

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WENDT CORPORATION)	
)	
Petitioner/Cross-Respondent)	Nos. 20-1319
)	20-1328
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
)	03-CA-212225, et al.
Respondent/Cross-Petitioner)	

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD
TO LODGE WENDT’S BRIEF IN SUPPORT OF EXCEPTIONS**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board respectfully requests permission to lodge with the Court the attached brief in support of exceptions filed by Wendt Corporation in the underlying Board proceeding. In support, the Board shows as follows:

1. As discussed in the Board’s brief (p. 17), Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), bars this Court from considering any argument not raised to the Board, absent “extraordinary circumstances.”

2. The Board’s brief (pp. 27, 32, 52) cites Wendt’s brief in support of exceptions to show that Wendt’s opening brief to the Court raises arguments not brought before the Board, and that Wendt admitted key facts on exceptions. The

brief in support of exceptions will aid the Court in evaluating the Board's contentions.

3. The record in a Board case does not include briefs in support of exceptions. The Board's regulations (29 C.F.R. § 102.45(b)) provide that:

"The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case."

4. Accordingly, the Board's normal practice in cases where a party's brief from the Board proceedings may prove helpful to the Court is to request that the Court permit the brief to be lodged separately from the formal record.

WHEREFORE, the Board respectfully requests that the Court grant its motion to lodge the brief in support of exceptions.

Respectfully submitted,

/s/David Habenstreit

David Habenstreit

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this 16th day of February 2021

Dated at Washington, DC

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

WENDT CORPORATION,

Respondent,

and

SHOPMEN'S LOCAL UNION #567,

Petitioner.

Consolidated Case No. 03-CA-212225, 03-CA-220998, 03-CA-223594

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

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Respondent Wendt Corporation (“Respondent” or “Wendt”) submits the following brief in support of its exceptions to the Decision of Administrative Law Judge Ira Sandron (“ALJ” or “ALJ Sandron”) issued on February 15, 2019, as reported at JD-19-19.

PRELIMINARY STATEMENT

ALJ Sandron’s decision raises very serious issues of both law and fact that go to the preservation of the very intent of Congress in adopting the National Labor Relations Act (“Act”). For example, despite finding three violations of Section 8(a)(5) of the Act arising out of past practices, nowhere in his decision does ALJ Sandron even mention the Board’s recent decision in *Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161 (2017) (“*Raytheon*”) —a case that was repeatedly cited in Respondent’s Post-Hearing Brief. Instead, the ALJ studiously ignores *Raytheon* and applies prior Board law overruled by *Raytheon*.

In similar fashion, the ALJ finds that Respondent violated Section 8(a)(3) of the Act with respect to temporary layoffs that occurred in February 2018, even though this very charge was not included in the Complaint by the General Counsel after a thorough investigation of this particular charge and, there was no amendment to include this charge in the Complaint during the course of the eight-day hearing. Obviously, the result is that this ruling by the ALJ that the temporary layoffs violated Section 8(a)(3) clearly violated the Respondent’s due process rights.

As will be demonstrated below, these two rulings are just examples of an overall pattern in the ALJ’s decision of ignoring relevant facts, misstating the record and applying superceded law in an apparent effort to achieve a particular desired result. It is respectfully submitted that the rulings to which the Respondent has made exceptions must be reversed to preserve the balance envisioned by the Act between protecting workers’ rights and recognizing an employer’s need to operate its business so as to foster stable labor relations.

ARGUMENT

POINT I

THE ALJ FAILED TO APPLY THE BOARD'S DECISION IN *RAYTHEON* IN FINDING THAT RESPONDENT VIOLATED SECTION 8(a)(5) WHEN IT PROCEEDED WITH TEMPORARY LAYOFFS THAT WERE CONSISTENT WITH ITS PAST PRACTICE

The ALJ found that the Respondent had a past practice of implementing layoffs during periods of economic slowdown. (JD 28:1 to 5; JD 25:10 to 18). Given the current status of the law under *Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161 (2017), it is shocking that—despite the ALJ's own finding of this past practice—the ALJ concluded that “even if the Respondent had a past practice of instituting economic layoffs due to lack of work, the advent of the Union removed its unilateral discretion with respect to layoff, and it still had an obligation to bargain with the Union over them.” (citations omitted). (JD 28:1 to JD 28:19). The ALJ then went on to state: “Where the parties are engaged in negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a subject matter. Instead, it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for an agreement as a whole, with two limited exceptions – economic exigency or where the union has attempted to delay bargaining.” (citations omitted). *Id.*

In reaching this decision, the ALJ failed to even attempt to distinguish *Raytheon*. Indeed, *Raytheon* is not mentioned **anywhere** in the ALJ's decision. The reason for this omission is obvious—the ALJ would have had no choice but to reach the opposite conclusion as to the temporary layoffs if he had ruled consistent with *Raytheon*. Moreover, as discussed below, even setting aside the ALJ's fatal error in failing to recognize the law established by the Board in *Raytheon*, the ALJ's ruling on the layoffs must also be set aside because he misapplied the

Board's decision in *RBE Electronics* and misstated the facts in the record to reach this decision as to the temporary layoff that occurred in February, 2018.

A. The Respondent Fully Met its Obligations under *Raytheon* When it Bargained to Impasse with the Union Prior to Proceeding with a Layoff in Accordance With its Past Practice.

The ALJ's conclusion that the implementation of a layoff, consistent with Respondent's past practice, was a change in the terms and conditions of employment is contrary to the Board's holding in *Raytheon*. In *Raytheon*, the Board held that past practices encompass the "dynamic status quo" and that, in determining whether there is a change to the terms and conditions of employment triggering an obligation to bargain, one must take into account any regular and consistent past pattern of change in working conditions. Thus, as the Board found in *Raytheon*, a modification consistent with such a pattern is not actually a "change" in working conditions at all and does not trigger an obligation to bargain.

As the Board explained in *Raytheon*, the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107 (1962) (hereinafter "*Katz*"), governs whether or not changes by an employer to a past practice are sufficiently material that they require bargaining. While the Board in *Raytheon* addressed the specific past practice of annual changes to health insurance, the Board expressly recognized that it would apply the same framework to a wide range of past practices. As the Board noted in *Raytheon*: "employers do not just paint walls. They take all kinds of actions, including many that affect wages, hours, benefits, and other employment terms. Again, the Board and the courts—interpreting *Katz*—have repeatedly held that employers can lawfully take such actions without bargaining if doing so does not constitute a change."

Raytheon, supra, 365 N.L.R.B. at 170.

Significantly, the Board expressly found that prior decisional law, such as those decisions relied upon by the ALJ—which prevented an employer from implementing its past practices during the negotiation of an initial contract unless the parties reached overall impasse—were inconsistent with and contrary to the Supreme Court’s decision in *Katz*. Specifically, the Board found that “when no CBA exists, the bargaining obligation imposed by [prior Board law] is not merely to negotiate to impasse or agreement regarding the particular action that the employer wishes to take (*e.g.*, painting the walls blue, to use the earlier example). Rather, under extant case law, if no CBA exists, the employer must bargain to a complete agreement or overall impasse regarding all mandatory bargaining subjects under negotiation before the employer can take action regarding any subject. Thus, [prior Board law] in tandem with other cases, prevents employers from doing precisely what they have done in the past until everything is resolved in contract negotiations. **This is 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. at 172. (emphasis added).

Despite the Board’s express statement in *Raytheon* that the framework established by the Supreme Court under *Katz*—and as fully described in the Board’s decision in *Raytheon*—should be applied, the ALJ abjectly failed to address *Raytheon* in any manner, despite Respondent’s extensively discussing the Board’s holding in *Raytheon* in its Post Hearing Brief. Instead, the ALJ inexplicably determined that the Respondent violated Section 8(a)(5) on precisely the grounds rejected by the Board in *Raytheon*!¹ In light of the Board’s express holding in *Raytheon* that this rule “...is contrary to *Katz* and to the Board's obligation to foster stable labor relations,

¹ In so doing, the ALJ stated: “Where the parties are engaged in negotiations for a collective bargaining agreement, an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about the subject matter. Instead, it encompasses a duty to refrain from implementation at all, absent overall impasse....” (JD 28:7 to 12).

and it was clearly not intended by Congress,” the ALJ’s determination was a clear error of law and must be reversed. *Raytheon, supra*, 365 N.L.R.B. at 170 (emphasis added).

When the framework established under *Raytheon* is applied to this case, the record evidence indisputably demonstrates that Respondent was entitled to implement the temporary layoff consistent with its past practice. As noted above, the ALJ expressly found that the Respondent had a past practice of economic layoffs. (JD 28:1 to 5, JD 25:10-18). The General Counsel did not dispute this past practice and conceded that Respondent had a past practice of both using temporary workers and layoffs to meet its fluctuating and cyclical need for production work. (General Counsel’s Post Hearing Brief at p. 75-78).

Of course, these concessions were consistent with the record evidence that Respondent engaged in periodic layoffs over the years. (R. Ex. 25-27 and TR 163, 573-575, 1298-1299, 1618-1630). It also was undisputed by the General Counsel that the Respondent honored the Union’s request to bargain with respect to the terms of the layoff and that the parties were unable to reach agreement as to layoff terms. (General Counsel’s Post-Hearing Brief at pp. 24-25; *see also*, R. Ex. 2 (bargaining notes regarding layoff), R. Ex. 6, GC Ex. 40 and 70 (a) and (b), and TR 104-105, 111-112, 146-155, 891, 1197-1213, 1230-1237, 1635-1636). Given these undisputed facts, and applying the correct standard established under *Raytheon*, the Respondent fully complied with Section 8(a)(5) by honoring the Union’s request to bargain and implementing the layoff in accordance with its past practices when the parties could not reach agreement as to layoff terms in time to address its business needs. As the Board observed in *Raytheon*, any other finding would be contrary to the Supreme Court’s decision in *Katz* and inconsistent with the Board’s obligation to foster stable labor relationships by preserving the dynamic status quo during the course of the negotiation of an initial contract.

B. The ALJ Both Misapplied the Board’s Decision in *RBE Electronics* and Misstated the Facts in the Record.

Even if the Respondent’s obligation to bargain with respect to the layoff was not governed by *Raytheon*, the ALJ committed an error of law in finding that Respondent was required to demonstrate an “economic emergency” under *RBE Electronics*. (JD 28:20 to 30). Contrary to the ALJ’s decision, *RBE Electronics* created an exception to the “economic emergency” requirement under the Board’s decision in *Masters Window Cleaning Inc. d/b/a Bottom Line Enterprises*, 302 N.L.R.B. 373 (1991) (hereinafter “*Bottom Line*”).

Indeed, the facts in *RBE Electronics* were virtually identical to those in this case. The employer in *RBE Electronics* was faced—as here—with the fact that there simply was not enough work for all of its employees necessitating a temporary layoff, rather than a dire “economic emergency” which was enterprise threatening. As the Board recognized in *RBE Electronics*, under *Bottom Line*’s financial emergency standard, employers were prevented from taking action when faced with loss of significant accounts or contracts or supply shortages which, while requiring prompt action, did not rise to the level of an “economic emergency.” It was for this reason that the Board created an exception to *Bottom Line* in *RBE Electronics* so as to recognize that—in addition to those dire economic circumstances that excuse bargaining altogether—there also can be circumstances that, while not dire, nonetheless require prompt action that cannot await a final contract.

To address these circumstances, the Board found in *RBE Electronics* that an employer who can demonstrate that it is compelled to take prompt action would satisfy its statutory obligation by providing the union with adequate notice of the need for prompt action and an opportunity to bargain. “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, supra*, 320 N.L.R.B. at 80, 82. (emphasis added).

In order to demonstrate that there is a need for “prompt action” under *RBE Electronics*,² an employer must show that it was compelled to take prompt action 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 before a final contract 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. Thus, contrary to the ALJ’s finding, the Respondent was not required to demonstrate an “economic emergency,” but merely that, due to factors beyond its control, prompt action was required. As noted above, the General Counsel did not dispute that the layoff was due to the cyclical nature of the Respondent’s business and customer needs. *See* General Counsel’s Post Hearing Brief at 75-78.

Thus, when the correct standard is applied to the record evidence, it is clear that the Respondent more than met its burden of demonstrating the need for prompt action and that the events which gave rise to the layoff were outside of its control. To the extent the ALJ’s conclusion as to the temporary layoffs is premised on his finding that—simply because Respondent notified the Union of the need for the layoff at a bargaining session on September 24, 2017—that this somehow demonstrated that prompt action was not required, this finding was not supported by any citation to the record. (JD: 28:26-30). This is not surprising since the

² To the extent that subsequent decisions by ALJs have cited *RBE Electronics* as being synonymous with the economic emergency standard announced in *Bottom Line*, these decisions involved cases where the employer unilaterally implemented without bargaining or without reaching impasse or where the ALJs fundamentally misunderstood the Board’s decision in *RBE Electronics*. Thus, these decisions have no application here.

Union's own witnesses testified that the Union was informed of a possible need for the layoff at a bargaining session held as early as January 24, 2018. (TR 70-72 and 104-105).

Similarly, to the extent the ALJ found that the Respondent failed to introduce any evidence to support a finding of an "economic emergency," this finding is contradicted by the un rebutted testimony of Respondent's witnesses who demonstrated that the need for the layoff was the result of factors outside the Respondent's control. (TR 1096-1100, 1197-1213, 1635-1636). Here, it should be noted that the record demonstrated that the Union had requested—and the Respondent had provided to the Union—documents relating to "work anticipated-man hours estimates, descriptions of work-time frame [and] name of job." (GC Exs. 39 and 38).

Significantly, the Union never claimed that it was not provided with these requested documents and information. It also is notable that the General Counsel did not introduce these documents to impeach either Mr. Howe or Mr. Bertozzi with respect to the need for the layoff³ and their testimony was not challenged in any other respect. Thus, to the extent the ALJ drew an adverse inference on the belief that these documents were "solely in the possession of the Respondent," this finding was unsupported by the record. (JD 28:24 to 25, *see also* JD 50:27-25 to 35). To the contrary, the record shows that both the Union and the General Counsel had been provided with extensive documentary evidence confirming the need for the temporary layoff including documents relied upon by Mr. Howe. *See* GC Ex. 38 and 39, and TR 1206-1207. Thus, if any

³ The General Counsel in its Post-Hearing Brief cited a January 31, 2018 email from Respondent's counsel which cited the fact that "**during this period** of intense production with overdue contracts having employees distracted by discussing amongst themselves the Company's assessment of their skills and ability could hinder production efforts." (GC Ex. 38). However, far from being inconsistent with the testimony of the Respondent's witnesses as to the need for the temporary layoff, this email confirms the testimony of Mr. Howe that "consistent with its usual pattern..." periods of intense work in order to meet customer deadlines would be followed by period of slow down. *See* TR 1197-1213. Moreover, this assertion by the General Counsel ignores the undisputed record evidence that the General Counsel had in its possession a detailed chart of Respondent's work flow for the last quarter of 2017 and the first quarter of 2018. While this detailed chart was not introduced into evidence, it was used to refresh Mr. Howe's recollection while testifying. *See* TR 1206 to 1207. *See also*, Point II, *infra*, explaining that the General Counsel, after conducting an investigation, determined **not** to include a claim in the Complaint that Respondent "manufactured" the need for the layoff.

adverse inference is to be drawn from the failure by either party to introduce these documents into the evidence, it should be an adverse inference against the General Counsel and Union.

In summary, applying the correct standard under *RBE Electronics*, the Respondent more than met its burden of demonstrating that there was a need to take action that could not await the negotiation of a full contract; that the need for the layoff was due to factors outside of its control; and that Respondent bargained in good faith with the Union until the date upon which action was required, without reaching agreement. Accordingly, the determination of the ALJ that under prior Board law the Respondent violated Section 8(a)(5) when it implemented the February 2018 layoff must be reversed—regardless of whether the Board applies *Raytheon* (which alone is dispositive) or *RBE Electronics*.

POINT II
THE ALJ VIOLATED RESPONDENT’S DUE PROCESS RIGHTS WHEN HE FOUND THAT THE RESPONDENT’S DECISION TO IMPLEMENT THE LAYOFF WAS MOTIVATED BY UNION ANIMUS IN VIOLATION OF SECTION (8)(a)(3).

The only allegation in the Complaint concerning the temporary layoffs was that Respondent had violated Section 8(a)(5) by implementing the layoffs without first bargaining. (GC Ex. 1 (u); Complaint at para.11 (f) to (h)). The General Counsel did **not** allege a violation of Section 8(a)(3) based on the layoffs nor did it seek to amend the Complaint either during or at the close of the hearing to add any additional claims with respect to the temporary layoffs. Consistent with these facts, the arguments in the General Counsel’s Post Hearing Brief were limited to its claim that Respondent violated Section 8(a)(5) when it implemented the February 2018 temporary layoffs. *See* General Counsel Post Hearing Brief at 75-78. Even though there was no allegation in the Complaint and the General Counsel never even argued that the temporary layoffs violated any section of the Act other than Section 8(a)(5), the ALJ nonetheless found that the layoff was motivated by union animus in violation of Section 8(a)(3). (JD: 26:30 to JD

27:35). This determination must be set aside as a gross violation of Respondent's due process rights.

It is well-settled that the Board may not find a violation absent an allegation in the Complaint unless the issue is closely connected to the subject matter of the Complaint and has been fully litigated by the parties. *CPL Linwood, LLC*, 367 N.L.R.B. No. 14 (2018); *Piggly Wiggly Midwest, LLC*, 357 N.L.R.B. 2344, 2345 (2012); *Dalton Schools, Inc.*, 364 N.L.R.B. 18, 19 (2016); *Bellagio LLC v. NLRB*, 854 F.3d 703, 713 (D.C. 2017); *see generally, Pergament United Sales, Inc.*, 296 N.L.R.B. 333 (1989) (affirmed 902 F.2d 130 (2d Cir. 1990). Procedural due process therefore requires that a party have meaningful notice and a full and fair opportunity to litigate all claims asserted against it. As the Board has observed, to be “meaningful,” “the notice must provide a party with a ‘clear statement’ of the accusation against it” and “it is axiomatic that a [party] cannot fully and fairly litigate a matter unless it knows what the accusation is.” *Factor Sales, Inc.*, 347 N.L.R.B. 747 (2006).

A simple review of the General Counsel's Complaint reveals that the General Counsel did **not** allege in the Complaint that the February 2018 temporary layoffs were motivated by union animus in violation of Section 8(a)(3). (GC Ex. 1 (u) *passim*). The record before the ALJ furthermore demonstrates that this was not an oversight by the General Counsel. The Regional Office had investigated the Union's charge that the decision to implement the layoff was motivated by union animus in violation of Section 8(a)(3) based on Mr. Voigt's statements that that union employees were “targeted for layoff.” The investigation conducted by the Region included serving the Respondent with an information request, as well as an interview of Mr. Howe which included, among other things, documents showing that Mr. Voigt's alleged

statements regarding the layoffs were false. *See* discussion herein.⁴ It was only after this investigation that the decision was made **not to include in the Complaint an allegation that the layoff violated Section 8(a)(3)**. Tellingly, the Union **did not appeal** the Region’s decision not to include this charge in the Complaint.

Consistent with the foregoing decision, apparently recognizing that the layoff was not motivated by union animus, the General Counsel conceded in its Post-Hearing Brief that the record evidence established that the Respondent’s business was cyclical in nature and that it was Respondent’s past experience that periods of intense work would be followed by slow-downs during which the Respondent experienced the need to engage in temporary layoffs. *See* General Counsel Brief at pages 77 and 78. Moreover, although the General Counsel questioned whether the need for the layoff met the “economic emergency standard” under *Bottom Line*, the General Counsel nowhere in its Post-Hearing Brief claimed that the temporary layoff was motivated by union animus. *Id.*

Even under circumstances much less compelling than the circumstances present here, the Board has not hesitated to overrule decisions by ALJs finding violations which were not alleged in the Complaint.⁵

⁴ As discussed *infra*, had there been an allegation included in the Complaint of a violation of Section 8(a)(3) with respect to the layoff, Respondent would have responded to such an allegation by presenting its evidence differently at the hearing. Likewise, in its Post-Hearing Brief, Respondent would have made arguments as to the additional evidence provided to the Region (as well as to the Union) during the investigation of the Union’s May 29, 2018 Amended Charge and at the hearing.

⁵ For example, in *CPL Linwood, LLC*, 367 N.L.R.B. No. 14 (2017), the Board rejected a finding by an ALJ that an employer violated the Act by failing to provide a union with a post-determination notice of a discipline, even though the Complaint alleged that the failure to provide notice to the union was a violation. As the Board explained in *CPL Linwood*, it is a violation of due process when the Complaint does not provide notice of the alleged violation; when the General Counsel does not seek to amend the charge either during or at the closing of the hearing; and when the General Counsel does not even contend in its post-hearing brief that the record would support a finding of the violation in question. Similarly, in *Dalton Schools, Inc.*, 346 N.L.R.B. 18, 19 (2016), the Board reversed an ALJ’s determination based upon the Board’s finding of a lack of adequate notice that an employee interview violated the Act even though the respondent introduced evidence regarding the interview as part of its defense. *See also, Bellagio, LLC v. NLRB, supra*, 854 F.3d at 713 (holding that the finding of a violation based upon an instruction

Moreover, the ALJ's determination also must be set aside based on his failure to even address whether the issue of the motivation for the layoff was closely connected to the subject matter of the Complaint or whether it had been fully litigated by the parties. (JD 26:30 to JD 27:35). The fact that the ALJ omitted this analysis is not surprising given that, as noted above, neither the Respondent nor the General Counsel believed this was an issue and given that the record clearly demonstrates that the General Counsel—after an investigation—affirmatively had decided not to bring this charge to Complaint. What is surprising, and necessarily again raises serious overall concerns as to the ALJ's decision is that the ALJ surely knew when he rendered this finding that this ruling could not withstand an analysis under the due process clause.

Notwithstanding the foregoing, in an abundance of caution, the Respondent will briefly address the test established by the Board in *Pergament United Sales*, 296 N.L.R.B. 333 (1989) for determining whether a violation not alleged in the Complaint can be sustained without violating the due process clause. The first prong of the *Pergament* test is whether the un-plead violation is “closely connected” to the allegations in the Complaint. In making this determination, the Board looks at three factors: 1) whether the un-plead violation involves the same legal theory; (2) whether the un-plead violation arises out of the same factual situation or sequence of events; and (3) whether the un-plead violation would be met with the same or similar defenses. *Continental Auto Parts*, 357 N.L.R.B. 840, 842 (2011).

Here, the un-plead violation that the layoff was motivated by union animus fails to meet any of these three factors. The Complaint alleges that the statements made by Mr. Voigt violated Section 8(a)(1)—an allegation that does not require any proof that the statements were true or that the Respondent acted consistently with those statements. As noted above, the allegation that

given to an employee not to discuss his discipline was “coercive” violated due process because it was not included in the Complaint).

the layoff violated Section 8(a)(5) involved proof of whether the Respondent had a past practice of layoff and under what circumstances Respondent may unilaterally implement a layoff. In contrast, violations under Section 8(a)(3) require the General Counsel to prove that the Respondent's decision was motivated by the protected activity of the affected employees. *NLRB v. Transportation Management Corp.*, 462 U.S. 393,402 (1983).

As to the second factor, "mere chronological coincidence" is insufficient, and there must be a showing that the conduct was part of a chain or progression of events. Here, there is no evidence that the statements by Mr. Voigt were the part of any "chain of events" since the record demonstrated that Respondent engaged in bargaining with the Union regarding the criteria for the layoff, agreed to the Union's proposals on the criteria to be used, and responded to the Union's requests for information pertaining to the layoffs. (R. Ex. 2, 38-39).

The second prong of the *Pergament* test is whether the issue had been fully litigated by the parties. In making this determination, the Board looks to whether the Respondent would have "altered the conduct of its case at the hearing had a specific allegation been made." *Piggly Wiggly Midwest, LLC*, 357 N.L.R.B. 2344, 2345 (2012). Whether or not the new evidence would have changed the result is not relevant and it is the failure to provide the opportunity to present evidence and argument that violates due process. *Id.* Here, not only would the Respondent have altered its conduct at the hearing, but it also would have presented the evidence in the record differently and made different arguments during the hearing and in its Post-Hearing Brief. To reach this conclusion, the Board need look no further than the ALJ's own decision in which he drew an "adverse inference" from the Respondent's failure to present documentary evidence to support a defense to the un-plead charge.⁶ (JD 27:25-30). Notably, in drawing this

⁶ As discussed in Point III *infra*, the ALJ drew no such adverse inference when the Union failed to produce bargaining notes to confirm the testimony of its witness that the Union both accepted the Company's wage proposal

adverse inference, the ALJ also ignored the record evidence that **this documentation was not—as the ALJ contended—solely within the Respondent’s possession** but had been the subject of a request for information from the Union as well as information provided to the Region in response to the May 29, 2018 Charge. *See* TR 1206-1207.

Likewise, during the hearing and in its examination of both its own witnesses and one of the General Counsel’s witnesses, the Respondent would have questioned these witnesses on the record evidence showing that Mr. Voigt’s purported claims that the Company intended to “target union supporters for layoffs” and that “once the Company started to ramp up again, they would bring in all new people...” constituted totally false statements.

Specifically, the Respondent would have pointed out that its proposal during bargaining with respect to the layoff— rather than “targeting” union supporters—actually identified five heavy union supporters⁷ as “necessary to run the plant”⁸ and therefore were employees who should not be subject to layoff. *Compare* TR 30 and JD 7:5 to 12 (identifying Union supporters) to the first ten names listed on R. Ex. 6 (listing ten employees “necessary to run the shop”) and R. Ex. 2. The Respondent also would have pointed out that, under the Union’s proposal that layoff be by seniority and not skill, the result was that eight “union supporters”⁹ were subject to layoff. In contrast, had the Union accepted the Company’s proposal, only seven union

and rejected the proposal and requested further bargaining. Again, this inexplicable action by the ALJ raises overall concerns regarding his decision and the fairness accorded to Respondent in this proceeding. Similarly, the ALJ granted a motion during the hearing made by the General Counsel for an amendment to the Complaint to assert an unfair labor practice charge against Respondent’s attorney based upon the cross-examination of one of the General Counsel’s witnesses. This ruling by the ALJ was reversed by the Board pursuant to an interlocutory appeal. Board Decision dated November 13, 2018.

⁷ Specifically, the record evidence identified 19 “union supporters.” (TR 30 and JD 7:5 to 10).

⁸ Mr. Griener, Mr. Allen, Mr. Pecoraro, Mr. Meunch and Mr. George were identified as necessary to run the shop and thus not subject to layoff. (R Ex. 6).

⁹ These union supporters were Mr. Pauley, Mr. Braswell, Mr. Castilloux, Mr. George, Mr. Krajewski, Mr. Rammacher, Mr. Bush and Mr. Hudson. (GC Ex. 40; TR 30).

supporters¹⁰ would have been laid off. *Compare* GC Ex. 40 to R. Ex. 6. Similarly, the Respondent would have pointed out that—in direct contradiction of Mr. Voigt’s alleged statements that the Company intended to replace the laid off workers with “new employees” and expressly provided for the recall of laid-off workers, something it had never done under its past practices. (R. Ex. 2).

Significantly, the truthfulness of Mr. Voigt’s statements (and whether he was even in a position to make decisions regarding layoffs)—while not relevant to any determination that he violated Section 8(a)(1) in making those statements—is directly relevant as to whether the statements reflected the Respondent’s motives for instituting the layoff.

In summary, there can be no doubt that the ALJ’s erroneous determination that the February 2018 layoff was motivated by union animus, thereby finding a violation of Section 8(a)(3), constituted an outrageous violation of Respondent’s due process rights. Certainly, it cannot be doubted that Respondent was **not** on notice that this would be an issue in this proceeding or subject to any ruling by the ALJ. Accordingly, Respondent certainly did not have an opportunity to fully litigate these issues.¹¹

POINT III
THE RULING THAT THE UNION DID NOT WAIVE ITS SECTION 8(a)(3) AND 8(a)(5)
CLAIMS AS TO THE WAGE INCREASE MUST BE REVERSED

The portion of the ALJ’s decision finding that the Union did not waive any claims under Section 8(a)(3) and 8(a)(5) presents the extraordinary case in which the Board must overturn an

¹⁰ These persons were Mr. Pauley, Mr. Braswell, Mr. Castilloux, Mr. Krajewski, Mr. Bush, Mr. Hudson, and Mr. Rammacher. (R. Ex. 6; TR 30).

¹¹ As discussed in more detail in Points II and VIII herein—even in the unlikely event that the Board were to conclude that the due process clause permitted the ALJ to find a violation on a charge that neither the Respondent nor General Counsel believed was at issue in this action—the ALJ’s application of the *Wright Line* test both in connection with the layoff—as well as to the discipline of one employee and the change in work assignments for another—highlights the serious need for the Board to reinstate the requirement that there be some showing of a causal nexus between the evidence of “union animus” and the adverse employment action.

ALJ's findings of credibility. In his decision, the ALJ conceded that on May 24, 2018 the Union had acquiesced in or accepted the Respondent's proposal of a 3.4% wage increase retroactive to April 8, 2018. The ALJ further conceded that Respondent had implemented this wage increase and retroactive payment by June 2, 2018. (JD 34:1 to 10 and 31:6-8). Illogically, however, the ALJ then reached the remarkable and contradictory conclusion that the Union had not waived its claims that Respondent violated Section 8(a)(3) by failing to provide raises retroactive to October 2017 or its claim that Respondent violated Section 8(a)(5) by failing to bargain with respect to the wages and evaluations. (JD 34:10 to 20).

The sole basis for this extraordinary conclusion by the ALJ was his statement that he credited the inconsistent and contradictory testimony of the Union witnesses that, at the May 24, 2018 bargaining session, the Union **both accepted and rejected** the Respondent's proposal and requested to continue bargaining. (JD 30:31 to 36). Incredibly, the ALJ credited this testimony despite the fact that the Union witnesses did not agree even among themselves on precisely what was purportedly "left open" for further bargaining. Mr. Rosaci, a Union organizer with 20 years of experience testified under questioning by the ALJ himself, that the Union left open both the amount and the retroactive date of the wage increase.¹² In contrast, Mr. Greiner testified that he

¹² The testimony in question was given by Mr. Rosaci regarding the Union's response to the Respondent's offer of 3.4% wage increase retroactive to April 8, 2018. (GC Ex. 9). This line of questioning shows the ALJ's own confusion (highlighted below) as to the inconsistency of the witness's claims that the Union both accepted and rejected Respondent's proposal. Specifically, Mr. Rosaci testified, and the Judge commented, as follows:

Q: What was the Union's counter? Or was there a response

A: We responded that we would accept this 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, especially since there were employees who were working in October of 2017 that were no longer employed in 2018. We felt that they should be getting an increase too.

Q: And was there any – and that was a verbal response?

A: Yes.

could not explain what occurred during the meeting and that he could not remember exact words of what was said. (TR 970-971) (reflecting garbled responses from Mr. Greiner under the ALJ's own questioning which was interjected for the obvious purpose of seeking to obtain a better response).

The ALJ actually recognized the inconsistency of the testimony of these two Union witnesses and nonetheless stated—without any explanation—that he was only crediting the portion of Mr. Rosaci that retroactivity was left open. (JD 30:40 to 41). Of course, this required the ALJ to conclude that Mr. Rosaci—who had 20 years of experience as a Union organizer and who was the spokesman for the Union during the May 24, 2018 meeting (TR 970)—actually did not know what the Union had agreed to during the May 24, 2018 meeting.

It also required the ALJ to accept the testimony of Mr. Greiner who admittedly stated that he could not explain what was agreed to at the meeting and that Mr. Rosaci was the Union's spokesman. (TR 970 to 971). Indeed, ignoring all these blatant inconsistencies in the testimony by the Union's own witnesses, the ALJ simply stated that he found the testimony of Mr. Bertozzi, a member of Respondent's bargaining team, "not credible" despite the fact that it suffered from none of the inconsistencies exhibited by the testimony of the Union's witnesses. (JD 30:39 to JD 31:2). Thus, the ALJ inexplicably rejected Mr. Bertozzi's testimony stating that

JUDGE SANDRON: Just so I understand. Did you accept it with -- well, so to speak, under protest or did you not accept it? In other words, how did you raise your position? Were you accepting it with objections or rejecting it?

THE WITNESS: No. We accepted it but made it clear that we wanted to bargain for the rest of the increased amount and retroactive to October. And Ms. Schroder told us at the time, says, "Fair enough. You can bargain for that."

JUDGE SANDRON: It's a little bit unclear though. So, you accept their proposal, but then you wanted to engage in further bargaining?

THE WITNESS: Yes.

TR at 41 to 42 (emphasis added); see also TR 24 (Mr. Rosaci has 20 years of experience as a union organizer).

the Union had accepted the Respondent's proposal without conditions and that the Union had agreed that the parties were "done" was not credible. (TR 1645). Ironically, the ALJ's rejection of Mr. Bertozzi's testimony was inconsistent with the ALJ's own finding that the Union had "acquiesced" in or agreed to the Respondent's proposal. (JD 34:1 to 2).

While the Board, in most instances, will defer to an ALJ's resolution of credibility determinations, the Board will set those determinations aside in those extraordinary circumstances in which the ALJ's credibility determinations are not supported by a preponderance of the evidence. *See, e.g. International Longshoremen's Association, Local 218, (Ceres Gulf, Inc.)*, 366 N.L.R.B. No. 20 (2018) and *Audio-Visual Services Group, Inc.*, 367 N.L.R.B. 103 (2019). Clearly, this standard is met when the ALJ credits only a portion of the testimony of a witness which the ALJ himself characterized as "unclear" (*See Note 12, quoting the testimony and highlighting the ALJ's comments thereon*) and when crediting the testimony required by the ALJ to conclude that the individual who was the Union's lead spokesperson during the negotiation did not even know what issues had been left open.

If this were not enough to justify the rejection of the ALJ's conclusions, the record also shows that, to reach his conclusions, the ALJ not only was forced to ignore the documentary evidence, but also was forced to ignore well-settled principles of contract law and common sense.

It is black letter law that an acceptance which includes terms that vary materially from the offer is insufficient to form a contract and constitutes a counter-offer. Restatement of Contracts Section 38 and 58.

The ALJ's remarkable conclusion also is contradicted directly by the Respondent's 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). This conclusion also is contradicted by Respondent’s payment—and the bargaining unit members’ acceptance—of the agreed-upon wage increase and retroactive payment to April 8, 2018. (JD 31:6-9). Indeed, nowhere does the ALJ explain this retroactive payment if, as he claims, the parties left the issue of retroactivity open to further negotiation.

Finally, the Union’s own documents actually **directly contradict the very testimony on which the ALJ relied**. Specifically, the May 29, 2018 information request served by the Union—which sought information on the dates of non-bargaining unit employee’s evaluation and raises—expressly stated that the information was requested “**in regard to employee evaluations...**”—with no mention whatsoever of the retroactive raises that were due to be paid within a few days by Respondent. (GC Ex. 10). (emphasis added). It was not until **June 22, 2018** – a month **after** the Union accepted the Respondent’s wage proposal and **after** Respondent had provided the raises to the unit members—that the Union first claimed that the parties had reached agreement only on the amount of the raises but that the issue of retroactivity was left open.¹³ (GC Ex. 12; JD 31:6 to 7) (employees received their wage increase and retroactive payment on June 2, 2018). Of course, even this belated June 22, 2018 letter was inconsistent with the testimony by Mr. Rosaci that **both** retroactivity and the amount of the raise were left open. *See* Note 11, quoting Mr. Rosaci’s testimony that both the amount of the raise **and** the retroactive date were left open.

¹³ It is no coincidence that the Union waited until **after** Respondent had paid the Union members their wage increase (including the retroactive payment made in June providing the raise back to April 8, 2018) **before** announcing that “no agreement” allegedly had been reached. In addition, the Union’s statement that its May 29, 2018 information request was relevant to “evaluations” which no longer were tied directly to wage increases was also not a coincidence. Thus, contrary to the ALJ’s conclusions, these documents actually confirm the Union’s clear understanding that, by accepting the Respondent’s offer and its implementation, the Union waived all further negotiations and any claims under the Act regarding these raises.

As shown by the foregoing, not only is the testimony by the Union witnesses inconsistent with the ALJ's own factual findings as to what occurred with respect to wage increases, as well as basic principles of contract law, but it also simply defies logic and common sense. Accordingly, the Board need look no further than the ALJ's "credibility" findings on the wage increase to determine that the ruling was against the preponderance of the evidence. (JD 30:28-31 to JD 31:5).

POINT IV
THE ALJ'S FINDING OF VIOLATIONS OF SECTIONS 8(a)(3) AND 8(a)(5) WITH RESPECT TO THE WAGE INCREASES ARE INCONSISTENT AND CONTRADICTORY AND MUST BE OVERTURNED UNDER THE CURRENT BOARD LAW ESTABLISHED BY THE *RAYTHEON* DECISION.

At page 32 of his decision, the ALJ found that Respondent violated Section 8(a)(3) of the Act by failing to provide the bargaining unit members raises at the same time it provided raises to non-union members. (JD 32:5 to 35). On the very next page the ALJ found that, although the parties reached an agreement to provide a 3.4% wage increase—which was awarded on a completely different basis than Respondent's past practice—Respondent violated Section 8(a)(5) by failing to "afford the Union timely notice and a meaningful opportunity to bargain..." with respect to wage increases that the Union had accepted. (JD 33:41 to JD 34:10). These findings are inherently inconsistent and contradictory and result in remedies beyond the ALJ's authority. Indeed, by studiously ignoring the Board's recent decision in *Raytheon*, the ALJ has devised an absurd remedy that requires the Respondent to simultaneously engage in further bargaining while at the same time granting the retroactive raises that the Union previously had sought in negotiations.

Setting aside for the moment the ALJ's conclusion that the Union did not waive these claims when the Union accepted the Respondent's wage increase proposal that was effective as

of April 8, 2018, the ALJ apparently followed pre-*Raytheon* Board law under which an employer previously was required to both follow its past practice or risk violating Section 8(a)(3) and at the same time refrain from implementing the past practice until it bargained to agreement with the Union.

The inherent conflict created by the pre-*Raytheon* approach is highlighted by the ALJ's conflicting remedies ordered in this case. Nowhere does the ALJ explain how the Respondent can both simultaneously "make the employees whole" for the delay in providing their wage increases (JD 48: 45 to 49:10) while at the same time bargain with the Union with respect to "evaluations and wage increases..." (JD 49:31-34).

A. Under *Raytheon*, an Employer Does Not Violate Section 8(a)(3) by Honoring a Union's Request to Bargain with Respect to a Past Practice.

In his decision, the ALJ conceded that the Respondent had a past practice of conducting performance reviews and granting periodic wage increases to both bargaining unit and non-bargaining unit employees. (JD 28:39 to JD 29:20). As the ALJ expressly found, the amount of wage increases 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 employees' raise, the ultimate decision on the increase each employee received was made by Respondent's senior management. (JD 29:36 to JD 30:2).

The ALJ also found that the Union made a demand¹⁴ that Respondent bargain with respect to both "the process and the wage increases..." (JD 30:10-22; GC Ex. 6). Additionally,

¹⁴ The Union's demand for bargaining was made prior to the Board's decision in *Raytheon* and, under the then-existing Board law, the Respondent **was precluded** from providing the raises without bargaining with the Union. As the D.C. Circuit observed, under this pre-*Raytheon* Board law, the Respondent was in a "Catch 22" situation under which it was 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 simultaneously being compelled to keep paying the wage increases under Section 8(a)(3). *Advanced Life Systems Inc. v. NLRB*, 898 F.3d 38, 48 (D.C. Cir. 2016);

the ALJ found that neither the Respondent nor the Union made any proposals¹⁵ with respect to wage increases until May 8, 2018. (JD 30:21 to 26). All of the proposals exchanged between the parties provided for across-the-board wage increases for bargaining unit employees that were unrelated to the employee reviews. (JD 30:22 to 30). The ALJ expressly found that the Union accepted the Respondent’s proposal for an across-the-board increase of 3.4% and that, as a result, the bargaining unit employees “might have received more or less than this amount under the established past practice.” (JD 33:41 to 43).

The ALJ conceded that, under the Respondent’s past practice, the reviews and raises were linked. (JD 29:36 to JD 30:2). The ALJ also conceded that the Union had demanded bargaining both with respect to the reviews and the pay raises, (GC Ex. 6) and that, as a result, the bargaining unit employee’s raises were no longer linked with their reviews. (JD 33:41 to 43, *see also* JD 30:22 to 30). Yet, without any reference to the Union’s demand to **bargain to change** the Respondent’s past practice of awarding raises, including the role employee reviews would play in determining those raises, the ALJ simply concluded that “an employer violates Section 8(a)(3) and Section 8(a)(1) by suspending annual evaluations and concomitant pay raises when motivated by anti-union animus.”¹⁶ (JD 32:5 to 35). The ALJ then proceeded to apply the *Wright Line* burden shifting analysis without any reference to the undisputed facts that the Union had demanded bargaining with respect to this past practice. As a result, the ALJ’s

Winn Dixie Raleigh, Inc., 267 N.L.R.B. 231 (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).

¹⁵ As the party seeking bargaining it was incumbent on the Union to make an initial proposal.

¹⁶ The ALJ’s conclusory statement in his decision (JD 32:10) that “I previously concluded that the element of animus has been satisfied...” based on the animus of one mid-level Supervisor totally unrelated to the employment action at issue underscores the need for the Board to require that the General Counsel demonstrate some causal nexus between the adverse employment action and the evidence of union animus supporting an inference that the employment action was at least partially motivated by union animus. It also underscores again the serious concerns raised by the ALJ’s consistent practice throughout the decision of ignoring the applicable law and making rulings inconsistent with his own fact findings seemingly in order to render rulings favorable to the Union.

analysis includes no evaluation whatsoever of the Respondent's actions in accordance with the framework established by the Board under *Raytheon*. As discussed below, this was a clear error of law.

The record evidence was undisputed that periodic reviews and raises were linked and that management had complete discretion in determining the amount of each employee's raise. (JD 29:36 to 30:3). As the Board noted in *Raytheon*, even when a past practice exists and the employer is permitted to continue to follow those past practices, this "has no effect on the duty of employers, under Section 8(d) and 8(a)(5) of the Act, to bargain upon request over any and all mandatory subjects of bargaining..." *Raytheon*, 365 N.L.R.B. at 177-77. The Board's reaffirmation in *Raytheon* of an employer's duty to bargain, when requested, regarding past practices was intended to strike a balance between the employer's need to make decisions necessary to its businesses, consistent with its past practices during contract negotiations, and the union's right to seek input/changes to those past practices prior to reaching an overall contract.

In order for this holding in *Raytheon* to have any meaning, an employer must be free to respond to a request to bargain by delaying implementation of its past practice until such time as either an agreement is reached or impasse is reached regarding the requested change to the past practice. Any other rule would both undermine the bargaining process and produce the absurd result whereby the very act of honoring a Union's request to bargain would result in a finding that the decision to bargain was motivated by anti-union animus. It was just this uncertainty and the absurd situation of placing an employer in the position that—regardless of what action the employer took—the employer would violate the Act that caused the Board to eliminate this "Catch 22" by virtue of its decision in *Raytheon*.

In any event, a rule that permits an employer, in response to a union’s request to bargain, to delay implementation of a past practice is fully consistent with pre-*Raytheon* Board law. For example, under the Board’s decision in *In Re Shell Oil*, 77 N.L.R.B. 1306 (1948), 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....” *Shell Oil, supra* at 1306, 1310. While *Shell Oil* was subsequently found to apply only to “new benefits,” once, as in this case, the Union demands bargaining regarding the “process and wage amounts” (GC Ex. 6), it is seeking a new benefit—namely, wage increases that are decided on a different basis from those given to non-bargaining unit employees. Thus, under both *Raytheon* and *Shell Oil, supra* at 1306, 1310, once the Union requested bargaining over the evaluation process and amount of the wage increase, it was in effect seeking a benefit that was different from the benefits received by non-bargaining unit members. In short, the ALJ’s own finding confirms that there can be no violation of Section 8(a)(3) when an employer, in response to a Union demand for bargaining, alters its past practice.

B. The ALJ’s Failure to Apply *Raytheon* Resulted in a Remedy that Exceeds the Remedy Permitted by Law.

The ALJ’s failure to apply *Raytheon* also caused him to order a remedy as to wage increases that exceeds the remedy permitted under Section 8(a)(3) and directly contradicts the remedy he ordered under Section 8(a)(5). The ALJ expressly found that the bargaining unit employee’s raises were different from the amounts they would have received under Respondent’s past practice. (JD 33:41 to 43). Nonetheless, the remedy he ordered under Section 8(a)(3) was that Respondent “make employees” whole for failing to conduct reviews and provide wage increases at the same time as non-bargaining unit employees. (JD 48:40 to JD 49:5). This remedy is inconsistent with the remedy permitted under Section 8(a)(3) and also is contrary to

the Union's own claim that retroactivity was and continues to be the subject of bargaining.

Likewise, this remedy is inconsistent with the ALJ's other directive that the parties bargain with respect to retroactivity. (JD 49:31 to 33).

As the ALJ concedes, a remedy for violations of Section 8(a)(3) requires that employees be made whole. As the Board explained in *Daily News of L.A. v. NLRB*, 73 F.3d 406, 413 (1996), the remedy for Section 8(a)(3) violations based on a failure to provide raises to bargaining unit members in accordance with the employer's past practice requires the General Counsel to submit evidence to approximate the wage increase each employee would have received under the Respondent's prior system of discretionary wage increases. *Daily News of L.A. v. NLRB*, 73 F.3d 406, 413 (1996). While the ALJ concedes that individual bargaining unit members may have received more or less under the past practice than the 3.42% raise negotiated by the Union, he simply ignores the fact that—based on the Respondent's past practice—some bargaining unit members would have received no raise, or a raise of less under the claimed past practice than these members now were receiving with the new 3.42% raise. *See* J. Ex. 2a (raise provided bargaining unit employees under past practice). Thus, the remedy ordered by the ALJ would require some bargaining unit employees to give back a portion of the raises they already received.

Moreover, this remedy also is inconsistent with the ALJ's finding, and the Union's own testimony, that retroactivity was the subject of bargaining. (JD 31:37). Indeed, as discussed below, not only does this remedy contradict the remedy ordered for the alleged violation of Section 8(a)(5) but it effectively dictates the results of that bargaining. Hence, this decision by the ALJ effectively grants to the Union what it admittedly was not able to obtain at the bargaining table.

C. The ALJ's Finding that Respondent Violated Section 8(a)(5) Lacks Factual Support in the Record.

The ALJ concluded that the Respondent violated Section 8(a)(5) because the Respondent “effectively secured the Union’s acquiescence by threatening to rescind the retroactivity portion of its wage proposal” without providing the Union with timely notice and an opportunity to bargain. (JD 34:1 to 9). While Respondent agrees with the ALJ’s finding that the Union acquiesced in or accepted its wage proposal, the remaining findings by the ALJ are directly contradicted by the documentary evidence. Far from “threatening” the Union, the Respondent’s written proposal on **May 24, 2018** stated that “**Retroactivity is a negotiated term.** In order to encourage the Union to accept what we believe is a very reasonable and fair wage proposal, if not accepted **on or before June 20, 2018**, the Company will rescind the retroactivity portion.” (GC Ex. 9). It is a common bargaining strategy, of course, for employers to offer Union’s incentives to accept an offer and to indicate that the incentives will be withdrawn if the offer is not accepted by a certain date. Thus, there is nothing in the Respondent’s proposal which constitutes a “threat.” As to the ALJ’s determination that the Union was given “insufficient” time to consider the Respondent’s proposal, the offer on its face stated that it would be left open for a month and it was the Union that accepted the 3.4% increase the very same day the offer was made. (JD 33:34). Thus, the documentary evidence refutes the finding that Respondent’s offer violated Section 8(a)(5) is and must be reversed as lacking a factual basis in the record.

Finally, as to the ALJ’s finding that Respondent failed to provide the Union with requested information on the date of the raises for non-bargaining unit employees, it is well settled that information pertaining to non-bargaining unit employees is not presumptively relevant. *Tri-State Generation and Transmission Assn., Inc.*, 332 N.L.R.B. 910, 911 (2000). Here, the ALJ committed an error of law by finding that the effective date of non-bargaining unit

members' raises was relevant to the Union's formulation of its own proposal with respect to retroactivity. Indeed, the ALJ completely overlooked the indisputable fact that the Union's request was not made until **after** the Union accepted the Company's wage proposal (which included an effective date for the raises for the unit members). He also overlooked the fact that the request stated that the information was relevant to the issue of employee evaluations, **not wage increases**. (GC Ex. 10).

If this were not enough, the ALJ also ignored his own finding that as result of the bargaining that the raises for bargaining unit and non-bargaining unit members were based on entirely different criteria. (JD 33:40 to 4). As a result, the effective date of these entirely different raises for the non-bargaining unit employees is simply not relevant to the Union's formulation of its own retroactivity proposal. Indeed, the Union itself recognized the lack of any linkage when it proposed a retroactive date of October—**not** the effective date of the raises for non-bargaining unit members. (TR 41-42). **Accordingly**, the General Counsel failed to meet its burden of demonstrating the relevance of information on the effective date of raises for non-bargaining unit members and there was no obligation for the Company to provide that information in response to the Union's request.

POINT V

THE BOARD'S DECISION IN *RAYTHEON*, NECESSARILY DEMONSTRATES THAT THE DECISION IN *TOTAL SECURITY MANAGEMENT* NO LONGER APPLIES WHEN DISCIPLINE IS IMPOSED CONSISTENT WITH AN EMPLOYER'S PAST PRACTICE.

In finding that the Respondent violated Section 8(a)(5) by failing to negotiate with the Union in the imposition of discipline, the ALJ relied upon the Board's decision in *Total Security Management Inc.*, 364 N.L.R.B. No. 106 (2016). (JD 24:35 to JD 25:8). In relying upon *Total Security Management*, the ALJ failed to address its continued viability in light of the Board's decision in *Raytheon*. Nor did the ALJ even attempt to apply the principles set forth in *Total*

Security Management in light of the Board’s decision in *Raytheon* so as to reconcile, if possible, these decisions. Instead, the ALJ simply ignored the new paradigm set forth in the *Raytheon* decision.

As set forth below, *Total Security Management* no longer represents the proper standard for determining whether an employer is required to engage in bargaining with respect to the imposition of individual discipline during the negotiation of an initial contract. Instead, under *Raytheon*, the Respondent only had an obligation to bargain with respect to individual discipline if the discipline imposed varied in **kind or degree from** what had customarily been done in the past or was imposed in response to a request to bargain on disciplinary policies.

The Board’s decision in *Total Security Management* was based on the exact opposite conclusion and held that, because employee discipline involves the exercise of discretion, it necessarily gives rise to a “change in the terms and conditions of employment” and triggers an obligation by the employer to bargain. Thus, in *Total Security Management*, contrary to the Board’s holding in *Raytheon*, the Board found that “even regular and recurring changes by an employer constitute unilateral action when the employer maintains discretion in the criteria it considers....” and that, once a union is selected, an “employer could no longer continue to unilaterally exercise its discretion...” *Total Security Management, supra*, 364 N.L.R.B. at 110.

Had the ALJ applied this standard to the facts in this case, he would have determined that the General Counsel did not even allege that the discipline imposed on Mr. Fricano varied materially or significantly from the discipline imposed either for similar offenses in the past or from discipline imposed on non-unit members.¹⁷ As to Mr. Bush, as set forth Point VIII *infra*, not only was the discipline imposed on Mr. Bush consistent with the Respondent’s past practices,

¹⁷ To the extent the Union’s demand to bargain regarding discipline, as the ALJ concluded, the parties have engaged in numerous bargaining sessions to reach an overall contract. (JD 50:44 to 51:4).

but it was consistent with its obligations under federal and state anti-discrimination statutes. In summary, to the extent that *Total Security Management* is inconsistent with *Raytheon*, the Board should apply *Raytheon* and reverse the finding by the ALJ that Respondent violated Section 8(a)(5) by failing to negotiate with the Union prior to imposing discipline on Mr. Bush and Mr. Fricano.

POINT VI
THE ALJ’S DETERMINATION THAT THE PERFORMANCE OF “BARGAINING UNIT WORK” BY RESPONDENT’S SUPERVISORS HAD A “MEASUREABLE IMPACT ON UNIT WORK” WAS BASED ON THE WRONG LEGAL STANDARD AND WAS UNSUPPORTED BY ANY RECORD EVIDENCE.

The ALJ’s determination that Respondent violated Sections 8(a)(5) and 8 (a)(1) by allowing Mr. Fess, Mr. Garcia and Mr. Norway, as shop supervisors, to perform “bargaining-unit work” was both inconsistent with his own factual findings and the undisputed record evidence. As the ALJ’s own findings established, and the General Counsel conceded, the Respondent had a past practice of its supervisors performing the same work as bargaining unit employees. (JD 42:17 to 26). The record evidence further demonstrated that the Respondent’s past practice extended beyond supervisors. Thus, Respondent also had a past practice of using service technicians, as well as non-bargaining unit temporary workers, and even senior managers, to perform the same work as bargaining unit employees. *See* R. Ex. 18 and 14, GC Ex. 2, General Counsel’s Post-Hearing Brief at p. 24 and TR 28, 121-123, 129-130, 256-259, 476-478, 536-538, 551-553, 556-559, 563-564, 583-584, 659, 1124-1126, 1130, 1180-1183, 1196, 1475-1476, 1481-1483, 1436. These findings by the ALJ and admissions by the General Counsel are not surprising given that the Union actually **opposed** including within the unit certain employees who spent more than a de minimis time performing work identical to that of bargaining unit

employees—such as, for example, the service technicians. *See* R. Ex. 18. Thus, the bargaining unit here is not based upon the work performed and there is no exclusive “bargaining unit work.”

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. Therefore, under *Raytheon*, as well as pre-*Raytheon* Board law addressing the General Counsel’s burden of proof when there is no “exclusive” bargaining unit work, it is the General Counsel who has the burden of coming forth with evidence that there has been a material and substantial change both in the number and percentage of total hours worked by non-bargaining unit employees who are performing the same tasks as bargaining unit employees. *North Star Steel Co.*, 347 N.L.R.B. 1364, 1367 (2006). For the change to be material and substantial, the General Counsel has the burden of showing how the alleged transfer affected the bargaining unit employees, including a causal connection between the transfer of work and the alleged harm to the bargaining unit and its members. *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). As the Board has explained, when as the ALJ found here, there is a past practice of transferring work to other employees, any change must be evaluated as being one of degree and it is the General Counsel’s obligation to demonstrate that the change in the past practice rose to the level of a substantial and material change in terms and conditions of employment. *Outboard Marine Corp.*, 307 N.L.R.B. 1333, 1338-1339 (1992); *Alan Ritchey, Inc.*, 354 N.L.R.B. 628, 629 (1992).

A. The ALJ Once Again Ignored Current Board Law and Failed to Perform the Analysis Required Under Board Law.

To conclude that the ALJ failed to apply the correct legal standard in evaluating the record evidence, the Board need look no further than the ALJ’s rejection of the Respondent’s

argument that it was entitled, under both the Board’s decision in *Raytheon*, as well as prior Board decisions, to continue its past practice of having non-bargaining unit employees—including supervisors—perform the same work as bargaining unit employees. In rejecting Respondent’s argument, the ALJ acknowledged that Respondent had established a past practice but nonetheless stated that:

“Respondent’s argument [that there was a past practice of supervisors performing bargaining unit work] ignores a fundamental difference between Fess, Garcia, and Norway and previous supervisors/manager who performed what is now bargaining unit work—in the past, no union represented employees and no bargaining unit work existed from which work could have been removed. Furthermore, to the extent that Hoerner [another supervisor] may continue to perform unit work that he performed before the Union was certified, such work was effectively unit work.” (JD 42:20 to 26).

As evidenced by this conclusion, the ALJ illogically determined that whether work was “bargaining unit work” was based on whether the specific individual performing the work had ever been in the unit, rather than the nature of the work itself.¹⁸ Based on this illogical conclusion, the ALJ then stated that the amount of time Garcia, Fess and Norway spent on supervisory work versus bargaining unit work is “irrelevant.” He then went on to state—without any citation to the record evidence that, because these supervisors performed more than a de minimis amount of “bargaining unit work, their removal from the unit had a measurable impact on the unit.”¹⁹ (JD 42:29 to 31). Thus, rather than relying on record evidence, the ALJ simply **assumed automatically** the factual basis needed for his legal conclusion. Accordingly, while using the term “measurable” in his decision, nowhere does the ALJ identify this “measurable impact” much less any evidence that would show that the level of “bargaining unit work” being

¹⁸ The ALJ’s reliance on *Presbyterian University Hospital*, 325 N.L.R.B. 443 (1998) is misplaced since, as the ALJ himself acknowledged, the Respondent had Supervisors/Foremen in the past who performed “bargaining unit work.”

¹⁹ The authorities cited by the ALJ in support of his conclusion **remarkably did not involve** a past practice of having non bargaining unit employees perform the same work as unit employees. See, e.g., *Regal Cinema*, 334 N.L.R.B. 304, 315-318 (ALJ decision discussing the employer’s position that it was entitled to transfer the work under the management’s right clause).

performed by non-bargaining unit employees differed materially and substantially from Respondent's past practice. *North Star Steel Co.*, 347 N.L.R.B. 1364, 1367 (2006). This failure constitutes a fatal error. It also underscores that the ALJ either fundamentally did not understand the issue before him or simply engaged in tortured reasoning to reach a pre-determined result.

B. The General Counsel Failed to Meet Its Burden of Demonstrating Either a Material or Substantial Change from Respondent's Past Practice or a Measurable Effect on the Unit.

When the correct standard is applied to the record evidence, there is no doubt that the General Counsel failed to meet its burden of coming forth with quantifiable evidence that the performance of bargaining unit work by Fess, Garcia and Norway constituted a material and substantial change from the Respondent's past practice or that there was any causal connection between the purported change and the harm to unit. The record shows that the bargaining unit that was certified was based entirely on job classifications—and not on the type of work that any individual performed. (GC Ex. 2). The record also shows that the Union intentionally excluded, over Respondent's objections, Field Service Technicians who perform the same tasks as those performed by the bargaining unit members. (R. Ex. 18, TR 121-123, 225, 539, 563-564). Thus, the Union has never claimed to represent all employees performing any specific work and, therefore, exclusive "bargaining unit work" does not exist.

Indeed, the ALJ repeatedly used the term "bargaining unit work" even though he acknowledged that there is no clear definition of what is "bargaining unit work." (JD 40:16 to 26). This failure by the General Counsel to put forth evidence as to what the Union was claiming was "bargaining unit work"—standing alone—confirms that the General Counsel did not and cannot meet its burden of demonstrating either a material or substantial change in the

amount of “bargaining unit work” being performed by non-bargaining unit employees, much less that this change had a “measurable impact” on the bargaining unit.

Even setting this problem aside, the record evidence also confirms the failure of the General Counsel to meet its burden of demonstrating a material and substantial departure from the levels of “bargaining unit work” performed by non-bargaining unit employees or any “measurable” impact on the unit. For example, R. Ex. 14 and R. Ex. 18—introduced by Respondent—summarized the percentage of direct labor hours worked by the three supervisors at issue and service technicians during 2017²⁰ through August 2018. While direct labor hours do not correlate 100% to the work performed by the individuals in the job classifications which make up the bargaining unit, they do provide the best evidence that was submitted by either party for purposes of comparing the relative volume of “bargaining unit work” being performed by non-bargaining unit members both before and after the certification of the unit to the volume after the promotion of Mr. Fess, Mr. Garcia and Mr. Norway in late September 2017 to supervisory positions.

As demonstrated by Respondent Exhibit 14, in 2018—the first year after their promotion—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. Thus—to the extent this small amount of labor deviated from any past practices—the deviation was only one of degrees. This small amount of deviation certainly does not rise to the level of a “material and substantial change” in the terms and conditions of employment. *Outboard Marine Corp.*, *supra*, 307 N.L.R.B. at 1338-1339; *North*

²⁰ Mr. Fess, Mr. Garcia and Mr. Norway were not promoted to supervisors until September 2017.

Star Steel Co., supra, 347 N.L.R.B. at 1367. *Accord, Alamo Cement Co, supra*, 281 N.L.R.B. at 738.

Finally, the General Counsel failed to demonstrate any casual connection between the work performed by Mr. Fess, Mr. Garcia and Mr. Norway and the alleged harm to the bargaining unit. This is not surprising given that the Union itself, in certifying the bargaining unit, affirmatively excluded Field Service Technicians from the unit who, on average, spend 50% of their time performing the same work as bargaining unit employees—an amount the Union apparently determined would not harm the unit. (R. Ex. 18).

If this were not enough, the General Counsel and the ALJ both failed to identify any evidence showing a causal connection between the alleged harm to the unit and the Respondent's decision not to back fill Mr. Fess,' Mr. Garcia's and Mr. Norway's positions. Again, this is not surprising given the General Counsel's concession that the Respondent had indicated that a slowdown was expected in work at the very time of these supervisors' promotions that led to the need for a layoff. (General Counsel's Post-Hearing Brief at p. 79). Notably, the General Counsel and the ALJ failed to point to any evidence that the Respondent's work load either required or supported the need to back fill these positions.

Accordingly, the ALJ's ruling must be reversed based upon the failure of the record evidence to demonstrate any causal connection between the alleged harm to the bargaining unit and the promotion of these persons to supervisory positions. Indeed, in the ALJ's rush to reach a desired predetermined result, he simply ignored the record evidence that the Union itself concluded that non-bargaining unit employees could spend up to 50% of their time performing so-called "bargaining unit work" without a measurable impact on the unit when it actively

opposed adding the Field Service Technicians and the Tech Center Operators to the unit in the representational proceeding. (R. Ex. 18, GC Ex. 2, TR 121-122).

C. The ALJ's Remedy Confirms the General Counsel's Failure to Meet its Burden of Proof.

The ALJ's proposed remedy simply directs that Respondent bargain "over the removal of unit work." (JD 49:31 to 34). As set forth above, however, the ALJ never defined "unit work" and the bargaining unit itself was not based on "unit work." Moreover, as the ALJ himself found, the Respondent had a past practice of using supervisors, Field Service Technicians, temporary employees and even senior managers to perform the same work as the members of the bargaining unit. *See* discussion *supra*. Likewise, neither the ALJ's decision nor his proposed remedy addresses what "deviation" from these past practices would rise to the level of a material and substantial change and thus constitute a "removal" of bargaining unit work giving rise to the obligation to bargain.²¹ In short, the remedy directed by the ALJ simply confirms that the General Counsel failed to meet its burden of proof and that, as a result, the remedy ordered by the ALJ fails to place the Respondent on notice of when and under what circumstances it is obligated to "bargain" regarding the performance of bargaining unit work by non-bargaining unit employees.

POINT VII
THE ALJ'S OWN FINDINGS OF FACT DEMONSTRATE THAT RESPONDENT DID NOT DENY MR. FRICANO HIS WEINGARTEN RIGHTS.

The ALJ's determination that Respondent violated Mr. Fricano's *Weingarten* rights serves only to confirm that he was intent upon finding violations of the Act, where none existed. It is black letter law that an employee is not entitled to a union representation at an interview

²¹ Here it is worth noting that with respect to the Field Service Technicians, as evidenced by Respondent Exhibit 18, the amount of time these employees spend performing the same work as bargaining unit employees fluctuates substantially over the course of a year and between years.

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).²²

Despite this well-settled law, the ALJ found that *Weingarten* applied **even though** he expressly found that—as soon as Mr. Fricano entered the conference room—he was handed a notice of discipline and was told that “management had already made the decision that he could do nothing about it.” (JD 17:10 to 16). Thus, based on the ALJ’s own findings as to what transpired during the interview, and based on all of the facts and circumstances, Mr. Fricano could not have reasonably believed that the interview was investigatory. The ALJ’s reliance on Mr. Voigt’s request that Mr. Fricano come to the conference room to discuss his safety violation does not convert the meeting into an “investigatory interview” or make Mr. Fricano’s self-serving testimony that he “reasonably believed” the interview might result in the imposition of discipline.

Ironically, if this ruling is upheld the result will be that—in order to avoid implicating an employee’s *Weingarten* rights—employers would be required to “ambush” an employee and impose discipline upon the employee in front of his/her fellow employees rather than in a private setting. Clearly, this is neither good practice, nor what the law requires. Therefore, upon applying the objective standard set forth in *Weingarten*—because the record shows that Mr. Fricano’s “interview” indisputably was solely for the purpose of **imposing** already decided upon discipline—it must be determined that Respondent was not obligated to honor a request for a union representative.

POINT VIII

²² As the Supreme Court also explained in the *Weingarten* decision, whether an employee “reasonably fears” he will be subject to discipline is an objective standard to be determined based on all the circumstances of the case and the employee’s subjective belief is not relevant to this determination. *Weingarten, supra*, 420 U.S. at 257.

THE ALJ’S FINDINGS THAT THE DISCIPLINE OF MR. BUSH AND REASSIGNMENT OF MR. HUDSON VIOLATED SECTION 8(a)(3) MISAPPLIED THE BOARD’S TEST UNDER *WRIGHT LINE* AND IGNORED THE ALJ’S OWN FINDINGS OF FACT.

In order to establish a violation of Section 8(a)(3), the General Counsel has the ultimate burden of establishing both that an employee was subject to an adverse employment action and that his/her protected activity was a substantial motivating factor for the employer’s decision to impose discipline or other adverse employment action. *NLRB v. Transportation Management*, 462 U.S. 393, 402 (1983). Assuming the General Counsel is able to establish an adverse employment action, whether the decision to take an adverse employment action was motivated by the employee’s protected activity, is subject to the burden shifting analysis under *Wright Line*.

Under the *Wright Line* two-part test, “the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer’s decision.” If the General Counsel meets this initial burden, the burden then shifts to the employer to demonstrate by a preponderance of the evidence that it had a legitimate business reason for the action it took and that it would have reached the same decision absent the employee’s protected activities. *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980) (affirmed 662 F.2d 899) (1981). As the Supreme Court emphasized however, this test does not change or add to the elements of the unfair labor practice **that the General Counsel has the burden of proving...**” *NLRB v. Transportation Management, supra*, 462 U.S. at 400.

The ALJ committed an error of law when he determined that the General Counsel met this burden based solely on the Section 8(a)(1) violations committed by Mr. Voigt which were directed at entirely different employees and which did not involve threats of transfer, denial of overtime or discipline. (JD 20:10 to 45) (citing the ALJ’s findings that Mr. Voigt violated Section 8(a)(1) in support of these violations as to the discipline of Mr. Bush and Mr. Hudson).

To the extent the ALJ relied upon decisions of the Board which do not require a causal connection between the evidence of anti-union animus and the decision to take a specific adverse employment action, these decisions are inconsistent with both the Board's decision in *Wright Line*, and the Supreme Court's decision in *Transportation Management*.

A. The General Counsel Failed to Meet Its Burden of Proof under *Wright Line* with Respect to Mr. Hudson's Claims.

The ALJ found that the General Counsel had met its initial burden to show that Mr. Hudson was temporarily transferred to work on the saw and was denied overtime in violation of Section 8(a)(3) based solely on certain statements by Mr. Voigt which the ALJ had found to constitute union animus in violation of Section 8(a)(1). (JD 20:31 to 40). Despite relying solely on the alleged "union animus" of Mr. Voigt to support these findings with respect to Mr. Hudson, the ALJ nonetheless admits in his decision that the statements by Mr. Voigt were made to entirely different individuals—not to Mr. Hudson. Moreover, three of Mr. Voigt's Section 8(a)(1) violations were made to Mr. Thompson, an individual whom the ALJ found was one of the employees who received overtime in place of Mr. Hudson! (JD 24:1 to 6). Even more importantly, the ALJ expressly found the granting of overtime to Mr. Thompson was "significant" because Mr. Thompson also was a welder who was temporarily assigned to other work. *Id.* Notably, however, the ALJ apparently did not even consider the absurdity of finding that Mr. Voigt's statements to Mr. Thompson constituted evidence of union animus in the decision to deny overtime to Mr. Hudson when—at the same time—the Respondent granted overtime to Mr. Thompson. The non-sensical nature of this explanation by the ALJ simply confirms the extent to which the precedents on which the ALJ relied are inconsistent with the Supreme Court's decision in *NLRB v Transportation Management, supra*, 462 U.S. at 402.

It goes without saying that the decisions relied upon by the ALJ all held that unrelated anti-union animus by a single manager is sufficient to meet the General Counsel’s initial burden. This prior line of cases, however, is contrary to both the Board’s decision in *Wright Line* and the Supreme Court’s decision in *Transportation Management*. In *Wright Line*, the Board adopted the test established by the Supreme Court in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) that allocated the burden of proof between the plaintiff and defendant in employment cases where the employer had a mixed motive for an adverse employment action. In explaining the plaintiff’s initial burden of proof, the Supreme Court emphasized that “the burden is placed on the respondent [the employee] to show that his conduct was **constitutionally** protected and that his conduct was a ‘substantial factor’ –or, to put it in other words, was a ‘motivating factor’ in the School Board’s decision not to rehire him...” *Mount Healthy, supra*, 429 U.S. at 287. Consistent with the Supreme Court’s decision in *Mount Healthy*, the Board similarly held in *Wright Line* that the General Counsel (who is the equivalent of the plaintiff in a civil action) must make “a prima facie showing sufficient to support the inference that protected conduct **was a motivating factor** in the employer’s decision.” *Wright Line, supra*, 251 N.L.R.B. at 1089.

As the Seventh Circuit has explained, under *Wright Line*, there must be a showing of a **causal connection** between the employer’s anti-union animus and the specific adverse employment action on the part of the decision maker. *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015). Of course, this causal connection is absolutely missing with respect to the ALJ’s findings as to Mr. Hudson. Moreover, even a showing of general union animus is not enough. As the Eighth Circuit has explained, “while hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer’s motive was

discriminatory, general hostility toward the union does not itself supply the element of unlawful motive.” *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554–555 (8th Cir. 2015). *Accord*, *Tschiggfrie Props. v. NLRB*, 896 F.3d 880 (8th Cir. 2018).

The requirement that the General Counsel establish as part of its prima facie case at least some link between the adverse employment action and the evidence of union animus is not only consistent with the Board’s holding in *Wright Line*, it also is further dictated by the Supreme court’s decision in *Transportation Management, supra*, 462 U.S. at 402. Specifically, in *Transportation Management*, the Supreme Court noted that “the Board has not purported to shift the burden of persuasion on the question of whether the employer fired [the employee] **at least in part because he engaged in protected activity.**” *Transportation Management, supra*, 462 U.S. 393 at n. 5. Thus, while it was not disputed in *Transportation Management* that the General Counsel met this burden, the Board expressly represented that the Board’s initial burden **included** a showing that the specific adverse employment action was motivated in part by the employee’s protected activities. Thus, the ALJ’s reliance on a finding of general union animus by Mr. Voigt was insufficient to meet the General Counsel’s burden under *Wright Line* and must be set aside.

Based on the ALJ’s own findings of fact and applying the correct burden of proof under *Wright Line*, the General Counsel did not meet its burden of proof with respect to the claim that Mr. Hudson’s transfer and denial of overtime was motivated by union animus.²³

With respect to the allegation that Mr. Hudson’s transfer to the saw was an adverse employment action motivated by union animus, there was no evidence or allegation that he

²³ Respondent does not dispute that the General Counsel met its initial burden of proof under *Wright Line* with respect to the discipline of Mr. Bush, but as discussed *infra* the Respondent more than met its burden of demonstrating that it would have taken the same action.

received less pay or that, consistent with Respondent’s past practices, employees were not reassigned to work outside their primary job titles. The only evidence introduced by the General Counsel and relied upon by the ALJ to support the finding that this temporary transfer even rose to the level of an adverse employment action—much less that it was partially motivated by union animus—was the testimony that the saw required “less skill” than welding. (JD 16:5 to 14). It was not disputed, however, that Mr. Hudson previously had received a “zero” rating on every skill in the facility other than welding, indicating that he lacked versatility and cross training in other areas. Indeed, Mr. Hudson himself implicitly recognized his need for versatility training in that he complained about this low rating. (JD 15:20 to 16:4; R. Ex. 16). It also was undisputed that, in addition to Mr. Hudson, other employees including two “union supporters” and Mr. Rojas, whose sympathies were unknown, also were transferred temporarily to maximize efficiency and afford employees an opportunity to expand their skill sets following the layoff. (JD 16:21 to 26) (stating that Mr. Bush, Mr. Krajewski, and Mr. Rojas also were transferred temporarily). *See also*, TR 30 for list of “union supporters.”

In summary, other than the statements by Mr. Voigt **made to different employees on different subject matters**, the General Counsel produced no evidence whatsoever that the decision to reassign Mr. Hudson to the saw even rose to the level of an adverse employment action much less one that was motivated by union animus. Again, this evidence is insufficient to satisfy the General Counsel’s initial burden under *Wright Line* and the Supreme Court’s decision in *Transportation Management*.

B. Mr. Bush’s Own Testimony Confirmed that Respondent Not Only Would Have Taken the Same Disciplinary Action, but that the Action it Took was Fully Consistent with its Obligations under Federal and State Anti-Discrimination Statutes.

The ALJ's decision with respect to Mr. Bush's discipline is one of the most perplexing of his rulings and further demonstrates that the ALJ either lacked a fundamental understanding of the issues before him or was intent on reaching a pre-determined result. To reach this conclusion, the Board need only consider that the ALJ's findings of fact as to the discipline imposed on Mr. Bush, were based entirely on the following description of testimony of Mr. Bush and others, by the ALJ that demonstrates that Mr. Bush's conduct clearly was in violation of federal and state laws regarding the creation of a hostile work environment: Wendt purchases a product from a German Company called FAG, which prints its names of it shipping box. (JD 12: 28 to 30) on December 21, 2017. "Bush held up the box and laughed. Voigt snickered. Bush walked over to Domaradzki's area set the box down and he said jokingly "here's your box." Both he and Domaradzki laughed." (JD 12:40 to 43).

Thus, despite actually finding that Mr. Bush was engaging in joking with another employee using the homophobic term FAG, the ALJ concluded that this conduct was not "overtly homophobic" and that there was no violation of Wendt's anti-harassment policy because nobody was offended. (JD 22:10 to 25). Either the ALJ has a fundamental misunderstanding as to an employer's obligation to prevent conduct which can give rise to a hostile work environment for a protected class of employees or he made these shocking conclusions in order to reach a predetermined result.

Contrary to the ALJ's statements in his decision, under federal and state anti-discrimination laws, Wendt's obligations are much broader than just addressing specific complaints of harassment when an employee is offended by the conduct of a co-worker. Instead, Wendt is obligated to take affirmative steps to prevent conduct which could give rise to a hostile work environment. A hostile work environment exists when an employer permits its employees

to use language which is offensive to a protected class of employees. It is not necessary that the person to whom the remarks are made is offended or that a person who might make a claim that a work environment is hostile actually hears the remark. As the courts consistently have held, a hostile work environment can exist simply by a potential plaintiff learning “second-hand” that the employer permits its employees to use discriminatory epithets such as the term “FAG.” *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir 1997) (“the mere fact that Schwapp was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim. Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment...”). *Accord, EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d. 377 (E.D.N.Y. 2016). Indeed, hostile work environments are almost always the result of employer’s failure to take action when co-workers engage in “joking” between individuals who find such comments “funny” between themselves.

It is just this type of “joking” by employees which the ALJ found, if permitted by Wendt to go unpunished, would give rise to a hostile work environment. It is only by taking quick and prompt action when the employer learns of such incidents that an employer such as Wendt can ensure that a hostile work environment does not take root.

The ALJ’s finding that Wendt did not follow its own policy by conducting an investigation is based on his incorrect finding that someone hearing the remark had to be offended for it to fall within Wendt’s anti-harassment policy. (JD 21:10 to 25). Since Mr. Bush never disputed the conduct, there was nothing to investigate. Moreover, once it was established by his own admission that he engaged in joking with respect to the term “FAG,” there likewise was no need for an investigation.

Similarly, the ALJ's finding that Mr. Bush was treated disparately simply was not supported by the record. The record demonstrated that employees who were found to have engaged in harassment directed at a status protected by anti-discrimination laws were all subject to suspensions. (R. Exs. 35 and 36). *Accord*, JD 14:5 to 14. The only comparators relied upon by the ALJ to support his finding of disparate treatment was an employee whose harassment did not involve any protected category of employees and an incident allegedly described by Mr. Garcia as involving an offensive gesture without any citation to the actual testimony. (JD 21:40 to 22:7). The ALJ's failure to provide this citation is not surprising since nothing in the testimony established that the "offensive gesture" implicated a protected class of employees. (TR 1379 to 1380). Notably, the General Counsel did not introduce the write-up for this employee which was provided by Respondent in response to items 11 and 12 of the subpoena issued by the General Counsel prior to the hearing.

In summary, the Respondent more than met its burden of rebutting any presumption that its discipline of Mr. Bush was motivated by union animus. Not only was Mr. Bush's discipline consistent with the Respondent's obligation under federal and state anti-discrimination laws, but it also was consistent with the discipline imposed on other individuals who engaged in similar conduct directed at a protected class.

POINT IX
THE ALJ AGAIN FAILED TO APPLY *RAYTHEON* IN RULING THAT
RESPONDENT'S OVERTIME POLICY VIOLATED SECTION 8(a)(5).

The ALJ's determination that Respondent violated Section 8(a)(5) by imposing mandatory overtime in shipping and receiving during November 2017 ignored, once again, the Board's decision in *Raytheon* as well as the record evidence. (JD 46:35 to JD 47:12). The ALJ's decision to evaluate a claim relating to a past practice without mentioning *Raytheon* is not

surprising. Had the ALJ evaluated the Respondent's past practices regarding overtime using the framework established under *Raytheon*, he would have had no choice but to reach the conclusion that the Respondent's actions in November of 2017 were fully consistent with its past practice of a flexible mandatory overtime.

The record evidence demonstrated that the Respondent's employment manual expressly notified employees that, if necessary, overtime could be mandatory. (GC Ex. 23 at p. 38 to 39). The record evidence also demonstrated that, based on the normal delivery times, at least a half hour of overtime was required every day.²⁴ (R. Ex. 22, TR 985, 986, 1445 to 1448). The witnesses for both the Respondent and Union agreed that, under Respondent's past practice, the two bargaining unit members and their supervisor would work cooperatively to determine who would cover these additional hours each day. (TR 646-648, 979-980, 986, 1444-1446, 1485).²⁵

In addition, the witnesses all agreed that, during other busy periods, management would indicate that overtime would be required and the two bargaining unit employees in shipping and receiving would work with their supervisor and decide amongst themselves how best to cover the required overtime. (TR 1446-1448, TR 997, 979-980, 985-986). On at least one occasion in the past, however, employees in shipping and receiving had been told that overtime was "mandatory." (TR 649).

²⁴ In yet another example of the ALJ's and the General Counsel's contradictory positions taken in this proceeding, the ALJ relies on the fact that the Supervisor in shipping and receiving would often cover for his employees from 3:30 PM to 4:00 or 4:30 PM. Nowhere, however, does the ALJ or the General Counsel explain why this regular and routine performance of so-called "bargaining unit work" by the Supervisor in shipping and receiving is any different from the conduct of Mr. Fess, Mr. Garcia and Mr. Norway in pitching in to perform "bargaining unit work" in their respective departments, as other similarly situated supervisors had also done, such as Steve Jasztrab. (TR 1332-1336). Supervisor Ken Scheidel admitted to performing work that bargaining unit employees had performed, he just did not "clock in" on jobs. (TR 561-562)

²⁵ Prior to Mr. Horner's being hired as the supervisor, one of the two bargaining unit employees would typically cover this extra half hour. (TR 985-986). While Mr. Horner typically covered this half hour after Mr. Horner's arrival in February 2017, this did not alter the past practice that, if Mr. Horner could not cover this period, one of the two bargaining unit employees would have to remain until the last delivery. *Id.*

The Respondent does not dispute that, in November 2017, the two employees in shipping and receiving were informed that—based on the anticipated workload—there would be a need for both employees to work more overtime than usual during the next three weeks and that they were expected to work more overtime than usual. Consistent with Respondent’s past practice, again, it was up to the discretion of the two employees when determining who would work this overtime. (TR 654-656).²⁶ Neither employee was disciplined for failing to work overtime on any given day, and one employee left work early one day without any repercussions. (TR 658, 982-983, 1041, 1447, 1485). Thus, other than the use of the word “mandatory” when the employees were informed of the need for overtime, there was nothing different in November 2017 from the Respondent’s past practice.

As the foregoing facts demonstrate, not only is the ALJ’s finding contrary as to “mandatory” overtime inconsistent with the Respondent’s employment manual, but it also is contrary to the Board’s decision in *Raytheon* which requires that past practices be evaluated in light of the dynamic status quo. Not surprisingly in light of the testimony of the General Counsel’s own witnesses, the ALJ failed to identify any change from Respondent’s past practice other than the use of the term “mandatory” and failed to explain how the use of this term somehow altered the Respondent’s past practice. Given the failure of the ALJ to identify any change to Respondent’s past practice and the obvious fact that the use of word “mandatory” itself did not constitute a material change to the undisputed nature of the past practice, the ALJ’s decision must be reversed under the Board’s decision in *Raytheon*.

POINT X

²⁶ While the ALJ makes much of the Respondent’s not questioning witnesses on this point, given that the General Counsel elected to consolidate in a single Complaint dozens of charges—many of which appeared to be based on miscommunications which could and should have been resolved without the need for the Union to even file a charge—it is obvious that not every fact could be the subject of questioning as a practical matter or the hearing would have continued for months.

**THE SINGLE STATEMENT IN MR. RULOV'S OTHERWISE POSITIVE REVIEW
WAS INSUFFICIENT AS A MATTER OF LAW TO GIVE RISE TO A SECTION 8(a)(1)
VIOLATION.**

The ALJ's determination that a single statement in Mr. Rulov's 2017 evaluation violated Section 8(a)(1) was an error of law—given the content of the evaluation itself and the ALJ's own findings that the single negative comment was in the context of an otherwise overall positive review. (JD 12:4 to 8). It is well settled that Section 8(a)(1) of the Act prohibits employers **only from** activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they were used must suggest an element of coercion or interference.” *Rossmore House*, 269 N.L.R.B. 1176, 1177 (1984) (affirmed 760 F.2d 1006 (9th Cir. 1985)).

Here, as the ALJ himself found, the review lauded Mr. Rulov's performance and included statements that he “has a large variety of skills... knows the tasks at hand and does it” and is a “steady force in manufacturing products...” (GC Ex. 43). The sole basis for the Section 8(a)(1) claim is the single comment in the review that Mr. Dmytro needs to “focus more the job at hand and worry less about non work-related activities.” (GC Ex. 43). While Mr. Rulov claimed that, during the review, Mr. Voigt made certain statements that led him to believe that this comment referred to Union activities, nonetheless during his conversation with Mr. Voigt at the time of his review, Mr. Rulov claimed to Mr. Voigt that “I didn't pay attention, I didn't pay attention...” Likewise, at the hearing, Mr. Rulov similarly testified he did not pay attention. (TR 411-412).

In short, Mr. Rulov himself did not perceive that either the comment in the review or the statements made by Mr. Voigt were significant enough to even require him to pay attention, much less suggesting an element of intention to coerce or interfere with his Section 7 rights. This, of course, is consistent with the review itself which was highly positive. In summary, the

documentary evidence—as well as Mr. Rulov’s own testimony—confirms that the ALJ’s finding that this single statement in Mr. Rulov’s review did not rise to the level of a violation of Section 8(a)(1).

POINT XI
**THE NLRB’S APPLICATION OF THE “JENCKS RULE” THAT DENIES
RESPONDENT ACCESS TO WITNESS STATEMENTS UNTIL AFTER THEY
TESTIFY ON DIRECT EXAMINATION VIOLATES RESPONDENT’S DUE PROCESS
RIGHTS, IS MANIFESTLY UNFAIR AND BY THE TIME OF HEARING SERVES
LITTLE LEGITIMATE PURPOSE.**

At the commencement of the hearing the Respondent’s Counsel made a threshold motion requesting immediate access to all “Jencks material” and “Jencks statements” as defined in Section 10394.8 of the National Labor Relations Act Case Handling Manual, which motion was summarily denied by the ALJ.²⁷ (TR 20-22). The so called “Jencks Rule” takes its name from the criminal procedure case of *Jencks v. United States*, 353 U.S. 657 (1957). The same has since been codified into the Jencks Act.²⁸ Respondent’s Counsel stated to the ALJ that it is time for the Board to revisit this antiquated and unfair rule as it is applied in the non-criminal context of unfair labor practice proceedings where “discovery” such as interrogatories and depositions does not occur and “which propagates trial by surprise against Respondents and deprives them of a fair hearing and of due process.”

It is fundamental to the tenets of due process that a Respondent have a right to know the opposing evidence and that a Respondent has the right to cross-examine its opponents, and that such right, in order to be meaningful, should permit access to such material to be reviewed in advance of witness testimony. By the time of the hearing, the ostensible reason for the rule, the

²⁷ The ALJ must follow extant Board law. In that vein, the January 2018 National Labor Relations Board’s Division of Judge’s Bench Book Section 16-613.1 provides: “The proper time for a disclosure request is at the close of the direct examination; it is premature to demand production earlier. *U.S. v. Martinez*, 151 F.3d 384, 390–391 (5th Cir. 1998), cert. denied 525 U.S. 1031 and 1085 (1998 and 1999).”

²⁸ 18 U.S.C. Section 3500 (1970).

ability of the Region to adequately investigate, and protection of the witness from potential retaliation, has long since expired and there is no fundamental difference between the time frame existing at the commencement of the witnesses' direct testimony and the time frame of the conclusion of that direct testimony, to serve the alleged salutatory purposes of the rule.

In this case, almost every witness that testified during the General Counsel's case had at least one affidavit, and some more than one. Anthony Rosaci, the lead witness had four affidavits, one consisting of 11 pages, front and back; the second, 4 pages, front and back; the third, 12 pages, single only; and the fourth, four pages, single only. Additionally, two e-mails were produced which were considered Jencks material, two and one pages respectively. (TR 115-121). A short recess to review these extensive documents and weave them into a prepared cross-examination, while having to consult handwritten notes of the witness' direct testimony, is inadequate and deprived the Respondent of due process. Unfair labor practice proceedings, in large measure, deal with conversations between people and it is axiomatic that all witnesses have selective memories (intentional or otherwise) when it comes to recall of conversational inputs/outputs.

Obtaining and having a reasonable opportunity to review Jencks material prior to a witness' direct testimony permits the Respondent the best position to understand the context of the testimony and an opportunity to meaningfully confront and cross-examine the witness. Contradictions between the testimony and the statement are fertile ground for cross-examination and for undermining credibility determinations of which are difficult to overturn in the exception process. Material testified to on direct examination that is not referenced or discussed in the Jencks material may also provide helpful exploration, especially if that is a distinguishing point or a main point in the direct testimony narrative. Obtaining them in advance of the hearing

would permit the Respondent to be able to compare the versions of the events in question by different witnesses permitting an appropriate and robust cross-examination. It is also inappropriate to require the Respondent to remember at the commencement of the cross-examination to request Jencks material or be precluded from receiving the same. Such rule serves no true purpose whatsoever other than to continue to permit the General Counsel to obfuscate evidence that may exculpate the Respondent. The Board should consider revising the Jencks Rule to permit the Respondent access to all Jencks material prior to direct examination and should not require Respondents to remember to request such material “timely” or be prejudiced.

CONCLUSION

It is respectfully submitted, on the basis of the foregoing and the accompanying Exceptions to the ALJ’s Decision, that the Board should decline to adopt the portions of the ALJ’s decision referenced in the accompanying Exceptions and that it should dismiss the claims set forth in paragraphs 8, 10, 11 and 12 of the Amended Consolidated Complaint against the Respondent.

DATED: April 15, 2019
Buffalo, New York

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____)	
WENDT CORPORATION)	
)	Nos. 20-1319
Petitioner/Cross-Respondent)	20-1328
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
)	03-CA-212225, et al.
Respondent/Cross-Petitioner)	
_____)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 374 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 365.

/s/David Habenstreit
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Dated at Washington, DC
this 16th day of February 2021

UNITED STATES COURT OF APPEALS
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_____)	

CERTIFICATE OF SERVICE

I certify that on February 16, 2021, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and were served through the CM/ECF system.

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Dated at Washington, DC
this 16th day of February 2021