

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

BASHAS' INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

and

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL**

Case 28-CA-21435

Case 28-CA-21501

Case 28-CA-21590

28-CA-21592

28-CA-21639

28-CA-21640

28-CA-21646

28-CA-21676

28-CA-21739

28-CA-21785

28-CA-21803

**BASHAS' INC.'S
BRIEF IN SUPPORT OF EXCEPTIONS
TO THE SEPTEMBER 24, 2009 DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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STATEMENT OF THE CASE

This consolidated case arises out of a corporate campaign the United Food and Commercial Workers Union, Local 99 and the United Food and Commercial Workers International Union (collectively “the Union” or “UFCW”) had been waging against Bashas’ since approximately 2006. That summer, the UFCW began filing ULP charges against Bashas’ and continued to do so for more than a year. Collectively, the UFCW filed eleven separate cases against Bashas’. On March 28, 2008, the Regional Director issued a Third Consolidated Complaint (“Complaint”), which the parties tried before Administrative Law Judge William L. Schmidt between April 15 and August 14, 2008. By the time the hearing had ended, the General Counsel had asserted 89 separate and distinct allegations against Bashas’. The ALJ found in favor of Bashas’ on 55 of those allegations and in favor of the General Counsel on 34.¹

Although Bashas’ could legitimately except to every adverse finding in the ALJ’s decision, it has excepted to only three specific findings that Bashas’ violated the Act by: (1) outsourcing to a third party one of the functions performed by a group of employees called “balers” at its Distribution Center (DC); (2) transferring one of its retail store employees (Maria Acosta) as a result of a personal dispute she had with a co-worker (who was also transferred); and (3) disciplining three different retail store employees (Teresa Cano, Ruben Salazar, and Paul Romero) for “time theft,” even though the undisputed evidence established that those employees had taken extended meal and rest breaks while on the clock (without authorization) and that Bashas’ had a consistent practice of disciplining other employees for that same infraction.

In concluding that Bashas’ outsourced its DC baler operation for discriminatory reasons, the ALJ ignored the fact that Bashas’ initiated its investigation of outsourcing at a time it did not know, and the ALJ did not find, that any of the employees who worked in the baler operation had engaged in any union activities – the “crucial evidentiary point” under established Board law.

¹ Throughout this brief, Bashas’ has included the following citations: ALJ Decision (“D”); the Reporter’s Transcript of Proceedings (“RT”); Respondent Exhibits (“R. Ex.”); and General Counsel Exhibits (“G.C. Ex.”).

See Leeward Nursing Home, 278 NLRB 1058, 1075 (1986). More significantly, in rejecting the economic reasons for its outsourcing decision as “pretextual,” the ALJ failed to make specific credibility determinations about substantial and uncontradicted testimony offered by the sole decisionmaker, Michael Basha, which established the economic justifications for his decision and proved that the Company anticipated saving more than \$100,000 a year by outsourcing the baler operation; in fact, the evidence proved Bashas’ actually achieved greater savings than anticipated. *See Robinson Furniture, Inc.*, 286 NLRB 1076, 1078 (1987) (proof that business decision actually resulted in the economic savings anticipated by the employer was persuasive evidence supporting conclusion that the employer’s decision was made for legitimate reasons). The uncontradicted evidence also established that the outsourcing decision was just one of several cost-cutting measures Michael Basha made at the DC in the face of the worst economic downturn since the Great Depression and the most significant drop in sales during the Company’s 75 year existence. (Those cost-cutting measures were not enough to keep Bashas’ from filing for Bankruptcy on July 12, 2009.) [See Notice of Bankruptcy, Exhibit 1.]²

Finally, the ALJ failed to consider and address substantial evidence proving that Michael Basha did not make the outsourcing decision for discriminatory reasons; in particular, evidence showing that Michael Basha: (1) investigated the outsourcing option for months before taking any action; (2) obtained (and rejected) multiple bids for economic reasons before making the decision; (3) made the decision months after learning that some DC employees were engaged in union activities; and (4) made the decision after it was clear (as the General Counsel’s own witnesses admitted) that only a small number of the approximate 800 DC employees supported

² Bashas’ did not seek to reopen the record to introduce its continuing financial problems while awaiting the ALJ decision, as the financial information it presented at the hearing had not been challenged. Bashas’ requests that the Board take notice of its pending bankruptcy proceeding and, should the Board refuse to do so, moves to reopen the record for the limited purpose of introducing this evidence in light of the ALJ’s reference to the General Counsel’s assertion that Bashas’ had not demonstrated that it “was ‘suffering financial adversity’ amounting to ‘sever [sic] economic difficulties.’” [D at 90.]

the Union (including just a handful of balers). By failing to consider and address that substantial evidence, the ALJ acted inappropriately by summarily rejecting Michael Basha's testimony. Moreover, in finding Michael Basha's decision pretextual, the ALJ improperly substituted his business judgment for Bashas'. See *DPI New England*, 354 NLRB No. 94, at **2-4 (2009) (reversing the ALJ when he "substituted his business judgment for that of the Respondent and ignored evidence" supporting the employer's proffered business justification for its decision).

The ALJ also improperly concluded that Bashas' violated the Act when it transferred retail employee Maria Acosta because her complaints regarding a co-worker (who was also transferred) with whom she had an ongoing personal conflict were, according to the ALJ, protected concerted activity. First, the General Counsel charged and argued that Acosta's transfer was driven by her Union activities – her non-Union activities were never at issue. As a result, the ALJ violated Bashas' due process rights by judging conduct that was never litigated. See *International Baking Co. & Earthgrains*, 348 NLRB No. 76, at *3 (2006). Second, the ALJ incorrectly found that Acosta's gripes about a co-worker were "concerted" and for Acosta's (and other employees') "mutual aid or protection." See *Abramson, LLC*, 345 NLRB 171, 173-74 (2005) (holding that the employee did not engage in concerted activity by asserting an individual right). Third, even if Acosta was engaged in protected concerted activity, the ALJ incorrectly held that Bashas' transferred her because of those activities.

Bashas' final exception is based on the ALJ's failure to apply settled Board law to the undisputed facts proving that: (1) three retail employees (Cano, Salazar, and Romero) stole time; and (2) Bashas' had a consistent practice of terminating employees for engaging in such activity. Similar to his analysis regarding Acosta, the ALJ violated Bashas' due process rights by issuing findings on matters that were never charged nor litigated (Salazar's transfer and Romero's suspension). The ALJ also failed to provide any explanation why he ignored an admission in Cano's *Jencks* statement, which proved that there was no causal link between Cano's union activities and her resulting discipline. He also improperly imputed the knowledge of one low-level supervisor to all of Bashas' management even though the decisionmaker at issue denied

knowing of the employees' union activities. *See, e.g., Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983) (refusing to impute knowledge as a matter of law where the decision-maker credibly denies receiving the information). Finally, the ALJ improperly rejected significant evidence demonstrating that Bashas' had disciplined these same employees for performance problems in the past and had consistently terminated employees for engaging in time theft, which was more severe punishment than the employees at issue received (suspension and transfer).

Because the ALJ failed to apply Board law to each of the three conclusions to which Bashas' has excepted, his conclusions should be reversed and the allegations dismissed.

EXCEPTIONS

Exception 1: Bashas' excepts to the ALJ's finding that it violated the Act when it outsourced its DC baler operation even though the planning for such outsourcing began months before the first sign of any organizing activity and where Bashas' produced uncontradicted evidence that it did so for legitimate reasons that were not pretextual.

Exception 2: Bashas' excepts to the ALJ's finding that Maria Acosta was engaged in protected concerted activity when she complained about her co-worker Victoria Zamora and that Bashas' discriminated against Acosta for engaging in such activity.

Exception 3: Bashas' excepts to the ALJ's finding that it violated the Act by disciplining Teresa Cano, Ruben Salazar, and Paul Romero even though the undisputed evidence established that Cano, Salazar, and Romero stole time from the Company by taking extended meal and rest breaks while on the clock.

ARGUMENT

I. EXCEPTION I: BASHAS' EXCEPTS TO THE ALJ'S CONCLUSION THAT IT OUTSOURCED THE BALER FUNCTION AT ITS DC BECAUSE OF THE BALERS' UNION ACTIVITIES AND TO DISCOURAGE OTHER DC EMPLOYEES FROM ENGAGING IN SUCH ACTIVITIES.

A. Background Facts.

The ALJ found that, during DC management's annual budget review in February 2007, DC Human Resources Manager Steve Schrade recommended that the Company either provide significant pay increases to certain classifications of workers in non-core DC operations (including the baler operation) or consider outsourcing them. Michael Basha rejected that proposal, but directed Schrade to look into the compensation and outsourcing possibilities so they could resolve Schrade's concerns in the 2008 budget cycle. The ALJ further found that Schrade spoke with a potential subcontractor, World Staffing Solutions (WSS), shortly after the February 2007 budget meetings. WSS was the contractor to whom Bashas' had, two years earlier, outsourced the unloading function at the DC (*i.e.*, unloading bulk products being delivered by vendors to the DC). The ALJ also found that, on June 20, 2007, Schrade met with WSS to discuss outsourcing. Schrade's relationship with WSS predated his employment with Bashas' – he had worked with WSS during his prior employment at another grocery retailer where WSS performed various non-core functions. Thus, Schrade reasonably turned to WSS to discuss outsourcing non-core DC functions (including the entire "reclamation" function, which included both the baler operation at the DC and other employees performing sorting and pallet repair at Bashas' nearby facility in Ocotillo). [D at 62, 82, 83.]

The ALJ, however, rejected Schrade's testimony that those discussions were a result of Michael Basha's directive to investigate outsourcing and compensation options for the 2008 budget cycle. The ALJ concluded that it was "nonsensical" to assert that, "in early 2007, pay increases of up to 20 percent would be required to remain competitive in the labor market for the kind of labor necessary to perform the work involved," but a year later, it could outsource one of the functions to a subcontractor who paid 30 percent less than Bashas'. While the ALJ rejected

the Company's evidence that its inquiry into outsourcing began in February 2007, he did not identify exactly when it was he believed that Bashas' had initiated that inquiry. [D at 92.]

The ALJ found that the Union had commenced an active organizing drive at the DC by mid-April 2007, following some period of time during which it had held meetings with "a small cadre of DC employees." While the ALJ did not make a determination as to when or how Bashas' specifically learned of such activities, he concluded that "Company officials plainly knew of the Union's emerging organizing effort by at least mid-June" because, on June 15, 2007, a supervisor had sent a note to Schrade, regarding information an employee had volunteered "about the union activities of several other employees," although none of the employees listed in the note worked in the baler operation. [D at 62; G.C. Ex. 15.]

According to the ALJ, "even at the early stages of the baler outsourcing project, evidence emerged that the union organizing played a pivotal role." The ALJ based this finding on a July 20, 2007 email sent by Schrade to WSS which stated that, "Things are moving swiftly. We have union issues with members of the baler dock." Although that same email also refers to prior discussions that Schrade had with WSS personnel about outsourcing and included specific information that WSS had previously requested when they visited the DC and observed the baler operation a week earlier, the ALJ did not address those aspects of the email. [D at 91.]

Despite the reference in Schrade's email to "things moving quickly," the ALJ's decision recognized that the outsourcing discussions did not move swiftly at all, as he concluded that Michael Basha did not make the final decision to outsource the baler function until December 2007 – many months after learning about union activity at the DC. During that time, the ALJ concluded that Bashas' retained its anti-union motivation to subcontract the baler operation. The decision suggests (but does not conclude) that the ALJ did not believe Michael Basha's testimony that, after receiving multiple bids from WSS, he sought bids from two additional companies before ultimately awarding the work to TBG Logistics ("TBG") (*i.e.*, the decision refers to Michael Basha's "claims" that he contacted other companies, including one named Direct Offloading Solutions ("DOS")). Nonetheless, the ALJ relied on DOS's bid – which

offered the Company substantial savings, yet was rejected by Michael Basha – as further evidence of Bashas’ allegedly discriminatory motive. In particular, the ALJ found “it reasonable to infer” that DOS’s bid, which stated that DOS would hire the “‘right’ individuals by using extensive screening techniques, background checks, and drug testing,” referred to screening out Union supporters and demonstrated that an “anti-union motive remained throughout the search for a baler subcontractor.” [D at 87, 91.]

The ALJ also placed great weight in the fact that Cash Eagan, Dry Receiving Manager for the morning shift (who oversaw the baler operation on the morning shift), did not testify even though Mel Kelly, the Dry Receiving Manager at the DC for the afternoon shift (who oversaw the baler operation on the afternoon shift) did testify. Noting Cash Eagan’s absence, the ALJ concluded that he had “little confidence in the accounts provided by [Bashas’] key witnesses” on the outsourcing decision. The ALJ rejected Michael Basha’s testimony that Cash Eagan simply escorted potential bidders around the warehouse because: (1) DOS sent a follow-up letter to Cash Eagan after its tour; and (2) a December 24, 2007 email from TBG to Michael Basha indicates TBG made a proposal modification following a conversation with Cash Eagan. [D at 92.]

As further evidence that an anti-union motive remained throughout the process, the ALJ relied on a Goal Planning Sheet that Schrade prepared for himself after being directed to oversee the implementation of the outsourcing decision that Michael Basha had made and announced to the management team. On that document, Schrade listed his goal at the top of the page; namely to: “outsource baler in a smooth, legal, well-communicated fashion.” [G.C. Ex. 13.] In addition, the Goal Planning Sheet listed the benefits Schrade identified as flowing from the decision: “Reduce expenses by 100K+; Increase ROI, efficiency; Remove associated employee issues; Educate DC members.” The ALJ failed to address the fact that the first two benefits that Schrade perceived from the decision were economic and, instead, focused on the third benefit Schrade identified in concluding that the “associated employee issues” related to eliminating pro-union employees. [D at 87-88.]

Apparently in an attempt to explain the many month delay between the onset of Bashas' discovery of union activities at the DC and the outsourcing decision, the ALJ concluded it was reasonable "to infer" that Michael Basha made the decision to outsource the baler operation in December 2007 as part of a coordinated Company "push-back" against the Union. The ALJ inferred that Michael Basha's decision was related to the filing of a civil lawsuit the Company brought against the Union that same month for racketeering and defamation, though Michael Basha testified without contradiction that he made the decision to outsource the baler operation on his own and, in response to the General Counsel's questions, affirmed that he was not part of the executive team that determined to file the lawsuit against the Union. Notably, the ALJ did not discredit that testimony. [D at 90-91.]

Significantly, the ALJ also failed to address, much less discredit, the uncontradicted testimony of Michael Basha that his decision to outsource the baler operation was just one of a series that he made in 2007 to substantially reduce operating costs at the DC in light of the effects of the greatest economic downturn since the Great Depression – such as drastically reducing headcount at the DC and changing the operating hours. By such decisions, Michael Basha was able to cut costs by hundreds of thousands of dollars each year. [RT at 1671:20-1672:4; 2536:1-2539:22; 2570:8-2573:18; R. Ex. 99.]

Finally, despite uncontradicted testimony that Bashas' told all remaining DC employees that the baler outsourcing was a one-time event and no further outsourcing was planned, the ALJ concluded "that the baler outsourcing was designed to chill union activities throughout" the DC because the "talking points" used to explain the outsourcing decision to non-baler employees "emphasiz[ed] industry competitiveness, local market conditions, and the trend in outsourcing non-core functions." However, the "talking points" used in discussions with the non-baler employees at the DC were not introduced at the hearing and, without explanation, the ALJ based his conclusion on a different set of "talking points" presented to the balers whose work was being outsourced to TBG but whom Bashas' had ensured would be offered jobs with TBG. Schrade testified, without contradiction by any of the witnesses called by the GC (who remained

with Bashas' after the outsourcing decision), that one of the talking points in the discussions with remaining employees was that the baler outsourcing was a one-time event and that no future outsourcing was planned. [D at 91; RT at 1553:23-1554:16; 1666:3-25; G.C. Ex. 53.]

B. The ALJ Erred In Finding That Anti-Union Animus Was A Motivating Factor In Bashas' Decision To Outsource The Baler Operation Because Bashas' Did Not Know Of Any Union Activities Among Its Baler Employees Before Initiating Discussions About Outsourcing.

Where an employer initiates discussions about outsourcing before learning that the group of employees to be outsourced is engaged in protected activities, its ultimate decision to outsource those employees' functions after learning about their protected activities cannot violate the Act. *See Leeward Nursing Home*, 278 NLRB 1058, 1075 (1986) ("the critical evidentiary point is that Respondent embarked on a pursuit of the subcontracting option . . . at a time when, on this record, there were no union activities among its employees"); *see also Liberty Homes, Inc.*, 257 NLRB 1411, 1411-12 (1981) (employer legally subcontracted operations after employees sought representation because it had initiated inquiries concerning the subcontracting before learning of its employees' union activities); *see also Daikichi Sushi*, 335 NLRB 622, 631-32 (2001) (employer lawfully outsourced work shortly after union won election because employer had "looked into" outsourcing earlier, and "firms routinely take months before arriving at a decision as significant as [sub]contracting").

1. The ALJ Failed To Consider And Address The Substantial And Uncontradicted Evidence That Bashas' Initiated An Investigation Into Outsourcing In February 2007.

Both Michael Basha and Steve Schrade presented uncontradicted evidence that Bashas' began the discussion of outsourcing the baler operation in February 2007, at a time when it is undisputed that Bashas' had no knowledge of any protected activities by any DC employees. Significantly, the ALJ credited Schrade's and Michael Basha's testimony that, as part of the annual budgeting process they conducted each year in February, Schrade suggested in February

2007 to either raise the wage rates for certain non-core DC classifications (including balers) or outsource their functions to a third party. Indeed, Schrade testified without contradiction that:

We make warehouse wage adjustments in March, generally following the Teamster contracts, and I had told Michael that I had a concern over those wage groups [the non-core functions], that they were not paid according to our statement that we pay in concert with what the union has us pay, nor did I feel that they were comparable in the market and I'd been actually discussing that or bringing that up as a subject for several months, but that was the time to address it precisely.

[RT at 1640:19-1641:1.] The ALJ credited Michael Basha's testimony that he directed Schrade to gather information as to the options so he could make a decision for the following year (2008).

[D at 82; RT at 2528:23-2529:6.]

Nonetheless, the ALJ concluded that there was no link between the February 2007 discussion/directive and the decision to outsource the baler operation, finding Michael Basha's contention that the one flowed from the other "almost nonsensical." According to the ALJ, if Schrade believed these non-core employee classifications were being paid 20% below market rate, Basha's "had a significant (and unexplained) reversal in thinking a year later" when it outsourced the baler function to a third party who paid the balers 30% less. [D at 92.]

In rejecting the connection between the February 2007 budgeting process meeting and the outsourcing decision, the ALJ ignored two important pieces of uncontradicted evidence, and misconstrued another. The first evidence he ignored is Schrade's notes, dated March 24, 2007, reflecting the first step he took in the project to look into the wage rates and outsourcing options for non-core DC employee classifications. [G.C. Ex. 50.] Those notes document that, in March 2007, Schrade had taken action consistent with Michael Basha's directive the prior month. But for the February 2007 discussion/directive, there is simply no reasonable explanation for Schrade's March 2007 research into those non-core employee pay rates. Even if there was some other explanation that the ALJ might have reached, he could not simply reject the uncontradicted testimony – that in the months after February 2007, Schrade was following up with the direction

he received in February 2007 – without addressing this significant piece of corroborating evidence. See *Leeward Nursing Home*, 278 NLRB at 1075 (“Respondent’s initiatives [to investigate outsourcing as an option] cannot be found to have been merely idle; neither from their timing, could they have been motivated by concerns which implicate Section 8(a)(3).”).³

The second piece of evidence was Schrade’s uncontradicted testimony that, when he looked at the Teamster collective bargaining agreements of Bashas’ competitors to find a wage scale for employees performing work comparable to the balers, there was no such data because those competitors had already outsourced the comparable baler function. [RT at 1642:9-1643:4; 1673:15-1674:12.] Again, the ALJ could not simply reject this important uncontradicted evidence – which provides context for the ultimate decision to outsource the baler function but not the other non-core classifications – without at least addressing it.

The ALJ’s conclusion that the Company’s explanation for its actions was “almost nonsensical” is based on a serious misunderstanding of the record. As noted above, Schrade testified that he proposed paying the designated employee classifications more because “they were not paid according to our [Bashas’] statement that we pay in concert with what the union [pay[s]. . . .” Clearly, in Schrade’s view, Bashas’ had to either pay them more or outsource their functions to a third party, or Bashas’ would not be able to legitimately claim that it paid “union scale.” That was Schrade’s conclusion in February 2007, and Michael Basha reasonably directed him to substantiate it by researching the options Schrade had presented. The fact that Michael

³ The ALJ erroneously accepted the General Counsel’s assertions that the “chilling effect” analysis articulated in *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), applied to this case. The Board has repeatedly held that *Darlington* is relevant only to plant closures – not to the subcontracting out a portion of an employer’s business. See, e.g., *San Luis Trucking, Inc.*, 352 NLRB 211, 231, 235 (2008) (applying *Wright Line* to subcontracting allegations, and *Darlington* to closure allegations); *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989) (rejecting judge’s use of *Darlington* “chilling effect” in subcontracting case and stating that “discriminatory subcontracting [cases] were explicitly distinguished from partial closings in *Darlington*”). However, despite the ALJ’s conclusion that *Darlington* applied, he purported to analyze the case under *Wright Line*, the correct standard.

Basha made an economic decision later in the year to increase pay for most non-core DC classifications and outsource another (the balers) demonstrates sound management, not anti-union animus. Indeed, no twist of logic can turn the facts that led to Schrade's discussions with WSS in June and early July into evidence to support the ALJ's conclusion that Michael Basha (the only decisionmaker whose motive is at issue) had an unexplained, nefarious or illogical change of heart between February and December 2007, such that the outsourcing project was independent of the February 2007 budgeting meetings. Indeed, the ALJ's conclusion that the two events were unrelated leaves two of his other findings unexplained and illogical: (1) Schrade's outsourcing discussions with WSS after the February 2007 budgeting meetings; and (2) Schrade's meeting with WSS on June 20, 2007 to discuss outsourcing, including outsourcing the baler operation.⁴

2. Even If Bashas' Did Not Initiate Outsourcing Discussions In February 2007, The ALJ Concluded It Had Initiated Discussions At Least By June 20, 2007, And The Undisputed Evidence Establishes That Bashas' Did Not Know Of Any Union Activity Among Its Baler Employees At That Time.

The ALJ acknowledges that Bashas' initiated outsourcing discussions no later than June 20, 2007. Five days earlier, however, on June 15, 2007, Schrade had received a report from a supervisor repeating information volunteered to him by a DC employee that six DC employees, who were all identified by name and worked in the DC's loading operation, had attended a Union meeting. [G.C. Ex. 34.] According to the ALJ, the fact that Schrade received that note just five days before his first face to face meeting with WSS (on June 20) "unquestionably provides a compelling link between the beginning of Respondent's serious search for a subcontractor and its knowledge about the union organizing." [D at 92.]

⁴ While the ALJ concluded that Schrade's June 20, 2007 meeting was prompted by the June 15, 2007 report that some loaders had attended a union meeting, that does not explain why Schrade would have immediately initiated discussions to outsource the baler operation rather than the loading operation. This point is discussed more thoroughly below.

The ALJ's reliance on the June 15 report to establish that Bashas' had an anti-Union animus when it commenced its "serious search for a subcontractor" is misplaced and cannot stand for the simple reason that none of the employees identified in that report were balers. [RT at 1589:5-1590:22; G.C. Ex. 34.] In finding a causal connection between the loaders' presence at a Union meeting and Schrade's initiation of discussions to outsource the baler operation, the ALJ's decision simply makes no sense. It is patently illogical to conclude that the union activities of one group of employees who worked in one part of the warehouse (the loaders) motivated Bashas' to discriminate against another group who worked in an entirely different part of the warehouse (the balers). [RT at 1590:22.] In the absence of some compelling evidence to explain the logical leap, that gap is far too wide to fill with mere speculation.

Remarkably, rather than explain the logical gap in his reasoning, the ALJ instead vigorously attacked Schrade's credibility because of his testimony about the June 15 report. In particular, the ALJ said Schrade testified that the June 15 report referred to a Teamster meeting, and that testimony rendered him generally incredible. Again, however, the ALJ's finding is unsupported by the record. Schrade did not testify that the meeting referenced in the June 15 report was a Teamster meeting; rather, he testified that when he received the report, he believed the (unidentified) union meeting was actually a Teamsters meeting:

Q. Did you have any information when you received this note, either in the note or from some other source, that the union meeting might be a UFCW or Hungry For Respect meeting?

A. No. I had no inkling or indication of that.

Q. Did you have any belief about what kind of meeting this might have been?

A. I believed it was a Teamster meeting.

Q. And why is that?

A. Because the only activity that we had experienced at the distribution center were the Teamsters and I knew that Ben Leyva had a personal relationship with and attachment to the Teamsters.

[RT at 1590:23-1591:9.] Obviously, the difference between what a person believed at a particular time in the past and what they later may learn is a crucial one, particularly in this case.

Schrade's explanation for his belief that the referenced union meeting was a Teamsters (not UFCW) meeting was supported with substantial evidence. In particular, Schrade's uncontradicted testimony demonstrated that: (1) the Teamsters had long expressed interest in organizing the DC; (2) one of the employees identified in the June 15 report as having attended the meeting was a long-time and well-known advocate of the Teamsters union; and (3) Schrade assumed that only the Teamsters would organize the DC because that was the union that represented Bashas' competitors' distribution center employees (including the employees at Schrade's former employer). As noted above, Schrade testified that Bashas' "followed" the Teamsters' contracts at other distribution centers to set its DC employee wages. As a seasoned distribution center HR manager, Schrade believed that the Teamsters had jurisdiction over all warehouse employees and would be the only union that could organize Bashas' DC employees. Without any prior notice of pro-UFCW activities by DC employees, Schrade's testimony about his beliefs at the time he received the June 15 report is not only credible, it is not challenged by any fact in the record.

In any event, well-settled Board law required the ALJ to address the facts supporting Schrade's belief before reaching a credibility finding. The ALJ not only failed to perform that analysis, he completely misinterpreted Schrade's testimony by concluding that Schrade was testifying that the meeting was, in fact, a Teamster meeting. Even the ALJ's conclusion that there was "corporate-wide conflict between Bashas' and the UFCW" by June 2007, rendering Schrade's testimony implausible is, in itself, incorrect. The first notice Bashas' had of any union activities occurred after Bashas' received the Union's Hungry For Respect (HFR) Report in late June 2007. [R. Ex. 5 (while the HFR was dated June 2007, it was released late in that month as evidenced by the fact it contains a statement dated June 13, 2007).]

In retrospect, Schrade's belief about what union sponsored the meeting referenced in the June 15 report was obviously incorrect. Moreover, if Schrade's testimony had been that, at the time of the hearing he still believed that the June 15 note referred to a Teamster meeting, the ALJ's conclusions about Schrade's credibility might have been more understandable. But, as

Schrade's testimony and the decision makes clear, the ALJ misconstrued Schrade's testimony and, as a result, viewed much of Schrade's other testimony with a jaundiced eye. This point was, as the ALJ noted, "no small matter." The fact that the ALJ formed his opinion of Schrade's credibility on an unfounded misinterpretation of the record is, likewise, no small matter.

3. Because The June 15 Report Did Not Provide Bashas' With Notice Of Any Union Activities By Baler Employees, The Evidence Clearly Demonstrates That Schrade Had Initiated Outsourcing Discussions Before July 17, 2007.

Although the ALJ concluded that the Union began an organizing campaign at the DC by April 2007, he made no finding that Bashas' managers learned about that alleged campaign until the June 15 report, and he made no finding that Bashas' managers knew of any union activity by any baler employees until July 17, 2007.⁵ Indeed, in several significant ways, the conduct of Bashas' managers provides compelling support for their testimony (which no witness or document disputed) that they did not believe there was any UFCW organizing among DC employees until Schrade learned, on July 17, 2007, that eight workers (including four balers) depicted in the June 2007 HFR propaganda were DC employees. Yet, the ALJ failed to address that evidence. For example, the ALJ failed to address the fact that it was only after that discovery on July 17, 2007 that Schrade suggested to Michael Basha (who agreed) that all 800 employees working at the DC should be required to attend educational meetings regarding the Union. Had Schrade received any indication that the Union was seeking to recruit DC workers earlier, there is no logical explanation as to why he would not have initiated those educational meetings earlier.

⁵ Despite the ALJ's findings regarding an "organizational campaign" at the DC, there is no record evidence of any actual effort by the Union to organize the DC employees – as opposed to enlisting their support for the UFCW's corporate campaign to damage Bashas' public image. Indeed, despite presenting numerous witnesses at the hearing, neither the General Counsel nor the Union presented any evidence that a single Bashas' employee had signed (or been solicited to sign) an authorization card or petition.

The ALJ also made much of Schrade's July 18, 2007 email to WSS that stated "we have union issues with members on the baler dock." However, the ALJ never addressed why Schrade would have written that in an email the day after he testified that he learned about the activity for the first time, despite having had – as the ALJ's decision acknowledges – multiple conversations with WSS representatives over the prior month. If union activity motivated Schrade's attempt to outsource the baler operation, he certainly would have mentioned that to WSS in their earlier discussions and it would not have been news to report to WSS in the July 18, 2007 email.

Indeed, the July 18, 2007 email – the very document the ALJ found proved anti-union animus – actually proves that the outsourcing discussions were well underway by the time Schrade learned of union activities by baler employees on July 17, 2007. In particular, the July 18 email string refers to significant amounts of detailed information that Schrade had previously provided WSS (during the July 13, 2007 visit). [RT at 1650:20-1653:15; G.C. Ex. 30; R. Ex. 48.] For example, Schrade had provided WSS with the total number of hours the baler employees had worked between July 2 and July 8, 2007, the most current information preceding the July 13, 2007 meeting. [*Id.*] That email cannot be used to support only the General Counsel's position: under Board law, the inconvenient portion that undermines the General Counsel's case and corroborates the credibility of Bashas' witnesses must at least be addressed. Yet, once again, the ALJ failed to do so. The ALJ wholly failed to explain how the July 18 email "clearly provide[d] direct evidence that pro-union sentiments among the baler employees motivated at least in substantial part the initiation of the outsourcing process" while at the same time proving that the discussions had commenced earlier and progressed to the point where Bashas' had already provided substantial information to WSS about the operations to be outsourced.

In addition, there is substantial and uncontradicted evidence (corroborated by contemporaneous documents) proving that on July 13, 2007, WSS managers visited the DC to observe the baler operation and requested and received data to create a proposal to present to the Company to outsource the "reclamation" functions, which included the baler operation. The

record demonstrates that Bashas' investigation into the possibility of outsourcing the baler operation was in full swing at the time management first learned of union activity by any baler employees. That timing precludes any finding that the General Counsel met its *prima facie* burden under *Wright Line*.

C. The ALJ Failed To Consider And Address The Substantial Evidence That Bashas' Outsourced Its Baler Operation For Legitimate Business Reasons And, Instead, Substituted His Judgment For That Of Bashas'.

It is a fundamental principle that the Board "does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated." *Ryder Distrib. Res.*, 311 NLRB 814, 816 (1993). "Rather, the Board considers the factors known to the employer at the time the decision was made and decides whether the employer's business strategy was chosen for discriminatory reasons." *Id.* at 816-17 (rejecting the ALJ's finding that the employer subcontracted its workforce due to anti-union animus and finding that the employer's projected economic savings, even if not realized, demonstrated that it would have made the same decision even in the absence of its employees having engaged in union activity).

Here, however, the ALJ did exactly what Board law prohibits. The ALJ wholly failed to address the factors known to Bashas' at the time it made its decision and, instead, summarily concluded that Bashas' actual motive for outsourcing the baler operation was anti-union animus. For example, the ALJ did not address the following factors that Michael Basha knew at the time he made his decision:

- Bashas' was facing the most significant reduction of business that he had ever seen in 20 years;
- By mid-2007, Bashas' was beginning to feel the effects of the national recession;
- He was seeking to dramatically cut operating costs at the DC, and made difficult decisions to achieve those savings, including: (1) reducing headcount by more than 10% in the 12 months between the Spring of 2007 and June 2008; (2) eliminating/combining shifts; and (3) changing the DC's hours of operation, resulting in approximately \$300,000 of savings, but also resulting in the loss of highly-valued management personnel. [RT at 2536:16-2539:2.]

- Bashas' baler operation was inefficient based upon the objective metrics provided by WSS in the August 2007 meeting between WSS and Michael Basha to discuss outsourcing the reclamation function;
- Achieving greater efficiency in the baler operation would require two dedicated supervisors (one per shift), which would increase costs by more than \$100,000;
- Achieving the savings WSS suggested (but would not guarantee) including making significant expenditures for capital improvements in the Ocotillo portion of the reclamation function;
- Michael Basha was in a cost-cutting mode, and was not willing to spend large sums of money as demonstrated by the other cost-cutting measures;
- Bashas' conducted an economic analysis of both the WSS bid and later the TBG bid to project potential savings before making a final decision to outsource the baler operation to TBG;
- Bashas' economic analysis projected that the Company would save more than \$100,000/year by outsourcing the baler function to TBG;
- Only a dozen or so employees in the entire 800 employee complement of the DC had expressed pro-union sentiments;
- Only a handful of balers had expressed pro-union sentiments by the time Michael Basha made the decision to outsource that operation; and
- If Michael Basha did not outsource the baler operation, Schrade wanted him to increase the balers' pay, so he would actually be saving more money than the economic analysis projected, as that projection was based on current labor costs of the baler operation.

In failing to address these facts, the ALJ effectively ignored Board law and substituted his opinion for Bashas' business judgment. The above facts are undisputed in the record, and demonstrate that when Michael Basha made the ultimate decision to outsource the baler function, he perceived both the need to cut costs and had taken actions to do so. Moreover, there was no allegation in the Complaint, nor evidence presented at hearing, that Michael Basha had made any statement or engaged in any conduct that was illegal under the Act, and there is no other evidence in the record demonstrating that he had any anti-union animus (he had not even seen Schrade's July 18, 2007 email by the time of the hearing in the Summer of 2008). Yet, it is his motive, and his alone, that is relevant to the ultimate decision to outsource the baler function; Schrade had absolutely no involvement in that final decision. [RT at 2570:2-7.]

Apart from the facts known to Michael Basha when he made the ultimate outsourcing decision, the deliberate process he went through in making that decision, including its drawn-out timing and other circumstantial evidence all corroborate his testimony that his decision was made for purely economic reasons. Indeed, Michael Basha pursued his goal of cost reduction in a methodical way. Rather than quickly take the first bid he received from WSS – as one would expect if he were merely looking at subcontracting as a means to stop newly-discovered union activity among the balers, he rejected the first proposal for solely economic reasons, requiring WSS to provide five bids in all – and then rejected WSS’s final proposal and took steps to obtain bids for outsourcing the baler from other third-party vendors. [RT at 2550:16-2551:10.]

1. The ALJ Drew Inferences That Are Not Supported By The Record.

The ALJ inferred that Bashes’ proffered business justification for outsourcing was pretextual based, in part, on the absence of Cash Eagan as a witness at the hearing. Yet, Cash Eagan’s absence does not diminish Michael Basha’s credibility or his business reasons for outsourcing the baler operation. As Michael Basha explained, he directed Cash Eagan (the A.M. Dry Receiving Manager) to give a tour of the DC and baler operation to potential subcontractors. [RT at 2552:24-2553:1.] While DOS did address a follow-up letter to Cash Eagan (R. Ex. 95), the logical inference is that was simply because Eagan was the Company representative who gave DOS the tour – not because he had any involvement in the decision-making process. Indeed, given Cash Eagan’s job as the manager with responsibility over the baler dock during the morning shift, it is far more reasonable to infer that he fulfilled exactly the role Michael Basha described, as he was the operational manager on duty when DOS visited the DC. Moreover, Cash Eagan holds the same job as Mel Kelly, they simply manage different shifts (morning/afternoon). It is illogical to draw an inference that Cash Eagan was somehow involved in the decision-making process, while the evidence demonstrated that Kelly (who did testify) was excluded. There is no dispute that it was Michael Basha who gave DOS the bid parameters and repeatedly communicated with DOS to obtain their bid. [RT at 2552:16-2553:13.]

Furthermore, the ALJ incorrectly concluded that Cash Eagan must have been involved in the decision to outsource the baler operation simply because TBG noted in an email addressed to Michael Basha that it was making a proposal modification following a conversation with Cash Eagan. [R. Ex. 97.] Michael Basha, however, testified (without contradiction) that he was the sole decision-maker in the outsourcing process and provided extensive details about that process. Indeed, that email is addressed to Michael Basha (not to Cash Eagan) and regarded operational issues (which Michael Basha would have presumably directed to the relevant operational manager – in this case, Cash Eagan). [*Id.*] There is no evidence that Cash Eagan, as an operational manager far lower in the management chain than Michael Basha, had any involvement in the actual decision making process. Nor is there any evidence that Cash Eagan provided any information to TBG about any union activities by baler employees. Cash Eagan was never identified by a single General Counsel or Union witness as having any involvement in union-related discussions or comments, and there was not a single allegation in the Complaint accusing Cash Eagan of any wrongdoing. Indeed, it would have been simply wasteful for Bashas' to extend an already prolonged hearing to call Cash Eagan to testify that he had no involvement in the decision making process, especially given Michael Basha's uncontradicted testimony to that fact. The negative inferences the ALJ drew from Cash Eagan's absence are wholly unwarranted and unsupported by the record.

2. The ALJ Discredited Schrade's Testimony Based Upon Misunderstandings Of His Testimony And Insupportable Inferences.

The ALJ improperly discredited Bashas' evidence about the legitimate reasons for its outsourcing decision based on his finding that the testimony of Schrade, a non-decisionmaker, was not credible on several key points. One of those points related to Schrade's reference to "removing associated employee issues" in his January 27, 2008 Goal Planning Sheet. Schrade testified that the associated employees issues referred to immigration law concerns he had about the baler population. The only stated basis for the ALJ's rejection of Schrade's explanation was the fact that Bashas' did not produce evidence showing that it was facing "serious liability under

IRCA.” [D at 91.] The fact that an Arizona employer might avoid creating a public record regarding potential immigration law issues – at a time when employers in Arizona were being subjected to the most stringent penalties in the nation for immigration law violations – to explain one point in a planning sheet a non-decisionmaker created after the decision was made by another, and which merely identified various benefits the non-decisionmaker perceived as flowing from the decision, provides no reasonable basis to find the testimony about the comment not credible. In any event, as a post-decision statement by a non-decisionmaker, Schrade’s January 27, 2008 Goal Planning Sheet should not be considered as evidence of what Michael Basha knew and considered when he made the decision to outsource the baler operation a month earlier on December 24, 2007.

Moreover, even if the ALJ were justified in drawing an inference about Michael Basha’s motives from Schrade’s post-decisional document, and the inference he drew about the “associated employee issues” was accurate, the ALJ failed to consider the other evidence in the Goal Planning Sheet that undermined his decision that an economic savings was just an “incidental” benefit of the outsourcing decision. [D at 91.] In particular, if the Goal Planning Sheet reflected Michael Basha’s motives, then it also reflects that the first two motives were entirely economic: “Reduce expenses by 100K+; Increase ROI [*i.e.*, return on investment], efficiency.” [*Id.*] The fact that Schrade listed those benefits above “removing associated employee issues” permits no inference other than that he perceived the economic benefits of the outsourcing decision as paramount. Accordingly, to the extent that Schrade’s Goal Planning Sheet reflects Michael Basha’s motives, it establishes that his primary motive was economic. In other words, he would have made the same decision even in the absence of any union activity. The ALJ cannot simply take the aspects of a document that might permit a negative inference to be drawn without, at a minimum, addressing the contrary evidence in the very same document.

3. The ALJ Failed To Consider And Address The Evidence Of Michael Basha's Deliberate Process In Evaluating The Outsourcing Option Over Many Months, And His Knowledge That There Was Little Support For The Union Among The DC Employees .

The fact that Michael Basha required WSS to provide multiple bids, each of which was more financially favorable to Basha's than the former, in and of itself is proof that his interest in outsourcing the baler operation was to save money. Had his goal been the illegal one ascribed to him by the ALJ, he would have logically accepted the first bid. That rather obvious point is completely missing from the ALJ's analysis, and his failure to explain why Michael Basha repeatedly demanded that WSS provide better economic terms requires the Board to reverse the ALJ's decision. *See Leeward Nursing Home*, 278 NLRB at 1075 (concluding that there was "plain evidence that Respondent was prepared to subcontract if [the third party] could demonstrate the economic utility of the [outsourcing] decision"; thus, "even if Respondent later began to view the subcontracting as a device which would work to the disadvantage of the organizing effort, I could not find that the latter motive caused Respondent to take action which it was not otherwise prepared to take"); *see also Manhattan Day Sch.*, 346 NLRB 992, 995 (2006) (noting that the employer's outsourcing decision was motivated by lawful economic reasons because it anticipated saving \$22,000 in labor costs).

Moreover, when WSS refused to give Michael Basha the terms he wanted, he abandoned his negotiations with that company and personally looked into other alternatives. One of the companies he contacted after ending the WSS negotiations was DOS. In its bid, DOS identified certain commitments it would make to Basha's, one of which was "hiring the right individuals by using extensive screening techniques, background checks, and drug testing." The ALJ concluded that commitment was "code talk" for not hiring pro-union employees, which is an illogical stretch based on the evidence. First, there is no overt mention of "union" or other protected activities in DOS's bid. Rather, DOS's assurances are based on common hiring practices (criminal background checks and drug testing) and are even more understandable in the outsourcing situation – given that Basha's would no longer be in control of deciding who was

employed as balers at the DC, it only makes sense that DOS, in bidding for the outsourcing contract, would assure Bashas' that it would adhere to the same hiring procedures Bashas' would use in making hiring decisions.

More importantly, the ALJ's limited analysis begs the question: *if Michael Basha's goal was to discriminate against the pro-union balers and chill the union activities of other DC employees – and any economic savings were just incidental to that goal – why did he not immediately accept DOS's bid which gave him exactly what the ALJ contends he wanted – avoiding pro-union balers?* The ALJ's failure to address that obvious contradiction in his logic is fatal to his out-of-hand refusal to credit Michael Basha's testimony about his legitimate business motives. Moreover, the ALJ's attempt to read an anti-union motive into DOS's bid is internally inconsistent. If Bashas' had communicated to DOS a desire to have that company not hire pro-union employees, Bashas' presumably would have told DOS which employees it should not hire. That never happened. In any event, DOS would likely have made the point without committing to relatively expensive background checks and drug tests. Yet, rather than accept DOS's bid when he was not satisfied with their proposed labor rate caps, Michael Basha looked further. He found Matt Connors with TBG. When Connors gave him the rate he wanted, Michael Basha awarded him the baler operation, saving Bashas' over \$100,000.

Furthermore, the length of time it took Michael Basha to outsource the baler operation is also compelling evidence that his decision was not made for discriminatory reasons. *See, e.g., Rainbow News 12*, 316 NLRB 52, 70 (1995) (“The facts that the decision to lay off employees took place 1-½ months after the petition was filed lends credence to a finding that they were not made precipitously in reaction to the union campaign.”). Indeed, the fact that Michael Basha made his final decision to hire TBG to run the baler operation five months after learning of the union activity among a handful of baler employees sets this case apart from those where discriminatory motive is evidenced by business decisions being made just days after receiving notice of union activities. *Cf. Kentucky May Coal Co.*, 317 NLRB 60, 63, 66 (1995) (employer announced outsourcing decision seven days after a majority of employees signed authorization

cards and one day after the union held its first “organizational meeting”); *Bonham Heating & Air Conditioning, Inc.*, 328 NLRB 432, 433 (1999) (employer announced it was closing a few days after receiving a demand for recognition); *CWI of MD., Inc.*, 321 NLRB 698, 701-03 (1996) (one day after receiving the union’s demand for recognition, the employer announced it was considering moving operations, and, seven days after the petition was filed, the employer announced its decision to move operations was final).

Additionally, in each of those cases where the Board found the timing of the employer’s decision persuasive in concluding the employer had violated the Act, the Board did not just focus on the timing of the decision, but the nature and extent of the protected activity that motivated the employer’s decision. In each of those cases, the employers made sudden business decisions on the heels of protected activities by a large percentage of its employees – such as by voting in favor of unionization or having signed authorization cards (and, typically, demanding recognition). Here, on the other hand, the record is void of any evidence suggesting suspicious timing or anything close to a majority of the DC employees engaging in protected activities. Rather, the protected activities involved only a tiny fraction of the approximate 800 employees working at the DC – less than fifteen in the entire DC at its high point – and there is no evidence of any card-signing. [RT at 1757:6-1758:22; 1762:9-1763:10.] Unlike the cases where employers acted precipitously to close operations in an effort to avoid imminent unionization, there is no evidence suggesting that unionization was even a remote risk.

Moreover, the evidence proves that Michael Basha did not believe there was any risk of unionization by the time he made the ultimate outsourcing decision in December 2007. For example, in November 2007, Schrade told Michael Basha that there was virtually no support for the Union among DC employees. [RT at 2522:19-2523:12.] Schrade provided uncontradicted testimony that led him to that conclusion. The first was a report from a DC employee.⁶ The

⁶ The Company provided the General Counsel with all the non-privileged documents reflecting the Company’s knowledge of Union activity at the DC. Two of those reports (Vasquez’s Note to File dated June 15, 2007, and Schrade’s Notes dated November 15, 2007) were admitted into
(Continued ...)

employee voluntarily told Schrade that, in November 2007, he had attended a Union meeting at a hotel and only six employees from the DC were present. [RT at 1613:7-1615:7.] The other two reports were from employees regarding a Union meeting they had witnessed at a nearby convenience store that only three DC employees attended. [RT at 1115:13-1116:25; G.C. Ex. 33.] The General Counsel's witnesses verified that the Union's meetings were poorly attended by DC employees – indeed, in August and September 2007, only around five employees attended the Union's meetings. [RT at 1762:9-1763:13.] By November 2007, that number had increased, but only to 11 or so. [RT at 1763:7-1764:11.]

Thus, by mid-November, Schrade had reasonably concluded that there were, at most, 15 employees at the 800 employee DC who supported the Union, including, at most, six balers. [RT at 1614:22-1615:16.] In fact, the risk of unionization was so low that, when Schrade and Michael Basha discussed whether they should conduct a second round of meetings with the DC employees to further educate them about the Union, they both agreed that, in light of the apparent lack of support for the Union and the cost of the programs in lost production time, the situation did not warrant another round of meetings with any group of DC employees. [RT at 2524:13-2525:7.] Clearly, when Michael Basha made the decision to outsource the baler operation to TBG a few weeks later, he reasonably believed that only a few DC employees were supportive of the Union. [RT at 2523:15-2525:7; 2569:18-2570:1.] It is illogical to conclude that, given this low level of support, Michael Basha would have taken the risk of outsourcing the baler operation to chill the almost non-existent union activities among the other DC employees.

Further bolstering Michael Basha's testimony as to his legitimate motives is the uncontradicted evidence that, in the first six months after outsourcing the baler function to TBG, Bashas' saved nearly \$100,000. [RT at 2570:8-2573:18; R. Ex. 99.] At that rate, the outsourcing decision generates a savings of approximately \$200,000 each and every year. While one might

evidence. [G.C. Exs. 33, 34.] A third was discussed on the record, but not offered into evidence. [RT at 1005:20; 1113:18-1115:10; G.C. Ex. 32.]

question an employer who decided to subcontract a department based on economic projections that turned out to be overly-optimistic or truly “incidental,” that is not the case here.

D. The ALJ Failed To Consider And Address Other Substantial Evidence In The Record That Is Inconsistent With His Findings.

In addition to the ALJ’s failures to consider and address the evidence discussed above, the record is replete with other evidence that supported the testimony of Bashas’ witnesses and is inconsistent with the ALJ’s conclusions. In light of the ALJ’s conclusory dismissal of the economic justifications for Bashas’ decision to outsource the baler operation, his failure to address this other evidence requires the reversal of his decision.

1. The ALJ Failed To Give Weight To The Fact That Bashas’ Did Not Take Adverse Action Against Other Pro-Union DC Employees.

Contrary to the ALJ’s conclusion, and as demonstrated above, the June 15 report cannot establish that Bashas’ was motivated by an anti-union bias because it is illogical to conclude that Bashas’ alleged bias motivated it to outsource one group of employees when it learned of the union activity of another. Further demonstrating the lack of logic in the ALJ’s conclusion is the fact that Bashas’ did not take any adverse action against the six DC employees who were identified as having attended meetings or otherwise supporting “the union.” [G.C. Ex. 34.] All but one of the employees identified in the June 15 report were loaders. [RT at 1590:4-15; G.C. Ex. 34.] Yet, there is no evidence that Bashas’ took any adverse employment action against the loaders either as a group or individually. [RT at 1591:16-18.] It simply defies logic to conclude, as the ALJ did, that if Bashas’ was motivated by an anti-union animus, it would attack one group of employees (the balers) who had engaged in little (if any) protected activities in response to the protected activities of another group (the loaders) and take absolutely no adverse action against the group of employees who actually engaged in the protected activity.

Moreover, the ALJ never addressed the substantial record evidence establishing that the balers were not the leaders of the Union efforts at the DC. Logic dictates that an employer would target the most pro-union employee groups if it wanted to engage in either illegal

discrimination or to chill its other employees from engaging in pro-union activities. *See Daikichi Sushi*, 335 NLRB at 631 (finding employer’s conduct in outsourcing department legal and relying in part on lack of evidence that the employees in the subcontracted department were more “pro-union” than other departments). Art Mendoza, a forklift driver (not a baler) led the only collective actions that occurred at the DC (two groups of employees who went to meet with Michael Basha in August 2007 regarding alleged safety issues). [RT at 494:8-16; 518:1-520:18; 533:7-537:14; 1592:22-1595:9; 1596:8-16; 1604:21-25; 2510:14-2515:12.] Raymond Moroyoqui, a utility employee (not a baler) was the only employee who passed out a “Safety Survey” sponsored by the Union. [RT at 1608:21-1609:7.] If Bashas’ had truly wanted to violate the law and send a powerful message to DC employees to avoid Union-sponsored activities, it would have quickly singled out the leaders (Mendoza and Moroyoqui) and come up with pretextual reasons to discharge them. However, those “leaders” received no discipline whatsoever, and were still employed with Bashas’ at the time of their testimony. [RT at 494:8-16; 538:9-25.] The ALJ simply failed to address these compelling facts.

2. The ALJ Failed To Give Weight To Bashas’ Efforts To Place The Displaced Balers In Other Positions And The Fact That Bashas’ Contractually Required TBG To Hire The Remaining Balers.

Bashas’ treatment of the balers after making the outsourcing decision is also inconsistent with the ALJ’s decision. If Bashas’ had wanted to outsource the balers as punishment for supporting the UFCW, or to stop potential organizing efforts by other employees, it would not have filled all eight open positions in the DC with balers – transferring nearly a third of the entire baler group, particularly on the basis of seniority (an objective standard that is blind to Union proclivities). [RT at 1669:17-1670:5.] Nor would Bashas’ have subsequently hired back two additional former balers into other positions post-outsourcing. [RT at 1675:1-7.] By transferring/hiring approximately one-third of the balers (10 of 29) to other open positions at the DC, Bashas’ retained and dispersed a group that, under the ALJ’s reasoning, would have been pro-Union, and would now have broader access to other DC workers to proselytize for the

Union. While Bashas' conduct in transferring so many balers to other positions on the basis of seniority is fundamentally inconsistent with the ALJ's conclusion that it was punishing them for pro-union conduct and/or to send a message to other employees, the ALJ failed to consider and explain how that inconsistency could not preclude his ultimate findings.

Indeed, if Bashas' wanted to discriminate against the balers, or stop future organizing, it would not have contractually required TBG to hire all balers who met its minimum qualifications. That requirement was intended to ensure employment for the baler employees, and to minimize the impact on them of a difficult business decision. It would have made no sense to include that contractual requirement with TBG if Bashas' viewed the balers as "pro-union" and wanted to rid itself of Union advocates because the employees hired by TBG continued to have access to Bashas' property and Bashas' employees – TBG's employees can use Bashas' employee break rooms, kitchen area, and parking lots. [RT at 934:3-11; 1671:6-19; 1674:19-25.] While the ALJ's recitation of the facts noted that three balers, all of whom were openly pro-union, were not hired by TBG, there was no evidence that those individuals met TBG's hiring standards (it is doubtful that at least one of them would have met any employer's standards: during its pre-hearing investigation Bashas' uncovered that A.C. Spann was a convicted felon who lied about his conviction at the hearing and in his employment application).

While the ALJ's decision suggests that there was some anti-union animus involved in the fact that three openly pro-union employees did not get jobs with either Bashas' or TBG, the negative inference he apparently drew from those facts is entirely inappropriate. TBG made those decisions – not Bashas'. Bashas' did not elicit evidence to explain TBG's decisions because those decisions were not at issue in this case and are irrelevant to Bashas' motives. *See Verizon*, 350 NLRB 542 (2007) (overturning ALJ decision and finding the employer legally outsourced certain work that was being performed by employees after those employees engaged in protected activities, and refusing to consider the employer's failure to ensure that the subcontractor hired the employees because there was no allegation in the complaint alleging a discriminatory failure to secure such positions for the employees). The fact that TBG did not

hire three pro-union balers clearly influenced the ALJ's decision, but, as *Verizon* demonstrates, his consideration of that evidence is inappropriate as Bashas' had no notice that it needed to address those facts as they were not charged nor litigated by the General Counsel. "Simply because violations could have been alleged in addition to those in the complaint does not obligate the employer to defend against all possibilities." *N.L.R.B. v. Pepsi-Cola*, 613 F.2d 267, 274 (10th Cir. 1980) (notice was insufficient to satisfy due process standards).

3. The ALJ Failed To Give Weight To Bashas' Efforts To Ensure The Remaining DC Employees Understood That The Outsourcing Decision Was Motivated By Economics And That Bashas' Had No Other Outsourcing Planned.

The undisputed evidence shows that Bashas' took steps to ensure that all DC employees, both the balers and the remaining employees, understood that the outsourcing of the baler operation was both motivated entirely by economic considerations and a one time event. [RT at 1666:19-25.] Schrade explained that the meetings with the remaining DC employees, and the "talking points" he prepared for managers to use during those meetings, were "to inform them of what was happening so that they understood and they didn't get their information through the grapevine or the rumor mill and to assure them that no other outsourcing events were in the mill." [RT at 1666:19-25.] However, the ALJ concluded that those talking points had the "opposite" effect. [D at 91.] In reaching his conclusion, the ALJ simply but obviously misinterpreted the record. The talking points Schrade created for communicating the outsourcing decision to the remaining DC employees were never introduced at the hearing; and the record clearly shows that the talking points the ALJ relied upon were a different set of "talking points" used to communicate the outsourcing decision to the balers. [D at 91; RT at 1553:23-1555:15; 1666:3-25; G.C. Ex. 53.]

Moreover, although the General Counsel called several witnesses who were still employed by Bashas', any of whom could have testified as to what Bashas' told them about the outsourcing decision and its impact on them and other employees, not a single witness contradicted Schrade's testimony that the talking points specifically assured the remaining DC

employees that there were no future outsourcing decisions planned. Indeed, the General Counsel's own witness testified that Bashas' management told him, in a private conversation instigated by that employee, that the outsourcing decision was made for economic reasons (Mendoza testified that Manager John Hansen told him, "Well, sometimes companies have to do these kind of measures, to compete with other companies. That is why we let the balers go.") [RT at 508:7-16; 886:3-887:2; 1798:1-11.] By relying on a set of talking points that were never received into evidence to discredit Schrade's testimony and to make a crucial finding in this case (that Bashas' outsourced the balers to chill the union activities of the remaining DC employees), the ALJ reached an unsupportable and incorrect decision.

If sending a message to chill the remaining DC employees from union activities was Bashas' goal, it logically would not have told them that it had no future outsourcing plans. At a minimum, one would expect that Bashas' management would have made statements that subtly implied that the outsourcing was somehow tied to protected activities of the affected employees. Yet, the record is utterly devoid of any such evidence. In fact, the evidence demonstrates that the exact opposite occurred, as the Hanson-Mendoza exchange shows. Thus, the direct and circumstantial evidence – and all reasonable inferences that can be derived from that evidence – are contrary to the ALJ's finding that Bashas' outsourced its baler operation to chill the remaining DC employees in the exercise of their Section 7 rights. *See Standard Dry Wall Prod., Inc.*, 90 NLRB 544, 545 (1950) (the Board bases its findings "as to the facts upon a *de novo* review of the entire record, and do[es] not deem [itself] bound the Trial Examiner's findings").

II. **EXCEPTION II: BASHAS' EXCEPTS TO THE ALJ'S CONCLUSION THAT BASHAS' VIOLATED THE ACT WHEN IT TRANSFERRED MARIA ACOSTA.**

A. **Background Facts.**

The ALJ found that Acosta began working for Bashas' in September 2000. She voluntarily transferred to store 20 in 2002 and thereafter went to store 107. In April 2006, she returned to store 20. When Acosta returned to store 20, the store management consisted of Paul Harper, store director, Jerry Schrock, merchandise manager, and Victoria Zamora, PIC. In mid-

to-late 2006, Zamora became the acting customer service manager (CSM) and performed those duties until May 27, 2007, when she began working as a nonsupervisory cashier, a position she previously held. Zamora was a nonsupervisory cashier during all relevant times. [D at 43.]

The ALJ further found that “Soon after Acosta’s return to store 20 in 2006 conflicts between her and Zamora broke out. Within a couple of months after her return, Harper issued Acosta a conference memorandum for ‘gossiping, spreading rumors and making threats towards a member of management.’ (R. Ex. 24.) This warning was precipitated by Acosta’s threat to kick Zamora’s ass.” [D at 44.]

The ALJ also found that “Acosta began attending union meetings regularly in the spring of 2007 and continued doing so through that summer. . . . The managers who worked with her uniformly claim they knew nothing about her union activities or sympathies until well after her transfer to Store 163 [sic].” [D at 44-45.]

The ALJ also found that “Throughout this period, the ill-will between Acosta and Zamora continued.” During a lengthy conversation with Pearl Castillo, a Food City human resources specialist, “Acosta complained about Zamora calling her names, being mean, and bossing her around in a disrespectful manner. Acosta also told Castillo in one or more of their meetings that Zamora had problems with other store 20 employees as well. Castillo looked into that claim by Acosta and confirmed it to be true. (Tr. 2330).” During one of their meetings, Acosta raised the notion of transferring to another store in order to get away from Zamora because she simply “couldn’t work with Zamora anymore.” [D at 47-48.]

The ALJ further found that “O’Connor [the Food City human resources director] said Zamora called her four or five times complaining about Acosta.” Zamora told O’Connor that Acosta “had previously threatened her, that she was gossiping about her, going around the store asking people if she was mean to them, and talking about – badly about her. . . . O’Connor, the key player in the decision to transfer Acosta, said both employees ‘were at it,’ and that [the] company could not say ‘that Victoria was the bad one or Maria was the bad one.’ . . . O’Connor felt it only ‘fair’ to transfer both employees to other stores.” [D at 50-51.]

The ALJ also found that Castillo called Acosta and asked that she come to the human resources department for a meeting with O'Connor and herself. During that meeting, Acosta claimed she was told "to find another store . . . [and] that she was being transferred because she had made complaints about Victoria." Acosta admitted that Castillo and O'Connor told her that they had to transfer her "from the store in order to find out who was the bad one, me [Acosta] or Victoria [Zamora]." Acosta also admitted that Castillo told her "that maybe it was possible [Acosta] wanted to transfer to another store or a department since she was having so many problems with Zamora." [D at 51.]

The ALJ found that Zamora transferred to Store 106, effective September 16, 2007. Seven days later, on September 23, 2007, Acosta transferred to store 162. [D at 51.]

B. The ALJ Did Not Find Acosta Credible.

As for witness credibility, the ALJ found that "Respondent's brief cites Acosta's bias based on her active support for the Union, the poor quality of her testimony, and the lack of corroboration for her assertions as the basis for arguing that Acosta was not a credible witness. Respondent's contention that 'Acosta's testimony was scattered, contradictory and nonresponsive' certainly has merit. To that litany, I would add her testimony occasionally became excessively self-serving. Put simply, the General Counsel's failure to produce other witnesses to verify Acosta's assertion even in some small way, or to provide argument in its brief why, despite her obvious shortcomings as a witness, her stories should be given credence over the contrary testimony of Respondent's witnesses made it particularly difficult to deal with wide-ranging complaint allegations that concern her. It is inconceivable that anyone witnessing Acosta testify could miss the struggles she had in the relatively formal courtroom setting required for her testimony. Several of her answers were confusing or nonresponsive. Other answers indicated she did not grasp the question even as translated into her native language. A few of her answers were directly contradicted by documentary evidence; still others seemed exaggerated. Respondent's brief correctly notes that I recessed the hearing at one point and

directed the counsel for the General Counsel, a fluent Spanish speaker, to emphatically instruct Acosta about the importance of listening to the question asked by counsel and answering the question asked. . . . Even though important portions of Acosta’s testimony lacked the indicia of deliberate deception, I am very skeptical about the reliability of her unsupported testimony and reluctant to put stock in her account of events where contradicted by others whose testimony I found less demonstrably unreliable.” [D at 53-54.]

C. The ALJ Erred When He *Sua Sponte* Considered Acosta’s Alleged Non-Union “Concerted Activities” When Such Activities Were Never Litigated.

1. The Complaint Allegations.

The allegations regarding Acosta’s transfer appear at Complaint paragraphs:

- Paragraph 7(j): “On or about September 17, 2007, the Respondent transferred Maria Acosta, herein called Acosta, contrary to her desires, from the Respondent’s Store 43 [sic] to the Respondent’s Store 162.”
- Paragraph 7(q): “The Respondent engaged in the conduct described above in paragraphs 6(y)(3), 6(cc), and 7(a) through 7(p), because the employees referenced in those paragraphs and other Respondent employees, had joined, supported, or assisted the union and engaged in concerted activities, and to discourage employees from engaging in these activities.”
- Paragraph 11: “By the conduct described above in paragraph 6(y)(3), 6(cc), and 7, the Respondent has discriminated in regard to the hire or tenure, or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Sections 8(a)(1) and (3) of the Act.” (Emphasis added.)

2. Bashas’ Was Denied Due Process Because Acosta’s Alleged Non-Union “Concerted Activities” Were Never Fully and Fairly Litigated.

“Due process requires that a party be on notice of the General Counsel’s contentions.” *International Baking & Earthgrains*, 348 NLRB No. 76, at *3 (2006). “[T]o decide the case on a theory neither raised nor litigated – would deny the parties due process of law.” *United Mine Workers of Am.*, 338 NLRB 406, 406 (2002) (declining to *sua sponte* find a violation based on a

theory that was neither raised nor litigated). “[T]he crucial focus is at all times on whether notice was given which provided the party with an adequate opportunity to prepare and present its evidence.” *N.L.R.B. v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 546 (7th Cir. 1987) (a violation based on a theory raised for the first time in the General Counsel’s exceptions brief to the Board violated the employer’s due process rights). Notice is provided either by express allegation in the Complaint or when “the course of the proceeding provided [the employer] with fair notice of the . . . claim so that the Board could decide the question based on its full litigation.” *Id.* at 545.

Here, Bashas’ did not receive any notice that Acosta’s alleged non-Union “concerted activities” were at issue in this proceeding. While the Complaint makes general references to “concerted activities,” the paragraph alleging that Acosta’s transfer violated the Act is limited to the assertion that her transfer was aimed at “discourag[ing] membership in a labor organization.” [Complaint at para. 11.] The Union was the “charging party” in all of the charges comprising the Complaint (including the charges regarding Acosta). [See Complaint at 2.] The theme throughout the Complaint was that Bashas’ took actions to “discourage membership in a labor organization.” [Complaint at para. 11.]. A plain reading of Complaint paragraphs 7(j), 7(q), and 11 demonstrates that the General Counsel had no intention of pursuing a theory that Acosta’s transfer was due to any alleged non-Union “concerted activities.” See *Bob’s Casing Crews, Inc. v. N.L.R.B.*, 429 F.2d 261, 263 (5th Cir. 1970) (rejecting the argument that a phrase generally alleging a violation because the employee ““engaged in * * * concerted activities for the purpose of collective bargaining or mutual aid or protection”” sufficiently disclosed that non-union “concerted activities” were at issue when the employee was also engaged in union activities). Indeed, the General Counsel’s pre-hearing investigation and presentation of evidence at hearing was focused on the actions Bashas’ took in response to Acosta’s “Union” activities. Importantly, the General Counsel’s own post-hearing brief argues only that Acosta’s transfer was motivated by her “Union” activities – not by any non-Union “concerted activities,” a fact the ALJ simply ignored in his decision. See *Bouley, Inc.*, 306 NLRB 385, 386-87 (1992) (finding ALJ erred in *sua sponte* ordering parties to brief an issue that the General Counsel never alleged or argued).

The failure of the General Counsel to advance any argument on Acosta's alleged non-Union "concerted activities" is the reason there is such scant evidence in the record on this issue. Indeed, the only evidence in the record regarding Acosta's alleged non-Union "concerted activities" were peripheral and extraneous comments made in response to questions about Acosta's "Union" activities and the underlying reason for her transfer – a personal dispute with a co-worker. However, "the simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing [the Respondent's] due process rights." *Quality C.A.T.V., Inc.*, 824 F.2d at 547; *see also Piqua Steel Co.*, 329 NLRB 704, 704 n.4 (1999). Had the General Counsel claimed that Acosta's non-Union activities were at issue, Bashas' would have presented evidence to demonstrate that Acosta was not engaged in any "concerted activities" for "mutual aid or protection." That is precisely why due process requires an issue to be fully and fairly litigated – "other evidence may exist or other arguments might be made that the party reasonably chose not to pursue or emphasize in the defense of the only claim of which it had been informed." *Quality C.A.T.V., Inc.*, 824 F.2d at 545-46.

In circumstances like these, with 89 separate and distinct allegations concerning conduct by various Bashas' supervisors at unionized and non-unionized facilities, at a hearing lasting over four months, producing nearly 3,000 pages of transcript and 200 exhibits, Bashas' was entitled to know, at some point during the course of the litigation, what conduct the General Counsel actually contended was unlawful (and what conduct the ALJ intended to judge) so that it could offer rebutting evidence. Bashas' should not be required to learn for the first time, from the ALJ's decision, the allegations brought against it. Due process mandates that the ALJ's decision regarding this issue be reversed and the Complaint allegations regarding Acosta's transfer be dismissed. *See Bouley, Inc.*, 306 NLRB at 387 (dismissing the ALJ's findings and concluding that remand was improper because it would "unnecessarily give the General Counsel another bite at the apple").

D. The ALJ Erred In Finding That Acosta Was Engaged In Protected Concerted Activity When She Complained About Zamora.

1. The Law.

“In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of ‘mutual aid or protection.’ These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).” *Holling Press, Inc.*, 343 NLRB 301, 302 (2004).

2. Acosta Was Not Engaged In “Concerted Activities When She Complained About Zamora.

In order for 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 Indus. (Meyers I)*, 268 NLRB 493, 497 (1984). In *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board reaffirmed that “concerted activity” includes “circumstances in which individual employees seek to initiate or to induce or to prepare for group action,” and “activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization,” so long as what is being articulated goes beyond mere griping. *See id.* at 887. For activity to be “concerted,” “[i]t is essential that the activity have some relation to group action in the interest of the employees.” *Scooba Mfg. Co. v. N.L.R.B.*, 694 F.2d 82, 84 (5th Cir. 1982).

The ALJ bases his conclusion that Acosta was engaged in “concerted activities” on two fleeting references to other employees at store 20: (1) Acosta’s statement to Castillo that “Zamora had problems with other store 20 employees as well”; and (2) Zamora’s complaint to O’Connor that Acosta was “going around the store asking people if she was mean to them.” However, there was no evidence that Acosta was engaged in any activities with or on behalf of other employees. There was no evidence that other employees approached Acosta and asked her to speak on their behalf or that Acosta was acting as a spokesperson for her fellow employees. Nor was there any evidence that Acosta was preparing to initiate or induce any group action if her complaints about Zamora were not addressed. *See Richdel, Inc.*, 265 NLRB 467, 467 n.2

(1982) (noting that “the mere enlisting of other employee’s assistance in furtherance of a personal dispute between an employee and a supervisor does not draw activity undertaken in furtherance of that dispute into the protections of the Act”).

Acosta’s own testimony (which the ALJ did not cite in his decision) demonstrates that Acosta met with Castillo by herself and with her own self-interests in mind. Acosta’s complaints stemmed from her own lengthy and escalating personal conflict with Zamora. That conflict began in 2006 when Acosta returned to store 20 and was fueled when Acosta was disciplined for “gossiping, spreading rumors and making threats” towards Zamora. (R. Ex. 24.) Thereafter, Acosta threatened to “kick Zamora’s ass.” When the conflict continued, Acosta met with Castillo and complained that Zamora “treated me [Acosta] very badly. That she did not talk to me [Acosta] with respect. She said words to me [Acosta] that would shame people.” [RT at 607:24-610:9.]⁷ Acosta also testified that “Victoria had pushed me [Acosta], and she would swear at me [Acosta], and one day it was in the 100’s, and she sent me [Acosta] out to go get the carts. She would scream at me [Acosta].” [RT at 610:10-613:8.] Acosta told Castillo and O’Connor that she wanted Zamora to “address me [Acosta] with respect.” [RT at 625:8-628:1.]

The evidence simply does not establish that Acosta was acting in concert with others when she complained to Castillo about her own personal conflict with Zamora. The evidence does, however, establish that Acosta’s complaints about Zamora amounted to her individual griping about a co-worker – nothing more. Her actions were not protected under Section 7. *See N.L.R.B. v. Charles A. McCauley Assocs., Inc.*, 657 F.2d 685, 688 (5th Cir. 1981) (“Individual griping and complaining are not protected concerted activity.”); *Abramson, LLC*, 345 NLRB 171, 173-74 (2005) (employee did not engage in concerted activity by asserting individual right).

⁷ During that same time period, Zamora complained to O’Connor about Acosta’s threats, gossip, and disparaging comments. There was no evidence offered demonstrating that other employees complained to O’Connor or Castillo about Zamora. However, the evidence does demonstrate that Acosta and Zamora simply could not get along with each other.

3. Acosta's Actions Do Not Fall Within The "Mutual Aid Or Protection" Clause Of Section 7.

Even if the Board finds that Acosta was somehow engaged in concerted activities when she complained about Zamora, the evidence demonstrates that such complaints were not for any other employee's "aid or protection" but Acosta's. The overwhelming evidence demonstrates that Acosta's complaints were the product of a purely personal dispute with Zamora. Acosta repeatedly testified that Zamora treated "her" badly, did not talk to "her" with respect, pushed "her," swore at "her," ordered "her" around, screamed at "her," and said words to "her" that would shame people. [See RT citations above.] There was no evidence that Acosta complained to management about Zamora's actions for any reason but to advance her own self-interests. See *Scooba Mfg. Co.*, 694 F.2d at 84 (stating that "[p]urely personal disputes are not within the protection of the Act" and finding that collective worker action was not contemplated).

To the extent Acosta claimed that Zamora had problems with "other employees," that claim was made to substantiate Acosta's assertion that Zamora (not Acosta) was responsible for their conflict. Indeed, the evidence demonstrates that both Acosta and Zamora were contemporaneously complaining about each other to Castillo and O'Connor, respectively. Because Castillo and O'Connor could not determine which of the two women was "the bad one," they decided that the fair result was to transfer both women. After realizing that the escalating conflict was likely going to lead to her transfer, Acosta attempted to bolster her claims by making the hollow assertion that Zamora had problems with other employees as well. That assertion was not done to aid those "other employees." She did not make that assertion to help her co-workers in any way. Instead, Acosta made the obscure reference to "other employees" to simply support her personal claim that Zamora was the "bad one." Such self-serving statements are insufficient to bring Acosta's actions within the protections afforded by Section 7.

The lack of evidence regarding "mutual aid or protection" here is far less than that seen in *Holling Press, Inc.*, 343 NLRB 301 (2004), where the Board still found that the employee's conduct was not for the "mutual aid or protection" of her co-workers. While the sexual

harassment in *Holling Press* is clearly distinguishable from the facts here, *Holling Press* is instructive in viewing the evidence on which the ALJ based his conclusion.

Acosta testified that “Zamora had problems with other store 20 employees.” She did not claim that other store 20 employees told her about their problems with Zamora. While seemingly minor, this is a critical distinction when determining whether Acosta was acting for “mutual aid or protection.” Acosta was clearly not advocating on behalf of Zamora. Nor was she advocating on behalf of other employees. She was simply attempting to exonerate herself in their ongoing dispute by claiming that Zamora “had problems with other store 20 employees.” Acosta reliance on that statement was with only one person in mind – herself.

Similarly, the evidence demonstrating that Acosta was “going around” store 20 and asking people if Zamora was mean to them was not done to accomplish a collective goal. Instead, that action was done to advance her own cause – providing Castillo and O’Connor with evidence to demonstrate that Zamora was “the bad one,” not Acosta. The record is void of any evidence identifying the “people” Acosta approached. It is also void of any evidence regarding what Acosta may have told those individuals about her plans. Notably, there is no evidence that Acosta offered or intended to help any other employees as a *quid pro quo* for their support of her personal crusade against Zamora. Nor is there any evidence that other employees actually had similar problems with Zamora – the General Counsel called no witnesses to corroborate Acosta’s testimony. Thus, even if the Board finds that the element of “concert” has been established, the element of “mutual aid or protection” is missing and requires dismissal of these allegations.

E. The ALJ Erred In Finding That The General Counsel Met Its *Wright Line* Burden Because Acosta’s Alleged Non-Union Concerted Activities Were Not Related In Any Way To Her Transfer.

The test for analyzing Section 8(a)(1) and 8(a)(3) “discrimination” allegations was announced in *Wright Line*, 251 NLRB 1083 (1980). Under *Wright Line*, the General Counsel must first make a *prima facie* case by establishing four elements by a preponderance of the evidence: (1) the affected employee was engaged in protected activity; (2) the employer knew of

the activity; (3) the affected employee suffered an adverse employment action; and (4) the protected activity was a substantial or motivating reason for the discipline. *Id.* at 1089; *see also Tracker Marine, L.L.C.*, 337 NLRB 644, 644, 647 (2002) (General Counsel failed to make a *prima facie* case because there was no causal connection between the employees' protected activities and the challenged discipline). "Under that test, the General Counsel must first prove, by a preponderance of the evidence, that animus against the employees' protected conduct was a motivating factor in the employer's adverse actions." *Verizon*, 350 NLRB at 546.

Even if Acosta's actions in telling management that "Zamora had problems with other employees" and "going around the store and asking people if Zamora was mean to them" were protected under Section 7, she was not transferred because she engaged in those activities. The evidence demonstrates that Bashas' transferred both Acosta and Zamora because of their long-standing personal conflict and because Castillo and O'Connor could not determine which of the two woman was responsible for their conflict. There is no evidence that Bashas' transferred Acosta because she spoke with other employees about her problems with Zamora. Nor is there any evidence that Bashas' transferred Acosta to retaliate against her from engaging in those allegedly concerted activities. Bashas' transferred Acosta (and Zamora) because they simply could not work out their problems and decided that the fair thing to do was to transfer both women to other stores. Acosta's non-Union "concerted activities" (whatever they may have been) were not related in any way to her transfer – not to mention the substantial or motivating reason behind her transfer as required under *Wright Line*. There is simply no evidence in the record demonstrating that Bashas' bore animus against Acosta because she complained about Zamora. *See Verizon*, 350 NLRB at 546 (holding that the employer's actions did not violate the Act because there was no evidence that the employer bore animus against the employees because of their complaints). This allegation should be dismissed.⁸

⁸ The ALJ's decision creates a paralyzing dilemma for employers. According to the ALJ's decision, anytime an employee has a personal dispute with a coworker, the employee may avoid the adverse consequences the employer might impose if the employee claims that other
(Continued ...)

III. EXCEPTION III: BASHAS' EXCEPTS TO THE ALJ'S CONCLUSION THAT IT VIOLATED THE ACT BY DISCIPLINING AND TRANSFERRING EMPLOYEES WHO ADMITTED STEALING TIME BY TAKING EXTENDED MEAL AND REST BREAKS WITHOUT AUTHORIZATION.

A. Background Facts.

The ALJ found that store 153 is in the district managed by Joel Konicke. At relevant times, the store hierarchy consisted of Jack Eagen, the store director, Christina Garcia, the merchandising manager, and Joe Hernandez, the customer service manager. Baltazar Rincon was the assistant CSM or person in charge (PIC) at store 153. By the second quarter of 2007, the night crew consisted of Teresa Cano, Ruben Salazar, Manuel Acevedo, Paul Romero, and Victor Cabrera. [D at 27.]

The ALJ found that “Cano began attending union meetings in February 2007. . . . Prior to her suspension in May, neither Cano nor any other night crew employees openly supported unionization or otherwise publicly sympathized with the union cause. Cano never wore any buttons or items of clothing that would identify her as a union supporter.” [D at 29.]

The ALJ further found that “[O]ne night in early April, Rincon approached Cano, Salazar, and Acevedo at work and asked if they had been speaking to the Union. Salazar told him they had. Rincon then left without saying anything further.” [D at 29.]

The ALJ also found that, on April 4, 2007, after noticing incomplete tasks, Jack Eagen began reviewing the store’s security cameras to determine if the night crew employees were stealing time by taking extended meal and rest breaks without authorization. On April 5, 2007, after discovering video proof that Cano and Salazar had taken extended meal and rest breaks during the April 3-4 shift, Jack Eagen “called Bashas’ loss prevention department (LPD) and

employees share her concerns about the coworker. Stated differently, an employer could not take any action against squabbling employees without violating the Act if the employees offer support for their respective positions through general statements such as “other employees have problems with Employee X as well.” This is an unworkable result that should be remedied by the Board by reversal and dismissal. *See Verizon*, 350 NLRB at 547 n.14 (recognizing the dilemma and finding that employer action in response to protected activities is not unlawful so long as it is not motivated by animus against protected activity).

spoke to Trish Lowderback, a loss prevention specialist” because his video review “disclosed that [Cano and Salazar] spent significant time while on-the-clock lounging at one of the checkout registers. . . . Typically, employees are fired for time theft infractions.” [D at 30-32.]

The ALJ also found that, on the morning of May 9, 2007, Lowderback and Mike Howard, an LPD supervisor, went to store 153 to conduct recorded interviews of Cano and Salazar. Salazar admitted to Howard that he and the other night crew employees sometimes took up to an hour and a half break at lunchtime without authorization. Salazar was suspended for three days and signed an agreement to repay Bashas’ \$269.46. Neither Salazar nor Howard mentioned the Union or the organizing campaign through the entire interview. Cano’s interview lasted about 2-1/2 hours. At about the midway point, Cano suggested to Lowderback that she believed she was being interviewed because she had spoken to the Union. Lowderback denied Cano’s assertion and told Cano that she was being interviewed because she took unauthorized breaks while on paid-time. [R. Ex. 59 at 1084.] Cano admitted that she was paid \$59.88 for time that she did not actually work. Cano (like Salazar) was suspended for three days and agreed to repay the Company for time she had not actually worked. Cano’s suspension notice advised her to return to the store on May 14 to discuss her future with the Company. [D at 32-35.]

The ALJ further found that, on May 11 or 12, Rae O’Connor, the Food City human resources director, called Cano with instructions that she should come to the corporate headquarters to meet with O’Connor on May 15. “[D]uring the course of the meeting, Cano again expressed her own opinion that the time-theft accusations were the result of her union activities rather than the wrongdoing with which she had been charged. O’Connor did not respond to Cano’s allegations at the time. At the end of the meeting, O’Connor told Cano that she would be discharged like others the Company caught not working while on the clock. However, O’Connor told Cano that she first had to speak with her superiors.” [D at 36.]

The ALJ also found that “That evening O’Connor called Cano at home to ask specifically who in the store knew he had spoken to people in the Union. Cano told O’Connor about the occasion when Rincon asked a group of night crew employees if they had spoken to the Union.

She also told O'Connor that Acevedo and Salazar had told her that they had been questioned about the union by Store Director Eagen and CSM Hernandez.⁹ O'Connor thanked Cano and said she would call again." [D at 36.]

The ALJ further found that "Following her telephone conversation with Cano, O'Connor met with Division Manager Konicke and Vice President Swanson. O'Connor reported the information she obtained from Cano in the phone call to the two executives." Even though Bashas' typically fired employees for time theft violations, Konicke decided that Cano's penalty should be limited to a conference memo with a DML warning her about not working while on the clock. In addition, Konicke decided that Cano should be transferred to another store. Salazar received the same disciplinary action and was also transferred to a different store. [D at 36.]

The ALJ also found that, because Cano complained about other night crew employees who had stolen time from the Company, Lowderback reviewed additional video to determine whether there were instances where the remaining three night shift employees were not working while they were on the clock. Lowderback's review failed to disclose that Acevedo or Cabrera had done so. However, she did locate two or three instances where Romero had punched in but failed to return to work as required. Lowderback and Howard interviewed Romero in a manner similar to the Cano and Salazar interviews. Like Cano and Salazar, Romero received a three day suspension along with a \$973.05 bill for time spent on the clock while not working. Romero was not transferred. [D at 36.]

B. The ALJ Erred When He *Sua Sponte* Considered Salazar's Transfer And Romero's Suspension When Such Activities Were Never Raised In The Complaint Or The Hearing.

The ALJ recognized that "[t]he complaint inexplicably contains no allegation that Salazar's transfer violated the Act. . . . [T]he complaint also contains no allegations that pertain to Romero at all." [D at 40.] Regardless, the ALJ found that Bashas' violated the Act by

⁹ The ALJ correctly found that Cano's testimony on this point was inadmissible hearsay.

transferring Salazar and suspending Romero as a result of the LPD time theft investigation “because these actions grew out of the same tainted loss prevention investigation that resulted in Cano’s suspension and transfer as well as Salazar’s suspension.” [D at 40.] In so finding, the ALJ denied Bashas’ due process because, while they may have been related to the LPD investigation, those specific issues were never fully and fairly litigated.

“[T]he Board has no authority to investigate alleged unfair practices on its own initiative.” *N.L.R.B. v. Complas Indus., Inc.*, 714 F.2d 729, 732 (7th Cir. 1983) (finding Board violated employer’s due process rights in allowing late amendment of complaint). However, that is exactly what happened here. The General Counsel amended the Complaint three times prior to the hearing and once during the hearing. Had the General Counsel intended to claim that Salazar’s transfer and Romero’s suspension violated the Act, it had ample opportunity to do so. Instead, Bashas’ was lulled into believing those actions were not at issue and, accordingly, did not present any evidence in defense of those actions. “Simply because violations could have been alleged in addition to those in the complaint does not obligate the employer to defend against all possibilities.” *N.L.R.B. v. Pepsi-Cola*, 613 F.2d 267, 274 (10th Cir. 1980) (notice was insufficient to satisfy due process standards).

Even more troubling, Bashas’ relied on those Complaint omissions to support its defense that similarly-situated individuals (Romero, Acevedo, and Cabrera) were subject to the same LPD investigation as Salazar and Cano and were treated similarly when the evidence proved that other night crew employees (Romero) engaged in time theft. Had Bashas’ known that Salazar’s transfer and Romero’s suspension were at issue, it would have offered additional (and likely different) evidence and certainly would have made alternative arguments. *See Quality C.A.T.V., Inc.*, 824 F.2d at 545 (finding that due process is violated unless “all of the evidence and argument has been presented that would have been presented had the allegation been raised in the complaint”). This is exactly why due process requires an issue be fully and fairly litigated – “other evidence may exist or other arguments might be made that the party reasonably chose not to pursue or emphasize in the defense of the only claim of which it had been informed.” *Id.* at

545-56. The ALJ simply should not be permitted to rule on issues that the General Counsel did not pursue and that Bashas' did not have an opportunity to defend against. The ALJ's findings regarding Salazar's transfer and Romero's suspension should be reversed and dismissed.

C. The ALJ Erred When He Found That The General Counsel Met Its *Wright Line* Burden Regarding The Cano, Salazar, And Romero Discipline.

The ALJ's finding that Store Director "Eagen initiated the LPD investigation of the night crew in an effort to rid himself of a group of union activists" hinges on two incorrect assumptions: (1) the assumption that Rincon asked about the night crew's union activities before April 4, 2007, when Jack Eagen began reviewing video regarding the time theft issue; and (2) the assumption that, even if Rincon asked his question before April 4, 2007, that Rincon's knowledge can be properly imputed to Jack Eagen. [D at 29, 40, 42.]

As to the first assumption, Cano's October 2007 *Jencks* statement plainly states that Rincon's alleged questioning occurred sometime after April 6, 2007. [RT at 353:12-24.] This timing is crucial (and fatal) to the General Counsel's *prima facie* case because Cano's own sworn affidavit demonstrates that Eagen discovered and began investigating the time theft issue before any member of management was aware of the night crew's union activities. The ALJ ignored this compelling evidence and, instead, relied solely on Cano's hearing testimony that Rincon's question occurred in "the early days of April." [D at 40-41; RT at 243:1-22.] However, there is no evidence that the "early days of April" is synonymous with "before April 4, 2007." Cano provided her *Jencks* statement (which she admitted was truthful) just six months after Rincon's alleged question, while her hearing testimony occurred over a year after Rincon's alleged question. [RT at 349:1-350:2.] While the ALJ makes the conclusory statement that Cano's hearing testimony was "more reliable" because of the "impressions Cano made while testifying" (D at 40), he provides no explanation why a sworn *Jencks* statement from the same witness made six months closer to the event in question would be less credible.

As to the second assumption, Jack Eagen expressly denied knowing whether any night crew employees supported or sympathized with the Union prior to April 6, 2007. [D at 30; RT at

1309:14-17.] The ALJ chose to discredit Eagen's testimony solely because Rincon had supposedly asked the night crew employees whether they had spoken with the union in "the early days of April" (D at 42), but there is no evidence that Eagen had any knowledge of Rincon's supposed question or Salazar's alleged answer. Given Eagen's express and unrefuted denial of any such knowledge, the ALJ erred in imputing Rincon's alleged knowledge to Eagen. *See, e.g., Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983) (refusing to impute knowledge as a matter of law where the decision-maker credibly denies receiving the information). The fact that one supervisor knows about union activity cannot logically be the only evidence used to discredit another supervisor's uncontradicted denial of such knowledge – otherwise, an employer could never overcome the knowledge-imputing presumption.

The ALJ also erred in finding that Bashas' did not meet its burden of proving that it would have taken the same actions in the absence of union activity. [D at 42.] Eagen discovered compelling evidence (from his review of the video on April 4, 2007) that Cano and Salazar committed time theft, which the ALJ concedes in his decision. [D at 31.] Nowhere does the ALJ find that time theft is not a legitimate business reason for discipline. Cano, Salazar, and Romero admitted committing time theft (which the ALJ does not discredit) and Bashas' disciplined those employees accordingly. The undisputed evidence demonstrates that Bashas' policy is to terminate employees who engage in time theft. Bashas' introduced a variety of prior discipline (terminations) it had issued to other employees for time theft, which the ALJ simply ignored. [R. Exs. 68-71.]

The fact that Bashas' spared Cano's, Salazar's, and Romero's jobs and treated them more favorably than other employees who had committed time theft further negates any finding of pretext. Indeed, that fact renders totally insupportable the ALJ's conclusion, cited above, that "Eagen initiated the LPD investigation of the night crew in an effort to rid himself of a group of union activists." *See St. Clair Mem'l Hosp.*, 309 NLRB 738, 743 (1992) (discharge for time theft was not pretext for discrimination when another employee "was also discharged for similar breaches of conduct and he had no union activity"); *J.P. Stevens & Co.*, 247 NLRB 420, 420,

477 (1980) (union supporter's verbal warning for sleeping on the job was not a pretext for discrimination when non-union employees were treated "more harshly").

The ALJ found that Bashas' discipline of the night crew employees was pretextual because, in his view, management had overlooked such misconduct in the past. However, the ALJ's finding that, in the past, Bashas' had failed to "initiate[] any immediate corrective action or issue[] even the slightest warning to the night crew after allegedly discovering they were sloughing off while on the clock or hearing about that possibility" is simply wrong. The record reflects that Bashas' repeatedly and consistently disciplined the same night crew employees for performance problems in the preceding two years. On October 19, 2005, Bashas' issued written discipline to Cano for not working while on the clock, failing to clock in and out for breaks, not completing work assignments, and leaving a shift early without management permission. [R. Ex. 9.] On June 22, 2006, Bashas' issued Cano written discipline for insubordination. [R. Ex. 10.] That same day, Bashas' issued written discipline to Cano (and the other night crew employees) for not working together as a team and simply doing "as [they] please and work[ing] as [they] please." [R. Ex. 11.] On July 24, 2006, Bashas' issued Acevedo written discipline for performance problems. [R. Ex. 31.] On September 21, 2006, Bashas' issued written discipline to Acevedo for performance problems. [R. Ex. 32.] On November 8, 2006, Bashas' suspended Acevedo for performance problems. [R. Ex. 33.] On December 12, 2006, Bashas' issued written discipline to Cabrera for performance problems. [R. Ex. 36 & 37.] That overwhelming evidence (which was simply ignored by the ALJ without explanation) demonstrates that Bashas' (and Jack Eagen) consistently disciplined the night crew employees for performance problems long before any of the those employees engaged in any Union activities.

Significantly, the ALJ dismissed the allegations regarding Cano and Cabrera's April 6, 2007 discipline for performance problems, specifically noting that: (1) the General Counsel had advanced no arguments why Romero's and Cabrera's April 6, 2007 discipline did not also violate section 8(a)(3); (2) "the warnings on their face recite legitimate job shortcomings"; and (3) the "suspect" timing based on Rincon's question is "blunted by the lack of evidence about

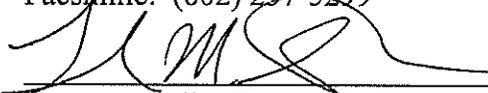
union activity by Cabrera and Romero.” [D at 39-40.] This same rationale applies to Cano’s suspension and transfer, Salazar’s suspension and transfer, and Romero’s suspension: (1) the General Counsel failed to allege that Salazar’s transfer and Romero’s suspension violated section 8(a)(3); (2) the suspensions and transfers were based on legitimate, undisputed evidence of time theft; and (3) any “suspect” timing based on Rincon’s question is “blunted” by the fact that Romero was disciplined even though (according to the ALJ’s finding regarding the April 6 discipline) he had not engaged in any union activity. Accordingly, the ALJ’s findings should be reversed and these allegations should be dismissed.

CONCLUSION

For the foregoing reasons, the Board should overrule the ALJ’s conclusions that Bashas’ violated the Act as discussed above and should dismiss those allegations. If the Board affirms any of the ALJ’s findings, then the Board should modify the ALJ’s Order and accompanying Notice to Employees so that the Order and Notice are no broader than absolutely necessary.

DATED this 7th day of December, 2009.

STEPTOE & JOHNSON LLP
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Attorneys for Bashas’ Inc.

ORIGINAL filed via E-Gov, E-Filing
this 7th day of December, 2009 with:

Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington D.C. 20570

COPY of the foregoing electronically mailed
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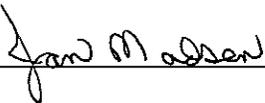


Exhibit 1

United States Bankruptcy Court District of Arizona		Voluntary Petition																				
Name of Debtor (if individual, enter Last, First, Middle): BASHAS', INC.		Name of Joint Debtor (Spouse) (Last, First, Middle)																				
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names). Bashas Food, Food City, A.J. Fine Foods, Bashas' Dine, Eddie's Country Store, Sportsman's, Bashas' United Drug, Bashas' Distribution Center, National Grocery, Western Produce		All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names)																				
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all): 86-0110430		Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all)																				
Street Address of Debtor (No. & Street, City, and State) 22402 S. Basha Rd Chandler AZ <div style="text-align: right;">ZIP CODE: 85248</div>		Street Address of Joint Debtor (No. & Street, City, and State) <div style="text-align: right;">ZIP CODE:</div>																				
County of Residence or of the Principal Place of Business: Maricopa		County of Residence or of the Principal Place of Business:																				
Mailing Address of Debtor (if different from street address). PO Box 488 Chandler AZ <div style="text-align: right;">ZIP CODE: 85244</div>		Mailing Address of Joint Debtor (if different from street address) <div style="text-align: right;">ZIP CODE:</div>																				
Location of Principal Assets of Business Debtor (if different from street address above). 22402 S. Basha Road, Chandler, AZ		<div style="text-align: right;">ZIP CODE: 85248</div>																				
Type of Debtor (Form of Organization) (Check one box) <ul style="list-style-type: none"> <input type="checkbox"/> Individual (includes Joint Debtors) <i>See Exhibit D on page 2 of this form.</i> <input checked="" type="checkbox"/> Corporation (includes LLC and L.L.P.) <input type="checkbox"/> Partnership <input type="checkbox"/> Other (If debtor is not one of the above entities, check this box and state type of entity below.) grocery store chain 	Nature of Business (Check one box) <ul style="list-style-type: none"> <input type="checkbox"/> Health Care Business <input type="checkbox"/> Single Asset Real Estate as defined in 11 U.S.C. § 101(51B) <input type="checkbox"/> Railroad <input type="checkbox"/> Stockbroker <input type="checkbox"/> Commodity Broker <input type="checkbox"/> Clearing Bank <input checked="" type="checkbox"/> Other <hr/> Tax-Exempt Entity (Check box, if applicable) <ul style="list-style-type: none"> <input type="checkbox"/> Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code.) 	Chapter of Bankruptcy Code Under Which the Petition is Filed (Check one box) <ul style="list-style-type: none"> <input type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 9 <input checked="" type="checkbox"/> Chapter 11 <input type="checkbox"/> Chapter 12 <input type="checkbox"/> Chapter 13 <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Main Proceeding <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding <hr/> Nature of Debts (Check one box) <ul style="list-style-type: none"> <input type="checkbox"/> Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." <input checked="" type="checkbox"/> Debts are primarily business debts. 																				
Filing Fee (Check one box) <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Full Filing Fee attached <input type="checkbox"/> Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b) See Official Form 3A. <input type="checkbox"/> Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B. 		Chapter 11 Debtors Check one box: <ul style="list-style-type: none"> <input type="checkbox"/> Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). <input checked="" type="checkbox"/> Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D) Check if: <ul style="list-style-type: none"> <input type="checkbox"/> Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,190,000. Check all applicable boxes <ul style="list-style-type: none"> <input type="checkbox"/> A plan is being filed with this petition <input type="checkbox"/> Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b) 																				
Statistical/Administrative Information <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Debtor estimates that funds will be available for distribution to unsecured creditors <input type="checkbox"/> Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors 		THIS SPACE IS FOR COURT USE ONLY																				
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B 1 (Official Form 1) (1/08)

<p>Voluntary Petition <i>(This page must be completed and filed in every case)</i></p>	<p>Name of Debtor(s): BASHAS', INC.</p>
Signatures	
<p style="text-align: center;">Signature(s) of Debtor(s) (Individual/Joint)</p> <p>I declare under penalty of perjury that the information provided in this petition is true and correct [If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7. [If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).</p> <p>I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.</p> <p><input checked="" type="checkbox"/> Not Applicable Signature of Debtor</p> <p><input checked="" type="checkbox"/> Not Applicable Signature of Joint Debtor</p> <p>_____ Telephone Number (If not represented by attorney)</p> <p>_____ Date</p>	<p style="text-align: center;">Signature of a Foreign Representative</p> <p>I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.</p> <p>(Check only one box.)</p> <p><input type="checkbox"/> I request relief in accordance with chapter 15 of Title 11, United States Code Certified Copies of the documents required by § 1515 of title 11 are attached</p> <p><input type="checkbox"/> Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the Chapter of title 11 specified in the petition. A certified copy of the order granting recognition of the foreign main proceeding is attached</p> <p><input checked="" type="checkbox"/> Not Applicable _____ (Signature of Foreign Representative)</p> <p>_____ (Printed Name of Foreign Representative)</p> <p>_____ Date</p>
<p style="text-align: center;">Signature of Attorney</p> <p><input checked="" type="checkbox"/> <u>s/Frederick J. Petersen</u> Signature of Attorney for Debtor(s)</p> <p>Frederick J. Petersen Bar No. 19944 Printed Name of Attorney for Debtor(s) / Bar No.</p> <p>Mesch, Clark & Rothschild, PC Firm Name</p> <p>259 North Meyer Avenue Address</p> <p>Tucson AZ 85701</p> <p>520-624-8886 520-798-1037 Telephone Number</p> <p>July 12, 2009 Date</p> <p><small>*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.</small></p>	<p style="text-align: center;">Signature of Non-Attorney Petition Preparer</p> <p>I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached</p> <p>Not Applicable _____ Printed Name and title, if any, of Bankruptcy Petition Preparer</p> <p>_____ Certification number. (If the bankruptcy petition preparer is not an individual, state the Certification number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)</p> <p>_____ Address</p> <p><input checked="" type="checkbox"/> Not Applicable _____ Date</p> <p>Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.</p> <p>Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.</p> <p>If more than one person prepared this document, attach to the appropriate official form for each person.</p> <p><i>A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.</i></p>
<p style="text-align: center;">Signature of Debtor (Corporation/Partnership)</p> <p>I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.</p> <p>The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.</p> <p><input checked="" type="checkbox"/> <u>s/Edward N. Basha, III</u> Signature of Authorized Individual</p> <p>Edward N. Basha, III Printed Name of Authorized Individual</p> <p>Vice-President Title of Authorized Individual</p> <p>July 12, 2009 Date</p>	<p><input checked="" type="checkbox"/> Not Applicable _____ Date</p> <p>Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.</p> <p>Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.</p> <p>If more than one person prepared this document, attach to the appropriate official form for each person.</p> <p><i>A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.</i></p>

**United States Bankruptcy Court
District of Arizona**

In re:

Case No. _____
Chapter 11

BASHAS', INC.

STATEMENT REGARDING AUTHORITY TO SIGN AND FILE PETITION

I, **Edward N. Basha, III**, declare under penalty of perjury that I am the Vice President of **BASHAS', INC.**, a Arizona Corporation and that on the following resolution was duly adopted by the of this Corporation:

"Whereas, it is in the best interest of this Corporation to file a voluntary petition in the United States Bankruptcy Court pursuant to Chapter 11 of Title 11 of the United States Code;

Be It Therefore Resolved, that **Edward N. Basha, III, Vice-President** of this Corporation, is authorized and directed to execute and deliver all documents necessary to perfect the filing of a Chapter 11 voluntary bankruptcy case on behalf of the Corporation; and

Be It Further Resolved, that **Edward N. Basha, III, Vice-President** of this Corporation, is authorized and directed to appear in all bankruptcy proceedings on behalf of the Corporation, and to otherwise do and perform all acts and deeds and to execute and deliver all necessary documents on behalf of the Corporation in connection with such bankruptcy case; and

Be It Further Resolved, that **Edward N. Basha, III, Vice-President** of this Corporation, is authorized and directed to employ **Frederick J. Petersen**, attorney and the law firm of **Mesch, Clark & Rothschild, PC** to represent the Corporation in such bankruptcy case."

Executed on: July 12, 2009

Signed: s/Edward N. Basha, III
Edward N. Basha, III

Basha's Inc.
Top 30 Unsecured Creditors Listing

(1) Creditor Rank	(2) NAME OF CREDITOR AND COMPLETE MAILING ADDRESS, INCLUDING ZIP CODE	(3) NAME, TELEPHONE NUMBER AND COMPLETE MAILING ADDRESS, INCLUDING ZIP CODE, OF EMPLOYEE, AGENT OR DEPARTMENT OF CREDITOR FAMILIAR WITH CLAIM	(4) NATURE OF CLAIM (trade debt, bank loan, government contract, etc.)	(5) C U D S	(6) AMOUNT OF CLAIM (IF SECURED ALSO STATE VALUE OF SECURITY)
1	CARDINAL HEALTH	CARDINAL HEALTH JASON DAY PO BOX 402605 ATLANTA, GA 30384-2605 Tel: 614-757-5000 Fax: 614-652-4166	Merchandise trade payable		\$2,758,377.63
2	PHOENIX COCA-COLA BOTTLING CO	PHOENIX COCA-COLA BOTTLING CO 2200 6TH AVE SEATTLE, WA 98121 Tel: 206-728-6000 Fax: 206-728-1855	Merchandise trade payable		\$2,560,560.35
3	FRITO LAY INC	FRITO LAY INC CYNTHIA L SMITH PO BOX 643104 PITTSBURGH, PA 15284-3104 Tel: 800-776-2257 Fax: 972-376-6314	Merchandise trade payable		\$1,188,133.95
4	SHAMROCK FOODS	SHAMROCK FOODS KAREN GILBERT PO BOX 52420 PHOENIX, AZ 85072-2420 Tel: 602-477-2382 Fax: 602-233-2791	Merchandise trade payable		\$1,068,195.55
5	KALIL BOTTLING CO	KALIL BOTTLING CO KAREN GUERRERO PO BOX 26888 TUCSON, AZ 85726-8888 Tel: 520-624-1788 Fax: 520-623-6662	Merchandise trade payable		\$1,035,067.58
6	PEPSI COLA - PHOENIX	PEPSI COLA - PHOENIX SRENOA SHERMAN PO BOX 1078 SAFFORD, AZ 85548 Tel: 928-428-2192 Fax: 928-428-9181	Merchandise trade payable		\$1,007,582.69
7	SOURCE INTERLINK DIST LLC	SOURCE INTERLINK DIST LLC PATRICIA FISHER 75 REMITTANCE DR CHICAGO, IL 60675-6427 Tel: 866-888-6389 Fax:	Merchandise trade payable		\$659,738.04
8	SWIRE COCA-COLA USA	SWIRE COCA-COLA USA REX HEAPS PO BOX 1440 DRAPER, UT 84020 Tel: 801-816-5431 Fax: 801-816-5423	Merchandise trade payable		\$588,915.80
9	HOLSUM BAKERY INC	HOLSUM BAKERY INC PO BOX 842176 DALLAS, TX 75284-2176 Tel: Fax:	Merchandise trade payable		\$538,612.91
10	KELLOGG SALES CO	KELLOGG SALES CO PO BOX 100918 PASADENA, CA 91189-0918 Tel: Fax:	Merchandise trade payable		\$501,996.62
11	SOUTHERN WINE & SPIRITS OF ARI	SOUTHERN WINE & SPIRITS OF ARI NIKI STEPP 2375 S 45TH AVE PHOENIX, AZ 85043 Tel: 602-533-8000 Fax: 480-477-7371	Merchandise trade payable		\$454,835.14
12	GENERAL MILLS FINANCE INC 2/16	GENERAL MILLS FINANCE INC 2/16 P O BOX 120845 DALLAS, TX 75312-0845 Tel: Fax:	Merchandise trade payable		\$453,725.32

Bashas' Inc
Top 30 Unsecured Creditors Listing

(1)	(2)	(3)	(4)	(5)
Creditor Rank	NAME OF CREDITOR AND COMPLETE MAILING ADDRESS, INCLUDING ZIP CODE	NAME, TELEPHONE NUMBER AND COMPLETE MAILING ADDRESS, INCLUDING ZIP CODE, OF EMPLOYEE, AGENT OR DEPARTMENT OF CREDITOR FAMILIAR WITH CLAIM	NATURE OF CLAIM (trade debt, bank loan, government contract, etc.)	C U D S AMOUNT OF CLAIM (IF SECURED ALSO STATE VALUE OF SECURITY)
13	MISSION FOODS	MISSION FOODS JULIE HUNT PO BOX 843777 DALLAS, TX 75284-3777 Tel: 972-232-5540 Fax: 972-232-5188	Merchandise trade payable	\$436,988.40
14	KRAFT FOODS INC 2/13	KRAFT FOODS INC 2/13 BANK ONE PASADENA, CA 91189-0139 Tel: Fax:	Merchandise trade payable	\$381,868.50
15	ALLIANCE BEV/CANYON DIV	ALLIANCE BEV/CANYON DIV ALLIANCE BEVERAGE DIST CO.LLC PHOENIX, AZ 85005-6066 Tel: Fax:	Merchandise trade payable	\$357,006.05
16	OCOTILLO WHOLESALE	OCOTILLO WHOLESALE C/O BASHAS' INC CHANDLER, AZ 85248 Tel: Fax:	Merchandise trade payable	\$356,365.34
17	COLIMAN PACIFIC CORP	COLIMAN PACIFIC CORP GARCIA PO BOX 13727 TEMPE, AZ 85284 Tel: 480-705-0601 Fax: 480-705-0803	Merchandise trade payable	\$343,971.25
18	UNITED NATURAL FOODS WEST INC	UNITED NATURAL FOODS WEST INC FILE 30382 PO BOX 60000 SAN FRANCISCO, CA 94180 Tel: 916-889-9531 Fax:	Merchandise trade payable	\$333,041.85
19	NABISCO BISCUIT CO	NABISCO BISCUIT CO JIM P. O. BOX 100223 PASADENA, CA 91189-0223 Tel: 570-820-1247 Fax:	Merchandise trade payable	\$324,860.59
20	DLJ PRODUCE INC	DLJ PRODUCE INC SALLY PO BOX 2398 WEST COVINA, CA 91793 Tel: 626-330-6849 Fax: 626-330-6579	Merchandise trade payable	\$319,164.20
21	OROWEAT FOODS CO	OROWEAT FOODS CO ATTN: MARTA CHAMPION FORT WORTH, TX 76134 Tel: Fax:	Merchandise trade payable	\$318,987.48
22	HICKMANS EGG RANCH	HICKMANS EGG RANCH CRYSTAL SAXTON 817 E INDIAN SCHOOL PHOENIX, AZ 85014 Tel: 602-241-5587 Fax: 602-241-5588	Merchandise trade payable	\$314,590.41
23	ABBOTT NUTRITION	ABBOTT NUTRITION BARBRA GALBRAITH 75 REMITTANCE DR STE 1310 CHICAGO, IL 60675-1310 Tel: 800-545-8217 Fax: 614-727-1911	Merchandise trade payable	\$313,514.34
24	SOUTHWIND FOODS LLC	SOUTHWIND FOODS LLC 4735 COLUMBUS AVE BELLINGHAM, WA 98229 Tel: Fax:	Merchandise trade payable	\$311,686.47
25	BLAZER WILKINSON LLC	BLAZER WILKINSON LLC JANE STEITZ PO BOX 7428 SPRECKELS, CA 93962-7428 Tel: 831-455-3700 Fax: 831-455-3705	Merchandise trade payable	\$308,494.75

Bashas' Inc.
 Top 30 Unsecured Creditors Listing

	(1)	(2)	(3)	(4)	(5)
Creditor Rank	NAME OF CREDITOR AND COMPLETE MAILING ADDRESS, INCLUDING ZIP CODE	NAME, TELEPHONE NUMBER AND COMPLETE MAILING ADDRESS, INCLUDING ZIP CODE, OF EMPLOYEE, AGENT OR DEPARTMENT OF CREDITOR FAMILIAR WITH CLAIM	NATURE OF CLAIM (trade debt, bank loan, government contract, etc.)	C U D S	AMOUNT OF CLAIM (IF SECURED ALSO STATE VALUE OF SECURITY)
26	NESTLE USA INC 2/15	NESTLE USA INC 2/15 PO BOX 841933 DALLAS, TX 75284-1933 Tel: Fax:	Merchandise trade payable		\$303,318.32
27	SARAH FARMS	SARAH FARMS JIM GARDNER 2751 E PALO VERDE YUMA, AZ 85365 Tel: 928-726-2763 Fax: 928-341-0905	Merchandise trade payable		\$301,320.30
28	PEPSI COLA BOTTLING	PEPSI COLA BOTTLING ERIC BOATNER 4980 RAILHEAD AVE FLAGSTAFF, AZ 86004 Tel: 928-522-2139 Fax: 928-527-3165	Merchandise trade payable		\$301,243.69
29	CONAGRA FOODS SALES INC	CONAGRA FOODS SALES INC CREDIT SERVICES PO BOX 409232 ATLANTA, GA 30384-9232 Tel: 800-425-4947 Fax: 402-516-0183	Merchandise trade payable		\$301,005.30
30	GEORGIA-PACIFIC CORP	GEORGIA-PACIFIC CORP P. O. BOX 281523 ATLANTA, GA 30384-1523 Tel: Fax:	Merchandise trade payable		\$287,990.22

RESOLUTION

Bashas' Inc., an Arizona corporation ("Bashas"), hereby consents to and approves the following actions and resolutions.

WHEREAS, this Board of Directors (the "Board") and the management of Bashas', have been evaluating and considering the reorganization of Bashas' business in consultation with the officers of Bashas and

WHEREAS, the Board has determined that it is in the best interest of Bashas and Bashas' creditors and other interested parties for Bashas to file a petition seeking relief under the provisions of Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").

RESOLVED, that, in the judgment of the Board, and in the best interest of Bashas and its creditors and other interested parties that a petition for reorganization under Chapter 11 of the Bankruptcy Code be filed by Bashas; and it is

RESOLVED, that Edward N. Basha, III is authorized and instructed to cause the preparation of a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code on behalf of Bashas and is authorized on behalf of Bashas to execute any and all documents necessary to effectuate the filing of the Chapter 11 proceeding on behalf of Bashas, including but not limited to advancing or lending such monies as are necessary to retain professionals to assist him in the Chapter 11 proceeding; and it is

FURTHER RESOLVED, that Edward N. Basha, III, is authorized to act on behalf of Bashas in all matters in connection with the Chapter 11 proceeding filed on its behalf, including but not limited to retaining Mesch, Clark & Rothschild, P.C., to act as its counsel, and retaining other professionals as needed in the Chapter 11 proceeding;

FURTHER RESOLVED, that all acts lawfully done or actions lawfully taken by Edward N. Basha, III, to seek relief under Chapter 11 of the Bankruptcy Code or in connection with the Bankruptcy Proceeding, or any matter related thereto, be, and hereby are, adopted, ratified, confirmed and approved in all respects as the acts and deeds of Bashas', Inc.

CERTIFICATE OF SECRETARY OF BASHAS', INC.

The undersigned, Edward R. Felix does hereby certify that:

1. That the undersigned is the duly elected, qualified and acting secretary of Bashas' Inc., an Arizona corporation, and in good standing under the laws of the State of Arizona, and as such Secretary the undersigned has custody of the records of Bashas', Inc.
2. Attached hereto as Exhibit A is a true, correct and complete copy of certain resolutions adopted at a meeting of the Board of Directors of Bashas' Inc. held on July 6, 2009, which resolutions have not been rescinded or modified in any manner and are still in full force and effect.

IN WITNESS THEREOF, the undersigned has set his hand this 6th day of July, 2009.

