

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VISION OF ELK RIVER, INC.

and

SUSIE STETLER, An Individual

Case 18-CA-19200

BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS

Submitted by:

Florence I. Brammer
Counsel for Acting General Counsel
Eighteenth Region
National Labor Relations Board
330 S. Second Avenue, Suite 790
Minneapolis, Minnesota 55401

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BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS

In the Complaint herein, General Counsel alleges that Respondent laid off five special education transportation employees in retaliation against their union or other protected, concerted activities in violation of Section 8(a)(3) of the Act and/or their participation in procedures before the National Labor Relations Board in violation of Section 8(a)(4) of the Act.¹

While finding that General Counsel established that the alleged discriminatees had engaged in protected activity and that Respondent had knowledge of that activity, ALJ Scully concluded that the evidence of union animus is “too remote to support an inference that it was the motivation for its decision to layoff any of the alleged discriminatees in 2009.” (ALJD 10: 23-27.)

I. BACKGROUND AND OPERATIVE FACTS

The ALJ's ten-page Decision is exceptionally concise, given that the record from the four-day, fifteen-witness hearing is over 1400 pages (900+ pages of transcript and 500+ pages of exhibits). However, those facts that are recited by the ALJ are not inaccurately summarized. Although the ALJD does not address some major factual areas developed in detail in the record, Acting General Counsel limits the arguments within this brief to content contained within the ALJD. It is Acting General Counsel's position that the Board need not go beyond the four corners of the ALJD to find merit to the Acting General Counsel's exceptions. Accordingly, for

¹ A brief note about the varying use of the terms “General Counsel” and “Acting General Counsel”: within this brief, the title “General Counsel” is used when complaint allegations or record evidence is being referenced (at which times General Counsel Meisburg was in office). The title “Acting General Counsel” is used in reference to positions and arguments being raised in the context of these exceptions, as former General Counsel Meisburg left office after the closing of the March 2010 ULP hearing and an Acting General Counsel is now in place.

purposes of brevity and efficiency, Counsel for Acting General Counsel, has limited citations to the ALJD, with the exception of references to one pivotal General Counsel exhibit.

As ALJ Scully notes in his Decision, after Respondent took over the transportation operations in 2000, there have been three organizing campaigns by the Service Employees International Union Local 284 (the Union) among Respondent's employees, the most recent of which was during the just-ended 2009-2010 school year. In addition, there has been a series of unfair labor practice charges filed against Respondent, one of which was a termination charge settled shortly prior to the scheduled July 2008 hearing. (ALJD 2:3-4, 2:42-47, 5:20-22, 6:9-11.)

The managers most relevant to this case are Mark Ostwald, who has been general manager since 2000; Brent Orr, who served as the manager of operations for Respondent's Elk River, Minnesota, facility from July 2006-June 2009 and again as a consultant from mid-August to mid-October 2009; and Colleen Smith, who has worked for Respondent since 2000 and has been its special education transportation coordinator since about 2002. (ALJD 3:1-7.)

In April 2009, the Elk River School District, for whom Respondent provides transportation services, directed that the procedure for routing school buses for the 2009-2010 school year would be altered and that the process for assigning aides to special transportation routes would also be revised. Despite Respondent's portrayal of these changes as a "substantial departure from past practice," Respondent nevertheless communicated in writing to its employees at the end of the 2008-2009 school year that it could offer "a reasonable assurance of employment next fall to all employees *who are willing to work with the company in positive and constructive ways* in implementing the necessary changes." (ALJD 3: 11-24 [emphasis added].)

Even as late as August 13, 2009, at which time Respondent convened its annual pre-school meeting and training session for all employees, there was no mention of layoffs. After

the design and multiple revisions of a “matrix” by which – Respondent asserts – special education drivers and aides were selected for layoff, the five alleged discriminatees in this case were laid off. None of them was notified about their layoffs by Respondent; rather, they learned of their layoffs only after they initiated contact with Respondent as the beginning of the school year approached and they had heard nothing about their assigned routes. (ALJD 3: 28-30; 3:44 - 4:35.)

Respondent repeatedly revised this matrix, and the revisions directly resulted in the removal of criteria advantageous to the alleged discriminatees (e.g., safety and willingness to work) and the substitution of, in the ALJ’s words, “totally subjective criteria which enabled Smith to manipulate the scoring any way she chose.” The matrix, its permutations and the impact of those permutations on the alleged discriminatees is covered in some detail in the ALJD and is briefed herein below. (ALJD 4:3-16.)

The ALJ found – after discrediting the denials of Ostwald, Orr and Smith – that all five of the alleged discriminatees had engaged in protected concerted activities and participation in NLRB matters. (See, e.g., ALJD 8: 19-30.) The activities and alliances forming the basis of the ALJ’s conclusions that they had all engaged in protected concerted activity and – in the cases of Trudy Edick, Susie Stetler and Anne Martin, also conduct encompassed by Section 8(a)(4) – are accurately set forth by ALJ Scully in his Decision. The ALJ’s detailed findings and conclusions about these activities – and, in particular, Respondent’s uncreditworthy denials of knowledge about them – are critical to Acting General Counsel’s exceptions. (ALJD 5:19 – 8:30.)

II. ACTING GENERAL COUNSEL'S ARGUMENT IN SUPPORT OF EXCEPTIONS

As Acting General Counsel's arguments in support of exceptions #1-4 involve largely the same legal issue – the inference of unlawful motivation – the arguments for these four exceptions will be briefed together.

1. To the finding that the evidence of union animus on Respondent's part is too remote to support an inference that it was the motivation for its decision to lay off any of the alleged discriminatees in 2009. (ALJD 10: 25-28.)

2. To the finding that General Counsel has not established a prima facie case by showing that there was a nexus between Respondent's union animus and the layoffs of the alleged discriminatees. (ALJD 10: 28-30.)

3. To the finding "[T]here [is] nothing else in the record to establish that Respondent harbored union animus at the time the instant layoffs occurred." (ALJD 9: 35-36.)

4. To the conclusion that the Respondent did not commit any of the violations of Section 8(a)(3) and (1) of the Act alleged in the Complaint. (ALJD 10: 38-39.)

Underlying the above four findings and conclusions is ALJ Scully's determination that General Counsel did not establish a nexus between "union animus" and the layoffs,² and therefore did not establish a prima facie case to support the complaint's 8(a)(3) allegations.

Acting General Counsel respectfully submits that the ALJ's Decision that General Counsel did not make out a prima facie case was based on an erroneously narrow and apparently

² As noted in Acting General Counsel's fourth exception, the ALJ did not present any legal conclusions regarding General Counsel's 8(a)(4) complaint allegations. (ALJD 10:23-42.) The ALJ did, however, discredit Respondent's denials of alleged discriminatees' actual or perceived participation in ULP charge-filing, investigations and hearings, as briefed in detail herein.

exclusive focus on the passage of time between General Counsel's overt animus evidence and the alleged discriminatees' layoffs.

Acting General Counsel argues that the ALJ's conclusion that General Counsel did not make out a prima facie case is unjustified on two grounds:

1. General Counsel's credited overt animus evidence – *regarding which multiple Respondent witnesses' testimony was expressly discredited* -- warrants a finding of animus and unlawful motivation for General Counsel's prima facie case. In fact, as briefed below, General Counsel's witnesses' credited testimony explicitly reveals that it was Respondent's carefully calculated strategy to implement adverse action against union supporters slowly and deliberately.

2. Even should the Board adopt ALJ Scully's argument that the credited overt animus evidence is too remote in time to support a finding of unlawful motivation, the ALJ's Decision provides several compelling bases -- in addition to the overt animus -- upon which to infer unlawful motivation and find that General Counsel established a prima facie case. For example, as briefed herein, ALJ Scully repeatedly discredited Respondent's denials of knowledge of the discriminatees' activities and also repeatedly discredited critical substantive animus and motivation-related testimony by Respondent's management witnesses. The ALJ failed to acknowledge or analyze several highly relevant evidentiary threads in the record (e.g., how attendance records factored into layoff selection [GC Ex. 8-10, 12, 15; Resp. Ex. 13-14].) However, Acting General Counsel does not take exception to the ALJ's failure to engage in further fact-finding. Rather, Acting General Counsel submits that the Board need not delve into the lengthy transcript or exhibits to conclude – *from the ALJD decision itself* – that General Counsel has satisfied all the elements of a prima facie case, including animus and unlawful motivation.

A. Record evidence of overt union animus, as credited in the ALJD, warrants a finding that the layoffs were unlawfully motivated by union animus and a finding that General Counsel has established a prima facie case.

Record evidence, as set forth in the ALJD, establishes multiple manifestations of union animus, overtly expressed to employees by Ostwald and Orr, Respondent's two top-ranking managers at all relevant times.

Terry Forner, a former driver for Respondent, describes himself as "very anti-union." (ALJD 8:34-36.) Forner testified that on June 7, 2007, the last day of the 2006-2007 school year, operations manager Orr stated to him that "[W]e have to be really really careful how we get rid of them" after he [Forner] had asked Orr what he was going to do about "the union people." (ALJD 8:36-39.)

Forner also testified that on that very same day, general manager Ostwald commented to Forner that he [Ostwald] had "wanted to get rid of them ['the union people'] at the time of the last union vote," but former manager Arlene Cunningham had talked him out of it. (ALJD 8: 40-43.)

Respondent's animosity toward the Union and its supporters did not end with the end of the 2006-07 school year. Forner further testified that about a week after the September 2007 NLRB election (i.e., during the 2007-08 school), Orr asked Forner to write up then-employee Pauline Hirning for "talking about the Union." According to Forner's credited testimony, manager James O'Neill was present when Orr made this demand of Forner. (ALJD 8:43-46.) Pauline Hirning is the former employee whose termination was the subject of a ULP hearing scheduled for September 2008, for which some of the alleged discriminatees were subpoenaed. (ALJD 5:28; 6:9-15; 7:9-11.)

For each and every one of these instances of overt animus, the ALJ found Respondent's denials uncreditworthy. This is not a case in which the Board is being asked to review and reverse any of the ALJ's credibility resolutions. The ALJ's credibility resolutions vividly convey his conclusion that Respondent's witnesses lack any credibility, as they are discredited over and over again throughout the ALJD on literally every substantive issue about which they testified.

Specifically regarding Oswald's and Orr's testimony about the animus expressed by Respondent during the conversations with Forner, the ALJ found:

- Oswald generally denied having any conversations with Forner concerning unions. I do not credit his denials which lacked any detail or context. They consisted entirely of monosyllabic answers to leading questions by Respondent's counsel which incorrectly paraphrased some of Forner's testimony. (ALJD 8: 48-49.)
- The same is true of Orr. He generally denied speaking to Forner about getting rid of union supporters He also denied asking Forner to write up Hirning. As was the case with Oswald, Orr's denials were elicited through leading questions by Respondent's counsel which lacked context and incorrectly paraphrased some of Forner's testimony. (ALJD 8:51-9:4.)
- I find Respondent's attacks on Forner's credibility as a "disgruntled employee" with a "grudge" against it are not persuasive. (ALJD 9:6-7.)
- Forner gave credible and detailed testimony about his conversations with Oswald and Orr, which was countered by their general denials. (ALJD 9:14-15.)
- [T]here is no reason for Forner to have testified that O'Neill was present during the conversation with Orr involving Hirning if he was fabricating it. O'Neill made two appearances to testify during the hearing but was not asked about the Hirning conversation which suggests his testimony would not have supported Respondent's position. (ALJD 9:17-21.)

After making the above credibility resolutions, ALJ Scully went on to find: “I find there [is] nothing else in the record to establish that Respondent harbored union animus at the time the instant layoffs occurred.” (ALJD 9:35-36.) In so finding, the ALJ notes that “there are no independent allegations of any conduct violating Section 8(a)(1) in the complaint in this matter.” (ALJD 9: 42-43.) Acting General Counsel submits that the absence or presence of “independent allegations” does not determine the existence of actual or inferred animus and unlawful motivation. It is not uncommon that animus evidence that comes to light during an investigation or ULP hearing, after the 10(b) period has tolled.

In fact, the record reveals that there *is* additional evidence of union animus beyond Respondent’s three interactions with Forner. In September 2007, around the same time that Respondent solicited a statement from Forner about Hirning’s union activity, it also grilled alleged discriminatee Trudy Edick about her own union activity. The ALJ credited Edick’s testimony (discrediting Respondent’s testimony to the contrary) and found that shortly prior to the September 2007 Union election, Orr and O’Neill called Edick into the management offices and accused her of disclosing employee names and addresses to the Union. (ALJD 5:26-32.)

Even later in the 2007-2008 school year, as found by the ALJ, Edick was again called into Orr’s office, where Orr accused her of having “pressed charges on him with the Union,” a reference to a charge filed by the Union concerning the earlier interrogation of Edick about the names and addresses. (ALJD 5:32-34.) Respondent’s smoldering animus toward the Edick-related charge is reflected in Orr’s reference to it in Respondent’s “history of charges” memo, described immediately below. (ALJD 5: 35-42; GC Ex. 48, p. 1.)

Perhaps the most notable evidence of Respondent’s sustained union animus into the 2008-2009 school year is the six-page memorandum referred to multiple times by the ALJ within

his Decision as the “history of charges” memo. This memo was prepared, posted and distributed by Orr in the employee breakroom at some point after July 2008, shortly prior to or after the onset of the 2008-09 school year, *the alleged discriminatees’ last season*. (ALJD 5:35-42; 9:40-43; GC Ex. 48.) Acting General Counsel requests and urges the Board to look at this document in its entirety.

This “history of charges” memo – which, Acting General Counsel suggests, was given too little weight in ALJ Scully’s analysis of animus – confirms Respondent’s animosity toward its employees’ union and NLRB activity, just as the 2008-09 school year was beginning. Not only does Orr’s “history of charges” memo ooze generalized animus: it contains explicit references to the activities of alleged discriminatees Trudy Edick and Sharron Lynas and it refers to unnamed employees who were “subpoenaed to appear at the hearing on July 16, 2008, *on Hirning’s behalf*.” (GC Ex. 48, pp.1, 2, 5 [emphasis added]; ALJD 5:35-36; 6:14-43; 7:9-17.)

With the same vigor with which he discredits Respondent’s testimony concerning the Former conversations with Orr and Ostwald, ALJ Scully repeatedly discredits Respondent’s denials that it knew alleged discriminatees Susie Stetler and Anne Martin were subpoenaed for Hirning’s ULP hearing in July 2008. (ALJD 6:14-43 [Stetler]; 7:9-17 [Martin]; 7:25-30.) The ALJ specifically finds that Respondent *knew* Stetler and Martin were subpoenaed – as Respondent characterized it in the history of charges memo – “on Hirning’s behalf” (i.e., “on behalf of the charges being made by Hirning *against the company*” [ALJD 7: 28-30; GC 48, p. 5 [emphasis added]]).

Acting General Counsel’s argues this to the Board: the lapse of time between Respondent’s overt animus and the discriminatees’ layoff is not “too remote,” as the ALJD has concluded. (ALJD 10:25-28.) The Board has acknowledged that while passage of time is

certainly a factor to be considered in the total context of a case, the relevance of prior animus should not be disregarded during an analysis of motivation for a subsequent adverse action. See, e.g., *Ohmite Mfg. Co.*, 220 NLRB 1206, 1209 (1975). As the Board held in *Southwire Co.*, if record evidence reflects that employees' union activities remain on an employer's radar, the passage of time in and of itself does not bar a finding of animus-driven motivation:

The Respondent argues that prior cases . . . should not be considered because of the passage of time [F]actors show that [the alleged discriminatee's] past was not forgotten by Respondent and cannot be discounted but must be considered as evidence of the Respondent's current motivation.

268 NLRB 726, 730 (1984).

Right up to late summer 2008, *as the discriminatees' final school season was beginning*, Respondent not only continued to harbor animus, but expressly communicated it in writing to its employees via the "history of charges memo." (GC Ex. 48.) As Respondent testified and the ALJ found, the routes for the 2009-2010 school year were not assigned until the very end of August 2009. (ALJD 3:28-42.) Respondent could not have produced any even remotely legitimate reason to implement layoffs *during* the 2008-2009 school year. To be "really really careful" [ALJD 8:39], Respondent *had* to wait until the start of the 2009-2010 school year. The beginning of the 2009-2010 school year in August 2009 was the first opportunity, Acting General Counsel argues, for Respondent to leap upon the school district changes as an opportunity to implement, to quote Forner's credited testimony, the company's desire to "get rid" of union supporters. (ALJD 8:36-43.)

The ALJ – citing without analysis three cases proffered by Respondent to support its argument that the animus evidence was "too remote" in time to find unlawful motivation – concludes, "I find nothing here which mandates a different result." (ALJ 9:48-52.) However,

Acting General counsel respectfully submits that the ALJ has taken a misstep by suggesting that a “mandate” is required for unlawful motivation to be found herein. As briefed above, the ALJ has credited General Counsel’s record evidence over Respondents pertaining to multiple manifestations of union animus. A finding of unlawful motivation from this record is not only permissible but, Acting General Counsel argues, warranted.

Even should the Board find that there was a questionable lapse of time between the employees’ protected activities, the overt animus and the adverse action, the Board has clearly held that a lapse in time does *not* dispositively rule out a finding of unlawful motive:

There is no specified time lag between union activity and discharge that serves to immunize an employer from responsibility under the Act [T]here is such a thing as latent hostility which bides its time and lies in wait, seeing the appropriate occasion to work its will.

Marcus Management, Inc., 292 NLRB 251, 262 (1989). See also *Kaumagraph Corp.*, 316 NLRB 793, 794 (1995).

B. Record evidence, as credited in the ALJD, warrants an inference that the layoffs were unlawfully motivated by union animus and a finding that General Counsel has established a prima facie case.

As the ALJ pointed out in his Decision, General Counsel is required to present persuasive evidence that animus toward protected activity and/or NLRB participation was a substantial or motivating factor in Respondent’s layoff decisions. Once that is accomplished, the burden of persuasion shifts to Respondent to demonstrate that it would have implemented these layoffs even in the absence of the alleged discriminatees’ protected activities. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf’d on other grounds 662 F.2d 899 (1st Cir., 1981), cert. denied 455 U.S.

989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).
(ALJD 4:48-5:3.)

Even if the Board should adopt the ALJ's conclusion that the overt animus evidence is too remote in time to support a finding of unlawful motivation, The ALJD and the underlying record provide a compelling basis for inferring unlawful motivation.

Board law is a highly fluid body of law, and there are not many holdings that can be characterized as "well-established." But this can be legitimately asserted: long-standing Board precedent clearly establishes that unlawful motivation can be inferred in the absence of overt animus. In fact, rare is the case in which there is a "smoking gun" establishing, without doubt, animus and unlawful motivation especially where – as here – Respondent is represented by experienced labor counsel.

As the Board has made very clear, "[e]ven without direct evidence the Board may infer animus from all the circumstances." *Electronic Data Systems Corp.*, 305 NLRB 219, 219 (1991), citing *Mistletoe Express Service*, 295 NLRB 273 (1989) and *Birch Run Welding*, 269 NLRB 756, 764-67 (1984), enf'd 761 F. 2d 1175 (6th Cir. 1987). In *Naomi Knitting Plant*, the Board held:

Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.

328 NLRB 1279, 1281 (1999), citing *FPC Moldings, Inc. v. NLRB*, 64 F. 3d 935, 942 (4th Cir. 1995), enforcing 314 NLRB 1169 (1994).

Acting General Counsel submits that an inference of unlawful motivation can and should be found in the instant case in part because *all three* of Respondent's operative witnesses (Orr,

Ostwald and Smith) were repeatedly discredited, not only regarding the animus evidence, as briefed above, but also on the matter of knowledge of the alleged discriminatees' union activities.

As the ALJ noted, "Respondent contends that it had no knowledge that any of the five alleged discriminatees had engaged in any activity protected by the Act." (ALJD 5:19-20.) The ALJ unequivocally discredited Respondent's facile denials of knowledge. (ALJD 5:19-8:30.)

As briefed above, **Trudy Edick** was called into Orr's office *twice* (once in O'Neill's presence) in the fall of 2007, where she was accused, questioned and critiqued for her actual and/or perceived union activity. (ALJD 5: 26-34.) *Almost a full year later*, as the 2008-2009 school year was beginning, Orr was still ruminating about Edick's union activity, as reflected in the six-page "history of charges" memo he authored and distributed. (ALJD 5: 35-42.) As the ALJ concluded:

Despite this, Orr denied any knowledge that Edick had ever engaged in any union activity. . . . [T]he evidence as a whole shows that there was very little that was said or done by Respondent's employees concerning the workplace that did not promptly make its way to its managers. I find that Respondent was aware that Edick was a supporter of the Union and that she had engaged in protected activity.

(ALJD 5: 44-45, 5:48-6:3.) If Edick's union activity had nothing to do with her layoff, as asserted by Respondent, why would its witnesses testify untruthfully about Edick's activity, of which the record reflects that Respondent was so obviously aware? The answer, Acting General Counsel submits, is because Edick's layoff was unlawfully motivated by these activities, not the asserted assessment of her "work performance" per any matrix.

The ALJ also discredited Respondent's denials that it knew about charging party **Susie Stetler's** protected concerted activities. (ALJD 6:5-43.) The ALJ found that Respondent, contrary to the testimony of Orr and Smith under oath at hearing, knew that Stetler had been

subpoenaed to testify at the Pauline Hirning ULP hearing in July 2008, testimony characterized by Respondent to be “*on Hirning’s behalf*.” (ALJD 6:14-26.) As the ALJ found:

Respondent presented testimony from its supervisors Orr and Smith who said that they had no knowledge of any protected activity on the part of Stetler or that she was involved with the Hirning unfair labor practices hearing I cannot credit Smith’s testimony that she was never informed that Stetler had been subpoenaed and intended to testify at the Hirning hearing. Moreover, Orr’s assertion that the employees were subpoenaed to testify “on Hirning’s behalf” indicates that Respondent considered those employees to be supporters of Hirning and the Union. I find that Respondent had knowledge of Stetler’s involvement with the Board hearing and believed that she supported the Union.

(ALJD 6:17-19, 38-43.) As with Edick, if Stetler’s union activity had nothing to do with her layoff, as asserted by Respondent, why would its witnesses testify untruthfully about Stetler’s activity? The answer, Acting General Counsel again submits, is because Stetler’s layoff was unlawfully motivated by her protected activity, not the asserted assessment of her “work performance” per any matrix.

Respondent’s denials are even more surreally unsupportable when it comes to **Sharron Lynas**. As the ALJ found, Lynas had served as a member of the Union’s organizing committee, a fact referenced in Orr’s “history of charges” memo in the late summer/early fall of 2008. As a member of the organizing committee, Lynas had *personally hand-delivered, to Orr*, a letter regarding the Union’s organizing campaign in 2007. Even Orr conceded at trial that Lynas had done so. (ALJD 6:45-48 GC Ex. 48, p. 2.)

Moreover, Lynas hosted Union meetings at her home and participated in door-to-door solicitation of union authorization cards, activity which was also referenced by Orr in his 2008 “history of charges” memo. (ALJD 6:51-7:2.) As the ALJ concluded:

It is simply not believable that Respondent was not told the names of the employees making the home visits and that it did not know that Lynas was involved. I find that Respondent had knowledge of Lynas' union activity and support.

(ALJD 7:2-5.) The same question is raised with Lynas as with Edick and Stetler: was Lynas' union activity— activity of which Respondent was indisputably aware – a motivating factor for her layoff? If not, why would Respondent witnesses testify untruthfully about it? The same answer is warranted, Acting General Counsel submits: Lynas' layoff was unlawfully motivated by her protected activity, not the asserted assessment of her “work performance” per any matrix.

Prior to her layoff, **Anne Martin** was the driver of the bus for which Sharron Lynas was an aide. Martin, like Stetler, was subpoenaed for the Hirning hearing in July 2008. (ALJD 7:6-

11.) The ALJ again discredited Respondent's denial of knowledge of Martin's protected activity:

Once again, Respondent claims that Smith's denial that she knew Martin had been subpoenaed . . . should be credited over Martin's testimony. Again, I do not agree. The fact is, as attested to by Orr, Respondent knew that employees were subpoenaed and had requested time off from “dispatch.” Respondent cannot explain how Orr could have known this if the employees had not informed Smith

(ALJD 7: 11-16.) Once again, why did Respondent testify untruthfully that it had no knowledge of Martin's activity? Acting General Counsel again asserts that it is because Martin's layoff was unlawfully motivated by this activity, not the asserted assessment of her “work performance” per any matrix.

Lastly, the ALJ turned to **Susan Walberg**, a special education aide who worked on charging party Susie Stetler's bus until Walberg was transferred from Respondent's Elk River facility to its Rogers facility. However, the transfer did not keep Walberg apart from her good friends at the Elk River facility. As the ALJ found, even after her transfer, Walberg traveled

back and forth between Rogers and Elk River every day to have lunch at Respondent's Elk River facility with her friends: known union supporters Susie Stetler, Trudy Edick and Anne Martin – all of whose union activities, as found by the ALJ, were known of by Respondent. (ALJD 7:19-22.)

The ALJ found that knowledge of Walberg's union activity – as with the other four alleged discriminatees – *“has been established by General Counsel or can be inferred from the evidence in the record as a whole.”* (ALJD 25-27 [emphasis added].) Specifically, the ALJ found that Respondent “knew that Walberg was a close friend and associate of the other four alleged discriminatees.” (ALJD 7: 30-31.) Moreover, the ALJ noted that Smith, Orr and O'Neill's unprecedented involvement in a routine doctor visit by Walberg reflected that “Respondent closely monitored all aspects of the employees' activities and undermines its claim that it had no knowledge of their Union activity or support.” (ALJD 7: 34-46.)

The ALJ's conclusion as he discredits Respondent's denials of knowledge is forceful and unambiguous:

The evidence shows that Respondent was informed as to what those employees were doing, not only at its facilities, but in private conversations in non-work contexts. It shows that it was willing to accept such reports as true without any investigation or providing employees with an opportunity to explain. Under the circumstances, I cannot credit its claims that it did not know or suspect union support on the part of employees who were identified as on the Union's organizing committee, who wore pro-Union buttons to company meetings, who solicited authorization cards from company employees, who spoke to employees about the Union on its vehicles and in its facilities, who made it known that they were going to appear at an NLRB hearing as witnesses in support of the Union's charges, or who were closely aligned with such employees.

(ALJD 8: 20-30.)

The ALJ's finding of knowledge for all five discriminatees supports a finding of unlawful motivation as well, especially in light of Respondent's repeatedly untruthful testimony relating to its knowledge. As the Board held in *Abbey's Transportation Services*, a case cited by ALJ Scully (ALJD 5:13), the circumstances establishing employer knowledge can also support an inference of unlawful motive. 284 NLRB 698, 701 (1987), enfd 837 F. 2d 575 (2nd Cir. 1988). See also *NLRB v. Long Island Airport Limousine Service Corp.*, 468 F. 2d 292, 295 (2d Cir. 1972), enforcing 191 NLRB 94 (1971) ("direct evidence may not be obtainable and circumstantial evidence and 'inference of probability drawn from the totality of other facts' . . . are perfectly proper.")

Respondent's uncredited testimony – offered at the hearing, repeatedly, from each of its pivotal players – warrants an inference of not only animus, but also of unlawful motivation. See, e.g., *Miramar Hotel Corp.*, 336 NLRB 1203, 1215 (2001) (unlawful employer motivation may be inferred where the employer's stated reasons for the action in question are "false of highly dubious in the light of reliable surrounding evidence").

The inference of unlawful motivation is especially appropriate where, as here, Respondent repeatedly attempts to conceal knowledge. See, e.g., *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 277 (2006) ("when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.").

C. Record evidence, as credited in the ALJD, warrants a finding that unlawful motivation should be inferred from Respondent’s pretextual professed motivation for the layoffs and, therefore, General Counsel’s prima facie case remains intact and/or Respondent’s Wright Line defense is rebutted.

Respondent’s assertion is that the alleged discriminatees were laid off because there were not enough positions available for the 2009-2010 school year and because *an evaluation of their work performance* resulted in their being ranked lower than other employees competing for the same jobs. (ALJD 4: 43-46 [emphasis added].)

Specifically, Respondent asserts that it developed and implemented a matrix by which calculations were done that determined who would be laid off. (ALJD 3:44-50.) Yet, as found by the ALJ, this matrix was a system that lacked consistency or integrity as a tool for any supposedly objective basis for adverse action against employees:

Much of the General Counsel’s evidence and argument in this case was devoted to establishing that the matrix of criteria Respondent used to determine who would be laid off was anything but an objective analysis of its employees’ performance, was irrational and unjustifiable in many respects, and was applied in a careless and manipulative manner to target specific employees. ***I agree and find this to be the case.***

(ALJD 10:5-9 [emphasis added].)

As noted by the ALJ, Respondent characterizes its matrix as “a fair procedure for assigning work” designed to “provide the best staff possible.” (ALJD 4:18-22.) However, after a review of the ALJ’s observations, it becomes apparent that the matrix –with its pervasively arbitrary subjectivity – is devoid of any “fairness” or correlation to work performance.

Accordingly, Acting General Counsel argues, an inference of unlawful motivation is more than warranted from Respondent’s purported reliance upon it as the basis for the layoff selections.

Even within the findings of the ALJD, without delving further into the transcript and exhibits, the following matrix components justifiably caught the attention of the ALJ in his Decision:

- The consideration of safety was removed from the first version of the matrix, even though, as the ALJ found, “[i]t is difficult to understand her [Smith’s] reasoning” and “safety was allegedly a primary concern of Respondent,” (ALJD 4: 7-10.)
- The consideration of an employee’s willingness to work every day, morning and afternoon, was removed from the first version of the matrix, which – as the ALJ noted – “adversely impacted the discriminatees’ scores “ (ALJD 4:10-11.)
- Respondent replaced the removed components of safety and willingness to work with “two totally subjective criteria,” i.e., “professional relationships” and “customer requests.” (ALJD 4: 10-13.)
- The newly inserted components of professional relationships and customer requests, as the ALJ found, “enabled Smith to manipulate the scoring any way she chose since she alone determined what constituted a positive ‘professional relationship’ and she alone knew whether a specific driver or aide was the subject of a customer request.” (ALJD 4: 13-16.)

As quoted above, the ALJ specifically found that the matrix “*was anything but an objective analysis of its employees’ performance, was irrational and unjustifiable in many respects, and was applied in a careless and manipulative manner to target specific employees.*” (ALJD 10:7-8 [emphasis added].)

Nevertheless – despite this scathing indictment of Respondent’s purported *and stated* basis for its layoff selections – the ALJ then went on to find that “there is much stronger evidence” that Stetler and Edick were targeted for layoff because of their involvement in an end-of-school potluck for which Stetler brought a cake and that Martin was targeted because of an off-duty,

passing conversation at a Target store at which she had a second job.³ From these observations, the ALJ then proceeded to find that despite “Respondent’s manipulating the matrix,” because neither the cake incident nor the Target comment constituted activity protected by the Act, “they do not constitute reasons that violate the Act.” (AJLD 10:12-21.)

What the ALJ fails to acknowledge is that Respondent itself *never* asserted that it selected Edick, Stetler and Martin for layoff because of any cake or Target incident.⁴ Respondent presented and litigated one, and only one, stated defense for its layoff selections: that it applied a purportedly non-discriminatory matrix in a purportedly non-discriminatory fashion and the resulting calculations placed the five alleged discriminatees at the bottom of the rankings.

It is not the role of the ALJ or the Board to replace Respondent’s flawed and pretextual defense – a defense formally found in the ALJD to be “irrational,” “unjustifiable,” “careless” and “manipulative” (ALJD 10:6-9) – with alternative defenses. A judge’s personal belief that there exists a potentially legitimate basis for lawful adverse action is not a substitute for actual evidence that a lawful reason was, *in fact*, the reason relied upon by Respondent. See, e.g., *Delta Gas, Inc.*, 282 NLRB 1315, 1317 (1987); *Bronco Wine Company*, 256 NLRB 53, 54 n.8 and accompanying text (1981).

This is emphatically reinforced by the federal circuit court in *Shattuck Denn Mining Corp.*:

It has long been established that for the purpose of determining whether or not a discharge is discriminatory in an action such as this, it is necessary that the *true*, underlying reason for the

³ The circumstances surrounding the cake and Target incidents are discussed in sufficient detail in the ALJD and will not be recited here. However, Acting General Counsel argues that a review of those incidents, as analyzed by the ALJ, further justifies a finding of overreaching and pretext. (ALJD 7:48-8:4 [Martin’s fleeting comments at a Target store]; ALJD 8:6-17 [Stetler, Edick and the “It’s a Good Day” cake].)

⁴ Further, the ALJ’s speculation about what Respondent’s unstated and unlitigated reasons *could* have been did not encompass two of the five alleged discriminatees, Sharron Lynas and Susan Walberg.

discharge be established. *That is, the fact that a lawfully [sic] cause for discharge is available* is no defense where the employee is actually discharged because of his Union activities.

Shattuck Denn Mining Corp v. NLRB, 362 F. 2d 466, 470 (9th Cir. 1966) (emphasis added), enforcing 151 NLRB 1328 (1965).

In light of the overwhelming evidence, as credited by the ALJ, that Respondent's purported reliance on the matrix for its layoff selections is pretextual, Acting General Counsel respectfully urges the Board to find that General Counsel has not only shown a prima facie case, but the inference of wrongful motive remains intact:

[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.

Limestone Apparel Corp., 255 NLRB 722, 722 (1981), enf'd 705 F.2d 799 (6th Cir. 1982).

Accord *United Rental, Inc.*, 350 NLRB 951 (2007):

[If] the evidence establishes that the reasons given for the employer's actions are pretextual – that is, either false or not in fact relied upon – the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf'd 705 F. 2d 799 (6th Cir. 1982).

350 NLRB at 951. This has been confirmed as recently as four months ago by the Board in *ABC Industrial Laundry*, 355 NLRB No. 17 (March 2, 2010):

[P]retextual discharge cases should be viewed as those in which “. . . the defense of business justification is wholly without merit,” and the “burden shifting” analysis of *Wright Line* need not be utilized. *Arthur Young & Co.*, 291 NLRB 39 (1988); *Wright Line*, supra, at 1089, n.5. Finally, regarding the latter point, “it is . . . well settled when a

respondent's stated reason for its actions is found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal."

355 NLRB slip at 16, citing *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991); *Shattuck Denn Mining Corp v. NLRB*, 362 F 2d 466 (9th Cir. 1966). As the Board also noted in *Mastercraft Casket Co.*, "[I]n pretext cases, there is seldom a clear line between the General Counsel's burden and Respondent's." 289 NLRB 1414, 1421 (1988), enf'd 881 F. 2d 542 (8th Cir. 1989).

However, even should the Board conclude that the second stage of the *Wright Line* analysis is necessary, Acting General Counsel argues that the record evidence exposing the pretextual nature of the matrix warrants a finding that General Counsel has rebutted Respondent's *Wright Line* defense that the layoff selections were motivated by the design and implementation of the matrix and not by protected concerted activity or NLRB participation.

[W]hen the stated motive for a discharge is found to be false, the trier of fact may infer that there is another motive. Moreover, it can be inferred that the motive is one that the employer desires to conceal and further would be an unlawful motive where the surroundings [sic] facts tend to reinforce that inference I also infer discriminatory motive from the pretextual nature of the discharge and the obvious falsity of Respondent's stated reason for the discharge. *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988).

Regal Health and Rehab Center, Inc., 354 NLRB No. 71 (2009), slip at 28-29.

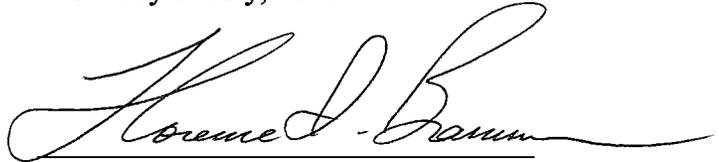
D. The ALJ wrongfully failed to find that Respondent violated Section 8(a)(4) of the Act as alleged in the Complaint.

The ALJ not only failed to find that Respondent violated Section 8(a)(4) of the Act, as alleged in the Complaint, but failed to articulate any conclusion of law at all on the integral 8(a)(4) allegations. (ALJD 10:31-39.)

As found by the ALJ, Trudy Edick, Susie Stetler and Anne Martin all participated in NLRB procedures – by providing affidavits during unfair labor practice investigations and by being subpoenaed as witnesses for a scheduled unfair labor practice hearing – and Respondent had knowledge of these activities. (ALJD 7:32-42 [Edick]; ALJD: 6:38-43 [Stetler]; ALJD 7:9-17 [Martin].)

Acting General Counsel submits that for the same reasons as briefed above for the Section 8(a)(3) allegations, record evidence supports a finding that these activities were a substantial or motivating factor in the layoffs of these alleged discriminatees and that General Counsel has shown that Respondent's proffered defense for the layoffs is pretextual. Therefore, Acting General Counsel asserts that the layoffs violate Section 8(a)(4) as well as 8(a)(3).

Dated at Minneapolis, Minnesota, this 28th day of July, 2010.



Florence I. Brammer
Counsel for the Acting General Counsel
National Labor Relations Board
330 South Second Avenue, Suite 790
Minneapolis, Minnesota 55401

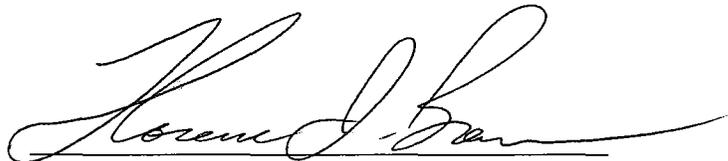
CERTIFICATE OF SERVICE

I hereby certify that copies of the Exceptions on Behalf of Acting General Counsel and the Brief in Support of Acting General Counsel's Exceptions were electronically filed with the Executive Secretary of the National Labor Relations Board and served electronically on the 28th day of July 2010 on the following parties:

Mark Ostwald
Vision of Elk River, Inc.
12508 Elk Lane Road NW
Elk River, MN 55330

Thomas R. Revnew, Attorney
Seaton Beck Peters
7300 Metro Boulevard, Suite 500
Edina, MN 55439

Susie Stetler
12003 257th Avenue
Zimmerman, MN 55398



Florence I. Brammer
Counsel for Acting General Counsel