

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

No. 20-1319

(Consolidated with 20-1328)

WENDT CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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

PROOF REPLY BRIEF FOR PETITIONER

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March 9, 2021

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SUMMARY OF ARGUMENT

The General Counsel's Brief simply ignores that virtually every issue that is the subject of this Appeal is based upon the Board's failure to apply its own precedents. Nowhere is this failure by the General Counsel to even acknowledge that the Board's rulings are contradicted by its own precedents more evident than in the General Counsel's misplaced arguments that the Board was correct in determining that Wendt did not have a past practice of layoffs when there was a lack of work. Not only did the General Counsel fail to even address the Board's refusal to apply its own precedents but, in order to make the argument, the General Counsel had no choice but to fundamentally mischaracterize the record evidence—thus underscoring the lack of substantial evidence supporting the Board's determination.

ARGUMENT

POINT I: THE VIOLATIONS WENDT DID NOT CONTEST ARE NOT RELEVANT TO THE ISSUES ON APPEAL

As an initial matter, Wendt must briefly address the General Counsel's contention that Wendt's decision not to appeal certain of the Board's findings that it violated Section 8 (a)(3) of the Act "lends aroma to the context" as to this Court's review of the findings that Wendt has appealed. General Counsel's Brief at p. 17, citing *Ryder Truck Rental v. NLRB*, 401 F.3d 815 (7th Cir. 2005). As a

preliminary matter, the *Ryder Truck Rental* case—which involved violations of Section 8 (a)(1) and (3) –does not even arguably have relevance to the Section 8 (a)(5) issues raised in this appeal. Notably—with only two exceptions—Wendt’s appeal raises issues under Section 8 (a)(5) of the Act. Therefore, not only are any findings that Wendt violated Section 8 (a)(3) of the Act not relevant to the Court’s determination of the issues now before the Court, but for the Court to consider these findings in reaching a determination of whether Wendt had a duty to bargain with respect to either the February 2018 layoffs or promotion of three unit members would violate Wendt’s due process rights. The Board itself recognized as much when it reversed the ALJ’s finding that Wendt’s layoff of ten employees violated Section 8 (a)(3) because this violation had never been charged under Section 8 (a)(3) and instead only had been charged under Section 8 (a)(5). *See* Board’s Decision at 2, reversing the ALJ’s finding that the layoff violated Section 8 (a)(3) on grounds that this violation was not alleged in the Complaint.

Even more importantly, as to the two issues on this appeal involving Section 8 (a)(3), as well as all other issues, this Circuit has recognized that the General Counsel cannot avoid—as it proposes to do by reason of this argument—its burden of showing particularized evidence pertinent to the claims at issue. Specifically, this Circuit has ruled that the fact of a finding of other violations of Section 8 (a)(1) and (3) **does not** absolve the General Counsel from coming forth with

particularized evidence that the specific adverse employment actions at issue were motivated by union animus. *Meco Corp. v. NLRB*, 986 F.2d 1434 (D.C. Cir. 1993). Indeed, that the General Counsel makes this argument underscores the weakness of its case.

POINT II: THE GENERAL COUNSEL HAS FAILED TO ADDRESS THE BOARD'S FAILURE TO FOLLOW ITS OWN PRECEDENTS REGARDING THE EXISTENCE OF PAST PRACTICES

The General Counsel inexplicably ignores the Board's failure to follow both its own precedents in *Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161 (Dec. 15, 2017) and *Mike-Sell's Potato Chip Company*, 368 N.L.R.B. No. 145 (Dec. 16, 2019), as well as the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962). As the Supreme Court emphasized in *Katz* and as the Board emphasized in *Mike-Sell's*, the key inquiry in determining whether a past practice exists is whether the actions taken by the employer were sufficiently regular and consistent with its actions in the past such that **"the employee would expect and recognize the contested [action] as a continuation...."** of what the employer had done in the past. *Mike-Sell's*, 368 N.L.R.B. No. 145, slip op. at p. 3 (2019) (emphasis added).

The Court can easily reject the General Counsel's assertion that Wendt had failed to prove "what it has always done" when faced with a lack of work. Wendt introduced evidence that it had a long history of layoffs due to lack of work

including layoffs in 2001, 2002, 2003, 2009 and 2015—all of which were based on decreases in customer orders and/or a decrease in available work. (TR 1631, ln. 19 to 1632, ln. 11; R Exs. 25-27). The General Counsel does not cite to any evidence that Wendt had **ever** failed to lay-off employees when it had no work for them to perform and indeed the record was devoid of any such evidence. In short, Wendt more than met its burden of demonstrating that it implemented layoffs whenever there was a lack of work.

The General Counsel also failed to even address the inconsistency with *Raytheon* of the Board's Decision that the 2015 layoffs were not "sufficiently" similar on grounds that the 2015 layoffs were permanent layoffs rather than temporary. As the Board found in *Raytheon*, under *Katz*, in order to qualify as a past practice, it is **not** necessary that each decision be identical or that it involve some exercise of discretion, so long as the decisions "**...do not materially vary in kind or degree from what has customarily been done in the past...**" *Raytheon Network Centric Systems*, 365 N.L.R.B. No. 161, slip op. at p 16 (2017) (emphasis added). Indeed, the Board's finding that the 2015 layoffs were materially different from its past practice of economic layoffs because the layoffs in 2015 were permanent and not temporary produces the nonsensical result whereby Wendt would have been free to proceed with a permanent layoff without violating the Act, but not a temporary layoff. Thankfully, neither *Raytheon* nor *Katz* require this

absurd result because, under the dynamic *status quo*, it is the fact of the past layoffs and not their duration which constitutes the past practice that Wendt was free to continue.

As to the Board's finding that the layoffs were not sufficiently frequent, the General Counsel fails to address how this Board's finding is consistent with its own decision in *Mike-Sell's* which held that the existence of a past practice is not dependent on whether the practice occurred in a regular and recurrent pattern. Instead, a past practice will be found to exist if the employer, when faced with similar circumstances, does what it has always done in the past such that employees can expect the action to be repeated. *See* Wendt's Opening Brief at p. 29 to 33. As the Board found in *Mike-Sell's*, the fact that the circumstances giving rise to the need to take action arises infrequently is not relevant so long as, when faced with similar circumstances, the employer acts in a consistent manner.

Finally, the General Counsel's assertion that Wendt may not point out to this Court the Board's failure to consider Wendt's employee handbook both misstates the applicable law and fails to recognize that the factual findings with respect to Wendt's past practices were first made by the Board and **not by the ALJ**. The authority relied upon by the General Counsel simply provides that Wendt may not raise issues on appeal which were not before the Board and nothing in that authority precludes Wendt from pointing out **factual errors made** by the Board.

This is particularly true when, as in cases such as this, the Board did not review the factual findings by the ALJ for errors¹ but actually conducted its own “careful examination of the record...” Decision at p. 5. Accordingly, Wendt is entitled to call this Court’s attention to the Board’s failure to take into account that Wendt’s employee handbook expressly notified employees that layoffs were possible and outlined the criteria Wendt would use for selecting specific employees for layoff. (GC Ex. 23 at p. 13 and 57). Pointing to existing factual evidence in the record that supports the legal arguments made by Wendt is both appropriate and compelled.

In short, nothing in the General Counsel’s Brief justifies or even addresses the Board’s deviations from its decisions in *Raytheon* and *Mike-Sell’s* or the dictates of *Katz*. Accordingly, the Board’s finding that Wendt did not have a past practice of layoffs must be reversed on grounds that the Board’s decision was contrary to *Katz* and the Board’s own precedents and because its findings were not supported by substantial record evidence.

With respect to the General Counsel’s arguments that after bargaining to impasse on terms of the layoff Wendt was required to demonstrate an “economic exigency,” as set forth in Wendt’s Opening Brief, this argument renders

¹ The ALJ actually assumed that Wendt had a past practice of layoffs, but concluded, in direct conflict with *Raytheon*, that with the advent of the Union, Wendt was no longer free to unilaterally implement a layoff. (ALJD 28:1-5).

meaningless the Board's Decision in *RBE Electronics of S.D., Inc.*, 320 N.L.R.B. 80 (1995). See Wendt's Opening Brief at p. 34 to 37. Moreover, Wendt finds the General Counsel's cavalier dismissal of the economic effect of requiring a small, family-owned business to pay \$60,000 to \$70,000 to employees to perform no work whatsoever, both troubling and demonstrative of a complete lack of understanding of the economic realities facing small businesses. While perhaps not placing Wendt on the verge of bankruptcy, incurring these costs certainly would have hampered Wendt's ability to face future economic difficulties.

POINT III: THERE WAS NO MATERIAL LOSS OF UNIT WORK

In its Opening Brief, Wendt properly demonstrated that Wendt's past practice of supervisors performing bargaining unit work demonstrated that the promotion of Fess, Garcia and Norway did not result in a material and substantial change in the amount of bargaining unit work available to the unit members. In its brief, the General Counsel relies upon the authority cited by the ALJ which holds that an employer has an obligation to bargain when as the result of the promotion of a bargaining unit employee to a supervisor position the "bargaining unit suffers **a significant loss** of work..." *Health Care and Retirement Corporation of America d/b/a Hampton House*, 317 N.L.R.B. 1005, 1007 (1995) (ALJ Decision quoting *In Re Lutheran Home of Kendallville*, 264 N.L.R.B. 525 (1982) (slip opinion) (emphasis added)). Whether the question is framed as whether the

promotions resulted in a “material and substantial” change from the past practice of supervisors performing unit work or whether the promotions resulted in a “substantial loss” of unit work, as the Board itself recognized in its decision, the loss of work has to be significant or more than de minimis in order to trigger a duty to bargain. Decision at p. 7.

The General Counsel’s Brief underscores that the Board’s Decision was not based upon an analysis of whether there was a loss work to the unit, but on the fact that Wendt did not replace Fess, Norway or Garcia after their promotion. General Counsel’s Brief at p. 22. Notably, however, this ignores the General Counsel’s own admission in its Brief that, at the same time these employees were being promoted, Wendt “noticed a slowdown in orders...” General Counsel’s Brief at p. 4-5. Indeed, the General Counsel concedes that, at the same time these three positions became vacant, there was a reduction in available unit work. Notably, had the three unit members simply left Wendt’s employ, it is clear that Wendt would not have had to backfill these positions because of no available work.

The General Counsel’s assertion that the three newly-appointed supervisors performed the same work as when they were in the unit ignores the undisputed evidence that the unit work performed by these employees combined amounted to only 1/2 of a full time position. (Decision at p. 7; R Ex. 14). The evidence the General Counsel cites in support of the Board’s assertion that Wendt transferred

the work previously performed by Fess, Garcia and Norway to temporary workers actually confirms that the unit work declined following these promotions.

Specifically, the General Counsel cites to Bertozzi's testimony at pages 10633 to 10634 in which Bertozzi testified that the number of temporary workers employed by Wendt depended on the workload in the shop and varied widely—ranging from relatively few temporary employees in 2015, increasing in 2016 to 2017 to approximately ten and then falling off again in 2018 so that, by February 2018, no temporary employees existed. In November of 2018, there were only two temporary employees. (TR 1634, lns. 16-25). Notably, the promotions took place in late 2017 and shortly after these promotions the number of temporary employees began to decline, **not increase**. See Wendt's Opening Brief at 19-21, and 46-47. Similarly, Howe did not admit that Wendt employed temporaries to perform some of the work previously performed by Fess, Garcia and Norway and, instead, consistent with Bertozzi's testimony, Howe stated that Wendt would hire temporaries **during peaks as needed**. (TR 1286-1287).

Thus, the foregoing testimony directly contradicts the Board's finding that Wendt used temporary employees to replace the bargaining unit work performed by Fess, Garcia and Norway. Instead, the record before the Board was that Wendt's use of the temporary employees was short lived and consistent with the practice of using temporary workers to manage the peaks and valleys of its work

load. In short, the General Counsel has failed to cite to anything in the record to support the Board's finding that the promotion of Fess, Garcia and Norway resulted in a substantial loss of unit work, much less the Board's finding of a loss of three full-time positions. Decision at p. 7. Accordingly, this finding by the Board should be reversed.

**POINT IV: THE BOARD IMPROPERLY ABANDONED THE CLEAR
AND CONVINCING WAIVER STANDARD AND SHOULD BE
REVERSED**

The General Counsel's argument that Wendt is precluded from arguing waiver under the Board's newly-adopted contract coverage standard is misplaced and disingenuous. Wendt clearly raised before the Board that the Union had waived any right to future bargaining of the retroactivity of wage increases. Wendt's Exceptions to the Board at p. 15 to 20. Not surprisingly, Wendt's Exceptions argued waiver under the clear and unmistakable standard, the standard in effect at the time. The Board **subsequently stated that it was abandoning the standard and would in future cases apply the contract coverage standard.** *MV Transportation, Inc.*, 368 N.L.R.B. No. 66 (Sept. 10, 2019). In light of the Board's clear statement in *MV Transportation* that it would be applying the contract coverage standard going forward, Wendt was entitled to take the Board at its word that it had **abandoned** the clear and convincing waiver standard and that it

would decide Wendt's Exception to the ALJ's decision finding no waiver under the contract coverage standard.

The General Counsel's contention that the lack of a written agreement ignores the fundamental principle of contract law that a contract can be formed by way of offer, acceptance and performance. *United States of America ex rel. Modern Elec., Inc. v. Ideal Electronic Security Co.*, 81 F.3d 240, 241 (D.C. Cir. 1996). The record evidence is undisputed here that there was an offer, acceptance and performance. As set forth in Wendt's Opening Brief, because the agreement reached expressly provided the date for retroactive wage increases, the issue of retroactivity clearly was within the subject matter covered by the agreement reached by the parties. Therefore, the Union was foreclosed from demanding further bargaining on this issue. *Wilkes-Barre Hospital Company, LLC*, 857 F.3d 364 (D.C. Cir. 2017).

The General Counsel's assertion that "bargaining" and "make-whole" remedies are not inconsistent is disingenuous at best and confirms that these dual remedies impermissibly dictate the outcome of that bargaining. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). Indeed, this dual remedy is directly contradicted by the Board's own finding that the parties **would bargain** regarding additional retroactivity of the wage increase. That is, the Board's make whole remedy contradicts its own holding that retroactivity was to be the subject of

future bargaining and, again, necessitates a reversal of the Board's ruling.

Moreover, if the Court should somehow find that there was an agreement to continue bargaining over additional retroactivity, then a "make whole" remedy is nonsensical and amounts to a duplicative award.

POINT V: THE GENERAL COUNSEL FAILED TO MEET ITS BURDEN OF ESTABLISHING A CAUSAL CONNECTION BETWEEN HUDSON'S UNION ACTIVITIES AND HIS REASSIGNMENT

In its Brief, the General Counsel fails to tie the reassignment of Hudson and the denial of overtime to any of his Union activities. Indeed, the union activities of Hudson cited by the General Counsel involved his initial organizing activities which occurred almost a year prior to his reassignment. General Counsel's Brief at 39. As this Court has held, the General Counsel not only must present evidence that Wendt knew of Hudson's pro-union activities, but also show that "the timing of the alleged reprisal was proximate to the protected activities and that there was anti-union animus to link the factors of timing and knowledge to the improper motivation." *Meco Corp. v. NLRB*, 986 F.2d 1434 (D.C. Cir. 1993).

Here, the General Counsel's failure to point to union activities by Hudson that were proximate in time to his temporary reassignment and denial of overtime underscore that the Board's finding must be reversed. If this were not enough, the General Counsel does not dispute in its Brief that other employees were reassigned following the layoff or that other Union supporters were assigned overtime.

Indeed, with respect to the denial of overtime, the General Counsel has not disputed the record evidence that both Hudson and other Union supporters were granted overtime. Wendt's Opening Brief at p. 22-23 and 49-50. This fact alone required that the Board cite to some specific evidence linking Hudson's denial of overtime to his union activities. The General Counsel's inability to come forth with any such evidence requires a reversal of the Board's finding that Wendt's decision to reassign Hudson and deny him overtime was motivated by his Union activities. *Meco Corp. v. NLRB*, 986 F.2d 1434 (D.C. Cir. 1993).

POINT VI: THE GENERAL COUNSEL'S BRIEF IS CONTRARY TO THE BOARD'S OWN FINDINGS REGARDING WEINGARTEN RIGHTS

Under the Supreme Court's ruling in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-260 (1975), this Court must reject those portions of the General Counsel's Brief which argue that the events leading up to the meeting with Fricano constitute evidence that the meeting was an investigatory meeting triggering his rights under *Weingarten*. General Counsel's Brief at p. 45-46. Indeed, these arguments by the General Counsel directly contradict the Board's findings in this case. Specifically, the Board expressly found that Wendt had decided—**prior to** the meeting—to discipline Fricano. Thus, the sole basis for the Board's Decision and the sole issue before this Court is whether, because the disciplinary document contained an option for Fricano to check a box to indicate whether he agreed or

disagreed with the discipline, this option converted the meeting into a *Weingarten* interview. (Decision at Note 6).

As set forth in Wendt's Opening Brief, it is well-settled—as the Board itself acknowledged in its decision—that a request that an employee sign or acknowledge a discipline only triggers the employee's rights under *Weingarten* if the disciplinary form seeks facts or evidence *in support of the decision* or to have the employee admit his wrong doing or sign a form to that effect. (Decision at Note 7).

Nowhere did General Counsel in its Brief provide any record evidence that Fricano believed, reasonably or otherwise, that—simply by being provided with an option to agree or disagree with the discipline or provide comments—he would be subject to any further discipline. Of course, this is because there is no such evidence in the record. Accordingly, it was an error of law for the Board to determine that, by simply providing a standard disciplinary form to Fricano, the meeting was converted to an investigatory interview, triggering Fricano's *Weingarten* rights.

CONCLUSION

For the reasons set forth in Wendt's Opening Brief and this Reply, Wendt's Petition to set aside and vacate the Board's July 2020 Decision and Order should be granted in its entirety.

Dated: March 9, 2021

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ADDENDUM

ADDENDUM : STATUTES AND REGULATIONS

29 U.S.C. § 158

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

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

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

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

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LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE
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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(a).

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Dated: March 9, 2021

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