

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION EIGHTEEN

VISION OF ELK RIVER, INC.

and

SUSIE STETLER.

NLRB CASE NO. 18-CA-19200

**RESPONDENT VISION OF ELK RIVER, INC.'S BRIEF
IN RESPONSE TO ACTING GENERAL COUNSEL'S EXCEPTIONS**

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STATEMENT OF THE CASE

On November 9, 2009, Susie Stetler (Charging Party or Stetler) filed an unfair labor practice charge with Region 18 of the National Labor Relations Board (NLRB) alleging Vision of Elk River, Inc. (Respondent or Vision) retaliated against her, Trudy Edick (Edick), Anne Martin (Martin), Sharron Lynas (Lynas) and Susan Walberg (Walberg) (collectively “the alleged discriminatees”), because they engaged in union activities and cooperated in a NLRB investigation, in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the National Labor Relations Act (“the Act”).

On February 11, 2010, Region 18 issued a complaint in the above-referenced matter, alleging that Vision selected the alleged discriminatees for layoff in retaliation for their protected activities. A hearing ultimately ensued before the Honorable Administrative Law Judge Richard A. Scully (the ALJ) on March 16-19, 2010. On July 7, 2010, Judge Scully issued his recommended decision and order (ALJD), dismissing the Complaint in its entirety. In essence, the ALJ found that the evidence of alleged animus (which occurred from fourteen months to over two years prior the layoffs) was “too remote to support an inference that it was the motivation for [Respondent’s] decision to layoff any of the alleged discriminatees in 2009.” (ALJD 10:23-27).

Acting General Counsel filed exceptions to the ALJD, with a supporting brief, on July 28, 2010.

STATEMENT OF UNDISPUTED FACTS

I. Overview Of Vision’s Business.

As a school bus company with facilities in Elk River and Rogers, Minnesota, Vision contracts with the Elk River School District, ISD 728 to provide transportation services to school

children. (Tr. 629-630)(ALJD 1). Vision transports elementary, middle-school, and high school students through its “regular route” division, and students with “special needs” through its special education transportation division. (Tr. 283). Students with special needs include children with autism, wheelchair-bound students, blind and deaf students, and those with mental disabilities and other special needs. (Tr. 745). In August, 2009, just prior to the beginning of the 2009-2010 school year, approximately thirteen (13) bus drivers, and fifteen (15) aides worked in the special education transportation division. (Tr. 134).

A. Vision’s Management.

As the Company’s General Manager for the last ten (10) years, Mark Ostwald oversees Vision’s facilities, management staff, and employees. (Tr. 282, 629)(ALJD 3: 1-2). Brent Orr worked for Vision as Manager of Operations from July 2006 until June 2009. (Tr. 308-09)(ALJD 3: 2-5). From August to October 2009, he also worked with Vision as a consultant. (Id.). Since June 2009, Jim O’Neill has been Vision’s operations manager where he oversees the day-to-day operations of the regular bus routes. (Tr. 726). Prior to June 2009, O’Neill was an assistant manager at Vision. (Tr. 726).

Colleen Smith is Vision’s Special Education Transportation Coordinator. (Tr. 741)(ALJD 3: 6-7). Her responsibilities include: designing special education routes, assigning of special education routes, working with parents and school staff to identify the special needs of students, and supervising drivers and aides within the special education transportation division. (Tr. 742)(ALJD 3: 7-9). Before becoming Special Education Transportation Coordinator, Smith was a school bus driver, first directly for the Elk River School District, and then for Vision. (Tr. 744). While employed by the Elk River School District, Smith was personally involved in a union organizing campaign in support of Service Employees International Union, Local 284

(Union, SEIU or Local 284) (Id.). After the union was elected as the representative of the school's driver employees, Smith served for a time as the union steward. (Tr. 748). Smith participated in a grievance between the SEIU and the School District, where she was awarded a payment of \$17,600 in 2008. (Tr. 749).

B. The Alleged Discriminatees.

The alleged discriminatees are either CDL drivers or aides within Vision's special education division. The drivers include Charging Party Susie Stetler (Stetler), and Anne Martin (Martin). (Tr. 448, 573). The aides include Trudy Edick (Edick), Sharron Lynas (Lynas) and Susan Walberg (Walberg). (Tr. 23, 387, 518).

II. Union Organizing Activities At Vision And Unfair Labor Practice Charges.

In 2003, and again in 2007, Local 284, engaged in organizing campaigns seeking to represent Vision employees. (Tr. 131, 749). The 2007 campaign culminated in an election on September 14, 2007, in which the employees voted 61 to 50 against selecting the Union as their bargaining representative. (GC Ex. 3).

Shortly before and after the 2007 election, the Union filed three (3) unfair labor practice charges which were either withdrawn or dismissed. (See Cases 18-CA-18385, 18-CA-18462, 18-CA-18526). In or about December 2007, the Union filed yet another charge, regarding the discipline and termination of employee Pauline Hirning. On July 7, 2008, the Company settled the Hiring charge through an informal settlement that was scheduled to go to a hearing on July 16, 2008. (GC Ex. 4; GC Ex. 48). By entering the agreement, "the employer [did] not admit to violating any section of the National Labor Relations Act." (Id.).

After this charge was settled, Orr distributed another communication, titled "A History of Charges, Complaints and Union Action Brought Against Vision of Elk River, Inc.," which he

compiled over a period of time, and which detailed the unfair labor practice charges which had been largely dismissed or defeated, and the election. (Tr. 317)(GC Ex. 48). This document outlined the cost of defending against those charges, and the Company's financial rationale for settling the Hirning unfair labor practice charge. (Id.) Although the communication noted that an unknown number of employees had informed Company dispatchers that they had been subpoenaed to testify at the hearing for that charge. (GC Ex. 48, p. 5; Tr. 323).

III. The School District Negotiates Significant Contract Changes With Vision.

As described in detail below, during calendar years 2008 and 2009, the School District negotiated several contractual changes, which impacted Vision's operations. In particular, in 2008, the Elk River School District changed the method by which it compensated Vision for the transportation of students. The School previously paid Vision on a per student basis, based on a portion of the aid the School received from the State of Minnesota for all students. (Tr. 631). In 2008, the School changed the formula and began paying Vision based upon each student eligible for transportation. (Id.). This formula cut \$400,000 from Vision's revenue. (Id.).

In December 2008, the District reopened negotiations on the parties' contract. (Tr. 632). As a result, Vision and the District began negotiating for a new transportation contract in January 2009, and sought a contract change which provided Vision would be paid on a per bus basis rather than the prior per student basis, and also sought to change the old two-tier transportation scheme to a three-tier scheme. (Id.). Under the two-tier system, routes divided students between high school students and elementary students for transportation purposes, with Vision buses making two (2) runs in the morning and two (2) in the evening. (Tr. 634). The three-tier system divided student transportation between elementary, middle-school and high school students, requiring Vision buses to make three (3) runs in the morning and in the evening. (Id.). By using

buses for three (3) routes each morning and evening, the three-tier system allowed the students to be transported with fewer buses. (Id.).

During the time of the negotiations, in approximately April 2009, the Elk River School Director of Special Services, Carl Jacobia, informed Smith that the District was also changing the method by which special education transportation aides/assistants were assigned to routes. (Tr. 635-36; 750). Specifically, the School wanted aides assigned to routes only when there was a specified student need for an aide, such as when a wheelchair-bound student was transported. (Id.). Previously, aides had been assigned to all special education routes. Orr and Jacobia subsequently corresponded by email about this change, which Orr had noted was “a substantial departure from past practice” of having aides on all the buses. (See R. Ex. 10).

The contract negotiations between Vision and the District became tense as they proceeded. (Tr. 637). The cuts and changes demanded by the District were significant, but because the School had other vendors available for its transportation needs, Vision had very little negotiating leverage. (Tr.635). As a result, Ostwald and Vision management were very concerned about the Company’s relationship with the District. (Tr. 637). In approximately late May or early June, Vision agreed to the District’s demands, and on June 8, 2009 the School Board approved the new contract. (See GC Ex. 46). The new contract resulted in another \$500,000 to \$600,000 savings to the District. (Id.).

IV. The Events At The End Of 2008-2009 School Year.

A. The Layoff Of Brent Orr And The Cake Incident.

On May 29, 2009, in a section of the company newsletter entitled “THE BUDGET WOES CONTINUE,” Vision announced that it was eliminating Brent Orr’s position as Manager due to the budget cuts the Company was facing. (R. Ex. 7). In particular, a newsletter section

written by Ostwald provided:

I have the unpleasant task of announcing that due to never before seen budget cutting, the company and I find it necessary to eliminate the Manager position held for the past three years by Mr. Brent Orr. He has brought his experience to our company to implement many changes faced by the industry as a whole. I believe everyone here has learned something from Brent and I have confidence that our staff will be able to continue on the path of growth, progress and professionalism. Brent's last day with Vision will be June 30th, 2009. I will miss Brent not only as a manager, but also as a friend.

(R. Ex. 7, Tr. 655).

Shortly after Vision announced Orr's layoff, Vision employees held a potluck/picnic lunch. Susie Stetler bought a cake for this event with frosting which contained the words, "It's a Good Day." (Tr. 455-56). At the hearing, Stetler admitted on cross-examination, that an employee named Ben Pittsley told her, "you must have read the newsletter" about Orr's layoff. (Tr. 481). Stetler further admitted that she told Pittsley that he could "make it anything" he wanted, and that Pittsley appeared to assume that the cake was intended to celebrate Orr's layoff. (Tr. 480-81). Significantly, although she contended she discussed the connection of the cake and Orr's layoff only with Pittsley, she also testified that "they assumed" the cake was a celebration of that layoff, indicating that several employees assumed this. (Tr. 480).

After the potluck, Ostwald arrived at the facility shortly before afternoon routes were scheduled to begin. (Tr. 297). At that time, multiple employees approached him, stating that Edick and Stetler brought in a cake to celebrate Orr's layoff. (Tr. 297). Ostwald became angry, and confronted Edick and Stetler at a picnic table outside of the facility, where an employee named Barb Bunker was apparently also seated. (Id.). Ostwald informed Edick and Stetler that their behavior was "childish," and that Orr was not only a manager at Vision, but also his friend. (Tr. 298). Stetler testified that at the time she "didn't know what he was talking about." (Tr.

488). However, Edick testified that Stetler responded to Oswald by saying, “What? It’s a good day, it’s Friday, the sun is shining and there’s one more week of school left.” (Tr. 51). Barb Bunker then asked him, “What? Are you having a bad day?” (Id.). Oswald concluded the conversation by telling them that they should “be looking for different work.” (Tr. 299).

According to Oswald, he was angry because he believed Stetler and Edick had brought the cake to celebrate Orr’s layoff. (Tr. 655). At the hearing, Stetler denied this was the purpose of the cake, but admits she never explained this to Oswald, despite the fact that she “assumed” Oswald believed the cake was to celebrate Orr’s layoff. (Tr. 491).

B. Smith Receives A Complaint From Handke School.

On June 3, 2009, shortly before the end of the school year, Smith received a telephone call from Robin Breas, of the Early Childhood Education program for the Handke School. (See R. Ex. 11, Tr. 754). Breas was upset, and asked Smith, “What the hell is going on a Vision?” (Tr. 760). Breas further stated that a Vision driver complained that Vision employees were being required to turn in their badges, that shop mechanics would be driving summer routes, and that aides/assistants would no longer be assigned to buses. (Tr. 760)(See R. Ex. 11). This event occurred while Vision was anxiously waiting for the School Board to approve its recently negotiated contract. (Tr. 658).

Smith inquired as to the identity of the driver, and Breas consequently called Smith a second time and identified the driver as the “lady at Target.” (Tr. 760). Smith identified Anne Martin as the only Vision Special Education Driver whom she knew worked at Target. (Tr. 761). Because this constituted a complaint from a school, Smith prepared a note documenting her conversation with Breas. (See R. Ex. 11). Smith subsequently issued a memo to employees prohibiting employees from making inappropriate remarks to school staff or parents. (GC Ex.

15). In particular, Smith noted that “inappropriate remarks and comments by the department’s employees to school district or company customers can damage the company’s operations and credibility.” (Id.)

C. Vision Communicates With Employees Concerning Contract Changes With The District.

On June 19, 2009, Ostwald sent a letter to Vision employees informing them that the District had approved a new transportation contract with Vision. (GC Ex. 46). The letter thanked employees for their patience and understanding during the extended negotiations. (Id.) It also thanked employees who asked questions or raised concerns directly with management, but noted that some employees had “indulged in speculation and rumor mongering” that had endangered Vision’s relationship with the School District. (Id.). Ostwald described this conduct as “regrettable” because it had the possibility of jeopardizing the livelihood of their colleagues and the future of the company. (Id.)

V. The 2009-2010 School Year.

Just prior to the commencement of the 2009-2010 school year, in August 2009, Ostwald became seriously ill, and was hospitalized with a life threatening lung infection from August 16 to August 29. (Tr. 639). He had no involvement in the operations or decisions at Vision from August to October. (Tr. 640). Brent Orr, who had been laid off in June, returned to Vision on a non-employee consultant basis to assist with operations in Ostwald’s absence in August. (Tr. 665, 710).

A. Planning For The 2009-2010 School Year.

It is undisputed that August is an extremely busy month at Vision. During August, Vision, and Colleen Smith, in particular, received a significant number of telephone calls with

questions and requests from schools and parents about transportation services for school children. (Tr. 784). Those requests continued to stream in until just before school resumed session. (Tr. 767). Smith was particularly busy during August 2009 because Ostwald was ill, and not available to assist. (Tr. 769). Furthermore, the change from a two-tier to a three-tier transportation scheme meant she had to redesign the routes. Because the Special Education routes cannot be designed until the vast majority of special education transportation requests have been received, Smith typically waits until the last two weeks of August to perform the work of designing those routes. (Tr. 767). During that time period in 2009, she worked ten (10) to sixteen (16) hour days. (Tr. 768). No drivers or aides are assigned routes until the routes are sufficiently designed to cover all children. (Tr. 769).

Smith finished designing the special education routes (with some ongoing modifications as some transportation requests trickled in) in late August. (Tr. 770). At that time, she realized there were insufficient routes to employ all the current Special Education drivers and aides. (Tr. 770). After realizing two (2) drivers and three (3) aides would need to be laid off, and with only slightly more than a week before the school year was scheduled to begin, Smith consulted with Orr about using a “matrix” of factors to select employees for layoff. (Tr. 137).

1. The Matrix Is Developed.

Orr provided Smith with a matrix he prepared twelve (12) to eighteen (18) months earlier, specifically for a layoff of regular route drivers. (Tr. 349-50)(GC Ex. 12, p. 1)(ALJD 3: 48-50). The “original” matrix was revised to eliminate a reference to bonuses which no longer existed, to allow for the evaluation of aides/assistants as well as drivers, and to lower the potential point totals. (Tr. 145-147, 351)(GC Ex. 12, p.2). Smith removed safety and driving considerations because aides/assistants do not drive, and because there had been no accidents

during the prior year (and thus occurrences of accidents would not be a distinguishing factor between employees). (Tr. 146). She added components which considered the employees' professional relationships (with district staff, students, patrons and colleagues), and whether a customer requested the continued service of an individual driver or assistant. (ALJD 4: 12-13). The General Counsel's witnesses acknowledged that requests by parents and/or school staff are important considerations. (Tr. 436, 507).

2. Smith Applies The Matrix To Employees.

The day after the matrix was finalized, Smith applied it to employees. (Tr. 155). For the seniority scores, she consulted a seniority list and used the employees' dates of hire with Vision. (Tr. 157). For the attendance scores, she reviewed a day-planner book which she used to track employee attendance and the scheduling of substitute drivers and aides. (Tr. 157). For the professionalism score, and the score for customer requests, she relied upon her memory of whether she had received complaints about the employee, or parent or school requests for continued assignment of individual employees. (Tr. 771). With regard to the attendance scores, Smith went through her day-planner book for each Special Education bus driver and assistant, and tallied their number of absences on a blank check-in sheet. (Tr. 157-58, 160, 774-75).

After awarding each employee a score for each factor of the matrix, and then doing the math, Smith calculated Stetler's total score as twenty-five (25). (GC Ex. 14). Edick's total score was fifteen (15). (Id.). Walberg's total score was eighteen (18). (Id.). Lynas' total score was ten (10). (Id.). Martin's total score was twenty (20). (Id.).

3. The Final Rankings.

When Smith was done evaluating the drivers and aides, she had an office employee, Alisha Mendez, type the final scores. (Tr. 188, GC Ex. 14). Under the typed scoring, Stetler and

Martin scored lowest among the drivers, with scores of twenty-five (25) and twenty (20), respectively. (GC Ex. 14). While the typed matrix scoring showed Lisa Hall had a score of “23,” it is also obvious that an arithmetic error occurred in that the “5” for the parent’s request for Hall’s continued service was not properly added. (GC. Ex. 14; Tr. 193, 811). Hall therefore received a total score of twenty-eight (28), which placed her above Stetler. (Tr. 193)(GC Ex. 14).

Among the aides/assistants, Sharron Lynas, Trudy Edick, Susan Walberg, and Margo Braun scored the lowest, with scores of ten (10), fifteen (15), eighteen (18), and eighteen (18), respectively. (GC Ex. 14). Although Walberg and Braun received the same total score, Braun had an earlier date of hire, and was retained. (GC Ex. 14)(R. Ex. 12).

Significantly, Braun had signed several letters to Vision employees as a member of the Union Organizing Committee. (GC Ex. 54, 56). Additionally, Julie Thornton, another member of the Union Organizing Committee who had signed the same letters, scored among the highest on the matrix. (GC Ex. 14, GC2).

B. Vision Notifies Employees Of The Layoffs.

After calculating the matrix scores and rankings of the bus drivers and assistants, Smith assigned routes to those who were retained. (Tr. 769). On Monday, August 31, 2009, Vision sent a memo to Special Education drivers and assistants, informing them that the School District’s changes have lessened the amount of work at Vision, and that a decision matrix had been developed to determine a fair procedure for assigning available work. (GC Ex. 16). Smith then made calls to a few of the drivers about their assignments, after which news that the route assignments were ready spread among the employees. (Tr. 860-861). Shortly thereafter, drivers and aides, including most of the alleged discriminatees, came to the facility for their

assignments. (Tr. 861). Because Smith was very busy preparing for the upcoming school year, she asked Orr to assist her with handling questions about the layoffs, and for responding to personnel file requests. (Tr. 223, 689, 794, 861-62).

C. Vision Identifies Errors In Responding To The Unfair Labor Practice Charge.

After the layoffs were implemented, Smith discovered that she made errors in the matrix scoring, particularly in the attendance scores. (Tr. 784, 817). Smith unequivocally testified she made honest mistakes due to the extremely busy state of the school transportation business in August and September. (Tr. 784). At the hearing, Smith testified in detail about how to determine absences from reviewing the entries in the day-planner book. (Tr. 775, 797, 856 and 859). An accounting of absences based on a review of that day-planner book, with adjustments made for other errors identified at the hearing (R. Ex. 13, 14), (See Tr. 173-79) (GC Ex. 21, 22) reveals the following tally for aides:

Name	Number Absences	Original Attendance Score	Corrected Attendance Score
Margo Braun	4	15	15
Karla Studebaker	6	20	10
Sandy A.	25	5	0
Phyllis Close	4	15	15
Pat Mesker	11	5	5
Peggy Thompson	6	20	10
Shar Weflen	7	10	10
Vicki Olesen	7	15	10
Sharron Lynas	12	0	5
Leslie Griner	8	10	10
Barb Allen	6	15	10
Susan Walberg	8	15	10
Sandra Fiedler	11	20	5
Trudy Edick	16	10	0
Barb Bunker	1	20	15

Similarly, for drivers, the accounting reflects the following tally:

Name	Number Absences	Original Score	Corrected Score
Don Williams	1	20	15
Phil Onstad	2	15	15
Karen Betland	3	15	15
Karen Wold	18	10	0
Anne Martin	3	15	15
Earl Williams	5	15	15
Susie Stetler	9	15	10
Janelle Jensen	6	15	10
Laree Verhoef	13	15	5
Lisa Hall	31	0	0
Dennis Verhoef	5	20	15
Janice Johnson	16	5	0
Julie Thornton	1	20	15

ARGUMENT

I. The ALJ Properly Found That Alleged Anti-Union *Animus* Did Not Motivate Respondent's Selection Of The Alleged Discriminatees For Layoff. [Response to General Counsel's Exceptions 1-4]

In sum, the ALJ properly dismissed the General Counsel's complaint in its entirety after he found that General Counsel failed to establish a nexus between the alleged "union animus" and the layoffs. In short, the ALJ found the General Counsel failed to establish a *prima facie* case to support the Complaint's allegations.

Board case law is clear that when alleging a discriminatory termination in violation of Sections 8(a)(1), (3) or (4) of the Act, the General Counsel must prove by a preponderance of the evidence that the employer discharged the employees because they engaged in protected union activities, or because they filed charges with, or gave testimony to, the NLRB. See Hardwicke Chemical Company, 241 NLRB 59 (1979); Tartan Marine Company, 234 NLRB 167 (1979); Wiers International Trucks, Inc., 353 NLRB No. 48, p. 28 (2008). Indeed, Section 10(c) of the Act requires the General Counsel prove that the employer terminated the employees because of their protected activities; "it is not upon respondent to prove that [the employees were]

discharged for other cause.” Georgia Pacific Corporation, 217 NLRB 761, 763 (1975). See also Michigan Precision Industries, Inc., 223 NLRB 892 (1976).

In Wright Line, 251 NLRB 1083 (1981), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), the Board adopted a burden-shifting approach the General Counsel must satisfy to establish anti-union discrimination in violation of Section 8(a)(3) of the Act. The General Counsel must first establish a *prima facie* case that anti-union animus motivated the employer’s decision. See also Laidlaw Corp., 171 NLRB 1366, enf'd, 414 F.2d 99 (7th Cir. 1969); Raysel-Ide, 284 NLRB 879, 880 (1987) (General Counsel must prove union activity was a contributing factor in the decision to take adverse employment action against an employee). To establish a *prima facie* case under Wright Line, the General Counsel must prove by a preponderance of the evidence that:

- (1) the employee engaged in union or other protected activities;
- (2) the employer knew of these activities;
- (3) the employer harbored animus toward those activities; and,
- (4) there was a causal connection between the activities and the employer’s adverse employment action against the employee.

West Virginia Steel Corp., 337 NLRB 34, 35 n.9. (2001); Affiliated Foods, Inc., 328 NLRB 1107 (1999); American Gardens Management Co., 338 NLRB 644 (2002). Notably, in establishing a *prima facie* case, the General Counsel must establish that the decision-maker in the adverse action had knowledge of the protected activities and harbored animus toward those activities. Florida Steel Corporation, 223 NLRB 174, 175 (1976); Ramada Inn of South Bend, 268 NLRB 287, 299 (1983).

If the General Counsel establishes protected conduct was a “motivating factor,” the

burden then shifts to the employer to demonstrate the same action would have taken place even in the absence of any protected conduct. Wright Line, 251 NLRB at 1089.

The same Wright Line framework is also used to analyze allegations of Section 8(a)(4) violations. Wiers International Trucks, Inc., 353 NLRB No. 48, slip op. at 29 (2008), citing McKesson Drug Co., 337 NLRB 935, 936 (2002). To establish a violation of Section 8(a)(4), General Counsel must prove, by a preponderance of the evidence, that Respondent's actions were motivated, at least in part, by the employees' filing of charges or testifying. Id., citing Wayne W. Sell Corp., 281 NLRB 529 (1986). The ALJ correctly found that the General Counsel failed to meet her burden for either the 8(a)(3) or 8(a)(4) allegations.

A. The ALJ Correctly Concluded That The Alleged Evidence of Overt *Animus* Was Too Remote In Time From The Layoff Decision To Justify A Finding Of Motivational Nexus Between Protected Activities And The Layoff Decision.

The ALJ correctly concluded that the alleged overt animus was too remote in time from the layoff decision to find a motivational nexus. Indeed, all the events relied upon by General Counsel are alleged to have occurred long before the September 2009 layoff decision. As a result, they were too remote in time to support a finding that *animus* motivated the layoff decision. The Board has recognized that significant gaps in time between protected activity/expressions of animus and adverse employment actions prevent the establishment of a nexus. Amcast Automotive of Indiana, Inc., 348 NLRB 836 (2006); Children's International Services, Inc., 347 NLRB 67 (2006). In fact, the Board's Quality Committee's Comprehensive Report on Quality Casehandling emphasizes that, "[T]iming is an important element of proving a discriminatory motive." Quality Committee's Comprehensive Report OM 10-26, p. 19 (December 22, 2009). The Quality Committee stated that, "General Counsel **must** also focus on this factor of [timing] at trial." Id. (emphasis added) The Committee also specifically

recognized that:

If the 8(a)(3) discharge or other discrimination occurs after a union organizing campaign or animus is remote in time, the Region should gather other evidence to establish the *prima facie* case, such as evidence of concrete instances of disparate treatment. The Region should take a hard look at how nexus to the protected activity can be established. The Investigator should look for specific evidence of animus by the decision-maker or about the discriminatee, rather than general evidence of unrelated animus.

Id.

The Board has long recognized the importance of timing to establishing a *prima facie* case of discrimination. In Amcast, an employee who had been active in union organizing activity in 1999 and 2002 was discharged in May 2004. 348 NLRB at 836, 837. The Board found that the two-year gap in time between his pro-union activity and his discharge was too great to support a connection. Id. at 838-39. In Children's Services, the Board also found that an employer's antipathy toward union activity, expressed in a letter distributed to employees two (2) years prior to the layoff of union supporters, "did not shed light on the Respondent's motive for its much-later discharge" of those supporters. 347 NLRB at 69. In other cases, the Board has found that even shorter gaps in time undermine the establishment of a nexus between union activity and an adverse action. Museum of Modern Art, 347 NLRB No. 96, 1 (2006) (an eight (8) month gap is insufficient to show union activity to support a *prima facie* case); Central Valley Meat Co., 346 NLRB 1078, 1079 (2006) (a six (6) month gap is insufficient to show nexus); Thurston Motor Lines, Inc., 171 NLRB 1262, 1271-1273 (1981) (a ten (10) month gap is insufficient to show nexus); Irving Tanner Co., 273 NLRB 6, 10-11 (1984) (a five (5) month gap is insufficient to show nexus); Qualitex, Inc., 237 NLRB 1341, 1343-1344 (1978) (a four (4) month gap is insufficient to show nexus).

In the immediate case, the allegedly protected activities of the alleged discriminatees, as well as the alleged conduct of Orr and Ostwald which General Counsel contends evidences animus, are remote in time from the layoff. In particular, the ALJ found, and General Counsel acknowledges, that the two conversations between Forner, Orr and Ostwald occurred in June and September 2007, two or more years before the layoffs. (ALJD 8:36-46; GC Br. 6). The ALJ also found that the latest meeting at which Orr questioned Edick about her allegedly protected activities occurred in the Fall of 2007, almost two years before the layoff. (ALJD 5:32-33). Additionally, Orr posted the “History of Charges” document in July 2008, over 13 months before the layoffs. (ALJD 5:35).¹

General Counsel attempts to dismiss the one to two year passage of time between the alleged animus and the layoffs as merely “a factor” to be considered. In doing so, however, General Counsel relies upon out of context quotes from Board decisions or simply ignores material facts in those cases. For instance, General Counsel’s reliance Southwire Co., 268 NLRB 726 (1984) is clearly misplaced and easily distinguishable from the instant case. In Southwire, the alleged discriminatee, who was laid off after a company reorganization, had been fired on two separate occasions years before and ordered reinstated by the NLRB. Id. The Board held that those older cases could be considered in evaluating whether union *animus* existed for the layoff, because evidence also existed that, contemporaneous with the layoff, the employer opposed unionization, and the decision-makers with respect to the layoff **discussed the**

¹ Contrary to the General Counsel’s assertion, the ALJ did **not** find that this document was “prepared, posted and distributed” after July 2008, and “shortly prior to or after the onset of the 2008-09 school year.” (GC Br. p. 9). Rather, the ALJ found merely that Orr posted and distributed the document in the Summer of 2008. (ALJD 5: 35). Further, Orr testified he compiled this document over a period of time – not all at once in July as General Counsel asserts. (Tr. 314). Orr also testified that he distributed the document around the time that the Pauline Hirning unfair labor practice charge was settled, which occurred on July 7, 2008. (Tr. 316; GC Ex. 4).

employee's past union activity when considering his selection for layoff. *Id.* at 730.

The Board's decision in Ohmite Manufacturing Co., 220 NLRB 1206 (1975) is distinguishable for similar reasons. In Ohmite, the alleged discriminatee was laid off in January 1975. The ALJ found the layoff was motivated by anti-union *animus*, relying in part, on an NLRB finding of unfair labor practices based upon threats made to the same alleged discriminatee during an organizing campaign in April 1974. The ALJ found the threats made eight months prior to the layoff were relevant to the January layoff because the threats were "uttered again" just prior to the layoff. *Id.* at 1209.

Thus, in both Southwire and Ohmite, the Board found evidence that the employers had considered the employees' protected activities contemporaneous with the challenged layoff decisions, which justified consideration of older evidence. Furthermore, that older evidence was in the form of formal NLRB unfair labor practice determinations. With regard to the employees who were laid off at Vision, there are no prior unfair labor practice determinations, only a prior settlement which contains a "non-admissions" clause. (GC Ex. 4). Moreover, no evidence of union *animus* contemporaneous with the September 2009 layoffs exists to justify consideration of older evidence of alleged *animus*.

In sum, as in Amcast and Children's Services, the last union activity prior to the layoffs concluded two (2) years prior to the September 2009 layoffs, while the last unfair labor practice charge proceedings had been resolved in early July, 2008. (Tr. 313, 341)(GC Ex. 4).² As a result, the layoff occurred two (2) years **after** the prior union organizing activity, and almost fourteen (14) months **after** the prior unfair labor practice charge proceedings concluded. This significant time gap undermines General Counsel's attempt to establish a nexus between the

² No evidence exists that the organizing which led to the March 2010 election began prior to the September 2009 layoffs.

allegedly protected activities, Vision's alleged animus, and the layoff of the five (5) women. If gaps of as little as four (4) months are sufficient to undermine a showing of animus motivated conduct, see Qualitex, *supra*, then certainly the passage of twenty-four (24) and fourteen (14) months do as well.

Similarly, in Marcus Management, Inc., 292 NLRB 251 (1989), also quoted by General Counsel, the Board found a violation where a discharge took place seven (7) months after an employee contacted a Vision representative, as compared with the gaps of almost fourteen (14) months to over two years in the immediate case. Even at seven (7) months, the Board was concerned about the passage of time. (Id. At 262). However, in Marcus Management, there was evidence that the employer had explicitly stated a desire to discharge the employee because of his Union activity, and had specifically planned to do so after six (6) months. (Id. at 356, 262).

Although General Counsel claims Vision had to be "really really careful" and wait until the September 2009 layoffs to "get rid" of the union supporters, there is no evidence of an actual plan to do so, as there was in Marcus Management. In fact, Vision did not know layoffs would even be necessary until late August, 2009. Rather, her argument relies upon pure speculation, not evidence, which amounts to nothing more than a bald assertion that, because Vision laid off five (5) employees, it must have been due to anti-union *animus*. General Counsel puts the proverbial cart before the horse with this argument, claiming that *animus* is established by the layoff itself, even though the law requires a finding of *animus* before the layoff can be found unlawful.

B. The ALJ Correctly Found General Counsel Failed To Establish A Nexus Between The Alleged Animus And The Layoffs Because Smith Made The Layoff Decisions.

After reviewing the totality of the facts in the instant case, the ALJ correctly decided General Counsel failed to establish a nexus between the animus and the selection of employees for layoff. Nevertheless, after disregarding significant lapses in time, General Counsel asserts without any basis that evidence of overt union *animus* (involving incidents occurring at least thirteen (13) months, if not longer, prior to the layoffs) warrants a finding that the selection of the five individuals for layoffs was unlawfully motivated. These incidents include the following: (1) two alleged conversations between Terry Forner, a former driver for Vision, and Ostwald and Orr in June and September 2007; (2) two meetings between Orr (with manager James O'Neill present) and alleged discriminatee Trudy Edick in the Fall of 2007, which the ALJ found to reflect anti-union *animus*; and (3) a "History of Charges" document distributed to employees by Orr in July 2008, which the ALJ found did not reflect anti-union animus.

Despite her argument, it is important to note that General Counsel does not dispute that the overall decision to layoff employees was lawful. (Tr. 10). As a result, she was required to establish Vision (i.e., Smith) selected each of the five (5) alleged discriminatees for layoff because of their protected activities and to establish its *prima facie* case for each of these individuals. See, e.g., Dillingham Marine and Mfg. Co. v. NLRB, 610 F.2d 319 (5th Cir. 1980); Delchamps, Inc., 330 NLRB 1310, 1315 (2000) ("common sense dictates that when employees are discharged for individual reasons, then the employer's knowledge of each employee's union

activity and the employer's motivation for each discharge are the relevant inquiries . . .").³

Simply put, General Counsel failed to meet her burden.

1. Since Smith Made The Layoff Decisions, The Alleged Animus By Orr And Oswald Is Largely Irrelevant.

The General Counsel's argument that a nexus exists between the evidence of alleged overt animus and the layoff is significantly flawed. Indeed, assuming for sake of argument only that the above-referenced incidents establish *animus*, they involved only Orr and Ostwald, who did not make the layoff decisions. The Board has recently, and consistently held that General Counsel must establish that the decision maker of an adverse employment action must possess the requisite animus. Vae Nortrack North America, Inc., 344 NLRB 249, 251 (2005), Pro-Tec Fire Services, Ltd., 351 NLRB 52 (2007), Children's Services Int'l, Inc., 347 NLRB 67 (2006). As the ALJ found, Smith was the decision-maker for the layoffs – an uncontroverted fact given the General Counsel's failure to file an exception on this finding. (ALJD 4:30-31). Furthermore, Ostwald was not present at Vision at the time of the layoffs because he was hospitalized for much of August due to a life threatening lung infection. (Tr. 639-40). Similarly, at the time of the layoffs, Orr was no longer a Vision employee since his position was eliminated in June 2009, and was merely acting as a part-time independent consultant. (Tr. 655, 664-65, R. Ex. 7).

³ In Dillingham, the court affirmed that the Board need not prove the Wright Line elements for each individual subject to a layoff when the overall layoff decision was unlawfully motivated. In the instant case, however, the General Counsel stipulated that the overall layoff decision was lawful. (Tr. 10). Furthermore, it is well established that "an unlawful motivation in the discharge of an employee cannot be based solely on the general bias or anti-union attitude of the employer, whether proved or conceded, but must be established by other facts in each individual case. Florida Steel Corp. v. NLRB, 587 F.2d 735, 744 (5th Cir. 1979); Berry Schools v. NLRB, 653 F.2d 966, 972 (5th Cir. 1981); Salem Tube, Inc., 296 NLRB 142, 145 (1989) ("But anti-union propaganda does not necessarily evidence bias toward a particular individual because of his Union activism.").

2. Smith Lacked *Animus* Before And At The Time The Layoff Decision Was Made.

Additionally, not only do the incidents of *animus* pertain to Oswald and Orr, the General Counsel failed to establish that Smith, as the decision-maker, had *animus*. In order to establish a nexus between an employer's *animus* and the layoff decision, the Board has held that the decision-maker of an adverse employment action must be influenced by *animus*, for that adverse action to be a violation of Section 8(a)(3). Vae Nortrack North America, Inc., 344 NLRB 249, 251 (2005); Pro-Tec Fire Services, Ltd., 351 NLRB 52 (2007); Children's Services Int'l, Inc., 347 NLRB 67 (2006). The evidence of allegedly "overt" *animus* relied upon by General Counsel, which involved Orr and Ostwald, simply does not involve Smith, and is therefore largely irrelevant.

The General Counsel failed to present any evidence that Smith had *animus* toward the employees' protected activities for one reason – she lacked such *animus* as established in the uncontroverted record. As Smith testified, before Vision became the District's transportation services provider, she was an active union supporter, and was actively involved in the successful organizing campaign to elect the SEIU (the same union involved in the organizing efforts at Vision) as the representative of the School employees. (Tr. 747). After the union won the election, Smith became the union steward for the District's bus drivers. (Tr. 447, 748). Furthermore Smith actively participated in a grievance against the School District after the District's drivers were eliminated. (Tr. 748). As a result of the grievance, in 2008 (around the same time the latest alleged overt act of *animus* occurred), Smith received a payment of \$17,800 from the District—a date notably after the conversations between Forner, Ostwald and Orr, which General Counsel claims establish *animus*. (Tr. 748-49). As Smith testified, the SEIU represented her in the grievance process which culminated in this payment, and she was happy

with the Union. (Id.).

General Counsel presented no evidence that Smith ever expressed an unfavorable opinion about the Union, or about the protected activities of Vision's employees. During prior union organizing campaigns at Vision, even as a supervisor, the evidence is that she did not oppose the organizing. (Tr. 750). Given these uncontroverted facts, no reasonable inference can be made that Smith held any individual *animus* toward the alleged discriminatees' protected activities, or that it affected her development and application of the matrix when selecting employees for the layoff. As a result, General Counsel failed to establish a nexus between the *animus* and the layoff decisions.

C. The Other Evidence Relied Upon General Counsel Does Not Support A Finding Of Overt *Animus*.

The General Counsel also misplaces her reliance upon other evidence as allegedly establishing *animus*, such as the "History of Charges" document, and conversations between Orr and Edick. Nevertheless, as the ALJ correctly found, neither the "History of Charges" document nor the conversations between Orr and Edick evidence *animus*. (ALJD 9:35-44). In fact, the ALJ found that the only evidence of *animus* related to conversations between Forner, Orr and Ostwald. (ALJD 9:35-36).

1. As The ALJ Correctly Found, "The History of Charges" Document Does Not Establish *Animus*.

While the General Counsel claims that the "History of Charges" document prepared by Orr "oozes generalized *animus*", (GC Brief p. 9, Ex. 48), she does not even attempt to explain or analyze how the document allegedly evidences that *animus*. Rather, General Counsel baldly asserts that it evidences "*animus*," apparently believing that pasting such a label on the document is sufficient to meet her burden of proof.

To the extent General Counsel discusses the substance of the document at all, she merely points to the fact that the document references two of the alleged discriminatees, and the fact that employees had been subpoenaed for the July 2008 unfair labor practice hearing. (GC Br. p. 9). While this may arguably constitute evidence that Orr had knowledge of certain facts, nowhere does the document evidence *animus*. The document is little more than a neutral history of the unfair labor practice charges. It merely identifies each unfair labor practice charge filed, describes its allegations and fact background, the Company's efforts to defend itself, and the outcome and the cost to the Company. It contains no threats, insults, disparaging remarks, or attacks on the union or employees. As a result, this document does not constitute factual evidence of *animus*.

Moreover, absent inclusion of unlawful threats, Orr's statement of his views and understandings in that document are protected by Section 8(c) of the Act, which precludes the Board from considering such expressions as "evidence of unlawful conduct." 29 U.S.C. § 158(c). Indeed, in Children's Services International, 347 NLRB 67 (2006), the Board held that much angrier expressions of displeasure with union activity were protected by Section 8(c), and could not constitute evidence that a layoff was motivated by union *animus*. 347 NLRB at 69-70. In Children's Services, a case analogous to the immediate case, the employer conducted a layoff because of a sudden budget cut. 347 NLRB at 67-68. One of the laid-off employees had been a union observer at the representational election in 2002, which the union won. Id. at 77. Another employee had been a member of the union negotiating committee, and both were among those who executed a bargaining agreement on behalf of the union. Id. The Board held that the employer's criticism of a union rally, and statements that the union had ruined the employer's reputation, were not unlawful. Id. at 69. The Board also found that statements by the

employer's interim director, that union supporters were driven by "mob mentality," created chaos, and had "derailed the organization," were expressions of her "views regarding the Union." *Id.* at 67, 69. The Board therefore concluded that "Section 8(c) provides that such views and opinions are not unlawful, and are not 'evidence' of unlawful conduct under any of the provisions of the Act." *Id.* at 69. Similarly, here, Orr's neutral reporting of the history of the unfair labor practice charges previously filed against Vision is also protected by Section 8(c), and cannot be used as evidence in this matter.

2. As The ALJ Correctly Found, The Conversations Between Orr And Edick Do Not Establish *Animus*.

General Counsel also attempts to argue that two conversations between Orr and alleged discriminatee Trudy Edick in 2007 establishes *animus*. Once again, however, after reviewing the record as a whole, the ALJ failed to find these incidents established *animus*.

Orr's first conversation with Edick in May 2007 (which General Counsel asserts was a "grilling"), was related to the disclosure of confidential employee contact information, and therefore cannot constitute evidence of *animus* against protected activities. (Tr. 667).⁴ During this conversation, Orr discussed with Edick the fact that other Vision employees were upset that they were being contacted by the Union, and believed that she had given the Union their personal contact information. (Tr. 667). Orr understood Vision provided Edick with this contact information for the purpose of the publishing of Vision's newsletter, part of which included

⁴ With regard to the first conversation between Edick and Orr, General Counsel misstates the ALJ's finding as to the timing of this conversation by asserting it occurred in September 2007, around the same time as a conversation with Forner. (GC Brief p. 8). Nevertheless, the ALJ simply found, and Edick merely testified, that the conversation occurred prior to the September 2007 election. (ALJD 5:27; Tr. 31). Furthermore, the record reflects that this conversation occurred in approximately May 2007, as reflected in the "History of Charges" document with which General Counsel is so focused. (GC Ex. 48, p. 1).

recognition of employee birthdays. (Tr. 31, 667, 716). Some employees knew Edick possessed this information and assumed she had given it to the Union. (Tr. 667) In speaking with Edick, Orr's concern was not that the information had been given to the Union, but rather that it had been given out to anyone. Thus, his concern was about the disclosure of confidential information, not union activity, and Orr's conversation with Edick about the issue cannot constitute evidence of animus toward protected conduct. The disclosure of such confidential information is not protected conduct. See Cook County College Teachers Union, Local 1600, 331 NLRB 118 (2000).

Additionally, during their conversation, Edick insisted that she was not responsible for leaking the employees' contact information to the Union, and was upset that employees blamed her for it. (Tr. 68, 668). Ironically, shortly thereafter, the Union sent a cease and desist demand letter to Orr, which failed to identify Edick. (R. Ex. 6).

The second conversation between Edick and Orr, which relates to a conversation pertaining to Edick "pressing charges" against Orr, also does not establish animus. With regard to that conversation, Edick testified that, in approximately November or December 2007, she went to Orr's office for the purpose of discussing a doctor's slip, but instead Orr ambushed her by accusing her of filing charges against Vision. (Tr. 33). On cross-examination, however, it became clear that the purpose of the conversation was about her need to obtain a return to work slip from a doctor, after a medical absence, to confirm that she could safely perform her job without endangering either her own, or the children's, safety. (Tr. 77-79). Edick acknowledged that she had been diagnosed with multiple sclerosis, and that Orr expressed concern over her safety and the children's safety while on the school bus. (Tr. 79). This meeting was merely the first of several meetings and telephone conversations between Orr and Edick about these safety

concerns, and the need for Edick to obtain a doctor's slip confirming her ability to perform the job of aide safely. (Tr. 80-84).

Thus, discussion of the "charge" was neither the purpose of the meeting, nor a large portion of the conversation. Moreover, even Edick's description of her conversation with Orr fails to establish animus. Edick testified that Orr merely expressed his understanding of the facts: that immediately after (within approximately three hours) their prior conversation, the Company had received the cease and desist letter or charge. (Tr. 33-34, 668)(R. Ex. 6). Assuming, for sake of argument, the truth of Edick's version of the conversation, the evidence merely shows that Orr concluded, based on the cease and desist letter received so shortly after that conversation that Edick complained about their May 2007 conversation. Given the timing, Edick could not have been surprised by Orr's conclusion. More importantly, Edick did not claim that Orr said anything hostile, derogatory or threatening about Edick, the filing of the "charges," or about the union during that conversation. Absent something further, a simple statement by Orr of his obvious conclusion that Edick had filed "charges" reflects merely his understanding of the situation. While this may arguably constitute evidence of knowledge (as the ALJ found), it hardly constitutes evidence of animus.

II. The ALJ Correctly Found The General Counsel Failed To Present Evidence To Support An Inference Of *Animus*. [Response to Exceptions 1-4]

The ALJ correctly dismissed the case in its entirety after the General Counsel failed to present any evidence to support an inference of animus at the time of the discharge. In an effort to revive her claims, General Counsel seeks to have the Board ignore the entire record before the ALJ and to infer animus. In doing so, General Counsel mischaracterizes the ALJ's findings as they pertain to the witnesses' testimony. Contrary to General Counsel's explicit and implicit assertions, the ALJ did not find Vision's witnesses were untruthful nor did he find they were not

credible. Furthermore, although the ALJ discredited some of the witnesses' testimony, he did not infer animus at the time of the discharge. Such inferences must be determined by the totality of all the circumstances. Electronic Data Systems Corp., 305 NLRB 219 (1991). In contrast, General Counsel's arguments rely upon isolated and misconstrued events. Given the totality of the facts and events in this case which occurred **two or three years** prior to the witnesses' testimony, he simply credited one witnesses' version of facts over another.

A. Contrary To General Counsel's Claims, The ALJ Did Not Find Orr and Oswald To Be Untruthful.

In apparent desperation to overcome the absolute dearth of evidence that the layoffs were motivated by animus toward protected activities, General Counsel repeatedly asserts that the ALJ found Respondent's witnesses (Orr and Oswald) were untruthful, and therefore that an inference can be drawn that those witnesses were concealing animus existing at the time of the layoffs. General Counsel's sole rationale for this conclusion is based upon profound misrepresentations of the ALJ's findings: the ALJ made no such finding of "untruthfulness". In short, General Counsel improperly seeks to impugn the character of Respondent's witnesses, by labeling them liars, when the ALJ made no such finding.

Administrative law judges are routinely required to make credibility resolutions which result in the crediting of one witness's testimony over another's testimony. It is well accepted that administrative law judges make such resolutions on a multitude of bases which do not implicate a witness's truthfulness. This may include poor memory, or narrow interpretations of examination questions, or insufficient specificity in testimony to overcome the testimony of another. Such bases, however, do not warrant a conclusion that a witness lied.

In the immediate case, the ALJ credited General Counsel's witnesses over Vision's witnesses for similar reasons, and on other findings that are neither supported by the record nor

by logic. For example, the ALJ declined to credit Oswald's denial of Forner's allegations because his testimony lacked detail, and "consisted entirely of monosyllabic answers to leading questions by Respondent's counsel which incorrectly paraphrased some of Forner's testimony." (ALJD 8:48-51). Oswald, however, as acknowledged by General Counsel, was still experiencing the effects of the lung infection for which he had been hospitalized in August. (Tr. 282). In fact, at the hearing, his breathing was heavy and labored, particularly immediately after walking to the witness stand. The fact that Oswald offered "monosyllabic" answers is hardly surprising, nor indicative of the untruthfulness which General Counsel seeks to infer.

Moreover, Vision's counsel's questions, contrary to the ALJ's finding, were not "leading." If they had been "leading," General Counsel would certainly have objected. Rather, they were largely questions to which "yes" or "no" were appropriate answers, and as such, by definition, were not leading. (See, Tr. 648-49). Finally, to the extent Vision's counsel may not have precisely captured Forner's exact testimony in his questions, they certainly reflected the essence of his testimony. Regardless, the form of counsel's questions provides no basis for concluding, as does General Counsel, that Oswald was untruthful.

Similarly, the ALJ discredited Orr's denial of Forner's allegations based upon the same circumstances – that Vision's counsel allegedly asked him leading questions (which were never objected to by General Counsel). As with the examination of Oswald, however, the questions from counsel required "yes" or "no" responses, and thus were, by definition, not leading. (See Tr. 683-84). Within his decision, however, the ALJ never found Orr to be untruthful.

General Counsel also argues that the ALJ's crediting of Edick's testimony over Orr's further shows that Orr was untruthful with respect to his knowledge of protected activity. However, Orr's testimony was largely consistent with Edick's testimony. In fact, Edick admitted

she told Orr that she: (1) was “sick and tired” of people accusing her of being involved in the union; (2) was not responsible for the filing of the charge against Vision pertaining to her discussion with Orr; and (3) did not give out employee address information. (Tr. 33, 68). Orr testified, without contradiction, that he believed Edick, and did not “perceive” her or other specific employees as union organizers. (Tr. 337, 675). The ALJ did not credit this testimony. However, an individual’s perception is innately subjective, such that differing perceptions can hardly form a basis for concluding an individual is untruthful.

The ALJ also refused to credit Orr’s testimony that he did not know that some of the five alleged discriminatees had been subpoenaed to testify at the unfair labor practice hearing. The ALJ made this decision largely based on the reference, in the “History of Charges” document prepared by Orr, that an “unknown number of employees” had been subpoenaed to testify “on Hirning’s behalf.” (GC Ex. 48, p. 5). The ALJ reasoned that Orr must have known who they were, because he could not have known of the subpoena unless Smith told him who was subpoenaed, and concluded that Respondent could not explain any other way for Orr to know. (ALJD 7:14-17). However, Orr specifically testified how he learned of the subpoenas: his office opened into the area where dispatchers took calls. (Tr. 709-710). He simply overheard dispatchers take calls from employees who reported that they had been subpoenaed, and needed the day off. At least two employees, other than Smith, performed dispatch duties. (Tr. 302). Based on overhearing the dispatchers’ side of phone conversations, he understood that employees had been subpoenaed, but did not specifically learn their identities, at the time he wrote that portion of the “history.” Furthermore, Orr’s testimony at the hearing was that, at the time, he could not “recall” who had been subpoenaed. (Tr. 323). He did not contend he had never known. Again, under such circumstances, while the ALJ performed the relatively routine

process of determining whose testimony to credit, he did not find Orr untruthful. More importantly, there is no basis under these circumstances for General Counsel's bald assertion to that effect.

Finally, as more fully discussed in Respondent's Brief in Support of Cross-Exceptions to the ALJD, Respondent disagrees with a number of the ALJ's credibility determinations as based on erroneous findings of fact, or mistaken readings of the record. In several instances, the ALJ found that knowledge of the alleged discriminatees' protected activities should be inferred to Respondent because he found "there was very little that was said or done by Respondent's employees" that "did not promptly make its way to its managers." (ALJD 6:1-3). The ALJ based this determination on a handful of isolated events, to draw a broad conclusion that Respondent kept track of nearly everything its employees were involved in, both at and away from work. This handful of isolated incidents does not support a conclusion that Respondent had the sort of knowledge of the alleged discriminatees' protected activities as found by the ALJ.

B. Contrary To The General Counsel, The ALJ Did Not Find Smith Was Untruthful.

Finally, to again state the obvious, the credibility of Orr and Ostwald is largely irrelevant. The ALJ specifically found that Smith made the layoff decisions. (ALJD 4:30-31). Thus, her credibility is the only one of relevance. The ALJ refused to credit Smith primarily on the question of whether alleged discriminatees Stetler and Martin had told her they had been subpoenaed for the Hiring hearing, and needed the day off. Smith's testimony reflects that she was not "aware" the employees had been subpoenaed (tr. 250), and did not "recall" being told of the subpoenas. (Tr. 796). As the ALJ noted, there was evidence to support Smith's testimony: the day-planner book which Smith used to track route assignments and employee absences had no entry reflecting time off requests for the day the hearing was scheduled. (ALJD 8:33-34). It

was undisputed that Smith relied upon her day-planner book for assignment scheduling purposes, and consistently recorded employee time off requests in the book. (Tr. 796). The alleged discriminatees also testified that they routinely filled out time off request forms when an absence was foreseeable, but did not do so for the day of the hearing. (Tr. 492, 585). However, the ALJ credited the testimony of Stetler and Martin that, in separate, very short conversations, they told Smith they had been subpoenaed, and would need the day off, to which Smith simply responded “okay.” (ALJD 6:14-15; Tr. 576).

Assuming the truth of Stetler’s and Martin’s accounts, and given that their versions reflect very short (and also “coincidentally” nearly identical) conversations with Smith, it is probable that Smith simply forgot the conversations. In fact, Smith’s reply of merely “okay” is suggestive of a lack of attention to their statements. Therefore, the ALJ’s determination to credit Stetler and Martin over Smith cannot be said to include a determination that Smith was untruthful.

The ALJ’s secondary rationale for declining to credit Smith’s denial of knowledge of the subpoenas similarly does not suggest that Smith was untruthful. Specifically, the ALJ determined that Smith must have known of the subpoenas because Orr referred to the subpoenas in the “History of Charges” document, and the ALJ concluded that Orr could only have learned of the subpoenas through Smith. (ALJD 7:14-16). This determination by the ALJ is not supported by the record. First, the “History of Charges” document does not identify the employees who were subpoenaed, and in fact refers merely to “an unknown number” of employees. (GC Ex. 48, p. 5). The document evidences merely that Orr was aware that some employees had been subpoenaed, not that he knew who they were or even their number. Thus, the primary piece of evidence upon which the ALJ based his conclusion that Orr knew the

employees who were subpoenaed, does not, in fact, establish such knowledge at all.

Additionally, as discussed above, even if Orr did have knowledge of their identities, contrary to the ALJ's finding, Orr explained how he acquired that knowledge: he overheard telephone conversations between the dispatchers and the employees who called-in to inform the dispatchers of the subpoenas, so that work schedules could be adjusted. (Tr. 709-710). Two employees, in addition to Smith, performed those dispatch duties. (Tr. 302). Thus, not only is it possible that a dispatcher other than Smith took the calls from employees, it in fact is likely, since 2/3rds of the dispatch duties were performed by someone other than Smith, and the absences were not reflected in Smith's day-planner. Thus, regardless of whether Orr knew the identities of the subpoenaed employees, his knowledge provides no basis upon which to conclude that Smith was untruthful when she denied knowledge of the subpoenas.

The final bases upon which the ALJ declined to credit Smith's denial of knowledge were similarly unsupported. Based on a handful of isolated events, the ALJ concluded that Vision kept careful track of all the activities of its employees, and therefore must have known of the subpoenaed employees, as well as of other protected activities. (ALJD 7:45-46) Initially, even if true, it does not support a conclusion that Smith personally knew of the subpoenas. Secondly, the ALJ's reasoning and premises are obviously faulty. Specifically, the ALJ referenced an incident in which Smith called alleged discriminatee Walberg, who was absent due to a doctor's visit (just prior to a scheduled vacation), to inform her of the need to obtain a doctor's slip. In essence, the absence created a five-day weekend for Walhberg. (Tr. 554; GC Exs. 73, 75) Such isolated incidents hardly constitutes persuasive evidence that Respondent tracked all employee activities, much less that Smith had knowledge of the subpoenaed employees.

In short, the bases upon which the ALJ declined to credit Smith's denial of knowledge of

the subpoenas or of other protected employee activities clearly do not imply a finding that Smith was untruthful. Furthermore, the ALJ's credibility finding do not support a inference of animus.

C. Contrary To The General Counsel's Temptations, The Board Does Not Second Guess Credibility Determinations Made By ALJs.

Although General Counsel tempts the Board to make critical credibility determinations in order to establish an inference of animus at the time of the layoffs, the Board has made it clear that is not its role. The ALJ made implicit credibility determinations when he found "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 discriminates in 2009." (ALJD 10:25-27). Upset with the ALJ's credibility determinations, General Counsel seeks a finding that Vision's witness were untruthful. While the ALJ credited some of General Counsel's witnesses, he did not find Vision's witnesses to be untruthful. Regardless, the Board had been clear that such credibility determinations are the province of the ALJ, not of the Board. Standard Drywall Products, 91 NLRB 544 (1950). Absent persuasive evidence, the Board will not second-guess the ALJ. Id. Here, by misconstruing the ALJ's credibility determinations to include untruthfulness, General Counsel improperly seeks to have the Board not merely replace the ALJ's credibility evaluations with its own, but also to have the Board replace the ALJ's determinations with General Counsel's speculation. Such conduct, however, is clearly beyond the authority which the Board has accorded itself by its case law.

III. Unlawful Motivation Cannot Be Inferred From Vision's Allegedly Pretextual Reasons For The Layoffs. [Response To Exceptions 1-4].

General Counsel's argument that the Board should find that Vision unlawfully laid off the alleged discriminatees because its reasons were pretextual is also misplaced. In fact, in order to make this argument, General Counsel both misconstrues the ALJ's findings, and misstates the

law. Contrary to the General Counsel's contentions, the ALJ made no finding that Vision's reasons for laying off the five alleged discriminatees were pretextual. Instead, the ALJ found that General Counsel failed to establish a *prima facie* case of either a Section 8(a)(3) or (4) violation. The structure of the Wright Line analysis is clear: General Counsel must carry the initial burden of establishing the *prima facie* elements of a violation. Wright Line, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981). Only then does the burden shift to the employer to show it would have taken the same adverse employment action, even absent protected activity. Id. Where, as here, the General Counsel failed to establish the *prima facie* elements of its claim, the employer has no obligation to establish the reasons for its actions. Thus, General Counsel puts the proverbial "horse before the cart," and attacks Vision for allegedly failing to meet a burden . . . establishment of legitimate reasons for its decision to layoff the alleged discriminatees . . . which it had no obligation to carry.

A. Vision's Use Of The Matrix Does Not Establish Unlawful Motivation.

As noted above, General Counsel's argument that the ALJ's criticisms of the "matrix" system used by Vision to select employees for layoff shows that the "matrix" was pretext for an unlawful motivation is misplaced. In arguing that pretext and unlawful motivation exist, General Counsel ignores the ALJ's clear determination that, regardless of such flaws and weaknesses in the matrix system, that system did not demonstrate "current union animus" or "the needed nexus between animus and the adverse personnel actions." (ALJD 10: 10-11). The ALJ's determination was clearly correct. The law does not allow General Counsel to evaluate the quality of Vision's decisions, or to substitute her judgment for that of Vision's management. In fact, the Board consistently recognizes that it has no role in determining whether an employer's layoff choices are correct. Children's Services International, Inc., 347 NLRB 67, 70 (2006).

Simply put, it is not the Board's role to determine whether an employer . . .

used the best decision-making process. The Respondent may make its layoff decision on any basis it chooses, good, bad, or indifferent – as long as it is not an unlawful basis . . . The wisdom of the Respondent's decision is immaterial. We are concerned only with discerning the sincerity of the Respondent's contention that the decision was not motivated by union animus.

Id.

Thus, contrary to the General Counsel's superficial argument, the critical issue is not whether the matrix system was "fair," or flawed, but whether the flaws reveal evidence of animus. In this case they do not.

1. The ALJ Correctly Found That The Use Of The Matrix Failed To Show Smith Had *Animus*.

As discussed earlier, Smith was the decision-maker of the layoff, and the manager who was responsible for development and application of the matrix. The ALJ found this to be the case (ALJD 4:30-31), and General Counsel does not challenge that finding. Thus, Smith's motive in the design and application of the matrix is at issue, not whether the matrix was poorly or well designed or executed. The General Counsel failed to produce evidence that Smith held animus toward the protected activities of the alleged discriminates. In fact, the record as a whole affirmatively reflects that Smith held positive feelings toward the Union.

As Smith testified, before Vision became the Elk River School District transportation services provider, and before she held a management position with Vision, she was an active union supporter at the School District, and actively involved in the successful organizing campaign to elect the SEIU (the same union involved in the organizing efforts at Vision) as the representative of those School employees. (Tr. 747). After the union won the election, Smith became the union steward for the District's bus drivers. (Tr. 447, 748). Furthermore Smith actively participated in a grievance against the School District after the District's drivers were

eliminated. (Tr. 748). As a result of the grievance, in 2008, Smith received a payment of \$17,600 from the District. (Tr. 748-49). She testified that the SEIU represented her in the grievance process which culminated in this payment, and that she was happy with the Union. (Id.).

General Counsel presented no evidence that, since becoming a supervisor for Vision, Smith ever expressed an unfavorable opinion about the Union, or about protected activities of Vision's employees. During prior union organizing campaigns at Vision, Smith did not oppose the organizing efforts. (Tr. 750). Given these facts, no reasonable inference can be made that Smith held any individual animus toward the alleged discriminatees' protected activities, or that it affected her development and application of the matrix when selecting employees for the layoff.

Furthermore, Smith's errors in matrix application included errors that actually benefitted several of the alleged discriminatees. An accounting of employee absenteeism from the evidentiary record shows that Smith mistakenly awarded Susie Stetler, Susan Walberg, and Trudy Edick higher attendance scores than the attendance records supported. Specifically, a review of the day-planner book by which Smith tracked attendance and schedules reflects that Stetler had nine (9) absences recorded in Smith's day-planner book and should have received an attendance score of 10. (R. Ex. 13 and 14). Smith mistakenly awarded her an attendance score of 15. (GC Ex. 14). Walberg had eight (8) absences recorded in Smith's day-planner book and also should have received an attendance score of 10. Smith also mistakenly awarded her an attendance score of 15. (GC Ex. 14). Edick had sixteen (16) absences recorded in Smith's day-planner book and should have received an attendance score of 0. (R. Ex. 13 and 14). Smith mistakenly awarded her an attendance score of 10. (GC Ex. 14). Only one of the alleged

discriminatees, Sharron Lynas, was negatively impacted by Smith's mistakes. Lynas had twelve (12) absences, and under the matrix should have received an attendance score of 5. (R. Ex. 13 and 14). Smith mistakenly awarded her 0 points. (GC Ex. 14).

If Vision targeted the alleged discriminatees because of their protected activities, one logically would expect that the scoring errors would uniformly work to their detriment. Because Smith's mistakes in calculating the employees' attendance scores actually worked to the benefit of three (3) of the five (5) alleged discriminatees, it is impossible to conclude that reliance on the attendance scoring was pretext for discrimination.

Further, Smith's matrix application does not suggest she targeted employees because of union or other protected activities. Of the five alleged discriminatees, only Lynas was a high profile union supporter. Stetler and Edick's support of the union was largely passive. Nothing distinguishes these employees from the other fifty (50) Vision employees who, according to the NLRB's ballot tally sheet, voted for the Union in 2007. (GC Ex. 3). While Martin claimed at the hearing that she was an active union supporter, her prior NLRB affidavit clearly notes that she had no significant involvement. (Tr. 585). Finally, it is undisputed that Walberg was not involved in the organizing. (Tr. 568). Rather, the ALJ found that she engaged in protected activities by associating with Stetler, Edick and Martin. (ALJD 7:20-22).

Other Special Education employees who were significantly more active and visible than Stetler, Edick, Martin and Walberg were not selected for layoff. These employees included Julie Thornton and Margo Braun, both of whom publically identified themselves as members of the 2007 Union organizing committee. In fact, Thornton was signatory to the May 16, 2007 letter which the committee personally delivered to Orr. (GC Ex. 49). Thornton was also one of three employees to receive a matrix score of 45, **the highest awarded**. (See, GC Ex. 14). Margo

Braun, along with Thornton, as a member of the organizing committee, was signatory to two (2) other letters addressing employees during the Summer of 2007. (GC Ex. 54, 56).⁵ Thus, Thornton and Braun had much higher profile roles in the union organizing than any of the alleged discriminatees, other than Lynas. Since they were **not** laid-off, and since Thornton scored high on the matrix, it is illogical to conclude that Smith's use of the matrix was a subterfuge to target Stetler, Edick, Martin or Walberg because of their lesser union activities.

2. As The ALJ Implicitly Found, Smith's Scoring Errors Do Not Establish Animus.

As the ALJ implicitly found, Smith's scoring errors do not establish animus. The flaws and inconsistencies in the selection process, criticized by the ALJ (and hyperbolically vilified by General Counsel), have a much simpler explanation than the manipulative scheme that General Counsel seeks to establish. Smith made mistakes, largely because she rushed through the layoff selection process. Smith attempted to plan and implement the layoffs during the extremely busy time period just prior to the beginning of the school year. Smith, and other employees, received many, many phone calls from parents and schools during this time, and Smith was responsible for the development of the transportation routes. (Tr. 768, 784). Those routes were in continual development for several weeks because requests for transportation for children continually flowed into Vision. (Tr. 767). August 2009 was even busier for Smith because major changes to the routes resulted from the move to a three-tier system, and because Ostwald's illness meant he was unavailable to assist. (Tr. 768-69). Edick and Lynas both acknowledged that the weeks before and after the beginning of the school year are always very busy at Vision. (Tr. 88-89, 442). In fact, Lynas acknowledged that this time of year was "crazy busy" and that Smith was

⁵ At hearing, Braun's testimony initially created the impression that she had also lost her job at Vision. (Tr. 890). However, on cross examination she admitted, she remained employed as an aide for the 2009-2010 school year, but had merely been assigned to a different bus. (Tr. 895).

often flustered. (Tr. 442).

In addition to the overall workload, Smith also made mistakes because she was required to make the layoff selections in a very compressed time period. Smith could not know if layoffs would even be required until the routes were substantially developed, and she knew how many routes would be run. However, the routes could not be developed until Vision received most of the transportation requests, which did not occur until late August. (ALJD 3:30-34) Only then, after designing the routes, could Smith determine whether, and how large, a layoff would be needed in the Special Education division. (ALJD 3:41-44) She created the routes during the last two weeks of August. (Tr. 767). By the time they were created, Smith had slightly over a week to plan (including development of the matrix) and execute the layoff, while at the same time taking numerous phone calls, continuing to receive requests for transportation, and continuing to adjust the routes on the basis of those requests. (Tr. 234)

Thus, due to her workload, and the time constraints for making the layoff selections, Smith rushed through the task. As a result, the matrix design was simply not well thought-out, explaining the weaknesses criticized by the ALJ. For example, the ALJ found it “difficult to understand” why Smith removed safety as a scoring factor in the matrix. (ALJD: 4:8). Smith explained it was because there had been no accidents by employees the prior year. (Tr. 781). Thus, Smith did not consider “safety” a distinguishing factor among the employees. While the ALJ points out that other factors, beyond actual accidents, affect safety, (ALJD 4:7-10), Smith’s decision to remove safety entirely from the scoring factors is explained simply by the haste of her decision-making process: after concluding there had been no accidents during the prior year, she dismissed safety as a factor simply because she did not give it any deeper thought. In this regard, it is significant that Smith had never previously planned and implemented a layoff, and

had no experience in the process. (Tr. 790). Furthermore, consideration of safety factors beyond actual accidents would likely have required Smith to expend substantial time reviewing records... time which was in short supply given the rapidly approaching start of the school year. Contrary to the General Counsel's speculative contention that weaknesses in the design of the layoff matrix show that Vision was manipulating the matrix to target the alleged discriminatees, the more reasonable (and in fact correct) explanation is simply that the design weakness was the result of Smith's inexperience, haste in developing the matrix, and limited time.

The mistakes Smith made in applying the matrix, and the ALJ's criticisms of its application, are similarly explained by Smith's time constraints and haste. Her haste caused miscalculations of employee absenteeism. Her haste, and the rapidly approaching commencement of the school year, also explain her reliance on memory and subjective evaluation when awarding employees' scores for the "professional relationships" and "customer request" factors of the matrix. In short, it would have required much more time and effort to obtain employee files, and review and tabulate objective criteria, than to award scores based on her subjective evaluation of employees' professional relationships. While this may well be a poor business practice, and correctly subject to criticisms (such as the ALJ's), it does not provide support for General Counsel's argument that the selection of the five (5) alleged discriminatees was motivated by animus, or that reliance on the matrix was pretextual.

B. The ALJ Did Not Provide Vision With Un-relied Upon Defenses.

General Counsel's argument that the ALJ improperly concluded that the flaws in the matrix and in its application did not establish an unlawful motive, because he relied on rationales not presented by Vision, is also misplaced. (GC Br. 20). By making such an argument, General Counsel again both misconstrues the ALJ's finding, and confuses her obligation to establish a

prima facie case with Vision's later consequential burden to present legitimate reasons for the layoff. Again, the ALJ dismissed the Complaint because General Counsel failed to establish a *prima facie* case. The ALJ never analyzed whether Vision's stated reasons for laying off the five alleged discriminatees were legitimate or pretextual because the burden of demonstrating a legal basis for the layoffs never passed to Vision. The General Counsel simply failed to meet her burden of establishing a *prima facie* case.

Thus, contrary to General Counsel's misrepresentation of the ALJ's finding, the ALJ did not supply Vision with "alternative defenses." (*Id.*). Instead, he properly evaluated the evidence as a whole to determine whether General Counsel met her burden of establishing a *prima facie* case. Stated differently, the ALJ evaluated whether General Counsel met her burden of establishing, by **a preponderance of the evidence**, that animus toward protected activities motivated Vision's layoff decisions. Considering the record as a whole (which General Counsel wishes to have the Board avoid), he found "much stronger evidence" that other reasons motivated those layoff decisions. (ALJD 10:12). In other words, the ALJ found that it was more likely that the alleged discriminatees were selected for non-protected reasons than because of animus toward their protected activities. Because other reasons were more likely, General Counsel, by definition, did not carry her burden of establishing **by a preponderance of the evidence** that animus toward protected activities motivated the layoff decisions. As a result, the ALJ did not improperly supply Vision with non-pretextual reasons for the layoffs, but properly evaluated the evidence as a whole to conclude that General Counsel failed to carry her initial burden.

C. The Case Law Cited by General Counsel Is Easily Distinguishable.

Moreover, it is clearly erroneous for General Counsel to argue that Vision did not rely upon the instance in which alleged discriminatee Martin had an improper discussion with a School District employee when it selected her for layoff. In this regard, Smith specifically testified that she considered this incident when selecting Martin. (Tr. 236). Finally, the cases cited, and selectively quoted by General Counsel, apparently for the proposition that she established a violation of the Act by showing that Vision's reasons for laying off the alleged discriminatees were pretext provide no such support. General Counsel's selective quotes often omit the context, if not the meaning of the case, and in some instances reflect outdated legal propositions.

As an example, General Counsel's citation to Shattuck Denn Mining Corporation v. NLRB, 362 F.2d 466 (9th Cir.1966) is clearly misplaced. The Shattuck decision was issued well before the Board adopted the Wright Line analysis (in 1980) as its standard in evaluating allegations of Section 8(a)(3) violations. Further, the Shattuck case involved the termination of an active union supporter and new union officer who was terminated within three (3) weeks of the union's certification. *Id.* at 467-68. Given the temporal proximity between the termination and the protected activity, it is clear that even under Wright Line, a *prima facie* case of unlawful discharge existed. Thus, unlike the immediate case where the ALJ's decision turned on General Counsel's failure to establish a *prima facie* case, consideration of whether the employer's asserted reason for discharge was pretextual was the only issue presented in Shattuck.

Similarly, General Counsel's citation to United Rental, Inc., 350 NLRB 951 (2007) is also misplaced. In United Rental, the General Counsel clearly established a *prima facie* case, in part, because the employer's unlawful actions occurred concurrently with a union organizing

campaign. Thus, the burden shifted to the employer, whose asserted reasons for its actions were evaluated as pretextual. *Id.* at 952. Moreover, in the instant case, General Counsel selectively cites to United Rental, and takes that quote entirely out of context. In fact, the language immediately prior to General Counsel's selective quote makes clear that General Counsel has the initial burden of establishing a *prima facie* case:

It is well established that 8(a)(3) allegations that turn on employer motivation are analyzed under Wright Line. Under that standard, the General Counsel must **first** show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing . . . the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. [citation omitted]

Id. [emphasis added]

Thus, United Rental, Inc. actually substantiates Vision's position once General Counsel failed to establish a prima face case, as properly found by the ALJ, the analysis ends.

The Board's decision in Limestone Apparel Corporation (quoted at GC Br. p. 21) similarly supports the conclusion that the ALJ properly dismissed the instant Complaint. 255 NLRB 722 (1981). In Limestone, the administrative law judge issued his decision just prior to the Board's issuance of Wright Line. *Id.* The Board then considered exceptions to that decision after Wright Line had been issued. The Board affirmed that Wright Line set forth the standard of analysis for allegations of Section 8(a)(3), and although the Limestone ALJ had not expressly incorporated Wright Line, the Board found that his findings were sufficient to satisfy Wright Line's "analytical objectives." *Id.* As a result, the Board clearly found that a *prima facie* Section 8(a)(3) case had been established, but simply declined to require the ALJ to insert the words "*prima facie*" after the description of that evidence. *Id.* Thus, unlike the immediate case, the Limestone General Counsel met its initial burden, such that the violation was found because the

employer failed to carry its consequential burden of establishing that it would have taken the same adverse actions for legitimate, nonpretextual reasons. Since General Counsel failed to meet her burden in the instant case, Vision never had that burden.

General Counsel also quotes ABC Industry Laundry, 355 NLRB No. 17 (2010), for her contention that Wright Line's burden shifting structure may be disregarded. However, in ABC, the Board affirmed an administrative law judge decision which fully applied Wright Line. Id. at 16-17. Moreover, the case relied upon by the administrative law judge for the quoted language, Arthur Young & Co., 291 NLRB 39 (1988), is clearly distinguishable, because a manager for the employer “explicitly conceded” that protected conduct was a reason for discharge. Id. at 44. Where evidence of employer motive is overt, as in that case, there is obviously no need for General Counsel to establish a *prima facie* case. In such a case, the only issue is whether an employer possessed a mixed motive, and can establish it would have taken the same action even absent protected activity. Where admissions do not exist, however, General Counsel is not excused from its burden of establishing a *prima facie* case.

Finally, General Counsel quotes from Regal Health and Rehab Center, Inc., 354 NLRB No. 71 (2009), again for the proposition that she had established that Vision’s reasons for the layoff are pretextual. In that case, however, strong evidence existed that union animus was a motivating factor in the employer’s discharge decision. Specifically, the discharged employee was one of only two employees known by the employer to be interested in the union. Id. at 28. Further, within a week of the union meeting, a supervisor warned her that the employer would terminate employees involved with the union. Id. The employee was fired less than a month after the union meeting. Id. at 27. Given the warning, and the timing of the discharge, a *prima facie* case was clearly established, regardless of the standard. The facts in the Regal Health

decision differ markedly from the facts of the immediate case, where from fourteen (14) months to over two years have passed between the protected activities and the layoffs, and between the time of the alleged evidence of animus and the layoffs.

IV. The ALJ Properly Dismissed The Section 8(a)(4) Allegations. [Response to Exception No. 5].

Finally, General Counsel also asserts that the ALJ not only improperly failed to find a violation of Section 8(a)(4) of the Act, but also failed to make any finding on the 8(a)(4) allegations, arguing that a violation should be found based on the same evidence that General Counsel contends establishes violations of Section 8(a)(3). (GC Br. 22-23). Nevertheless, since the ALJ dismissed the Complaint “in its entirety,” it is clear that he dismissed the Section 8(a)(4) allegations on the same basis as the Section 8(a)(3) allegations: General Counsel failed to establish its *prima facie* burden of showing that animus toward those protected activities motivated Vision’s layoff decisions.

In fact, General Counsel’s failure to establish a *prima facie* case for a violation of 8(a)(4) is even more pronounced than its obvious failure to do so for the alleged Section 8(a)(3) violations (if that is possible). The only finding by the ALJ which supports a *prima facie* case of an 8(a)(4) violation is that Vision was aware that alleged discriminatees Edick, Stetler and Martin had been subpoenaed to testify at the July 2008 unfair labor practice hearing relating to the termination of former Vision employee Pauline Hirning. General Counsel scheduled that hearing for July 16, 2008, and issued the subpoenas several weeks earlier. Thus, the subpoenas were issued almost fourteen (14) months prior to the layoff decisions, undermining any temporal connection to those decisions.

That hearing was canceled, after General Counsel and Vision settled the matter. (GC Ex. 4). Therefore, none of the alleged discriminatees ever testified. Although General Counsel now

refers to the providing of affidavits during the prior investigation of those unfair labor practice charges as among the protected activities, General Counsel has never previously alleged or argued that Vision had knowledge of such affidavits. Even now General Counsel offers no such support. Moreover, the record is bare of any evidence to suggest that any of the alleged discriminatees ever requested time off to provide affidavits to the General Counsel, or ever told any Vision manager that they had provided, or intended to provide, affidavits to the General Counsel.

Thus, General Counsel's theory of a violation of Section 8(a)(4) flounders on the rocks of unreason. It is simply unreasonable to conclude that Vision became angry at the alleged discriminatees for being subpoenaed, when such an event is beyond their control, and when they never testified in any manner, adverse or otherwise, against Vision. It is even more unreasonable to conclude, as General Counsel contends, that Vision maintained animus toward their passive receipt of the subpoenas for 14 months, until the time of the layoffs. The ALJ correctly dismissed the 8(a)(4) allegations.

CONCLUSION

The Board should adopt the ALJ's dismissal of the Complaint in this matter. The ALJ correctly found that General Counsel failed to establish a motivational nexus between the events which allegedly evidence animus, and the layoffs that occurred long after those events. Further, there is no evidence that the decision maker with respect to the layoff, Colleen Smith, herself possessed animus. General Counsel's arguments to the contrary rely on mere speculation or conjecture. As such, General Counsel has failed to establish the *prima facie* elements of an 8(a)(3) or 8(a)(4) violation, and the Complaint should therefore be dismissed.

Dated: August 18, 2010

SEATON, BECK & PETERS, P.A

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VISION OF ELK RIVER, INC.**

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Linda L. Finn of the City of Prior Lake, County of Scott, in the State of Minnesota, being duly sworn says that on the 18th day of August, 2010 she served the following:

1. **Respondent Vision of Elk River, Inc.'s Brief In Support of Cross Exceptions to the Administrative Law Judge Decision;**
2. **Respondent Vision of Elk River, Inc.'s Brief in Response to Acting General Counsel's Exceptions**
3. **Cross-Exceptions on behalf of Respondent Vision Of Elk River Inc.**

on the parties listed below, directed to said parties at their last known address at:

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AND FEDERAL EXPRESS – OVERNIGHT DELIVERY
(w/o signature)

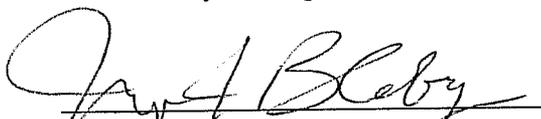
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Linda L. Finn

Subscribed and sworn to before me
this 18th day of August, 2010


Notary Public

