

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 SUPPORT OF CROSS EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE DECISION**

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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).

Though the ALJ dismissed the Complaint in its entirety, he also made other findings adverse to Vision, including that the selection criteria for the layoff was unintentional, and unjustifiable in many respects, and applied in a careless and manipulative manner (ALJD 10:7-9); that all the alleged discriminated engaged in protected activities, and that Vision had knowledge of their protected activities (ALJD 6:2-3, 6:41-43, 7:2-4, 7:14-15, 7:26-31, 8:21-22); and that there was evidence that General Manager Mark Ostwald and former Operations

Manager held animus toward employees' union activities in 2007 (ALJD 8:34-46).

On July 28, 2010, Acting General Counsel filed Exceptions and supporting brief, arguing that the ALJ's finding that the evidence of animus was too remote to establish a nexus to the layoffs, was in error. General Counsel also argues the ALJ erred by not finding a Violation of Section 8(a)(4) of the Act. Vision now files Cross-Exceptions to the ALJ's adverse findings.

Issues Presented

Vision has filed nine (9) cross-exceptions, including subparts, thereto to the ALJ's findings:

1. To the finding that the matrix of criteria used by the Respondent to determine who would be laid off was anything but an objective analysis of its employees' performance, was irrational, unjustifiable, and applied in a manipulative manner to target specific employees. (ALJD 10: 5-9). Included within the scope of this exception, but not necessarily limited thereto, are exceptions to the following findings:
 - a. That it is difficult to understand Smith's reasons for removing the safety component from the matrix of selection criteria. (ALJD 4: 7-9).
 - b. That Smith's removal of the component considering the employees' willingness to work adversely impacted the discriminatees' scores. (ALJD 4: 10-11).
 - c. That Smith replaced two objective criteria with two totally subjective criteria which enabled Smith to manipulate the scoring any way she chose. (ALJD 4: 13-14).

2. That the evidence as a whole shows there was very little that was said or done by Respondent's employees concerning the workplace that did not promptly make its way back to its managers. (ALJD 5: 48, 6: 1-2).
3. To the finding that Respondent closely monitored all aspects of the employees' activities, which undermines its claim that it had no knowledge of their Union activity or support. (ALJD 7: 33-34; 44-46). Included, but not necessarily limited, within the scope of this exceptions are exceptions to the following findings:
 - a. That the Martin encountered a teacher's aide at a department store prior to the start of the 2009 summer school, which led to the June 3, 2009 memorandum issued by Smith. (ALJD7:48-50; 8:1-4).
 - b. That Smith's request that Walberg obtain a doctor's note saying she was capable of performing her duties as an aide demonstrates that Respondent closely monitored all aspects of the employees' activities. (ALJD: 7: 36-39, 44-45).
 - c. That Ostwald's acceptance of the representations of an unidentified employee that Stetler and Edick brought a cake to a pot luck lunch at the Elk River Facility to celebrate Orr's layoff shows that Respondent closely monitored employee activities and was informed of what employees were doing. (ALJD 8: 6-17, 22-24).
4. To the finding that Respondent was aware that Edick was a supporter of the Union and that she had engaged in protected activities. (ALJD 6: 2-3).
5. To the finding that Respondent had knowledge of Stetler's involvement with the Board hearing and believed that she supported the Union. (ALJD 6: 42-43).

6. To the finding that Respondent had knowledge of Martin's involvement with the Board hearing. (ALJD 6: 6-17).
7. To the finding that Respondent had knowledge of Walberg's union activity. (ALJD 19-24).
8. To the finding that Respondent had knowledge of union activity on the part of each of the alleged discriminates. (ALJD 7:25-26);
9. To the finding that Respondent had union animus to the extent the ALJ credited Forner's testimony, discredited the testimony of Oswald and Orr refuting Forner's testimony, and/or relied upon the history of charges memorandum.

For purposes of argument, Vision's exceptions fall within four (4) legal issues: (1) whether the evidence supports the ALJ's finding that the layoff selection matrix was irrational, unjustifiable, and applied in a manipulative manner to target specific employees, which relate to Exception No. 1, and its subparts; (2) whether the evidence supports the ALJ's finding that Vision monitored all aspects of the employees' activities such that very little that was said or done by Respondent's employees did not promptly make its way back to its managers, which relates to Exception Nos. 2 and 3, and their subparts; (3) whether the evidence supports the ALJ's findings that Vision had knowledge of the protected activities of each of the alleged discriminates, which relates to Exception Nos. 4 - 8; and (4) whether the ALJ properly credited Witness Forner's testimony and discredited the testimony of Ostwald and Or, which relates to Exception No. 9.

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, SEIU 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. The matter had been 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 a 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.) 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.

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 the District 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 were tense. (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 experienced 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, 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 to 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, Oswald 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). Oswald 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.). Oswald 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 to a Handke aide 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 to identify 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 part-time 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. (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" points 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).

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 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).

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

Several months 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 reveals the following tally for aides (R. Ex. 13, 14), (See Tr. 173-79) (GC Ex. 21, 22):

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 erred in finding the layoff selection criteria used by the Respondent to determine who would be laid off was anything but an objective analysis of its employees' performance, was irrational, unjustifiable, and applied in a manipulative manner to target specific employees.**

The ALJ erred in holding that:

. . . the matrix criteria Respondent used to determine who would be laid was anything but an objective analysis of its employees' performance, was irrational and unjustifiable in many respects, and was applied in a careless and manipulative manner to target specific employees.

(ALJD 10: 6 – 9). While Vision's application of the matrix may have been careless, the ALJ's other findings are not supported by the record or the law. In fact, the ALJ's finding is based primarily on several other findings which simply are not supported by the record or the law, including:

- a. That it is difficult to understand Smith's reasons for removing the safety component from the matrix of selection criteria. (ALJD 4: 7-9).
- b. That Smith's removal of the component considering the employees' willingness to work adversely impacted the discriminatees' scores. (ALJD 4: 10-11).
- c. That Smith replaced two objective criteria with two totally subjective criteria which enabled Smith to manipulate the scoring any way she chose. (ALJD 4: 13-14).

The ALJ found Smith developed the layoff selection matrix, and determined that the alleged discriminatees would be laid off. (ALJD 4: 1, 30-31). In developing the matrix, Smith started with a matrix she received from Orr which had been previously used for selecting regular education drivers for layoff. (ALJD 3: 48). The components of the original matrix consisted of seniority, the previous year's attendance, safety record, and whether the driver was willing to

work every day in the morning and afternoon. (ALJD 3: 50-52). Smith revised that matrix, removing the safety component and consideration of whether employees were willing to work every day. (ALJD 4: 6, 10-11). In their place, she included consideration of employees' professionalism in their work relationships and whether a customer (such as a parent or school employee) had requested an employee's continued service on a route or assignment to a child. (ALJD 4: 12-13).

In finding it difficult to understand Smith's reasoning in removing the safety component of the matrix, and in leveling his other criticisms at Smith over the content of the matrix, the ALJ assumed the role of a "Monday-morning-arm-chair-quarterback." The law, however, does not allow the ALJ, or the Board, to substitute their judgment for that of Vision's management. Indeed, the Board has consistently recognized 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). Nor is it 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.

In this case, Smith clearly rushed through the process of designing the matrix and selecting employees. Mistakes were admittedly made during that process. The record reflects, however, that those mistakes were honest ones. Moreover, the ALJ clearly, and correctly, determined that the matrix could not be tied to animus. His criticisms of Smith's decisions are therefore not only beyond the scope of his authority, but also irrelevant, gratuitous and, in multiple respects, simply erroneous.

A. The ALJ's criticism of Smith for removing the safety component of the selection criteria is unfounded.

The ALJ's conclusion that it is difficult to understand Smith's decision to remove the consideration of safety from the selection criteria, and, in the ALJ's view, to substitute a subjective element, is itself an entirely subjective determination by the ALJ. Smith concisely explained why she removed the safety component: there had been no accidents among special education employees, such that the safety component did not reflect obvious distinctions among the employees for layoff selection purposes. (ALJD 4: 7). The fact that the ALJ found it "difficult to understand her reasoning," because other factors also have a bearing on safety, reflects merely that he subjectively determined that retention of safety would have improved the quality of the matrix.

However his difficulty in understanding her decision, itself an obviously subjective determination, stems from his ignoring the law and the context of layoffs. It was undisputed that Smith attempted to plan and implement the layoffs during the extremely busy and compressed time period just prior to the beginning of the school year. (Tr. 784). 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 often flustered. (Tr. 442).

In addition to the overall workload, Smith also 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. However, the routes could not be developed until Vision received most of the transportation requests, which did not occur until late August. (Tr. 766+67). Only then, after designing the routes, could Smith determine whether, and how large, a layoff would be needed in the Special Education division. She did route development during the last two weeks of August. (Tr. 767). By the time it was done, 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.

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 may not have been well thought-out, in part explaining the weaknesses criticized by the ALJ, including why Smith removed safety as a scoring factor in the matrix. (ALJD: 4:8). In short, Smith did not consider “safety” a distinguishing factor among the employees given the lack of accidents, and therefore dismissed safety as a factor simply because she did not give it any deeper thought.

In addition, given the short time period for making the layoff decisions, she needed selection criteria that were easily and simply applied. A review of the more subtle factors of a safety record, beyond occurrence of accidents, would likely have taken significant time, since Smith would have needed to obtain and review records. While Smith’s decision to remove safety from consideration may have resulted in an imperfect selection process, open to criticisms (such as the ALJ’s), it is hardly a decision which is “difficult to understand.” The ALJ’s determination to that effect is beyond the scope of his legal authority, and is unsupported by the

record. Children's Services International, Inc., 347 NLRB at 70.

B. The ALJ's finding that Smith's removal of the layoff selection criteria component considering the employees' willingness to work adversely impacted the discriminatees' scores is not supported by the record. (ALJD 4: 10-11)

The ALJ also erroneously found that Smith's removal of the component considering the employees' willingness to work every day, morning and afternoon, from the selection criteria, adversely impacted the discriminatees' scores. (ALJD 4: 10-11). This finding, however, is simply speculation. In fact, General Counsel has not argued that it negatively impacted the alleged discriminatees.

More importantly, the record does not reflect how this factor would have affected the scores of the alleged discriminates. Whether this factor would have changed their selection for layoff would depend on a comparison of their scores with those of the other special education division employees. The record has no evidence whatsoever to support a finding that their scores with respect to this factor would have been favorable to those of other employees. Moreover, at least some of the alleged discriminatees, including Stetler, had a summer job, were not available to drive during summer school, and thus were not able to work "every day." (Tr. 762). The ALJ's finding is therefore not supported by evidence in the record.

C. The ALJ's finding that Smith replaced two objective criteria with two totally subjective criteria which enabled Smith to manipulate the scoring any way she choose, is not supported by the record.

The ALJ erroneously found that Smith replaced two objective criteria with two totally subjective criteria which enabled her to manipulate the scoring any way she chose, to target the alleged discriminatees. (ALJD 4: 13-14). The ALJ's finding is obviously in error. Specifically, Smith removed from the layoff selection matrix provided her by Orr the components of safety and willingness to work every day. However, these components, particularly safety, are neither

simple nor objective. Since there had been no accidents among the special education division employees, evaluation of safety could not be done simply by counting accidents. Rather, as contemplated by the ALJ, inclusion of safety as a factor would have required consideration of many subtler factors. Consideration of the overall safety performance of employees, based on these subtler factors would have required evaluation of the safety related conduct and performance of each employee. Such evaluation is by nature subjective.

Furthermore, the factors Smith added to the layoff criteria, consideration of customer requests (for service from an individual) and professionalism of their work relationships, were not completely subjective. With respect to the requests for continued service, Smith considered simply whether she had received requests from parents or school personnel for a particular employee to continue to be assigned to a particular route or child. For each employee, Smith had either received such a request, or not. Thus, the consideration was not subjective. Although Smith may have relied upon her memory, this does not change this to a subjective factor, since the question of whether she received such requests for individual employees remains an objective fact. (R. 18, 19)

Similarly, the scores Smith assigned to employees for the professionalism of their work relationships were largely dependent simply on the number of incidents of work place conflict that occurred with respect to each employee. This score was primarily the measure of how many complaints she received about a given employee from other employees or from school staff or parents. As a result, the professionalism score was largely a matter of counting those complaints. This, again, is primarily an objective consideration. As such, the ALJ's finding that Smith replaced objective criteria with subjective criteria, is simply erroneous.

II. The ALJ erred in finding that Vision monitored all aspects of the employees' activities such that very little that was said or done by Respondent's employees did not promptly make its way back to its managers.

The ALJ also erred in finding Vision had knowledge of the alleged discriminatees' protected activities, based in significant part on his finding that the Company "closely monitored all aspects of the employees' activities," and that "very little was said or done" by the employees "that did not promptly make its way to its managers." (ALJD 6: 1-2; 7:45). These findings are unsupported by the record, and/or are based on flawed reasoning. Specifically, the ALJ based his finding that Vision closely monitored its employees on three (3) incidents which he found to have occurred, which are either unsupported by the record, or which, when given the proper factual context, do not support the finding that Vision monitored its employees.

A. The ALJ's finding that alleged discriminatee Martin encountered a teacher's aide at a department store prior to the start of the 2009 summer school, does not support a finding that Vision closely monitored its employees. (ALJD7:48-50; 8:1-4).

In finding that Vision closely monitored its employees, the ALJ relied upon an incident in which it was reported to Smith that alleged discriminatee Martin had a conversation with an aide from Elk River's Handke school, regarding who would be driving buses for the summer school session. (ALJD 7: 50-51). With respect to that conversation, on June 3, 2009 Smith received a telephonic complaint from an individual named Robin Breas, who works with the early childhood education office at the Handke School. (Tr. 231). Breas complained that a driver told her (Breas') assistants that they would have to turn in their badges, that mechanics were driving summer school routes, and that Vision would not supply aides for buses any longer. (R. Ex. 11; Tr. 760). Breas was apparently quite angry, beginning the conversation with: "what the hell is going on at Vision." (R. Ex. 11). Smith asked Breas to identify the driver, and Breas

subsequently called back, informing Smith that the driver was the “lady that works at Target.” (R. Ex. 11; Tr. 760-61). That individual was Martin. (Id.). Smith then prepared a memo to employees warning them that inappropriate communications to School employees about Vision’s operations would not be tolerated. (GC Ex. 15). Smith subsequently clearly testified that this incident was a factor in her decision to “downgrade” Martin during the layoff selections. (Tr.236).

Thus, Vision became aware of the incident because a School District employee (not a Vision employee) proactively (and angrily) brought it to Vision’s attention. The incident, which occurred while Vision was in the process of negotiating a new contract with the School District, simply does not support the ALJ’s finding that Vision was itself engaged in the monitoring of its employees.

B. The ALJ’s finding that Smith’s request that Walberg obtain a doctor’s note, demonstrates that Respondent closely monitored all aspects of the employees’ activities is not supported by the evidence (ALJD 7: 36-39, 44-45).

The ALJ also relied upon an incident in which, after alleged discriminatee Walberg left Smith a phone message stating that she would be absent due to a doctor’s appointment, Smith telephoned Walberg twice to inform her she needed to obtain a doctor’s note before returning to work. (ALJD 7: 33-45). However, the act of a supervisor in contacting a employee who had left them a voice mail message stating they would be absent due to a doctor’s visit, does not constitute “monitoring” beyond what might be considered a normal practice at any other business. The ALJ also notes that company policy required a doctor’s note only after three days of absence. (ALJD 7: 37-38). However, despite Walberg’s initial testimony that she missed two hours, she in fact missed three (3) days. (See Tr. 528, 531). Because she had prescheduled an absence for the third day, it is not unexpected that an employer would seek to confirm (by

requesting a doctor's slip) that the unscheduled sick days were not an attempt to extend an already long weekend.

Regardless, under these circumstances the ALJ's finding that this incident shows Vision closely monitored its employees to the extent that "very little that was said or done" by employees "did not promptly make its way to its managers," is simply not supportable. Smith simply responded to a voice mail left by Walberg saying she would be absent. Since Walberg had pre-scheduled an absence such that, with the sick days, she would be absent for 3 consecutive work days, it is reasonable that Smith would want to confirm that the sick days were legitimate. In fact, it is merely the performance of her supervisory duties.

C. Oswald's acceptance of an unidentified employee's representation that Stetler and Edick brought a cake to a pot luck lunch at the Elk River Facility to celebrate Orr's layoff does not support the ALJ's finding that Vision closely monitored employee activities and was informed of what employees were doing. (ALJD 8: 6-17, 22-24).

The final incident upon which the ALJ erroneously relied to find that Vision carefully monitored its employees was also isolated, and unique to its circumstances. Specifically, the ALJ relied upon an incident in which Oswald angrily confronted alleged discriminatees Stetler and Edick because he believed they had brought a cake to an employee pot luck lunch in celebration of Orr losing his job. (ALJD 8: 6 – 17).

The incident occurred at the end of the 2008-09 school year. 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 Oswald 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 experienced 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 first testified that she did not discuss with other employees the cake's relationship to Orr's layoff. (Tr. 480). She subsequently admitted on cross-examination, however, 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 to 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). 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).

The circumstances involving the cake incident were unique and isolated. Whether or not Stetler and Edick intended the cake to be a celebration Orr’s loss of his job, other employees perceived it as such. “Celebrations” for such developments certainly could not be common events at Vision, or, really, any other workplace. Furthermore, the idea that they were “celebrating” Orr’s loss of his job . . . in other words, celebrating his misfortune . . . could indeed seem offensive to other employees, as well as to Oswald. In fact, the cake was particularly offensive to Oswald, since he and Orr were friends, and it had been his difficult task to eliminate Orr’s position due to the budget shortfall. The fact that employees would report this to Oswald when he arrived at the facility cannot be viewed as surprising, given the offensiveness of their understanding of the incident. However, there is no evidence that such offensive incidents were common. Moreover, the ALJ did not find, nor does the record support, that employees routinely reported such incidents to management. In fact, it was likely the uniqueness of what the employees perceived to be offensive conduct by Stetler and Edick which prompted their complaint to Oswald. Employee complaints about such an isolated and unusual incident simply do not support the ALJ’s finding that Vision closely monitored its employees’ activities.

Oswald’s reaction to the employee complaints also does not support the ALJ’s finding of such monitoring. The fact that he “simply accepted the representations” (as found by the ALJ,

ALJD 8: 16-17), became angry, and confronted Stetler and Edick, is understandable given the circumstances, the timing, and his friendship with Orr. More importantly, his reaction provides no support for the ALJ's finding that the Company monitored employees. The issue is not how Ostwald reacted, but whether the incident supports the proposition that Vision routinely sought such information about employee activities. Indeed, it does not. If Ostwald routinely sought and received all sorts of complaints by employees about other employees, he would likely have been disinclined to simply accept the complaint on its face, but rather would considered it in the context "just another complaint" among others.

Overall, the ALJ's reliance on three (3) discrete and isolated incidents to find that Vision "closely monitored all aspects of the employees' activities" is not justified. Each of these incidents involve unique facts and context. The fact that Smith required Walberg to obtain a doctors' slip, since her overall absence would be for three (3) days, does not suggest unusually close monitoring, but routine attendance management. Vision's concern over Martin's comments to School District Aides arose during negotiations for a new contract with the District, a time when Vision was particularly sensitive to its relationship with the school, and after it received an angry complaint from a School District employee. Thus, it was not the result of proactive monitoring of employees. Finally, Ostwald's confrontation of Stetler and Edick over the "cake incident," was the result of complaints by other employees about what they perceived as offensive conduct. Again, this was an unusual and unique situation. Three such isolated incidents cannot support the ALJ's overall finding that Vision tracked "all aspects of the employees' activities."

III. The ALJ erred in finding that Vision was aware of the protected activities of each of the alleged discriminatees.

The ALJ also erroneously found that Vision had knowledge of each of the alleged discriminatees' protected activities. To establish a *prima facie* case of either a Section 8(a)(3) or (4) violation, General Counsel must establish by a preponderance of the evidence that Vision had knowledge of the alleged discriminatees' protected conduct. Florida Steel Corporation, 223 NLRB 174, 175 (1976); Ramada Inn of South Bend, 268 NLRB 287, 299 (1983). Specifically, the employer's decision maker with respect to an adverse action must know of the employee's protected activity. *Id.* In this regard, Smith testified that she had no knowledge of the protected activities of the five alleged discriminatees. (Tr. 785-788). She did not discuss with Orr, or other managers, the identities of employees which were either involved in union activity, or in NLRB investigations. (Tr. 251). In fact, all of the management witnesses consistently testified that the Company did not hold meetings to discuss union activity. (Tr. 251, 287-88, 384-85). Regardless, not only did Smith testify she lacked knowledge of protected activity, but there no significant evidence to contradict Smith's testimony. The ALJ's finding to the contrary is based on unsupported speculation.

A. The ALJ erred in finding Vision had the requisite knowledge of Stetler's protected activities.

The ALJ made no finding that Smith individually had knowledge of Stetler's union activities. As discussed above, the law requires that a decision maker have the requisite knowledge. Florida Steel Corporation, 223 NLRB 174, 175 (1976); Ramada Inn of South Bend, 268 NLRB 287, 299 (1983). To the extent such a finding is inferred, it is presumably based on

the ALJ's finding that "very little that was said or done by Respondent's employees concerning the work place" did not "promptly make its way back to its managers." (ALJD 6: 1-2). As discussed, *supra*, this finding was based largely on speculation, not a preponderance of evidence in the record.

The ALJ also determined that Smith must have known of Stetler's subpoena, 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). In this regard, however, 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). The document evidences merely that Orr was aware that some employees had been subpoenaed, not that he knew who they were, or, indeed, even how many. 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.

Further, 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 does not establish by a preponderance of the evidence that Smith had such knowledge.

Smith credibly testified that at the time she prepared the matrix scores, she had no knowledge of either Stetler's union activity, or her involvement in unfair labor practice charges which had been previously filed against Vision. (Tr. 785-86). Ostwald similarly testified that he had no knowledge that Stetler was involved in union activity or in any unfair labor practice charges prior to the layoff. (Tr. 657). Orr was equally clear in his testimony that he did not know of Stetler's union activity or involvement in unfair labor practices. (Tr. 674). In fact, Stetler admitted she told Ostwald that she did not support the Union, and that she did not think the Union could do "anything" for her. (Tr. 494-495).

Although Stetler allegedly answered questions about the Union when asked by fellow employees (Tr. 450-51), the record fails to establish whether her responses were for or against the Union. Similarly, nothing in the record establishes Vision ever observed her engaging in such conduct. Regardless, even in this activity, Stetler was merely a passive participant, since by her own testimony, she merely answered questions which were posed to her, and did not actively seek to discuss the Union with co-workers. (Tr. 451).

With respect to the alleged violation of Section 8(a)(4), General Counsel presented self-serving testimony from Stetler that she informed Smith of the July 2008 subpoena. (Tr. 467). Smith, however, denied Stetler informed her of the subpoena. (Tr. 250; 854). Furthermore, although Stetler admitted she "always" submitted "time off" requests when she knew she would be absent from work, General Counsel failed to introduce into the record a time off request for the day of the hearing and Stetler did not contend that she filled out such a request. (Tr. 492). Smith's day-planner book lacks any notation that Stetler would be off work for the day of the Hiring hearing. (R. Ex. 14, 7/16/08 entry). Smith relied on this day-planner for scheduling purposes, and would have needed to keep track of such requests for days off by recording them

in the book.

Additionally, the ALJD did not find, and General Counsel apparently does not contend, that any Vision manager knew of any other involvement Stetler may have had in NLRB proceedings or investigations. While Stetler gave an affidavit to the NLRB for the July 2008 Hiring hearing, there is no evidence to support even an indirect inference that Smith, or any other Vision manager knew of that affidavit.

Under these circumstances, the ALJ's finding that Smith had knowledge of Stetler's involvement with the NLRB proceedings is not supported by a preponderance of the evidence. Further, to the extent the ALJ found that Vision had knowledge of the alleged discriminatees' union activities, he did not explicitly find that Smith individually had knowledge of those activities. To the extent such a finding is implied, it is not supported by a preponderance of the evidence in the record.

B. The ALJ erred in finding that Vision possessed the requisite knowledge of Edick's protected activities.

The ALJ similarly erroneously found that Vision had knowledge of the protected activities of alleged discriminatee Edick, based primarily on two conversations that occurred between Edick and Orr, the "History of Charges" document prepared by Orr, and on his finding that "there was very little that was said or done by Respondent's employees concerning the workplace that did not promptly make its way to its managers." (ALJD 5: 26-42; 6: 1-3). However, as with Stetler, this again is an insufficient finding of knowledge for purposes of a Section 8(a)(3) or (4) allegation, since the ALJ made no finding that the decision maker had such knowledge. Florida Steel Corporation, 223 NLRB 174, 175 (1976); Ramada Inn of South Bend,

268 NLRB 287, 299 (1983). The ALJ simply made no finding that Smith had knowledge of Edick's protected activities.

The record does not support a finding that Smith had such knowledge. While Edick claims to have worn a "union button," had her picture published in a union newsletter, and asked employees to sign union cards during the 2007 organizing campaign, nothing in the record establishes Vision, and Smith individually, was aware of this activity. (Tr. 23, 27, 30, 71). With regard to the flyer, the record establishes that the Union sent it out only to employees who had signed union cards during the summer of 2007 when few employees were at Vision's facilities. (Tr. 69). No evidence exists that any Vision manager, including Smith individually, saw the flyer prior to the layoffs or observed her wearing a union button or engaged in any other activity.

As with Stetler, to the extent a finding that Smith had knowledge of Edick's protected activities may be inferred from the ALJ's broad finding that Vision managers were aware of almost everything "said or done by Respondent's employees," (ALJD 6: 1-2), the error of that finding is discussed, *supra*.

Similarly, a preponderance of the evidence also does not support the ALJ's finding that other managers knew of Edick's protected activities. Specifically, the ALJ's finding that Orr and Edick had conversations that establish Vision's knowledge of her union activities, ignores the overall context of those conversations. (ALJD 5: 26-42). In the first conversation, Edick admitted that she told Orr that she was "sick and tired" of people accusing her of being involved in the union; and that she not give out employee address information. (Tr. 33, 68). Orr testified, without contradiction, that he believed Edick. (Tr. 675).

The second conversation between Edick and Orr was about the need for her to obtain a return to work slip from a doctor to confirm that she could perform the 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. (Tr. 79). Moreover, 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). The subject of the "charges" was neither the purpose of the meeting, nor a large portion of the conversation. Moreover, Edick merely testified that Orr 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. (Tr. 668)(R. Ex. 6). Therefore, Orr concluded that Edick had "filed charges." The record reflects that Edick denied filing those "charges," and also told Orr that she did not support the union. (Tr. 33, 670).

In short, there is only marginal evidence that Orr was even arguably aware of Edick's allegedly protected activities, since Edick denied such involvement to him. There is no evidence that Smith, as the decision-maker for the layoff, was aware of them at all. In fact, Smith's direct testimony was that she was not aware of Edick's alleged protected activities. (Tr. 786). Absent evidence that Smith, as the decision maker in the layoff, was aware of Edick's protected activities, the ALJ's finding that Vision had knowledge of her protected activities is neither supported by the record, nor by the law, which requires that the decision maker possess the requisite knowledge.

C. The ALJ erred in finding that Vision possessed the requisite knowledge of Lynas' protected activities.

The ALJ's finding that Vision had knowledge of alleged discriminatee Lynas' alleged protected activity, (ALJD 7: 2-4), also erroneously ignores the legal requirement that Smith, as

the decision maker, must possess the requisite knowledge for purposes of Section 8(a)(3) or (4) allegations. Further, it is substantially based on a broad, unsupported determination that it was “simply not believable that Respondent was not told the names of employees making the home visits” to other employees’ homes to “discuss unionizing the company.” (Id.)

The ALJ’s rationale for finding that Vision knew Lynas was involved in union activity, because it “simply not believable” that the Company was not informed she was making home visits, is not supported by the record. The ALJ’s sole basis for this finding is a reference in Orr’s “History of Charges” document to union organizers contacting employees at their homes. (ALJD 7: 1-2). The relevant portion of the document specifically refers to a conversation between Orr and Edick:

The discussion related to the confidentiality of personnel information available to Ms. Edick for employee newsletter purposes. The conversation was initiated by management because other employees expressed concern that union organizers had obtained their personal addresses and phone numbers and were intruding on family and home activities to discuss unionizing the company. The employees wanted to know if the company or anyone in the company was providing the union organizers with this personal employee information.

(GC Ex. 48, p. 1).

This language reflects that the home visits at issue were not by employees, such as Lynas, but by “union organizers.” Moreover, if the visits referenced in this document were indeed by Vision employees, including Lynas, it seems unlikely that the complaining employees would be asking the Company about how the union obtained their address information, since it would be clear that it was obtained from co-workers. Thus, the document relied upon by the ALJ does not evidence that the home visits referenced were by Lynas, or any other Vision employees, and does not support his finding that Vision was informed of Lynas’ home visits.

The only other significant evidence that any Vision manager was aware of Lynas’ union

activity is that over two years prior to the layoff decision, on or about May 16, 2007, Lynas was among a group of employees who delivered a letter to Brent Orr. (Tr. 387-88; GC Ex. 49). The May 16, 2007 letter contained the signatures of nine (9) employees, including Lynas, who informed Orr that they were the SEIU union organizing committee. (GC Ex. 49). While this was provided to Orr, there is no evidence whatsoever in the record that Smith was aware of the letter or Lynas' involvement in delivering it to Orr.

Lynas had her photograph published in a union newsletter and also signed two letters from the organizing committee and addressed to Vision employees, dated June 7, 2007 and July 12, 2007. (GC Ex. 7, 54, 56). With regard to the newsletter, Lynas testified that it was "handed out." (Tr. 430). While Lynas failed to identify when or where the newsletter was distributed, no evidence exists that these documents were distributed at Vision's facility or that any Vision manager saw them. Similarly, since the newsletter contained information about a June 23, 2007 member meeting, and discussed an upcoming election on July 10, it is clear that the newsletter was handed out between those dates when employees generally are on summer break. (See GC Ex. 7).

With regard to the June 7, 2007 letter, Lynas admitted that she had no idea how many drivers or assistants were around to receive it during the summer. (Tr. 428). With respect to the July 12, 2007 letter, Lynas admitted she did not even know if it was distributed at all. (Tr. 428-29). Both letters addressed employees, and no evidence exists in the record that any Vision manager saw either of them. (GC Exs. 54, 56).

Significantly, the ALJ did not find that Vision was aware of Lynas' cooperation with NLRB proceedings, but only of her "union activity and support." (*Id.*) Although Lynas was subpoenaed to testify at the Hiring unfair labor practice hearing, General Counsel presented no

evidence that Smith, or any other Vision manager was aware of Lynas' subpoena. Because Lynas did not work during the summer of 2008, she had no reason to disclose the subpoena to any manager. In fact, she admitted, she told no one of the subpoena. (Tr. 433). Similarly, Smith unequivocally testified that she had no knowledge of that subpoena or of Lynas' involvement in any unfair labor practice charges. (Tr. 780).

As a result, once again, the ALJ's finding that Vision had knowledge of Lynas' protected activities is erroneous because there is no evidence of the requisite knowledge by Smith, as the decision maker. Florida Steel Corporation, 223 NLRB 174, 175 (1976); Ramada Inn of South Bend, 268 NLRB 287, 299 (1983). The ALJ's finding of generalized knowledge of Lynas's home visits is not supported by the document relied on by the ALJ. The only other evidence was from the visit to Orr's office, well over two years prior to the layoff.

D. The ALJ erred in finding that Vision possessed the requisite knowledge of Martin's protected activities.

The ALJ's finding that Vision knew of alleged discriminatee Martin's protected activities is simply based on speculation, and disregard of evidence in the record. (ALJD 7: 6-17). Initially, the ALJ did not explicitly find that Vision had knowledge of Martin's union activities, but only of her having been subpoenaed to appear at the NLRB proceeding scheduled for July 16, 2008. (Id.). To the extent such a finding of Vision's knowledge is inferred, it is significant that Martin's testimony about her union activity is largely contradicted by her prior affidavit to the Board, in which she clearly stated that "I was working for Vision when the union tried to organize about five years ago, but I wasn't involved. I didn't get involved in the most recent organizing, either." (Tr. 585). Thus, Martin was admittedly not actively involved in the union.

The only union activities which the ALJ found her to be involved in consisted of signing

an authorization card in 2007, attending union meetings, and wearing a pro-union button at a day-long annual meeting in 2007. (ALJD 7: 7-9; Tr. 575). There is no evidence that Vision managers, much less Smith individually, was aware of these activities, or would have remembered them well over two years later, at the time of the layoffs. In fact, Smith specifically denied knowing Martin had been subpoenaed to the July 2008 unfair labor practices hearing. (Tr. 787).

The ALJ's finding that Smith knew of Martin's involvement in NLRB proceedings and/or investigations, is largely based on Orr's reference to the subpoenas in the "History of Charges" document. (ALJD 7: 14-16). The ALJ concluded that Orr could only have learned of the subpoenas through Smith, and asserts that "Respondent cannot explain how Orr could have known this if the employees had not informed Smith" of their subpoenas. (ALJD 7:14-16). However, as discussed, *supra*, 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, indeed, 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.

Further, as discussed, *supra*, 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. 709-10). 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 does not establish by a preponderance of the evidence that Smith, as the decision maker, had the requisite knowledge.

Although Martin self-servingly claims she told Smith that she had been subpoenaed to testify at the July 16, 2008 unfair labor practice hearing, the evidence undermines her claim. Specifically, Martin did not submit a time off request form, though she admits knowing of the Company's policy which requires such a form. (Tr. 588). Further, Smith's day-planner book, by which Smith tracked absences and the need for substitutes, contains no reference to Martin's pending absence. (R. Ex. 14, entry for July 16, 2008). Given the need to plan for such absences, it is inconceivable that Smith, if aware of the subpoena, would not have made note of Martin's pending absence. Martin's bald claim that she told Smith of the subpoena is neither supported by the record, nor believable.

E. The ALJ erred in finding that Vision possessed the requisite knowledge of Walberg's protected activities.

The ALJ also erred when he found that Vision had knowledge of Walberg's protected activities based almost exclusively on his finding that she was a "close friend and associate of the other four alleged discriminatees." (ALJD 7: 30-31). The knowledge that the ALJ infers is merely knowledge that Walberg was a friend and associate of the others. It is not knowledge of Walberg's own protected activities. Given the ALJ's subsequent holding that the layoffs were not motivated by animus toward protected activities, it is simply illogical to find that Vision's alleged knowledge of Walberg's relationship with the other alleged discriminatees is knowledge of protected activities.

Indeed, it was unrefuted that Walberg attended no union meetings (Tr. 548), and admitted that prior to being laid off she engaged in no significant union activity (Tr. 568). She also was not subpoenaed in the Pauline Hirning matter, and did not give an affidavit to the Board in that matter. (Tr. 568). Absent such activities, it is illogical to conclude that Vision management, and Smith in particular, had knowledge that Walberg engaged in protected activity.

IV. The ALJ erred in finding that Vision held animus toward protected activities based on the testimony of witness Forner.

ALJ found that Vision possessed animus toward employees protected activities, specifically their activities in support of the Union, based in large measure on the testimony of witness Terry Forner. (ALJD 8: 37-46; 9: 35). Forner testified that both Orr and Ostwald made statements at the end of the 2007-2008 school year about getting rid of union supporters, during conversations with him. (ALJD 8: 39; 41-42). Both Orr and Ostwald denied having such conversations with Forner. (ALJD 8: 48, 51). The ALJ, however, credited Forner over both Orr and Ostwald. (ALJD 8: 48-51). The ALJ's rationale for doing so is either unsupported by the record, or is based on faulty logic.

The ALJ declined to credit Ostwald's denial of Forner's allegations because they lacked "detail or context," and "consisted entirely of monosyllabic answers to leading questions by Respondent's counsel which incorrectly paraphrased some of Forner's testimony." (ALJD 8: 49-51; 9: 2-4). Ostwald, 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, and is not an appropriate basis for discrediting his testimony.

Equally inappropriate is the ALJ's reliance on Ostwald's lack of "detail or context," for

discrediting his testimony. Forner testified that at the end of the 2006-2007 school year, he (Forner) asked Oswald how he (Oswald) was going to “take care of the union people.” (ALJD 8: 40-41). According to Forner, Oswald told him that he (Oswald) “wanted to get rid of them [the union supporters] at the time of the last union vote, but that Arlene Cunningham, a former manager, talked them out of it.” (ALJD 8: 41-43). When questioned about whether he (Oswald) had ever had had any discussions with Forner about unions, Oswald answered “no.” (Tr. 648). Oswald also answered “no,” when asked if he ever had “any discussion with Terry Forner about taking care of the union supporters at any point in time?” (Tr. 649).

While Oswald’s denials of having such a conversation with Forner do lack “detail and context,” the ALJ’s reliance on this as a basis for refusing to credit Oswald’s testimony is flawed. This is because, if no such conversations occurred, there is no “detail or context” for Oswald to provide. Thus, “no,” is the only answer Oswald could provide.

The ALJ’s other bases for refusing to credit Oswald’s testimony were his findings that Vision’s counsel asked Oswald leading questions, and had incorrectly paraphrased Forner’s testimony. (ALJD 8: 50-51). However, Vision’s counsel’s questions, contrary to the ALJ’s finding, were not “leading.” Had they been, 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 counsel for Vision may not have precisely captured Forner’s exact testimony in his questions, they certainly reflected the essence of his testimony. Thus, the substantive rationale for the ALJ’s refusal to credit Oswald’s testimony is flawed.

The ALJ’s refusal to credit the testimony of Orr is also flawed. Forner testified that, at the end of the 2006-2007 school year, he asked Orr what he (Orr) was going to do about the

“union people.” (ALJD 8: 37-39). According to Forner, Orr replied “we have to be really really careful how we get rid of them.” (ALJD 8: 39). Orr denied that such a conversation occurred. (ALJD 8: 51-52, 9: 1). The ALJ refused to credit Orr’s denial for the same reasons as he refused to credit Oswald: “Orr’s denials were elicited through leading questions by Respondent’s counsel which lacked context and incorrectly paraphrased some of Forner’s testimony.” (ALJD 9: 2-4).

The record reflects the following testimony:

Q Did you have a discussion with Mr. Forner about getting rid of union supporters?

A No.

Q Did you have a discussion with Mr. Forner that Vision had to be very, very careful on how to get rid of union supporters?

A I don’t think I ever had that kind of conversation with Mr. Forner, no.

Q Did you tell Mr. Forner, at any point in time, that you wanted to get rid of union supporters?

A No.

(Tr. 683-84).

As with Oswald’s testimony, this reflects that Vision’s counsel’s questions, contrary to the ALJ’s finding, were not “leading.” Rather, they were questions to which “yes” or “no” were appropriate answers, and as such, by definition, were not leading. Finally, to the extent counsel for Vision may not have precisely captured Forner’s exact testimony in his questions, they certainly reflected the essence of his testimony. Thus, the substantive rationale for the ALJ’s refusal to credit Orr’s testimony is flawed in the same manner as his rationale for refusing to

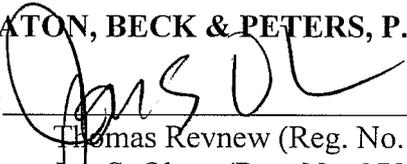
credit Ostwald's testimony.

CONCLUSION

Consistent with the ALJD, the Board should dismiss the Complaint in its entirety. Nevertheless, the evidence establishes that General Counsel failed to establish other elements of a prima facie case for Section 8(a)(3) and 8(a)(4) violations. The ALJ's erroneous findings failed to identify these as additional grounds for dismissal of the Complaint.

Dated: August 18, 2010

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