony of Susan Sands*

Susan Sands offered testimony regarding the incident with Mr. Lopez. Ms. Sands testified that she currently worked at Respondent's Santa Fe Springs facility and that she had been with Respondent for a year in the position of assistant operations manager. [Vol. 6, Tr. 610:9-20]. She explained her job duties included ensuring Respondent, which just began being publicly traded in September 2017, was in compliance with the Sarbanes-Oxley Act of 2002 also known as "J-SOX standards," her duties included training departments to make sure they followed the proper protocols. [Vol. 6, Tr. 610:21-25, 611:1-12].

In reference to drivers at the facility, Ms. Sands testified that she did interact with them during standard operation training procedures, however she did not train them in regard to client interactions unless there was a procedure not being followed. [Vol. 6, Tr. 612:8-18]. Ms. Sands explained that she had also attended three driver meetings when she first began her job and that she also spoke at the meetings. [Vol. 6, Tr. 612:19-25, 613:1-2].

In regard to Respondent's meeting held on December 4, 2017, Ms. Sands testified that the meeting took place in the front warehouse office and that she attended the meeting in order to review standard operating procedures with employees in regard to credit and invoice processing, however she clarified the employees had already been briefed on the procedures at a previous time. [Vol. 6, Tr. 613:3-25]. Ms. Sands explained that she also volunteered to go to the meeting so that she could get to know the drivers and understand Respondent's S.O.P.s in order to make sure they were being followed. [Vol. 6, Tr. 614:1-4]. Ms. Sands recalled that about forty to fifty people were

present at the meeting including all drivers. [Vol. 6, Tr. 614:5-11].

Ms. Sands testified that the meeting began with Mr. Matheu speaking in English, she opined that in her interactions with non-English speaking employees she personally would usually meet with them after a general meeting and help them work through material using a translator. [Vol. 6, Tr. 614:12-23]. Ms. Sands recalled that about two to three minutes into Mr. Matheu's speech an employee aggressively spoke up towards Mr. Matheu, however Ms. Sands clarified that, although the employee appeared visibly upset, she did not know what was said since he had spoken in Spanish. [Vol. 6, Tr. 614:23-25, 615:1-21]. Ms. Sands also testified that other supervisors were at the meeting, including Mr. Romero and Mr. Vasquez. [Vol. 6, Tr. 615:22-25, 616:1].

Going back to the employee who spoke at the meeting, Ms. Sands recalled that for most of the meeting the employee stood with an aggressive stance, including having his arms crossed in front and slightly leaning back with his feet shoulder widths apart. [Vol. 6, Tr. 616:2-9]. Ms. Sands described that the employee spoke in a hostile way and that his tone was loud during the few minutes he spoke to Mr. Matheu. [Vol. 6, Tr. 616:10-24]. She also recalled that he made comments and gestures throughout the meeting to the drivers standing around him, including nudging them to agree or disagree with what was being said. [Vol. 6, Tr. 616:25, 617:1-14]. Ms. Sands testified that after the employee finished speaking Mr. Matheu responded in Spanish. [Vol. 6, Tr. 617:15-25, 618:1-5].

After the meeting, Ms. Sands testified that she was contacted by an HR representative Jinna Baik, who was conducting an investigation about the meeting, Ms. Sands testified she met with Ms. Baik on December 8, 2018. [Vol. 6, Tr. 618:6-25]. She recalled Ms. Baik revealed the employee who spoke at the meeting was named "Rolando" and asked that she prepare a statement in her own words about the incident at the meeting, Ms. Sands complied and turned the statement in a few days later. [Vol. 6, Tr. 619:1-18].

Ms. Sands testified that she was familiar with R Exhibit 3 and that it was the statement she gave to HR in regard to the December 4, 2017 meeting. [Vol. 6, Tr. 620:9-25].

Ms. Sands testified to GC/Ms. Pereda that her start date with Respondent was October 8, 2017 and that she was hired on to the position of assistant operations. [Vol. 6, Tr. 622:10-20]. She also testified she did not speak Spanish and thus was unable to understand what the employees at the December meeting said. [Vol. 6, Tr. 622:21-25, 623:1]. Ms. Sands recalled that during the meeting everyone in attendance was standing and that several employees spoke including Mr. Lopez, although she once again did not understand what was said. [Vol. 6, Tr. 623:2-23]. Finally, she explained that she did not reach out to HR about the meeting and that she only submitted the statement after being contacted on December 8, 2017. [Vol. 6, Tr. 623:24-25, 624:1-10].

In regard to the statement she gave to HR, Ms. Sands testified that she described Mr. Lopez's statements as "sarcastic" however, she confessed she didn't know what he had said but believed she could tell he was being sarcastic even if she couldn't tell what he had stated. [Vol. 6, Tr. 624:11-25, 625:1-2]. Ms. Sands recalled that during the meeting Mr. Matheu, Mr. Romero and Mr. Vasquez spoke in English and responded to the employee in Spanish, however she reiterated she did not understand the Spanish portions of what was said. [Vol. 6, Tr. 625:3-25, 626:1-5].

On re-direct, Ms. Sands testified that her statement in R Exhibit 3 stated that Mr. Lopez's tone was "aggressive, sarcastic and hostile" and that she had inferred that based upon his manner of speaking and his body language during the meeting which included him rolling his eyes, smacking his lips and making comments while the speakers were speaking. [Vol. 6, Tr. 626:6-25, 627:1-7]. On re-cross with UC/Ms. Sánchez, Ms. Sands defined the word sarcastic as "to be demeaning." [Vol. 6, Tr. 627:8-13].

2. Testimony of Anthony Vasquez

In regard to the December 4, 2017 company meeting, Mr. Matheu testified that he attended

the meeting along with Mr. Matheu, Jose Romero and other drivers. [Vol. 6, Tr. 642:25, 643:1-4]. Mr. Vasquez explained that the purpose of the meeting was to inform drivers how to complete customer credit line paperwork because some drivers were using incorrect codes and filling out the payment paperwork wrong. [Vol. 6, Tr. 643:5-15]. He recalled Mr. Matheu started the meeting by addressing the thirty drivers in English and that as he was speaking Mr. Lopez spoke up in Spanish. [Vol. 6, Tr. 643:16-25, 644:1-8].

Mr. Vasquez described how Mr. Lopez complained about the weights in the delivery trucks and how employee Augustine Troncoso's truck was made to go out on delivery while being overweight. [Vol. 6, Tr. 644:9-19]. Mr. Vasquez testified that Mr. Troncoso was present at the meeting but that he did not speak up and that Mr. Lopez spoke for about two minutes. [Vol. 6, Tr. 644:20-25]. Mr. Vasquez recalled that Mr. Lopez's tone was aggressive and loud as he spoke and that he made a pointing gesture at Mr. Vasquez and "accused" him and another supervisor Alberto of making him personally take an overweight truck in the past. [Vol. 6, Tr. 645:1-22]. Mr. Vasquez recalled the conversation ended with Mr. Matheu telling Mr. Lopez he would talk to him one on one because the topic was not related to the meeting. [Vol. 6, Tr. 645:23-25, 646:1-2].

Mr. Vasquez identified GC Exhibit 3 as a verbal warning given to Mr. Lopez on December 5, 2017. Mr. Vasquez explained the warning was given after he reported to HR that Mr. Lopez had interrupted and talked during the safety meeting December 4, 2017. [Vol. 6, Tr. 646:3-23]. He testified that Mr. Lopez received the warning on December 5, 2017 during a meeting with himself and Mr. Romero. [Vol. 6, Tr. 646:24-25, 647:1-3]. Mr. Vasquez recalled that during the meeting Mr. Lopez stated he did not agree with the accusations in the warning. [Vol. 6, Tr. 647:4-5].

The day after the meeting Mr. Vasquez also testified that he and Mr. Romero spoke with Augustine Troncoso and asked if he had told Mr. Lopez that his truck was overweight, to which Mr. Troncoso denied he had. [Vol. 6, Tr. 647:6-16].

Going back to the verbal warning received by Mr. Lopez, Mr. Vasquez testified that he and Mr. Romero met with HR to discuss Mr. Lopez receiving a warning. [Vol. 6, Tr. 648:2-14]. He recalled speaking to HR employee Jinna Baik in particular, telling her that Mr. Lopez was very aggressive at the meeting, however he clarified Ms. Baik did not instruct him to issue the warning. [Vol. 6, Tr. 648:15-25, 649:1-6].

3. Testimony of Frank Matheu

Mr. Matheu testified that he was present in the courtroom the day before and witnessed the testimony of Susan Sands and that he recalled holding a safety meeting on or about December 4, 2017 in which the same Ms. Sands briefly spoke. [Vol. 7, Tr. 878:14-25]. Mr. Matheu explained that he began to hold the weekly communication meetings with drivers and warehouse workers in order to improve the communication between supervisors and employees and to keep employees generally apprised of what was going. [Vol. 7, Tr. 879:1-8].

At the weekly safety meeting on December 4, 2017, Mr. Matheu recalled that Ms. Sands was present to retrain drivers on how to complete their paperwork. [Vol. 7, Tr. 879:9-25, 880:1-2]. He testified that as he was speaking about the daily safety report Mr. Rolando Lopez spoke up about weight issues with another employee's truck. [Vol. 7, Tr. 880:3-16]. Mr. Matheu recalled that Mr. Lopez's tone of voice as he spoke was angry and aggressive and that he accused Mr. Vasquez and "Alvarado" for never caring whether the trucks were overweight and that the neglect was obviously evidenced in Augustine Troncoso's truck which was forced to go out overweight every day. [Vol. 7, Tr. 880:17-22]. Mr. Matheu recalled that as Mr. Lopez spoke, he aggressively pointed at Mr. Vasquez, Mr. Matheu then jumped back into the conversation and explained that although the point was valid, it should be saved for a one-on-one conversation. [Vol. 7, Tr. 880:23-25, 881:1-5]. Mr. Matheu testified that Mr. Lopez was ultimately disciplined for his outburst during the meeting with a verbal warning. [Vol. 7, Tr. 881:6-10].

III. LEGAL ARGUMENT

The conduct of Mr. Lopez was not concerted activity. While the Act protects concerted activity, it does not protect insubordinate conduct of the type engaged in by Mr. Lopez. Respondent didn't dispute the points Mr. Lopez was making, they simply asked him not to disrupt the meeting, which he clearly did in a threatening manner. Respondent concedes that concerted activities, which involves employees complaining about wages, hours and working conditions is protected conduct. However, concerted activities can also cross a line where they become insubordinate and disruptive and are not protected. In the present case, Mr. Lopez "crossed the line". He disrupted the meeting even though he was told his issue would be addressed at the conclusion of the meeting. He was aggressive and sarcastic. The warning notice issued to him was justified.

The Board changed its standards for adjudicating whether certain conduct by an employee constitutes protected concerted activity in its decision in *General Motors LLC, supra*. The Board adopted the "*Wright Line*" test. Under the "*Wright Line*" test the General Counsel must demonstrate an employee was engaged in concerted activity; there was employer knowledge of the concerted activity; and the employer had animus against the activity. Once such a prima facie case is made the burden shifts to the employer to establish that its discipline of the employee was not based upon the workers concerted actions.

The Administrative Law Judge's analysis of these facts is completely erroneous. She appears to give no weight whatsoever to the testimony of Respondent's witnesses. The Administrative Law Judge in ruling that Mr. Lopez' conduct was protected states that his disruption of the meeting was for no more than two minutes (Decision, 8:1-5). When a normal business meeting is being conducted, a person who interrupts the meeting for up to two meeting is engaging in very disruptive conduct. As much as the Administrative Law Judge wanted to overlook

Mr. Lopez' tone of voice, she does concede (Decision, 8:fn.13) that he did in fact raise his voice. The idea that employees can conduct themselves the way Mr. Lopez did and obtain a "shield" from discipline which is sanctioned by this Agency would send the entirely wrong signal. It would mean that employees who are union activists can engage in this type of conduct without fear of discipline. A company must be able to conduct its day-to-day business and communicate with its employees without facing disruptions under the guise of "concerted activity". Mr. Lopez was not fired, suspended or in any way inhibited from engaging from engaging in existing and/or future union activities. He was given a verbal counseling and that should have been the end of it, as opposed to intervention by the NLRB in the day-to-day operations of a company.

In the instant case, Respondent understood and was willing to listen to Mr. Lopez's complaints regarding working conditions, i.e. the amounts of products being carried by the trucks operated by Company drivers. All that the Respondent requested was that Mr. Lopez not disrupt the meeting and interrupt the speakers with rude conduct, which the evidence shows he clearly did. Under the Board's new standard in *General Motors LLC, supra*, the discipline of Mr. Lopez should be upheld.

IV. CONCLUSION

For the reasons stated, the findings that Respondent committed unfair labor practices should be reversed.

Dated: March 1, 2021

Respectfully Submitted By:

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CERTIFICATE OF SERVICE

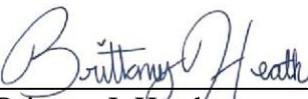
I, Brittany J. Heath, declare and state as follows:

1. I am at least 18 years of age, not a party to this action. I am employed at the Law Offices of Scott A. Wilson, which is located in San Diego County, California. My business address is 433 G Street, Suite 203, San Diego, CA 92101. My e-mail address is sawfrontoffice@pepperwilson.com.
2. I hereby certify that on October 30, 2019, a copy of **WISMETTAC ASIAN FOODS, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION ON REMAND** in Cases 21-CA-207463, 21-CA-208128, 21-CA-209337, 21-CA-213978, 21-CA-219153, 21-CA-212285, and 21-RC-204759 has been submitted by E-Filing to the National Labor Relations Board, Office of the Executive Secretary, in Washington DC.
3. On March 1, 2021, I served by e-mail, a copy of the document listed in item 2 on the parties as follows:

NAME OF PERSON SERVED	ELECTRONIC SERVICE ADDRESS
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Diego, California on March 1, 2021.

By: 
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Assistant to Scott A. Wilson