

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

WISMETTAC ASIAN FOODS, INC.

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 630**

and

ROLANDO LOPEZ, an Individual

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

Case 21-CA-212285

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

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I. PRELIMINARY STATEMENT OF THE CASE

On August 30, 2019, Administrative Law Judge (ALJ) Laws issued her decision in the above matter, finding that Wismettac Asian Foods, Inc. (Respondent) had engaged in numerous violations of the Act, including unlawfully disciplining employee Roland Lopez (Lopez) for complaining about safety conditions during a safety meeting. In reaching her decision, the ALJ applied an *Atlantic Steel*¹ analysis to the facts at issue. After the ALJ's decision issued in the instant case, the Board, in *General Motors*, 369 NLRB No. 127 (2020), held that it would no longer apply an *Atlantic Steel* analysis to determine whether an employer had unlawfully discharged, or otherwise disciplined, an employee who engaged in abusive conduct in connection with protected concerted activity. Rather, the Board held that it would similarly analyze these types of allegations under a *Wright Line*² analysis. In light of the Board's ruling in *General Motors*, the Board in this case remanded the allegation that Respondent unlawfully disciplined employee Lopez by issuing him a verbal counseling record for further proceedings, while applying a *Wright Line* analysis to the facts at issue.

Thereafter, on January 19, 2021, the ALJ issued her Decision on Remand in the above matter, concluding that under both a *Burnup & Sims*³ and a *Wright Line* analysis, Respondent violated Section 8(a)(1) and (3) the National Labor Relations Act (Act) by disciplining driver Lopez for speaking out about drivers' working conditions at a safety meeting.

In its exceptions, Respondent now seeks to undermine the ALJ's well-supported findings with baseless arguments in an effort to deflect from the clear evidence that cuts against it.

¹ 245 NLRB 814 (1979).

² 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

³ 379 U.S. 21 (1964).

Accordingly, it is thus respectfully requested that Respondent's exceptions be rejected in their entirety, as they do not warrant disturbing the ALJ's findings and conclusions of law.

II. STATEMENT OF FACTS

Respondent imports and distributes perishable goods. (ALJDR 2:25-26.)⁴ At its Santa Fe Springs facility, Respondent employs over 100 employees, including drivers. (ALJDR 2:25-31.) At the time of the hearing, employee Lopez had worked for Respondent as a driver for over ten years. (ALJDR 3:fn. 3)

Respondent violated Section 8(a)(1) of the Act by disciplining longtime driver Lopez for voicing safety concerns at a December 4, 2017 safety meeting. (ALJDR 10:13-15; GC Exh. 3.) Specifically, on December 5, 2017, Respondent issued Lopez a verbal counseling for "making comments of other drivers [sic] issues that we had, that had nothing to do with the briefing." (ALJDR 5:5-14; GC Exh. 3.)

Moreover, Respondent violated Section 8(a)(3) of the Act by issuing Lopez the verbal counseling in response to his union activities. (ALJDR 8:21-24; 10:17-18.) In the months leading up to the December 5, 2017 verbal counseling, Lopez had been a vocal union supporter, by encouraging employees to vote in favor of unionization. (ALJDR 2:39-41; 3:1-8.)

A. December 5, 2017 – Verbal Counseling Issued to Rolando Lopez for Raising Drivers' Concerted Safety Concerns

In the days leading up to the December 4, 2017 safety meeting, after Plant Manager Anthony Vasquez (Vazquez) ordered driver Agustin Troncoso (Troncoso) to operate an

⁴ References to the ALJ's January 19, 2021 decision are cited herein as "ALJDR" followed by the page(s) and line number(s). Citations to the hearing transcript will be referred to as "Tr." followed by the appropriate page number(s). Citations to the Counsel for the General Counsel's exhibits, the Respondent's exhibits, and the Union's exhibits will be referred to as "GC Exh.," "R. Exh.," and "U Exh.," respectively, followed by the appropriate exhibit number(s). Citations to the Respondent's Brief in Support of its Exceptions will be referred to as "R. Br." followed by the appropriate page number(s).

overweight delivery truck, drivers Lopez, Yader Alvarado (Alvarado), and Troncoso openly discussed with one another their safety concerns with operating Respondent's overweight delivery trucks. (ALJDR 4:17-23.) Then, on December 4, 2017, Respondent held a safety meeting with all of the drivers, about 30 of them, including Lopez, Alvarado, and driver Giovanni (last name unknown). (ALJDR 4:25.) Also present at this meeting were Plant Manager Vasquez, supervisor Jose Romero (Romero), and Assistant Operations Manager Susan Sands (Sands). (ALJDR 4:26-28.) The meeting was led by Frank Matheu (Matheu), Respondent's Acting Deputy Regional Manager. (ALJDR 4:30-32.)

Matheu started the safety meeting by reviewing accidents that had occurred the previous week, including discussing a safety incident that had occurred at another of Respondent's warehouses. (ALJDR 4:30-32.) Realizing that the meeting was to address safety issues, Lopez sought an opportunity to make upper management aware of the safety issues drivers were facing. (ALJDR 4:30-34.) As such, Lopez, speaking in Spanish, asked Matheu if he could speak, and then told Matheu that he believed Vasquez forced driver Troncoso to drive an overweight delivery truck. (ALJDR 4:32-34.) After some back-and-forth between Matheu and Lopez, Matheu asked Lopez to lower his voice. (ALJDR 4:35-36.) Then, after about two minutes, when Matheu asked Lopez to end the conversation, Lopez immediately complied with Matheu's request. (ALJDR 4:37; 8:4-5.)

While at the safety meeting, in response to the safety concerns raised by Lopez, Supervisor Romero told Lopez that there was no reason to bring up an individual case during the safety meeting, claiming that Troncoso's work issue on the day in question was related to his truck airbrakes. (ALJDR 4:3-40.) However, also at the meeting, driver Giovanni flat out rejected Romero's claim—that Troncoso's issues were his airbrakes—and reiterated Lopez's position that

the problem was, in fact, the overweight delivery trucks that drivers were being forced to operate. (ALJDR 4:40-41; 5:1-2.) At no point during the safety meeting did Lopez use any profanity, threaten anyone, or engage in any physical contact with any of the attendees. (ALJDR 4:2-3.)⁵

Immediately the next day after the safety meeting, on December 5, 2017, Supervisor Romero and Plant Manager Vasquez summoned Lopez for a meeting. (ALJDR 5:5-6.) During this meeting, Romero told Lopez that he was going to be issued a verbal warning for having brought up an individual case at the safety meeting. (ALJDR 5:6-14.) The written verbal counseling record issued to Lopez confirms that Lopez was disciplined for speaking out about drivers' issues at the safety meeting.⁶ (ALJDR 4:9-14; GC Exh. 3.)

Only after Lopez was issued the verbal counseling, at human resources' request, Assistant Operations Manager Sands, who was present at the safety meeting, met with human resources on December 8, 2017, and submitted a statement to human resources on December 11, 2017, regarding what had transpired at the December 4, 2017 safety meeting. (ALJDR 5:16-19; R. Exh. 3.)

B. December 5, 2017 – Verbal Counseling Issued to Rolando Lopez for Assisting the Union During the Organizing Drive

In the Spring of 2017, the International Brotherhood Teamsters, Local 630 (the Union) began to organize Respondent's employees, including the drivers. (ALJDR 2:39-41; 3:1-2.) On August 21, 2017, when the Union requested voluntary recognition from Respondent, Lopez was part of the employee delegation that accompanied the Union to request voluntary recognition from Respondent. (ALJDR 3:4-8.) Moreover, Lopez was also a member of the union committee, which was responsible for assisting the Union with the organizing drive. (ALJDR 2:39-41; 3:1-2.) And,

⁵ Sands does not speak or understand Spanish. (ALJDR 5:18-19.)

⁶ Lopez did not realize that he had been issued a *written* verbal counseling record until several weeks after the safety meeting when he was reviewing his personnel file and discovered the document in his file. (ALJDR 5:fn.. 7.)

the week before the September 19, 2017 election for representation was held at Respondent's facility, on September 8, 2017, Matheu and one of Respondent's labor consultants met with Lopez and his brother (Luis Lopez).⁷ (ALJDR 3:24-31.) During this meeting, Respondent told Lopez and his brother that Respondent would make changes so long as there was no third party at the facility. (ALJDR 3:24-31.) Respondent's labor consultant also called the organizing drive a revenge on the part of employees and asked Lopez and his brother to seek certain guarantees from the Union. (ALJDR 3:24-31.)⁸

III. ANALYSIS

The ALJ Properly Found That Driver Lopez Engaged in Protected Concerted Activities During the December 4, 2017 Safety Meeting and was Disciplined for Voicing Drivers' Safety Concern (Respondent's Exceptions Nos. 1 through 22.)

The ALJ concluded that Lopez engaged in protected concerted activities during the safety meeting and, in applying a *Burnup & Sims* and *Wright Line* analysis, concluded that Respondent violated the Act by issuing driver Lopez a verbal counseling record for voicing drivers' safety concerns. (ALJDR 8:26-28.)

In its exceptions to the ALJDR, Respondent's arguments center around its unsubstantiated belief that Lopez did not engage in protected concerned activities during the safety meeting. Rather, Respondent, in its exceptions, claims that Lopez was disciplined for insubordination, including, "crossing the line" during the safety meeting.⁹

⁷ The results of the first election were set aside and a second election was held on February 6, 2018. (ALJDR 4:12-15; 4:fn. 4.)

⁸ In *Wismettac Asian Foods, Inc.*, 370 NLRB No. 35 (2020), the Board affirmed the ALJ's findings that Respondent, on September 8, 2017, promised employees better benefits and improved terms and conditions of employment if employees rejected the Union as their bargaining representative.

⁹ Respondent similarly takes issue with the ALJDR's decision not to credit Respondent's witnesses over certain events. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362

Contrary to Respondent’s unsupported claims, the ALJ appropriately found, as supported by the record, that driver Lopez – by speaking about safety issues at a safety meeting where other drivers also spoke up about those same safety concerns – engaged in protected concerted activities. (ALJDR 7:9-24.) In general, to find an employee’s activity to be “concerted,” it must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984). Here, Respondent arranged a meeting with the drivers, in part, to discuss safety issues. (ALJDR 4:25-33.) Given the nature of the meeting, and the incident that had transpired a few days before the meeting—where a driver was forced to operate an overweight delivery truck and a few of the drivers had openly discussed with one another their safety concerns of being required to operate overweight delivery trucks—during the safety meeting Lopez took the opportunity to raise drivers’ safety concerns of being forced to operate overweight delivery trucks. (ALJDR 4:17-37.) Furthermore, Lopez’s comments during the safety meeting were not mere griping about an individual’s personal issues. (ALJDR 7:fn. 11.) In fact, when Supervisor Romero tried to dismiss Lopez’s complaints by admonishing him for bringing up an “individual case” to a group meeting, at least one other driver similarly reiterated Lopez’s safety concerns with the overweight delivery trucks that drivers were being forced to operate. (ALJDR 4:39-41; 5:1-3.)

1. Respondent Violated Section 8(a)(1) and (3) of the Act by Disciplining Lopez under *Burnup & Sims* Analysis

Respondent excepts to the ALJ’s finding that Respondent violated the Act by disciplining driver Lopez for engaging in protected concerted activities at the safety meeting.

(3d Cir. 1951). Respondent fails to present any credible basis for reversing the ALJDR’s credibility findings.

As noted by the ALJ, "...an employee's discipline independently violates Section 8(a)(1), regardless of the employer's motive or a showing of animus, where 'the very conduct for which employees are disciplined is itself protected concerted activity,'" citing *Burnup & Sims*. (ALJDR 6:19-23.) *Burnup & Sims* analysis is applicable to the instant case given that Lopez was disciplined for engaging in protected concerted activities, and Lopez did not engage in misconduct during the safety meeting as alleged by Respondent. (ALJDR 6:33-35.) Under the principles set forth in *Burnup & Sims*, when an employer disciplines an employee for misconduct arising out of a protected activity, the employer has the burden of showing that it held an honest belief that the employee engaged in misconduct. 379 U.S. at 23. The ALJ appropriately concluded that Respondent failed to establish that Lopez was issued a verbal counseling record "...based on an honestly held belief that he had engaged in misconduct in the course of protected activity." (ALJDR 8:26-28.)

First, while Respondent attempts to exaggerate Lopez's conduct at the safety meeting, claiming that Lopez engaged in misconduct by being loud and aggressive during the safety meeting—thereby warranting disciplinary action—the ALJ specifically rejected this argument, noting that even if Lopez raised his voice and spoke out aggressively at the safety meeting, such behavior on Lopez's part did not rise to the level of "misconduct." (ALJDR 8:5-12.) Secondly, the ALJ rejected Respondent's claims that Lopez was disciplined because his conduct at the safety meeting frightened Operations Manager Sands. (ALJDR 8:14-24.) In doing so, the ALJ noted that in the written statement, prepared by Sands *after* Lopez was issued the verbal counseling record, not once did Sands mention that she had been frightened by Lopez's conduct at the meeting nor did Sands state such was the case during her testimony. (ALJDR 8:14-24.) In fact, given that Sands does not speak or understand Spanish, Sands was unable to understand what was being said during

the safety meeting, during which Lopez spoke in only in Spanish. (ALJDR 8:17-19.) Moreover, as noted by the ALJ, at no point during the safety meeting did Lopez use any profanity, make any threats towards anyone, act insubordinately, or touch anyone present. (ALJDR 8:10-11.)

Despite Respondent's failed attempts to exaggerate Lopez's conduct during the safety meeting, the language in the verbal counseling record issued to Lopez stating that he, "was making comments of other drivers' issues that we had..." is irrefutable evidence that Lopez was disciplined for concertedly presenting drivers' work issues in a group setting. (GC Exh. 3.)

Furthermore, in addition to finding that Lopez engaged in protected concerted activities when he complained about the safety of the overweight delivery trucks at a safety meeting, in light of Lopez's union activism, the ALJ properly concluded that the verbal counseling issued to Lopez for alleged misconduct was nothing more than pretext, "...drummed up to discipline union supporter Lopez, in the height of the union campaign," in violation of Section 8(a)(3) of the Act. (ALJDR 8:21-28.)¹⁰

¹⁰ In its exceptions, Respondent excepts to the ALJ's findings that Respondent violated Section 8(a)(3) by disciplining Lopez. Respondent's arguments are centered around its claim that Lopez did not engaged in protected concerted activity during the December 4, 2017 safety meeting. Respondent did not except to the ALJ's finding that Respondent violated Section 8(a)(3) on the basis that it was not specifically pled in the Second Consolidated Complaint.

Although the Second Consolidated Complaint does not include an 8(a)(3) violation with regards to the facts at issue here, the ALJ nonetheless properly concluded that Respondent's conduct in issuing Lopez the verbal counseling record also violated Section 8(a)(3) of the Act. It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Whether a matter has been fully litigated rests in part on "whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *In re Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191 (2012), citing *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989).

In this case, irrespective of whether Respondent violated Section 8(a)(1) and/or (3) of the Act, the ultimate issue in both allegations is precisely the same: whether Respondent issued Lopez the verbal counseling record for reasons that are unlawful under the Act. *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989) (judge appropriately concluded that respondent's refusal to hire employees violated Section 8(a)(4)

Therefore, by failing to establish that it disciplined driver Lopez based on an honestly held belief that Lopez engaged in misconduct during the December 4, 2017 safety meeting while engaging in protected concerted activities as the meeting, in applying *Burnup & Sims* analysis, the ALJ accordingly concluded that Respondent violated Section 8(a)(1) and (3) of the Act. (ALJDR 8:26-28.)

2. Respondent Violated Section 8(a)(1) of the Act by Disciplining Lopez Under a *Wright Line* Analysis

Similarly, as concluded by the ALJ, applying a *Wright Line* analysis to the instant case, warrants the same finding, that Respondent violated the Act by disciplining driver Lopez for engaging in protected concerted activities. (ALJDR 10:13-14.)

The Board uses the burden-shifting scheme set forth in *Wright Line* to determine whether an adverse employment action against an employee violates Section 8(a)(1) or (3) the Act. Under *Wright Line*, the General Counsel has the burden of establishing that an employee's protected activity was a motivating factor for the adverse employment action taken against that employee. The General Counsel can meet this burden by showing that: (1) the employee was engaged in protected activity; (2) that the employer had knowledge of that activity; (3) that the employer had animus toward the activity, and (4) that there is a causal relationship between the employee's protected activity and the employer's adverse employment action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019).

of the Act rather than Section 8(a)(3) as alleged, noting in part that both Sections of the Act involved the same set of facts—the lawfulness of the respondent's motivation for failing to hire the employees); see also *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004) (supervisor's alleged 8(a)(1) and (3) statements and refusal to transfer an employee both also violated 8(a)(4)). Here, there is no question that the 8(a)(3) allegation is closely related to the 8(a)(1) allegation in the Second Consolidated Complaint, and the allegation was fully litigated by the parties at the hearing.

As the ALJ concluded, the General Counsel's *prima facie* case is easily established in this case. (ALJDR 9:16-17.) First, as discussed above, Lopez engaged in protected concerted activities; when Lopez spoke out at the safety meeting, he was bringing forth drivers' safety concerns about being required to operate overweight delivery trucks, leading to other drivers similarly voicing their safety concerns at the meeting with regards to drivers being required to operate overweight delivery trucks. (ALJDR 9:6-7.) Second, Respondent clearly harbored animus by directing Lopez, multiple times during the safety meeting and the next day after the meeting, not to voice other drivers' concerns. (ALJDR 9:9-16.)

Despite the fact that the Board no longer applies an *Atlantic Steel* analysis to determine whether an employer unlawfully discharged, or otherwise disciplined, an employee who engaged in abusive conduct in connection with the protected concerted activity, in its exceptions, Respondent appears to be applying the wrong legal standard to this case, by implicitly advocating for an *Atlantic Steel* type of analysis, by arguing that, "While the Act protects concerted activity, it does not protect insubordinate conduct of the type engaged by Mr. Lopez," noting that "...concerted activities can also cross a line where they become insubordinate and disruptive and are not protected."

Contrary to Respondent's arguments for a different legal standard, under *Wright Line*, if the General Counsel meets its burden and shows that the employee's protected activity was a motivating factor for the adverse employment action, the burden of persuasion shifts to the employer, who must prove it would have taken the same adverse employment action even in the absence of the employee's protected activity. (ALJDR 9:19-24.) The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must "persuade" that the action would have taken place absent the protected conduct "by a preponderance of the

evidence.” *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion, a violation of the Act may be found. *Id.*, citing *Bronco Wine Co.*, 256 NLRB 53 (1981).

In finding that Respondent failed to satisfy its burden of persuasion under a *Wright Line* analysis, the ALJ rejected Respondent’s claims that Lopez’s conduct at the meeting “crossed the line,” by disrupting the safety meeting and by being aggressive and sarcastic. (ALJDR 9:34-38.) Rather, in line with the *Burnup & Sims* analysis discussed above, the ALJ concluded that such explanation was nothing more than Respondent’s pretextual attempt to mask its true discriminatory motive for disciplining driver Lopez. (ALJDR 9:34-38.) Even more so, in finding that Respondent failed to satisfy its burden, the ALJ noted that at no point did Respondent present any evidence that it had disciplined other employees for engaging in similar conduct. (ALJDR 9:40-41.) And, with regards to Operating Manager Sands’ statement, the ALJ similarly found this “evidence” to be pretextual evidence, highlighting that the statement was prepared after Lopez was disciplined and thus could not have been relied upon by Respondent to discipline Lopez in the first place. (ALJDR 9:41; 10:1-11.)

In light of Respondent’s failure to meet its burden that it would have disciplined Lopez even in the absence of protected concerted activity, in applying a *Wright Line* analysis, the ALJ concluded that Respondent similarly violated Section 8(a)(1) of the Act by disciplining driver Lopez for raising drivers’ concerns during the December 4, 2017 safety meeting. (ALJDR 10:13-14.)

IV. CONCLUSION

In summary, the record fully supports the conclusion that Lopez's alleged misconduct occurred in the context of both union and protected concerted activities and, therefore, that Respondent's discipline for alleged misconduct is unlawful under a *Burnup & Sims* and/or a *Wright Line* analysis. Accordingly, the Board should reject Respondent's exception to the ALJ's Decision on Remand, and find that Respondent disciplined Lopez in violation of Section 8(a)(1) and (3) of the Act.

Dated: March 15, 2021

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision on Remand of the Administrative Law Judge in Cases 21-CA-207463, 21-CA-208128, 21-CA-209337, 21-CA-213978, 21-CA-219153, and 21-CA-212285, have been submitted by E-Filing to the National Labor Relations Board, Executive Secretary, on March 15, 2021. The following parties have been served with a copy of the same documents by e-mail:

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Respectfully submitted,

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DATED at Los Angeles, California, this 15th day of March, 2021.