



United States Government
NATIONAL LABOR RELATIONS BOARD
 Region 8
 1240 East 9th Street - Room 1695
 Cleveland, OH 44199-2086

Telephone: (216) 522-3715
 Fax: (216) 522-2418
www.nlr.gov

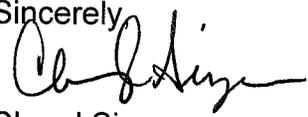
November 23, 2009

National Labor Relations Board
 Attn: Lester Heltzer, Executive Secretary
 1099 – 14th Street, NW
 Washington, DC 20570

RE: Camaco Lorain Manufacturing Plant
Case No 8-CA-36785

Dear Mr. Heltzer:

Attached herein is the General Counsel Exceptions and Brief in Support for the above-captioned case.

Sincerely,

 Cheryl Sizemore
 Counsel for the General Counsel
 Region 8

Electronically filed

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

CAMACO LORAIN MANUFACTURING PLANT

And

CASE NO. 8-CA-36785

**UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW, REGION 2B**

**EXCEPTIONS OF COUNSEL FOR THE
GENERAL COUNSEL AND BRIEF IN SUPPORT**

Cheryl Sizemore
Counsel for the General Counsel
National Labor Relations Board
1695 AJC Federal Building
1240 East Ninth Street
Cleveland, OH 44199

Richard R. Mellot, Jr., Esq.
Trigilio & Stephenson, PPL
5750 Cooper Foster Park Road, W
Suite 102
Lorain, OH 44053-4132

TABLE OF AUTHORITIES

Cases

<i>Bourne Co. v. NLRB</i> , 332 F.2d 47 (2d Cir. 1964).....	12
<i>Camaco Manufacturing Plant</i> , 353 NLRB No. 64 (2008)....	.1, 11,17
<i>Dallas & Marvis Specialized Carrier Co.</i> , 346 NLRB NO. 27 (2006)	20
<i>Flexsteel Industries</i> , 311 NLRB 257 (1993).....	19
<i>Fred'k Wallace & Son</i> , 331 NLRB 914 (2000)	19
<i>Frontier Telephone of Rochester</i> , 344 NLRB 1270 (2005).....	18, 19
<i>Grass Valley Grocery Outlet</i> , 338 NLRB 877 (2003).....	16, 17
<i>Medcare Associates Inc.</i> , 330 NLRB 935 (2000).....	12
<i>Nicholas County Health Care</i> , 331 NLRB 970, 977 (2000)	20
<i>Performance Friction Corp.</i> , 335 NLRB 117 (2001).....	11
<i>Pleasant Manor Living Center</i> , 324 NLRB 368 (1997)	12
<i>Rossmore House</i> 269 NLRB 1176 (1984)	9, 12, 14, 15
<i>Spartech Corp.</i> , 344 NLRB NO. 72 (2005).....	20
<i>Sproule Construction Co.</i> , 350 NLRB 774 (2007).....	17
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).....	6, 9, 12, 13
<i>U.S. Service Industries</i> , 314 NLRB 30, 31 (1994) enfd. Mem. 80 F.3d 558 (D.C. Cir. 1996)	27

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

CAMACO LORAIN MANUFACTURING PLANT

and

CASE NO. 8-CA-36785

**UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW, REGION 2B**

**EXCEPTIONS OF COUNSEL FOR THE
GENERAL COUNSEL AND BRIEF IN SUPPORT**

Administrative Law Judge Keltner W. Locke issued his supplemental decision in the above-captioned case, JD-24-09, on September 28, 2009.¹

I. EXCEPTIONS

Counsel for the General Counsel excepts to the following findings of fact and conclusions of law made by Judge Locke in this matter:²

1. JD, page 4, lines 24-26

Judge Locke's findings and conclusions that Cheers testimony was not credible, and that Respondent had discharged him and resentment over that termination would incline Cheers to bend his testimony to hurt Respondent.

2. JD, page 4, lines 26-27

¹ On December 18, 2008, the Administrative Law Judge's decision JD-16-07 regarding Camaco Lorain Manufacturing Plant Case No. 8-CA-36785 was remanded by the Board in *Camaco Manufacturing Plant*, 353 NLRB No. 64 (2008). References to the ALJ's original decision will be identified as JD-16-07.

² All further page and line references in the Exceptions are to Judge Locke's decision, JD-24-09. Where "JD" is used herein, it will refer to the written decision issued by Judge Locke; Where "Tr." is used herein, it will refer to the transcript. Where "G.C. Exh." is used herein, it will refer to General Counsel's Exhibit. Where R. Exh. is used herein, it will refer to Respondent's Exhibit. Where Jt. Exhibit is used herein, it will refer to Joint Exhibit.

Judge Locke's finding that Jones testified in a way that did not offer him any satisfaction of revenge.

3. JD, page 5, lines 47-48; JD page 6, lines 1-2

Judge Locke's findings and conclusion that the record does not establish a history of employer hostility or discrimination.

4. JD, page 6, lines 15-16

Judge Locke's findings that Jones was not seeking information on which to base disciplinary action.

5. JD, page 6, lines 18-21

Judge Locke's findings of facts and conclusion that the third and fourth Rossmore House factors also militate against a finding of coercive interrogation.

6. JD, page 9, lines 33-34

Judge Locke's findings that the first four Rossmore House factors still weigh against finding an unlawful interrogation.

7. JD, page 9, lines 34-38

Judge Locke's findings that the record does not establish:

(1) a history of employer hostility or discrimination;

(2) Jones was seeking the information, or that he appeared to be seeking the information, as a basis for taking action against employees;

(3) Jones was not high in the management structure; and

(4) the interrogation did not take place in a locus of authority.

8. JD, page 9, lines 40-42

Judge Locke's finding that only the fifth Rossmore House factor weighs in favor of finding that the question was coercive and therefore unlawful.

9. JD, page 10, line 23

Judge Locke's findings and conclusions that the present facts appear to fall within the Frontier Telephone of Rochester precedent.

10. JD, page 10, lines 24-27

Judge Locke's findings and conclusions that (1) employees openly discussed the Union organizing meetings; and (2) in these circumstances, a reasonable employee likely would conclude that the supervisor learned of the Union meeting lawfully, rather than as the result of surveillance.

11. JD, page 10, lines 27, 39-40

Judge Locke's findings and conclusion that Supervisor's Jones question did not create an unlawful impression of surveillance.

12. JD, page 10, lines 43-46

Judge Locke's findings and conclusions that Jones did not make the statement that there was not going to be a union in the plant, that employees tried before and people got fired.

13. JD, page 23, lines 45-47

Judge Locke's findings and conclusions that Allen took offense because Serrano's stated unwillingness to work would keep the whole team from receiving the incentive.

14. JD, page 24, lines 47-50

Judge Locke's findings and conclusion that Jones' accounts of Allen, Serrano, Potts and Dellipoala differ in some details but in general paint a fairly consistent picture of what transpired, and then that the differences in testimony do not suggest any attempt to conceal or distort.

15. JD, page 25, lines 15-17

Judge Locke's findings and conclusions that Allen's testimony was credible that other employees had demonstrated their ability to meet their standard; and that Allen might reasonably infer that Serrano did not meet the standard because he was unwilling to "bust his butt".

16. JD, page 25, lines 28-31

Judge Locke's findings and conclusions that General Counsel has not proven, by a preponderance of the evidence, a connection between Serrano's protected activity and his discharge; and that even assuming that the government had established such a nexus, Respondent met its burden.

17. JD, page 25, lines 38-40

Judge Locke's findings and conclusions that Respondent cannot be expected to produce evidence that it had treated other employees similarly in similar instances; and that there were no similar instances because of the newness of the program.

18. JD, page 26, lines 7-11

Judge Locke's findings and conclusions that Respondent had reason to believe that unwillingness contributed to Serrano's failure to meet the standard because other employees, on a different shift, had met the standard.

19. JD, page 26, lines 13-14

Judge Locke's findings and conclusions that it does not matter whether Serrano was unwilling or unable to meet the standards. Rather, what matters is that Serrano did not do so and said he could not do so.

20. JD, page 26, lines 24-25, 30

Judge Locke's conclusion that Respondent lawfully discharged Serrano, and recommends that the Board dismiss this allegation.

II BRIEF OF THE COUNSEL FOR THE GENERAL COUNSEL IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Counsel for the General Counsel files these exceptions because the Supplemental Decision issued by ALJ Locke is seriously flawed and reflects, for a second time, the ALJ's failure to closely review the record and consider the undisputed testimony from some of the witnesses credited by the ALJ. He wholly ignored the testimony of witnesses who credibly testified to the events that led to the Respondent's unlawful actions. First, as demonstrated below, the Judge clearly misunderstood and misapplied the facts that caused him to reach factual conclusions not supported by the record. In addition, the Judge's legal analysis is also disconnected from Board law and the facts in the record, and he ignores the manner in which the *Camaco* Board ordered these allegations to be analyzed on remand. That is the only way he could have concluded, for example, that the unlawful interrogation and creation of an impression of surveillance engaged in by the Respondent was perceived as nothing more than a harmless joke. Finally, and for a second time, the Judge's credibility resolutions were superficially crafted. He offered

minimal explanations for his credibility findings, ignored key contradictions in the testimony of Respondent's witnesses, failed to credit General Counsel's witnesses when they testified consistently and omitted credibility resolutions on critical conflicting testimony.

Counsel for the General Counsel acknowledges that the Board's established policy is to not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Counsel for the General Counsel urges for the second time, however, that the evidence presented herein supports a reversal of Judge Locke's decision on the basis of his misconstruing the facts, making ill-considered credibility resolutions and misapplying Board law. The preponderance of the evidence in the instant case contradicts the Judge's credibility resolutions.

A. Credibility Issues Related to the Allegation of Unlawful Interrogation

Four witnesses testified regarding the allegation of unlawful interrogation. Respondent presented one witness, former supervisor Lewie Jones, who admitted that he questioned certain employees about attending a union organizing meeting held at Denny's restaurant.

Counsel for the General Counsel presented three witnesses, two of whom are current employees, Alejandro Velazquez and Ralphy Vargas, and a former employee Andre Cheers. Judge Locke in his decision credited Velazquez's testimony over that of Supervisor Jones regarding the interrogation. Judge Locke further found that Jones asked

Ralph Vargas a similar question regarding his attendance at the meeting the evening before. JD page 4, lines 36-38, page 5, lines 9-23.

Second, Judge Locke noted that there was no reason to believe that Vargas harbored animus toward the Respondent, and therefore no reason to doubt the truthfulness of his testimony. JD page 5, lines 18-20. Thus, the Judge properly concluded that Jones had in fact questioned Vargas and Velazquez about their attendance at the Union meeting. JD page 5, lines 22-23.³

The Judge, however, refused to credit Andre Cheers' testimony apparently because he believed that Cheers had been terminated and therefore harbored animus toward Respondent. JD page 4, lines 24-26. Cheers, however, was not terminated. Rather, Cheers' undisputed testimony both on direct and cross examination, was that he failed a drug test and could not return to work until he completed a work related drug program. Cheers', on his own, elected to find other employment rather than incur the cost of a drug program. Tr. 161. The Respondent's Drug-Free Workplace Program and Policy corroborates Cheers' testimony. Jt. Exh. 1. (pg. 10-16 of Respondent's Handbook) Equally significant, none of Respondent's witnesses rebutted his testimony. Simply put, Judge Locke's finding that Cheers was terminated by Respondent is unsupported by the record. It then follows that ALJ Locke erroneously concluded that Cheers' testimony is not worthy of belief because it was based on the belief that Cheers was terminated.

More importantly, Cheers testimony was consistent with the testimony of Velazquez and Vargas. Tr. 161. Like Velazquez and Vargas, Cheers did not admit to Jones that he attended the meeting. Tr. 165. Even the ALJ found that more than one

witness testified that Jones asked about the Union meeting, which makes it more likely that Jones similarly questioned Cheers and made the statement in question. JD page 5, lines 9-11.

Counsel for the General Counsel submits that Judge Locke's misunderstanding or disregard of the record evidence resulted in a flawed credibility determination regarding Andre Cheers.

It is noteworthy that Cheers' testimony regarding the inquiries made by Jones is made more plausible by the testimony of Respondent's witness, Human Resource Manager Karen Mayfield. Mayfield admitted that Jones reported to her that Cheers was involved in union activity at the facility. Tr. 460. Clearly, Jones had in fact spoke with Cheers regarding the Union, despite Jones' testimony that he had no knowledge of Cheers being involved in the Union. Tr. 235. Mayfield is still in Respondent's employ, and would have no reason to testify against Respondent's interest. Thus, there is no reason to doubt the truthfulness of her testimony on this point. Judge Locke totally ignored the conflicting testimony of Respondent's own witnesses and summarily credited Jones statement when Cheers' testimony regarding Jones' questions was more plausible and was consistent with that of Mayfield, Vargas, and Velazquez. Judge Locke's sole basis for not crediting Cheers is premised on his mistaken belief that Cheers was terminated and therefore harbored animus toward Respondent.

In summary, Cheers testimony is supported by the statements made by Respondent's Human Resource Manager, the Respondent's Drug-Free Work-Place Policy and Program, and the testimony of General Counsel's witnesses Vargas and Velazquez. Judge Locke's credibility determination as it relates to Cheers was incorrect

³ Jones asked the employees "How was the meeting?"

and should be reversed pursuant to established Board law. *Standard Dry Wall Products*, supra.

B. Unlawful Interrogation by Supervisor Lewie Jones

Counsel for the General Counsel submits, as explained below, that ALJ Locke misconstrued existing and well-established precedent regarding Board law relative to an 8(a)(1) finding of unlawful interrogation. A finding of unlawful interrogation requires that all the circumstances surrounding the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed under Section 7 of the Act. In making his supplemental decision on remand, Judge Locke erroneously evaluated the five factors that were highlighted in *fn 20 of Rossmore House 269 NLRB 1176 (1984)* and determined that four of the five factors were not present in the instant case. In *Rossmore House*, the Board suggested some factors that *may* be considered in determining whether an unlawful interrogation has occurred. Certainly, the factors noted in *Rossmore House* are to be considered, but they only represent some areas of inquiry. *Id* at 1178 *fn 20*. Specifically, the *Rossmore* Board stated that “These and other relevant factors are not to be mechanically applied in each case.” Yet, ALJ Locke did so, and erred in his application of the *Rossmore* factors to the instant case. This misapplication resulted in an erroneous conclusion.

The background facts and circumstances of the case as it relates to the interrogation need to be repeated in some detail here. General Counsel notes that discriminatee Sam Serrano contacted the Union to organize employees. Tr. 30, 91. The Union initially arranged to meet with a small group of employees at a Denny’s restaurant

in late February or early March 2006. Tr. 30-32, 91. The meeting was cancelled after Serrano determined that Supervisor Lewie Jones had found out about the meeting. Tr. 32, 93.

A second meeting was scheduled at Denny's restaurant on April 26, 2006. Six employees attended the meeting including Alejandro Velazquez, Ralph Vargan, Rodney Hoover, Andre Cheers, Sam Serrano, and Danielle Harris. G.C. Exh. 6, Tr. 33, 94, 144, 152, 163. At the time of the meeting Cheers, Vargan, and Serrano were supervised by Lewie Jones. Tr. 59, 153, 164. Jones prepared their evaluations, gave them raises, transferred them to various locations in the plant and disciplined them. There is no dispute that he was a statutory supervisor.

The morning after the Union meeting Velazquez, Vargan and Cheers were approached by Jones and asked, "How was the meeting yesterday?" Velazquez testified that he did not want to respond, so he continued to work. Tr. 147. Vargan testified that he stated, "I don't know what meeting you're talking about." Tr. 155.

Cheers testified that he was approached by Jones at the same time that Vargan was approached. Tr. 164. Jones asked "How did that meeting at Denny's go?" Tr. 164. Cheers responded that he didn't know what Jones was talking about. Tr. 165. Cheers testified that several hours later, Jones approached him in his work area after everyone had gone on break. Cheers testified that Jones stated "You're smarter than Sam. You've been around longer than him." Tr. 166. Cheers further testified that Jones stated that "they had tried to get a union before and people got fired." Tr. 167. Cheers did not respond to Jones' statements. Cheers testified that he immediately told Serrano that

Jones knew about the Union meeting at Denny's and that he no longer wanted to be involved in a Union. Tr. 168, 172.

Sam Serrano and UAW organizer Tom Zmarzek testified that the Union made a decision to stop the organizing campaign because Supervisor Jones had questioned employees about the Union meeting. Tr. 37, 97-98. Jones inquiry had a chilling effect on the Union's campaign. The fact that the Union's organizing drive was effectively halted before it could get off the ground is evidence that Jones' inquiries were violative of Section 8(a)(1) of the Act, a factor that was not considered by Judge Locke.

Not only did Judge Locke fail to consider the impact of Jones' statements on the dissolution of the organizing drive, but he also ignored the fact that Cheers, Velazquez, and Vargas had not previously disclosed their pro-Union sentiments to Jones.⁴ Furthermore, there was no evidence presented that Vargas, Velazquez, and Cheers had ever joked with Jones about the Union meeting. Instead, Jones only named one employee that joked about the meeting, Danielle Harris. *Camaco supra*, at 2. Judge Locke's apparent failure to recognize that General Counsel's witnesses were not in privity to jokes made about the meeting is critical to a finding that Jones' questions were coercive and threatening.

Respondent, by Jones, unlawfully interrogated and created an impression of surveillance with respect to these three individuals. To these individuals, Jones did not provide a valid purpose for the questions and/or statements communicated to the employees. Jones provided no assurances that there would be no reprisals. In similar circumstances, the Board has found a violation of 8(a) (1). *Performance Friction Corp.*,

⁴ The *Camaco* Board noted that there was no evidence presented that Vargas or Velazquez was an open union adherent. *Camaco supra*, at 2.

335 NLRB 117 (2001); *Pleasant Manor Living Center*, 324 NLRB 368 (1997). Simply put, ALJ Locke misconstrued material facts for a second time.

Equally important, Judge Locke misapplied most of the *Bourne* test factors noted in *Rossmore House*, including the background, the nature of the information sought, the personnel involved in the questioning, and the place and method of interrogation.⁵

Counsel for the General Counsel first notes that an analysis of the Rossmore factors does not require strict evaluation of each factor. *Medicare Associates Inc.*, 330 NLRB 935 (2000); *Rossmore House*, supra. With regard to the background factor, ALJ Locke “missed relevant record evidence” when he found that there was no evidence of past antiunion animus at the time Jones questioned the employees. First, Judge Locke analyzed this factor solely based on record evidence that included references to a previous settlement agreement between the parties. Because the settlement agreement was not produced at the hearing, ALJ Locke concluded that the record does not establish any history of employer hostility or discrimination. JD page 5, lines 48-49; page 6, lines 1-13.

Judge Locke overlooked relevant testimony by Respondent and General Counsel’s witnesses that establishes a history of employer hostility or discrimination. First, Respondent’s witness Human Resource Manager Mayfield’s testified that she held several meetings with supervisors, including Jones, aimed at combating the union organizing campaign. Tr. 459. Mayfield testified that Supervisor Jones made this report to her in about February 2006. Tr. 458. This meeting took place after Jones’ initial report that union activity was occurring at the facility. Tr. 458-459.

⁵ *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964)

Mayfield testified that she immediately spoke to supervisors about supervisory actions that would be deemed illegal. Tr. 459. Mayfield told them that she didn't want any illegal actions, specifically "no threats, interrogation, promises, surveillance." Tr. 459. She further testified that she told supervisors, "I don't want any illegal actions. If we do – violate any of this, it is illegal, and I've been through this before." Tr. 459-460. Mayfield testified that the previous illegal actions occurred in 2001. Tr. 460. The Judge failed to consider Mayfield's testimony regarding Respondent's previous actions during a Union campaign. In that connection, there is no reason to disbelieve her admissions on this point, especially in view of the position she holds with Respondent.

Similarly, Union Organizer Tom Zmarzek testified that the Union had attempted to organize Respondent's facility approximately five or six years ago. Tr. 28. The Union lost the election. Zmarzek testified that immediately after the election, approximately 22 union supporters were terminated. The Union filed Board charges and the case was settled. Tr. 28-29. While it is true that General Counsel did not enter into evidence the settlement agreement related to Respondent's previous unlawful activity, Mayfield and Zmarzek testified that Respondent had previously demonstrated antiunion animus during the Union's organizing drive. Mayfield's statement that "I don't want any illegal actions. If we do – violate any of this, it is illegal, and I've been through this before", can only militate a finding that the Employer had previously harbored anti-union animus. Tr. 459 – 460. Judge Locke disregarded the evidence on this point.

Likewise, General Counsel's witness Cheers, as previously noted, testified that Jones told him that the Employer would never allow a union to be at the facility. Jones further told Cheers that the Union had made a similar attempt previously but did not get

in. Tr. 167. Cheers' testimony regarding Jones' statements was corroborated by the testimony of Human Resource Manager Karen Mayfield and UAW organizer Tom Zmarzek. Tr. 28-30, 459-460. The ALJ's failure to consider witness testimony concerning Respondent's previous antiunion animus is yet another serious flaw that precluded a finding of unlawful interrogation.

As to the second *Rossmore* factor, "the information sought", Judge Locke found that the record did not establish that Jones was seeking information on which to base disciplinary action. JD, page 6, lines 15-16. Thus, ALJ Locke found that evidence of this factor was not present. Here again, ALJ Locke failed to analyze critical evidence found in and established on the record. Accordingly, General Counsel directs the Board's attention to the following facts:

- Prior to Serrano's organizing efforts, he had never been disciplined or suspended for anything other than attendance related issues. Tr. 434-438.⁶
- Prior to Serrano's organizing efforts he received very good evaluations, and on two occasions received a \$1.00 an hour raise. In fact, Jones testified that a \$1.00 more an hour is a substantial raise and outside the normal range for evaluations. R. Exh. A; Tr. 247⁷
- In late February or early March 2006, the Respondent became aware of Serrano's organizing efforts, including the Union meeting attended by employees and began to write him up on a regular basis. Tr. 244.
- Jones testified that in the early spring of 2006, Serrano turned on him like a pit bull, and began to create problems. Tr. 258, 260-261. Jones was unable to

⁶ See also JD 16 – 07, page 2, lines 33 – 35.

⁷ Serrano's evaluations are on pages 45-46, Serrano's merit wage increases are on page 74-75.

provide a valid reason for why Serrano changed. Tr. 260-262. Considering the timing, Jones' statement strongly suggests Respondent harbored animus toward Serrano for his attempts to organize the Respondent's facility.

- Mayfield testified that Jones had reported that union activity was occurring at the facility. Jones further reported to Mayfield that Andre Cheers and Adoelle Hoover were involved with the Union. Tr. 460.

The evidence is therefore substantial that the Respondent had an early awareness of Serrano's union activity. That is the only plausible explanation for the sudden disciplinary actions taken against Serrano. Almost immediately Serrano's involvement with the Union became known, and his work performance and behavior was being characterized by the Respondent as a problem. Thus there was indeed a nexus between Serrano's union activities and Respondent's retaliation against him. Significantly, there is no indication that *Rossmore* even requires a finding that the interrogator is seeking information to mete out discipline.

The evidence regarding the third and fourth *Rossmore House* factors, relative to the identity of the questioner and place and method of the questioning was also misconstrued by Judge Locke. In that regard, Jones interrogation of Vargas and Cheers occurred in their work area. Judge Locke implies that the interrogation lacked coercive intent because it did not take place in a "locus of authority." JD, page 6, lines 18-20. *Rossmore House*, nor any other Board case, *requires* that interrogation take place off the work floor before it can be found to be coercive. The record does not even establish whether Jones had an office.

Secondly, despite the Judge's dismissal of Jones as little more than a first-line supervisor, "not high in the management structure" he was, at least from the perspective of Vargas and Cheers, the chief decision maker in all aspects of their work. Jones was responsible for evaluating the employees, sending them home, directing their work, and issuing their raises. Tr. 228, 230-231, 244, 250, 253; JD page 6, line 18. There was no other layer of supervision at the facility between Jones and General Manager Michael Allen. In Jones absence, Allen performed his duties. Tr. 228. JD page 23, lines 33 – 36. Judge Locke ignored these facts and erroneously concluded that Jones responsibilities as a first-line supervisor did not support a finding that the question was coercive and therefore unlawful. JD , page 9, lines 34-42

Equally significantly, Jones questioned employees Vargas, Velazquez, and Cheers, even though they had not disclosed their sympathies about the Union to him or the Respondent. The questioning occurred at the start of their shift and within 24 hours of their attendance at the Union meeting. Tr. 153, 164. Because the employees had not openly made it known that they were attending the Union meeting, Jones had no reason to casually engage them about the Union.

Likewise, Jones' questioning of Vargas, Cheers and Velazquez immediately after the meeting took place caused anxiety and fear. Velazquez and Cheers did not respond to Jones' questioning. Had it been a joking conversation as asserted by the ALJ, a response would have been given. Similarly, Vargas, rather than admit that he attended the meeting, lied in order to keep his activity secret from his supervisor. If the employees were not fearful of Jones, the employees would have told the truth, as they did in the

hearing, and admitted that they attended the meeting. Even the ALJ credited Vargas and Velazquez regarding these issues. JD page 6, lines 39 – 43.

Contrary to the ALJ's finding, Vargas, Velazquez and Cheers' responses to Jones' questioning militates a finding of coercive interrogation. See *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), wherein the Board found that the employer's questions were unlawful because the employee was not an open union supporter, and, in fact, attempted to conceal his union support as evidenced by his reply.

The *Camaco* Board in remanding this portion of the allegation noted that based on Board precedent, this factor alone is enough to support a finding of unlawful interrogation, without consideration of any other factors. JD page 6, lines 23-28. *Camaco supra*, at 2. ALJ Locke failed to adequately analyze these facts pursuant to the *Camaco* Board's remand and in accordance with *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007) and *Grass Valley Grocery Outlet*.

Accordingly, in light of all the above, Counsel for the General Counsel respectfully urges that the Board reverse the Administrative Law Judge's findings that the Respondent, by Lewie Jones, did not violate Section 8(a)(1) of the Act when he interrogated Ralphy Vargas, Alejandro Velazquez, and Andre Cheers, and when Jones made a statement of futility to Cheers. The Board should further review the Judge's other findings and conclusions relative to the allegation of creating an impression of surveillance.

C. Supervisor Lewie Jones' Inquiries Created an Impression of Surveillance

In his Supplemental Decision, Judge Locke refused to find that Supervisor Jones' questions created an impression of surveillance. In so doing, Judge Locke found that the

facts in the instant case were similar to the facts in *Frontier Telephone of Rochester*, 344 NLRB 1270 (2005) By doing so, Judge Locke erroneously determined that a reasonable employee likely would conclude that Supervisor Jones learned of the Union meeting lawfully, rather than as the result of surveillance. JD page 10, lines 25 -27.

The facts in the instant case are distinguishable from *Frontier* for several reasons, and require a brief discussion. In *Frontier*, the main issue was whether the Respondent violated the Act by agreeing to accrete an unrepresented group of internet help desk technicians into an existing bargaining unit of customer service representatives who were represented by the Communication Workers of America (CWA). *Frontier, supra* at 1270.

In *Frontier*, the alleged unlawful surveillance by a supervisor occurred at a time when the CWA's efforts to represent the technicians were known to everyone that worked at the facility, particularly since the CWA had already filed a petition seeking to represent the technicians. *Frontier supra*, at 1276.

Here, it is undisputed that Serrano and Union Representative Zmarzek attempted to conceal their first organizational meeting with interested employees at a Denny's Restaurant. Unlike *Frontier*, there was no evidence to suggest that their actions were known by all of the employees, let alone management. *Id.* Significantly, Serrano cancelled the first meeting when he became aware that Supervisor Jones had found out about the meeting. Tr. 32, 93.

Equally significant, the *Frontier* supervisor was alleged to have created an impression of surveillance because he questioned employees about the Union and its organizational website while the employees were openly discussing the possible

accretion. *Frontier supra*, at 1276. The supervisor told the employees that he was aware of the Union's organizing website. In that instance, the Board found that the supervisor had not violated the Act because he was simply questioning employees about something that they were already discussing, and the CWA's organizing efforts were well known and the website was never deemed as a secret. *Id.*

Here, Cheers, Vargas, and Velazquez testified that Jones approached them about the Union meeting without any warning or provocation. Contrary to *Frontier*, there was no evidence presented that these employees (Cheers, Vargas and Velazquez) had joked or openly discussed the Union with Jones or any other management official at the facility. Accordingly, these employees could reasonably conclude that Jones had unlawfully surveilled them at the meeting the day before.

The fact that one employee, Danielle Harris, might have joked about the Union meeting, does not give Jones the right to randomly question other employees about their attendance at a union meeting.⁸ These employees were questioned by their immediate supervisor the day following the Union's organizational meeting at a Denny's restaurant. The employees either did not respond or denied attending the meeting. Given these circumstances, Jones' statements constituted the unlawful creation of an impression of surveillance.

The test for finding an impression of surveillance is whether an employee can reasonably assume from an employer's statement that his union involvement has been placed under surveillance. *Fred'k Wallace & Son*, 331 NLRB 914 (2000).

In *Flexsteel Industries*, 311 NLRB 257 (1993) the Board explained,

⁸The ALJ expressly credited the testimony of Vargas and Velazquez that Jones did not question them in a joking manner.

The idea behind finding “an impression of surveillance”...is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.⁹

Under this standard, Jones’ inquiry gave Cheers, Vargas, and Velazquez the impression that Respondent was endeavoring to keep track of who attended the union meeting. Jones’ inquiry coming the day after the meeting would reasonably tend to discourage participation in the Union. Indeed, the Union’s organizing campaign came to a screeching halt on the day Jones questioned the employees.

Based on these facts, the Board should reverse the ALJ’s findings and find that the Respondent, by Lewie Jones, violated 8(a)(1) of the Act when he created an impression of surveillance by questioning employees about their attendance at the Union meeting one day after the meeting occurred.

⁹ See also *Spartech Corp.*, 344 NLRB No. 72 (2005) where the Board found that an employer’s agent’s statement that the company knew who had attended an organizational meeting a day or two earlier to employees constituted a creation of unlawful impression of surveillance; and *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB No. 27 (2006) where the Board found that an employer’s manager created an impression of surveillance when, 2 days after an offsite organizational meeting, he told an employee that he was aware of his organizing efforts.

D. Credibility Resolutions Related to Serrano's Termination

In making a determination relative to Serrano's termination, Judge Locke provided no rationale for crediting Respondent's witness Frank Dellipoala. JD page 25, lines 2-4. This is incredulous, considering Respondent's primary witness Michael Allen and General Counsel's witness Serrano were involved in the conversation that resulted in Serrano's termination. Tr. 426. Likewise, Serrano and Allen acknowledged that General Counsel's witness current employee Tammy Potts was present when their conversation took place. Tr. 206. All three of these individuals testified that Dellipoala was not in the cell when Serrano and Allen held their conversation. Tr. 84, 426. Moreover, Allen's testimony, to some degree, confirmed that of General Counsel's witnesses and conflicted with Respondent's only other witness, Frank Dellipoala.

Moreover, Judge Locke made no credibility determinations regarding the testimony of Potts. Locke's failure to credit Potts testimony is particularly troubling as Potts is still in Respondent's employ and would have no reason to harbor animus against her employer. Likewise, Judge Locke made no credibility resolution regarding Serrano's testimony, whose testimony was similar to Potts.

It appears that Judge Locke rushed to a conclusion regarding this portion of the case at bar without the benefit of reviewing the transcript and other record evidence. In so doing, Counsel for the General Counsel submits that Judge Locke's credibility resolutions and/or the lack thereof, in conjunction with the misapplication of the instant facts to Board law requires a reversal of his decision to dismiss the allegation concerning Serrano's discharge.

E. Respondent Terminated Serrano for Engaging in Protected Concerted Activity

To support his dismissal of the allegation that Serrano was terminated because he engaged in union or protected concerted activities, the Judge, with minimal analysis, concluded that Serrano's protected activities had nothing to do with his termination. Instead, Judge Locke incorrectly concluded that Allen terminated Serrano because Serrano was unwilling or unable to meet the standards of the incentive program. The weight of the evidence demonstrates that the ALJ's conclusions are not supported by the facts.

Judge Locke barely addressed the meeting where General Manager Allen discussed a new incentive program and the subsequent meeting where Sam Serrano criticized the Respondent's incentive program on behalf of himself and others. JD page 28, lines 32-33. General Counsel, however, finds it necessary to examine these events in analyzing what led to Serrano's termination.

Sam Serrano and current employee Tammy Potts testified that General Manager Michael Allen introduced an incentive program to employees who worked in their area, commonly referred to as the 191/192 driver and passenger cell. The affected employees included Sam Serrano, who operated a machine referred to as a driver cell, Tammy Potts, who operated a machine referred to as a passenger cell, Ron James, who operated a machine referred to as the subcell and Carl Doman, who checked parts. These facts are undisputed. Tr. 81-82.

Allen informed employees that each employee would receive a dollar more an hour if the driver cell and passenger cell produced 60 parts an hour for every eight hours,

and provided that no bad parts were sent out during the week. Tr. 82, 203. There was no discussion about action to be taken if employees were unable to meet the standard of the incentive program. These facts are undisputed.

After the meeting concluded, the four employees returned to their work area and had a discussion about the program. Potts testified that she and Serrano thought the incentive program was “bullshit” and they stated so at the employee meeting. Tr. 204. Potts testified that she felt this way because the machines would break down and Serrano’s machine (the driver cell) was very difficult to operate due to the amount of parts produced on it, and the driver cell had more mechanical breakdowns than the machine she operated, the passenger cell. Tr. 200-201, 204. Potts further testified that Serrano told the group that he knew that he could not consistently produce 60 parts an hour each day, based on the machine malfunctions. Tr. 204. Potts and Serrano agreed that no one could operate the driver cell consistently to meet the guidelines of the incentive program. Tr. 204.

Although Allen was not a participant in that discussion, the record evidence demonstrates that Allen was aware of Serrano’s sentiments regarding the program when he approached Serrano several days later. G.C. Exh. 5.

Allen testified that the 191/192 cell members, Tammy Potts, Carl Doman, and another individual who worked in the cell, were present when he had a conversation with Serrano regarding the incentive program. Tr. 426 Potts, Doman and Serrano all testified consistently about the incident, with the exception that Doman recalled the date of the conversation incorrectly.

At least Potts, Allen, and Serrano consistently testified that Potts was the closest to the conversation that occurred between Serrano and Allen because it occurred in front of her work station. Tr.85, 206. Allen, Potts and Serrano testified that Allen approached Serrano about the fact that the production records demonstrated that he was not producing 60 parts an hour as required to earn the new incentive. General Counsel notes that Potts testified that Allen was angry when he approached Serrano. Tr. 206. Serrano and Potts testified that Serrano told Allen that he was doing his best. Tr. 86, 206. Serrano testified that he told Allen that he could not consistently make 60 parts per hour on the driver cell because it was a temporary assignment for him. Tr. 86. He added that he also could not do it because of the mechanical problems with the driver cell. Tr. 86.

Serrano testified that Allen stated, "Sam I heard you said a dollar's not enough. Is that true?" G.C. Exh. 5. This statement demonstrates that Allen had knowledge that Serrano had criticized the program. Serrano testified that he told Allen that he did not feel a dollar an hour was enough because he could not consistently run 60 parts an hour, based on how the machines performed.¹⁰ Serrano also told Allen that he was not the only person that felt this way about the incentive program. Tr. 86, 206. Serrano testified that *it is at this point* that Allen called over team leader Frank Dellipoala and asked him if anyone else on first shift could run the driver cell, and Dellipoala stated, "No." Tr. 87.

It is important to note that Allen asked Serrano's opinion about the incentive program. It was Allen who angrily approached Serrano and brought up the subject of the incentive program and provoked him to express his disapproval of it. Serrano did not voluntarily bring the conversation up about the dollar extra an hour. Serrano's testimony on this issue is supported by Karen Mayfield's notes subpoenaed and provided as General

Counsel Exhibit 5. Mayfield testified that the information noted on G.C. Exh. 5 was supplied by Michael Allen regarding facts surrounding Serrano's termination. G.C. Exh. 5. Tr. 471. It is clear from the notes that two days prior to Allen's confrontation with Serrano, he knew that Serrano did not approve of his program because of his discussion with other employees. Tr. 470-471; G.C. Exh. 5. He then confronted Serrano and provoked him into making the remarks that he later relied on to justify the discharge. Judge Locke did not consider this in his credibility determination regarding Michael Allen. If he had done so, he would have likely been inclined to credit Serrano's testimony.

Serrano testified Allen later approached him at the end of the day and told him that he was being discharged. Serrano testified that Allen told him that he did not like his comments about his incentive program, therefore he was terminated. Tr. 89. Respondent did not rebut Serrano's testimony.

With respect to the discharge incident, Potts testified that Allen approached Serrano and told him that he needed to produce more parts. Tr. 206. As previously noted, Potts described Allen as being angry. Serrano, according to Potts, told Allen that he was doing his best. Tr. 206. Serrano also told Allen that he did not agree on the dollar an hour incentive program, and that he was not the only one that didn't agree on the program. Tr. 206. This testimony was not rebutted by Michael Allen.

Allen admitted that he "confronted Sam." Allen testified, "I said what the heck, come on Sam, these other guys can do it." "And we was right in their cell, and we was amongst it with all – everybody, I was on the outside of it a little bit, but I questioned him like three different times." Tr. 398-399. Allen testified that after he continued to question

¹⁰ Supervisor Jones admitted that the driver cell broke down frequently. Tr. 252-253.

Serrano, Serrano told him that it “wasn’t worth a buck more an hour right in front of everybody.” Tr. 400. Allen testified that when Serrano made that statement in front of the employees it “broke my spirit.” Tr. 400. Allen never denied that Serrano stated that other employees felt the same way. In fact, Allen’s statement that Serrano voiced his opinion about the program in front of everybody makes it more plausible that Serrano stated that other employees felt the same way about the program. This point is further supported by the fact that Allen stated that he knew Serrano had stated that it was not worth a buck more, and Respondent’s notes support that conclusion.

Equally significant, Serrano did not refuse to perform work when he spoke to Allen, and even Allen’s testimony does not suggest that he did. Serrano was merely voicing his opinion about Allen’s incentive program and providing him with an explanation as to why he was unable to reach the production goal on an hourly basis. This fact is not in dispute.

Based on the testimony of all three witnesses, it is apparent that Serrano did nothing more than give his opinion and the opinion of others about Allen’s program. Serrano explained that neither, he, nor his co-workers felt that the incentive program would work in light of the maintenance issues involved in the driver and passenger cell. Allen did not like the fact that Serrano made this statement in front of other employees.¹¹ Accordingly, Allen terminated him.

It is well established that it is unlawful for an employer to discharge employees in the belief that they engaged in concerted activity for the purpose of mutual aid or

¹¹ Allen testified that Serrano had made complaints in July 2006 about how employees were treated by supervisors and other working conditions, including problems with equipment. However these complaints were made in Allen’s office without the presence of other employees. Tr. 436-438.

protection. *U.S. Service Industries*, 314 NLRB 30, 31 (1994) enfd. Mem. 80 F.3d 558 (D.C. Cir. 1996)

Applying this principle here in the context of a **Wright Line** analysis, General Counsel submits that Potts and Serrano's testimony is more than sufficient to support the finding that Respondent believed that Serrano's complaints about the incentive program were on behalf of himself and his co-workers. Both Potts and Serrano testified that co-workers not only discussed this matter amongst themselves, but that Serrano told Respondent that the employees felt this way. Unfortunately, from the standpoint of the employees and particularly of Serrano, this information did not cause the Respondent to improve the incentive program. Rather, Respondent retaliated against the person, Serrano, who it viewed as the primary spokesman of the employees. In a word, Respondent decided to kill the messenger in order to silence the message.

The factor of timing also supports the inference of unlawful motivation because Serrano's discharge occurred immediately after Respondent was placed on notice of the employees' position that they did not believe the incentive program would work.

Based on these facts, Counsel for the General Counsel has demonstrated a prima facie case. The Respondent must demonstrate that it had sufficient cause to discharge Serrano regardless of his protected concerted and/or union activity. The Judge concluded that the Respondent met its burden because Serrano's statement that he would not make the effort to make the program a success is unprotected.

Judge Locke asserts that this statement meant that the whole team would be damaged by his unwillingness to perform. Therefore Respondent did not act unlawfully

when Serrano was terminated. No witness, however, testified that Serrano made that statement and Judge Locke's finding that the statement was made should be reversed.

Counsel for the General Counsel asserts that the weight of the evidence suggests that Serrano made the statement that a dollar was not enough because of the driver cell's mechanical problems in conjunction with the expressed statement that other employees felt the same way. Potts testified to that effect. Moreover, there was nothing in the record that suggests that Serrano refused to work on that day. To the contrary, Serrano continued to work efficiently as he had done in the past. Jt. Exh. 10. So at the very least, Serrano complained to Allen about how he and others felt about the incentive program, but then performed his job. Serrano's criticism of the program was provoked by Allen because the latter was already aware that Serrano did not like his program and had expressed this to other employees in discussions about the program. G.C. Exh. 5.

More importantly, Respondent's stated reason that it terminated Serrano on that day because he refused to put forth an effort must be considered pretextual on the basis of evidence of disparate treatment established in the record. Although Judge Locke found that the Employer had not treated Serrano differently because of the newness of the program, General Counsel disagrees. In that connection, under cross examination, Mike Allen initially testified that he would terminate any employee, like Serrano, for slowing down production or refusing to perform work. Tr. 421-422. Counsel for the General Counsel reminded Allen that he had not taken similar action concerning Jesus Lopez just two weeks after Serrano was terminated. Tr. 443. At that point, Allen conceded that Lopez had intentionally slowed down production and refused to perform work. Allen

authorized Lopez to be sent home for one day. Lopez was allowed to return to work the next day. Tr. 423-423.

The evidence demonstrated that although Lopez was terminated a week later, Respondent gave him several opportunities to improve, even after he committed various acts of insubordination. Jt. Exh. 7(C), 7(D), and 7(E). Even assuming arguendo that Respondent's version of Serrano's statements is accurate, the treatment of Lopez illustrates that Serrano was treated differently than other similarly situated employees. Judge Locke refused to consider the clear evidence of disparate treatment or make the finding of pretext. Instead, he erroneously found that the Employer could not be expected to produce evidence that other employees were treated similarly because the incentive program was new.

ALJ Locke failed to recognize that the newness of the incentive program has nothing to do with an employee's inability or refusal to perform work. Even more compelling, Respondent did not bother to defend itself against evidence of disparate treatment regarding Lopez and Serrano, and Judge Locke, on remand and for the second time, failed to consider the issue. JD page 2, lines 33-41.

Judge Locke also ignored credibility issues concerning Allen's testimony regarding the employees who replaced Serrano after his termination. According to Allen, once Serrano was replaced, his replacement was able to produce 60 parts per hour for a "string" of time. Tr. 401. A review of the Respondent's records from the time Serrano was discharged, August 23, 2006 through September 8, 2006, discloses that no one who replaced Serrano on the first shift was able to produce 60 parts per hour for eight hours

all week during that time period.¹² Jt. Exh. 10. Either Judge Locke did not take time to review Jt. Exh.10, and the obvious calculation errors, or he simply chose to ignore it when the evidence supported a wholly different conclusion.

Equally significant, once the Respondent discharged Serrano, the primary union activist and advocate for employee rights, no other employees were disciplined for failing to perform under the incentive program. In fact, the incentive program was terminated without fanfare.¹³ In other words, Serrano's predictions that the program would not work were correct. Serrano's only mistake was that he publicly criticized the program on behalf of himself and others, which caused Allen embarrassment. Allen's testimony that Serrano broke his spirit when he made the statement in front of everyone supports Counsel for the General Counsel's conclusion that Serrano's termination was motivated by his Union and/or protected concerted activities.

III CONCLUSION

Counsel for the General Counsel respectfully submits that Judge Locke's decision in these matters should be set aside to the extent that he failed to find the alleged violations of Section 8(a)(1) and (3) of the Act set forth in the Complaint.

Dated at Cleveland, Ohio this 23rd day of November 2009.

Respectfully submitted,

Cheryl Sizemore
Counsel for the General Counsel

¹² A review of Jt. Exh. 10 produced by Respondent disclose that the calculations of pieces per hour are incorrect for the first shift, and should be reflected as follows: 8/28/06-50.6 pieces, 8/29/06-50.74, 8/30/06-56.94, 8/31/06-48.24.

¹³ A review of Joint Exhibit 10 discloses that employees continued to miss the 60 parts per hour mark, but there is no evidence that anyone was counseled or disciplined for failure to meet the incentive production standard.

National Labor Relations Board
1695 AJC Federal Building
1240 E. 9th Street
Cleveland, Ohio 44199
216-522-8187
Fax 216-522-2418

PROOF OF SERVICE

I attest that a copy of the foregoing Exceptions and Brief in Support were e-mailed the 23rd day of November 2009 to the following:

Richard R. Mellot, Jr., Esq.
Trigilio & Stephenson, PPL
5750 Cooper Foster Park Road, W
Suite 102
Lorain, Ohio 44053-4132

Tom Zmarzek, Organizer
UAW, Region 2B
5000 Rockside Road, #300
Cleveland, Ohio 44131-2174

Cheryl Sizemore
Counsel for the General Counsel
National Labor Relations Board
1695 AJC Federal Building
1240 E. 9th Street
Cleveland, Ohio 44199
(216) 522-8187
(216) 522-2418 Fax