

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

SABO, INC., d/b/a HOODVIEW VENDING CO.

and

Case 36-CA-10615

ASSOCIATION OF WESTERN PULP AND PAPER
WORKERS UNION affiliated with UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA

**BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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On November 30, 2010, Administrative Law Judge Lana H. Parke (“Judge Parke”) issued her decision finding that Respondent, SABO, Inc., d/b/a Hoodview Vending Co. (“Respondent”), did not unlawfully discharge employee LaDonna George (“George”) for engaging in Union and/or protected concerted activity. Specifically, Judge Parke concluded that, while George was discharged, in significant part, because of a conversation she had with co-worker Steve Boros (“Boros”), that did not constitute activity that was concerted or protected. Further, despite finding that Counsel for the Acting General Counsel (“Acting General Counsel”) had established her initial burden under Wright Line, Judge Parke concluded that Respondent established that it would have terminated George’s employment in the absence of George’s Union activity.

The Acting General Counsel posits that Judge Parke erred when she concluded George was not engaged in protected concerted activity during her discussion of a job posting with Boros. Moreover, contrary to Judge Parke’s conclusion, Respondent did not establish that it would have discharged George in the absence of her Union activity,

but rather, the timing of George's discharge, considered in conjunction with Respondent's actions after it discharged George, establish that Respondent's asserted reasons for discharging George were mere pre-text for discrimination.

The remaining exceptions involve facts and conclusions attendant to the discharge overlooked by Judge Parke and are subsumed within the broader argument related to Judge Parke's erroneous conclusion that Respondent established it would have discharged George in the absence of her Union activities.

I. INTRODUCTION

In support of the allegations set forth in the Consolidated Complaint, the Acting General Counsel established at hearing that George was part of the Union's organizing committee from the beginning of the Union's campaign, and remained one of the last supporters of the Union through the date of her discharge. Throughout the campaign, George remained a target of Respondent's ire, particularly because of a dispute over her alleged supervisory status, which required her testimony as the sole employee witness at the pre-election hearing.

During Respondent's pre-election anti-Union campaign, which began in February 2009, it threatened employees with the loss of certain of their benefits if the Union won the election, that it would be the hardest employer the Union has ever bargained with, and that employees' wages would remain frozen while the parties bargained. Respondent also harassed its employees by maintaining and enforcing a rule restricting employees from talking about the Union while at work, communicating to employees that those who voted for the Union were disloyal, and referring to the Union's supporters

as “rats.” Further, Respondent interrogated George on May 29, 2009, after learning that she was continuing to seek the assistance of the Union.

Approximately two months later, on August 27, 2009, the Regional Director for Region 19 approved both a bi-lateral Settlement Agreement under which Respondent posted a Notice remedying the above conduct, and a stipulation to set aside the March 10 election. Although the rerun election was scheduled for January 7, 2010, the Union withdrew its petition about a week before the election due to tremendous loss of support. George was one of only two remaining supporters of the Union still employed by Respondent at the time the Union withdrew its petition. Respondent’s response to the withdrawal was a memo to its employees thanking them for their support in choosing “to speak for [themselves]” and promising a “thank you” party in the near future. It was against this backdrop that George was discharged two weeks later.

Indeed, as also established at hearing, George engaged in protected concerted activity on the day before she was fired by “stirring things up” when she spoke with employee Boros about a job listing. Respondent’s asserted reasons for discharging George are pretextual, and Judge Parke erred when she concluded that Respondent established that it would have discharged George in the absence of her Union activity.

II. BACKGROUND¹

A. Respondent’s Operation

Respondent is engaged in the business of providing vending and office coffee services to companies throughout Southwest Washington and Northwest Oregon from

¹ Although the Acting General Counsel does not take issue with many of the facts set forth in Judge Parke’s decision, inasmuch as Judge Parke omitted or disregarded many key facts, as set forth in the exceptions, a recitation of facts is included.

its facility in Tualatin, Oregon.² (ALJD 2:8-17, Tr. 28:2-4, Tr. 140:18-21, GCX 1(f) par. 2(a), GCX 1(h) par. 2). Respondent's facility is divided between warehouse and office space. (JTX 4 pg. 2). Respondent shares its office space with another vending company called S&S Vending. (Tr. 198:17-21). Respondent, at the time of the hearing, had about 13 employees, including 7 Route Drivers. (Tr. 143:3-8). Respondent has been owned by Bob and Sally Hill since 1992. (Tr. 142:13-16). Bob Hill is Respondent's President and Sally Layton-Hill is the Secretary-Treasurer. (ALJD 2:17-21, Tr. 200:20-23).

B. LaDonna George

George began working for Respondent in August 2001. (Tr. 60:10-12). In May 2007, George was offered and accepted the position of Respondent's Route Supervisor. (Tr. 61:18-62:7). George received an additional \$500 per month after taking the position of Route Supervisor, and received a \$100 increase about 5 months later. (Tr. 62:11-13, 93:18-94:2). As Route Supervisor, George was responsible for training new employees, following up with audits of the existing employees, making sure that employees were filling machines properly and cleaning them, as well as responding to customer complaints about machines not working properly from 7 a.m. to 11 p.m. (Tr. 62:2-6, 14-17, 63:13-22). Training new employees included showing them how to properly: load their trucks, fill the machines, locate the various job locations and where to park their vehicles, make contact, rotate product in their trucks, and maintain

² References to Judge Parke's decision appear as (ALJD__:__). The first number refers to the pages; the second to the lines. References to the transcript appear as (Tr. __:__). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GCX __); References to Respondent Exhibits appear as (RX __); and References to Joint Exhibits appear as (JTX __).

cleanliness. (Tr. 62:18-23). George would train employees every three or four months and, in the year before George's employment was terminated, she trained three to four employees. (Tr. 62:24-63:4). The last time George trained an employee was in October or November 2009. (Tr. 63:5-8). George was also one of Respondent's two cold food route drivers. (Tr. 171:16-25). George continued being assigned to drive cold food routes up through the time of her discharge. (RX 10, RX 14, RX 15, Tr. 178:10-15).

C. Union Organizing Campaign

On January 27, 2009, Paul Cloer, Organizing Coordinator from the Union, sent letters to the Hills notifying them that a majority of their employees had expressed a desire to be represented by the Union, and that seven of Respondent's employees, including George, had agreed to serve on the Union's organizing committee.³ (Tr. 27:9-10, JTX 2, JTX 3(a)). At the time the Union organizing began, Respondent employed 9 Route Drivers and 1 technician.⁴ (Tr. 19:11-25, RX 5, Tr. 143:9-13). That same day, the Union filed an RC petition seeking to represent Respondent's employees. (Tr. 19:11-25, JTX 4).

Respondent's reaction to the Union campaign was swift and unquestionably hostile. Within a few days of the Union first identifying its organizing committee to Respondent, Respondent quickly retaliated against George by issuing her a written warning dated February 2, 2009, asserting that George worked too slowly. (JTX 3(a), GCX 9). George's unrebutted testimony at hearing established that, although she had

³ The Union sent subsequent letters to Respondent on February 23, 2009, and June 11, 2009, identifying the members of the Union's organizing committee. George is named in these letters. (ALJD 2: 28-34, JTX, 3(b), JTX 3 (c)).

⁴ Although Respondent employed employees in addition to those discussed above, those employees will not be discussed as they were not involved with, nor the subject of, the unfair labor practice hearing.

been told in the past by Mrs. Hill that she was a slow worker, George had never received a written warning about being too slow in the approximately two years prior to February 2, 2009. (Tr. 65:6-67:17). Notably, George was not given this document by Mr. or Mrs. Hill; rather, the first time she saw this warning was when she provided an affidavit to the Board. (Tr. 66:25-67:12).

Thereafter, a hearing was conducted on February 6, 2009, to determine whether, as asserted by Respondent, George was a statutory supervisor, in which George, subpoenaed by the Union, was the only employee to testify. (Tr. 67:18-25, JTX 4). On February 13, 2009, the Regional Director for Region 19 issued a Decision and Direction of Election, determining that Respondent had failed to carry its burden of proving that George was a statutory supervisor. (Tr. 68:18-21, JTX 4). Six days later, Respondent held a mandatory meeting to talk with its employees about the pending election, and to urge its employees not to vote for the Union. (ALJD 2:42-43, Tr. 36:3-11, Tr. 68:22-69:7, Tr. 153:15-17, RX 12).

During this meeting, Mrs. Hill read a prepared speech and told employees, among other things, that: if the Union won the election, the Union would find Respondent to be the toughest employer they have ever come up against; that the employees would have to pay \$40 per month in Union dues and initiation fees of \$100 to support the Union bosses' salaries; and that the Union's officials were dishonest. (ALJD 3:7-25, RX 12 pg. 3-5, Tr. 36:14-21, Tr. 69:14-16, Tr. 70:21-22, Tr. 154:1-6). Mrs. Hill informed employees during this meeting of the poor economic state of

Respondent, while also informing them that the union election was costing Respondent thousands of dollars.⁵ (RX 12 pg. 4).

About a week after Respondent's anti-Union meeting, Mrs. Hill, clearly dissatisfied with the Regional Director's decision that George was not a supervisor, harassed George about her supervisory status. (JTX 4, Tr. 71:12-72:5, Tr. 97:8-17). After George told Hill that she was not a supervisor, Mrs. Hill angrily told George that she (Mrs. Hill) didn't care what the Union said about whether George was a supervisor or not, and that George was a supervisor. (Tr. 72:11-15). At that point, George told Mrs. Hill that she wanted to resign from her position as supervisor and, at Mrs. Hill's instruction, put her desire to resign from the Route Supervisor position in writing. (Tr. 72:15-21, Tr. 97:8-17). George's resignation was not accepted at that time, and her duties remained the same until November 2009. (ALJD 2:34, Tr. 32:12-17, Tr. 72:22-23, RX 2).

Absent from Judge Parke's decision is the undisputed evidence that, in conjunction with Mrs. Hill's anti-Union meeting, Mr. Hill distributed flyers, in which the Union was repeatedly referred to as dishonest and/or corrupt, urging employees to vote against the Union. (39:9-41:13, GCX 5-7). The flyers distributed to employees also threatened that "[n]egotiations could take months, or years to complete," and that "[d]uring this time or an appeal to the election your wages and benefits are generally frozen." (GCX 5 & GCX 6). Also missing from Judge Parke's decision; the Acting General Counsel established that in the time leading up to the election, Respondent

⁵ Respondent had retained Sandy Rudnick, Labor Consultant, as well as an attorney, Robert Fried. (Tr. 8:3, Tr. 10:21-11:2, Tr. 167:9-20).

maintained and enforced a rule restricting employees from talking about the Union at work. (GCX 15, 209:11-211:4).

On March 5, 2009, five days before the election, employee Dwight Covington, a known Union supporter, met with Mr. and Mrs. Hill to discuss his paycheck. (ALJD 3:35-36, Tr. 42:6-15, JTX 3(a), JTX 3(b)). During this meeting, Mrs. Hill threatened that if the Union got in, Respondent would eliminate the drivers' flexible schedules, that Respondent would no longer pay for benefits, there would be no work in between 6:00 p.m. and 6:00 a.m., and that there would be a meeting every morning at 6:00 a.m. (ALJD 3:36-39, Tr. 43:3-14, Tr. 57:8-12). Mrs. Hill then left the office, and Mr. Hill, in response to a question Covington asked about Respondent's "Ironman Award" incentive program, threatened that the "Ironman Award" would be contingent on the results of the election. (ALJD 3:44-45, ALJD 4:1-2, Tr. 44:3-4:2, Tr. Tr. 44:24 - 45:4, Tr. 57:2-5).

1. The Union Is Unsuccessful

An election was conducted on March 10, 2009, resulting in a tie, with two challenged ballots. (ALJD 2:23-26, Tr. 19:11-25, JTX 5). The day after the election, March 11, 2009, Mrs. Hill distributed a memorandum to employees suggesting that the Union was untrustworthy if it did not withdraw the challenge it made to an employee's ballot. (Tr. 19:11-25, JTX 5, Tr. 189:22-190:6). Mrs. Hill also posted a notice on the side of employee lockers thanking Respondent's loyal employees for voting "no" in the election. (ALJD 4:5-8, Tr. 45:13-19, Tr. 47:12-19, GCX 8). Both parties filed timely Objections to the Election, and while those were pending, Mrs. Hill approached Covington and told him that no matter what he told his "little friend at the Union," they were going to run the company how they wanted to through the down economy, and

that if the employees wanted to “run to the Union like a bunch of rats, that was fine, and they were going to still do things the way they wanted.” (ALJD 2:26, ALJD 4:8-11, Tr. 19:16-25, Tr. 48:22-49:5).

2. Continued Animus

A couple of months later, on May 28, 2009, George met with the Hills to discuss two written warnings and a memo she received. (Tr. 74:10-20). At the conclusion of the meeting, George told the Hills that she wanted to look at the warnings and the memo because there were discrepancies she wanted to address, and that she would get back to them in the next few days. (Tr. 75:4-8). George then left the meeting and, about fifteen minutes later, received a call from Paul Cloer. (Tr. 75:11-17, Tr. 110:4-6). George told Cloer about the meeting she had just had with the Hills and, in response to what George told him, Cloer told George that he was going to file a charge against Respondent with the Board. (Tr. 75:19-76:2). He did. (GCX 3). As when Cloer initially identified the Union’s organizing committee, Respondent’s reaction to its employees’ Union activities was swift, and unmistakably hostile.

The very next day when George went to work, the Hills, who were clearly not pleased that George had sought the Union’s assistance, called George into the office and interrogated her about why she had not given them the feedback she said she would give them, and instead spoke with Cloer about the warnings and memo she was issued the day before. (Tr. 76:3-10). Mr. Hill then asked George about why she called Cloer, and George explained that she didn’t call Cloer, but rather Cloer had called her because “he cares about us and wants to check up on us...” (Tr. 76:15:19). At that point, Mr. Hill got angry and slammed his hand down on the desk and told George to

leave. (Tr. 76:20-23). George subsequently provided the Hills a response to the warnings and memo, as she said she would. (Tr. 109:3-110:12).

3. Settlement of ULP Charges and Setting Aside the Election

On August 27, 2009, the Regional Director approved a stipulation to set aside the election and a Settlement Agreement between the parties to resolve the charges in Cases 36-CA-10438, 36-CA-10470 and 36-CA-10481.⁶ (ALJD 2:37-39, Tr. 29:17-21, GCX 2). As part of the settlement, Respondent was required to post a Notice to Employees disavowing conduct which, *inter alia*, coerced its employees. (GCX 2, GCX 3). Five employees, including George, provided affidavits in support of the Union's charges. (Tr. 29:6-15). A second election was scheduled for January 7, 2010. (Tr. 19:11-25).

Incredulously, despite Respondent's assertion that it considered discharging George in both May and July, in November 2009, Mrs. Hill approached George and offered her the opportunity to continue being Route Supervisor. (Tr. 73:5-9, Tr. 168:6-170:13, RX 14 pgs 1-2). George declined and chose to step down from her position as Route Supervisor. (Tr. 73:12-13, RX 4). She was not demoted. (Tr. 197:21-24).

4. Petition is Withdrawn

On December 31, 2009, as most of its supporters no longer worked for Respondent, the Union withdrew its petition. (ALJD 2:39-40, Tr. 19:16-25, JTX 3(c), JTX 7, RX 5). In addition to being one of the Union's remaining supporters, George was

⁶ The Settlement Agreement contains a "Scope of Agreement" clause which provides, "[t]he General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence."

also the only employee who had provided affidavits in support of the Union's charges still employed by Respondent at the time the second election was scheduled to occur. (Tr. 29:6-15, RX 5).

Relieved that the Union was no longer seeking to represent its employees, on January 5, 2010, Respondent issued a memo to its employees from Mrs. Hill informing them that the upcoming election was cancelled. (Tr. 77:15:23, Tr. 189:11-16, GCX 11). In the memo, Mrs. Hill wrote, "[n]ow it is back to surviving the recession and building Hoodview back to where we were before the Union cost us so much time, effort and money. I would never wish for any of you to have a person such as the union organizer for the AWPPW in your lives." The memo thanked employees for their support and announced that Respondent would be having a "thank you party." (GCX 11).

On that same day, George was issued a memo, a copy of which was sent to Respondent's other Cold Food Route Driver, Karen Burke, concerning George making a delivery to one of Respondent's "A" accounts, Charter, later than the customer wanted. (Tr. 171:17-19, Tr. 173:15-24, RX 15). The memo asked that George make sure she delivers to Charter by 8:30 a.m. in the future. (RX 15).

D. George Is Issued a Final Warning

On the night of January 6, 2010, George was informed that her father had unexpectedly passed away. (ALJD 4:13-14, Tr. 80:8-13). On the way to her parents' house, George called the cell phones of both Hills to inform them of her father's passing, but was not able to speak with either of them. (ALJD 4:14-15, Tr. 78:23-79:5, Tr. 79:11-80:21, RX 4, GCX 12). George then called Respondent's main line for service calls, and left a message on that phone for the Hills notifying them that her father had

died and that she would not be in to work. (ALJD 4:14-15, Tr. 79:5-81:5, GCX 12, Tr. 102:24-103:5). Mr. Hill contacted George on Friday, January 8, 2010, asked her about funeral arrangements for her father and about when she would be returning to work. (ALJD 4:15-17, Tr. 78:8-13, Tr. 82:2-13). George responded that she didn't know about funeral arrangements since her father wanted to be cremated, and that she would be back at work on Monday. (ALJD 4:17-18, Tr. 82:7-14).

Later that day, George's family learned that they could have a placement ceremony for her father, and one was scheduled for Thursday, January 14, 2010, at 2:30 p.m. (ALJD 4:18-19, Tr. 82:23-83:12). George returned to work on Monday, January 11, 2010, and, after finishing her route on Thursday, January 14, 2010, asked Mrs. Hill if she could have the following Monday and Tuesday off from work because she "wasn't doing too good." (ALJD 4:21-23, Tr. 83:6-20). At Mrs. Hill's request, George then filled out a vacation form for the time off and turned it in. (ALJD 4: 23-24, Tr. 83:21-84:2). George had not requested Friday, January 15, off from work because she felt like she was "strong enough" at that time to work one day. (Tr. 84:2-7).

On January 15, 2010, George arrived at work around 5:30 a.m., and learned that Mrs. Hill denied her request for time off because Respondent didn't have anyone to do her route. (ALJD 4:25-28, Tr. 84:8-19, Tr. 86:22-25, GCX 13). George, who was already upset, became even more upset after seeing that her request for time off to grieve was not granted, and wadded up the vacation request form. (ALJD 4:30-31, Tr. 84:13-85:10, GCX 13). George then proceeded to get sandwiches and other items ready to load into her truck, but found that she was getting more and more emotional, and was crying. (Tr. 85:13-18, Tr. 114:20-22).

After debating about whether she should continue working, and have customers see her in the state she was in, or go home, George decided she needed to go home. (ALJD 4:31-32, Tr. 85:17-24). Before leaving, George wrote a note on the vacation request form, notifying the Hills that she was unable to work, and then placed it under the office door for Mr. Hill, who starts work at 6:30 a.m. (ALJD 4:34-35, Tr. 85:25-86:5, Tr. 115:3-4, Tr. 204:17). It is undisputed that George had never before left work without finishing her route without calling Mr. or Mrs. Hill first. (Tr. 115:6-10). However, George did not feel that she could talk due to her emotional state on the morning of January 15, 2010. (Tr. 114:15-22). George left Respondent's facility around 6:15 a.m., went home and cried herself to sleep. (Tr. 86:22-87:5).

Later that day, on the way to a physical therapy appointment, George saw that Mr. Hill had called her. (ALJD 4:40-41, Tr. 87:8-11). When she returned home from her appointment, George saw that Mrs. Hill had sent her an e-mail with an attachment stating, in pertinent part, "You are expected to be at work and on time to do your job Monday morning January 18, 2010, or you will be terminated." (ALJD 4:2-5:7, Tr. 87:12-21, GCX 14). Mrs. Hill sent George a text message on Sunday asking if she would be returning to work, and George texted Mrs. Hill back, letting her know that she would be returning to work. (Tr. 88:11-21).

E. Events of Monday, January 18, Leading to George's Discharge

George reported to work on Monday, January 18, 2010, and, in the process of getting ready for her route, had a conversation with two co-workers in the warehouse: Steve Boros ("Boros") and Keith Neary ("Neary"). (ALJD 5:15-17, Tr. 88:22-89:3). In an attempt to cheer herself up, George apologized, sarcastically, to Boros and Neary for

having to fill in on her route on Friday, even though she knew that they did not know how to do her route. (Tr. 89:4-11). During this conversation, George asked Boros if he had seen the job posting that was on the employment website. (ALJD 5:17-19, Tr. 89:16-17). Boros, who did not feel secure in his position with Respondent, told George that he had seen the job posting. (Tr. 120:1-121:6). The job posting did not list who the hiring business was, but the posting was for a route soda driver position in Tualatin, Oregon. (Tr. 89:19-21; Tr. 121:7-21). Knowing that there were only two vending companies, Respondent and S&S Vending, located in Tualatin, George told Boros and Neary that she didn't believe the posting was for S&S Vending because its turnover was not as high as Respondent's. (ALJD 5:19-22, Tr. 90:3-5).

Although he does not remember exactly what was said, after he confirmed that he had seen the job posting, Boros believes George said something to the effect of "so, who's it going to be." (Tr. 123:7-15). George did not tell Neary or Boros that the job listing was for one of their jobs or that someone was going to be fired but, according to Boros, "it was insinuated." (ALJD 5:24-27, Tr. 90:6-11, Tr. 122:8-12, Tr. 130:11-14). Boros explained that he believed that the job listing was for his job for two reasons: he had been having conversations with Mrs. Hill on an almost daily basis during which she criticized his job performance; and he was the most senior of the newly hired employees. (Tr. 120:1-11, Tr. 122:13-123:3).

After Boros completed his route for the day, Boros approached Mr. Hill in the warehouse and asked him if he was going to be fired. (ALJD 5:29-30, Tr. 123:25-124:7). Mr. Hill told Boros that he was not going to be fired and asked Boros who told him that he was going to be fired. (ALJD 5:30, Tr.124:8-9). Boros told Mr. Hill that

George told him he was going to be fired. (ALJD 5:31, Tr.123:10-14). Mr. Hill assured Boros he would not be fired, adding that George would be fired because she had left work without notice. (ALJD 5:31-33, Tr. 124:16-18).

Right after his conversation with Mr. Hill, Boros went to Mrs. Hill's office and asked her if he was going to be fired. (ALJD 5:33-34, Tr. 125:6-17). Mrs. Hill told Boros he was not going to be fired and asked Boros who told him he was going to be fired. (ALJD 5:34-35, Tr.125:15-18). Boros mentioned to Mrs. Hill that he had seen the job posting on the employment website for a route position and that George told him he would be fired. (ALJD 5:35-36; Tr. 126:2-5, Tr. 16-19). Mrs. Hill then said something to the effect of, "that pisses me off," and got on the phone with her attorney. (Tr. 125:20-22).

Later that same day, Mrs. Hill called George and asked that she see her (Hill) after finishing her route. (ALJD 5:8-9, Tr. 90:18-22). At around 4:30 p.m., George met with Mrs. Hill in her office, and Mrs. Hill angrily asked George why she was "stirring things up." (Tr. 90:23-91:5, Tr. 91:19-21). When George responded that she didn't know what Mrs. Hill was talking about, Mrs. Hill asked George why she (Hill) had someone coming to her office, asking if they were going to be fired. (ALJD 5:40-41, Tr. 90:5-9). Again, George told Mrs. Hill she didn't know what she was talking about, and pointed out that everyone was looking for jobs. (ALJD 5:41-42, Tr. 90:9-10, Tr. 182:4-5). Mrs. Hill then questioned George about who was looking for a job and then George said it was Keith, George and Nathan. (Tr. 91:11-13, RX 16). George was then questioned about who she thought should be fired, and George responded that she didn't know; and that that was Mrs. Hill's business. (Tr. 91:14-18). By that time,

George, who was still emotional over her father's death, became upset, told Mrs. Hill that she couldn't handle talking anymore, and turned to leave the office.⁷ (Tr. 91:24-92:2, Tr. 215:3-5). Mrs. Hill said "bye." (Tr. 92:2).

The following day, after finishing her route, George was loading her truck and was asked by Mrs. Hill to come to see her in the office. (ALJD 6:7, Tr. 92:3-11). George told Mrs. Hill that she was "still emotionally upset" and didn't know if she could have the conversation. (Tr. 92:12-14). Mrs. Hill said it would only take a couple of seconds. (Tr. 92:16). George finished the work she was doing, changed her clothes and then went into Mrs. Hill's office. (Tr. 92:17-19). George and Mrs. Hill then went into Mr. Hill's office, and when they arrived, Mrs. Hill grabbed an envelope, handed it to George and told her that it was her final paycheck. (Tr. 92:18-22). Mrs. Hill told George that it was her last day working for Respondent, that she was untrustworthy, and then asked for her keys and her phone. (ALJD 6:7-9, Tr. 92:22-23). Mrs. Hill did not explain to George what she meant when she said that she was untrustworthy, nor did she give George any other reason for why she was fired. (Tr. 92:24-93:3). George, who was in shock over being fired, did not ask any questions. (Tr. 93:2-5).

Mrs. Hill asserted numerous reasons for discharging George, including George's long history of violating company rules, uncooperativeness, not responding to calls both as a supervisor and as a driver, failure to service accounts, walking off the job without communicating that she would not be there, which led the Hills to feel they could not rely on her, and telling Mr. Boros he was going to be fired. (ALJD 5:43-6:5). Notably,

⁷ Mrs. Hill asserts that George shouted "I can't deal with this" and that Rhonda Brown of S&S Vending, who sits next door to her office, overheard this. (Tr. 182:7-9, Tr. 197:1-198:21) George denies shouting. (Tr. 215:6-10). Brown did not testify.

Mrs. Hill testified that she did not know if they would have fired George if the conversation with Boros had not occurred. (ALJD 6:50-51).

F. Respondent's Post-Discharge Actions

The day after discharging George, Mrs. Hill addressed an assembled group of route drivers, telling them she was tired of the behind-the-back talk in the warehouse, with everybody talking behind everybody's back instead of talking to Mr. and Mrs. Hill if there was a problem with somebody. (ALJD 6:11-14, Tr. 127:5-10). Mrs. Hill told the employees at the meeting that George had been fired for "gossiping and spreading rumors, telling people they're going to be fired." (ALJD 6:14-15, Tr.127:14-17).

After the meeting, Mrs. Hill approached Boros and asked him if George had told him that he was going to be fired. (Tr. 127:23-128:4). Boros responded that George didn't tell him he was going to be fired, but that he felt it was implied "just by process of elimination and my own knowledge." (Tr. 128:5-8). Mrs. Hill responded to Boros' comments by asking him if he would testify, and Boros declined. (Tr. 128:9-11). Thereafter, Mrs. Hill approached Boros a couple of times and asked if he had spoken with the Board. (Tr. 128:12-16).

III. ARGUMENT

A. JUDGE PARKE ERRED WHEN SHE FOUND THAT GEORGE WAS NOT ENGAGED IN PROTECTED CONCERTED ACTIVITY DURING HER DISCUSSION OF RESPONDENT'S JOB POSTING WITH BOROS

1. Judge Parke Erroneously Rejected the Cases Cited by the Acting General Counsel

Though correctly recognizing that a conversation between two or more employees may constitute a concerted activity if it "was engaged in with the object of

initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees,”⁸ Judge Parke erroneously concluded that George and Boros’ conversation did not constitute concerted activity. This conclusion is not supported by the law or the record evidence.

Specifically, in Cadbury Beverages, Inc., the Board approved an administrative law judge’s reliance on a line of cases “establishing the rule that employee discipline or discharge for discussing with other employees subjects affecting employment interferes with, restrains, and coerces each discussant in the exercise of his or her right to engage in concerted activity for material aid or benefit.”⁹

In Cadbury Beverages, employee Matzan was disciplined for allegedly telling coworker Dennis that the employer’s human resources manager and two union officers wanted to fire Dennis for taking maternity leave. Matzan denied making the statement. The employer argued that this was a damaging and defamatory rumor and suspended Matzan after an investigation. Matzan testified that he overheard a union officer tell the human resources manager that he should have fired Dennis before taking maternity leave after he learned that Dennis was going to seek the union officer’s help in obtaining an expected bonus. Although any further activity contemplated by Matzan and Dennis was implied rather than explicit, the Board found, and the D.C. Circuit affirmed, that the conversation between the two was “directed toward future action” and therefore

⁸ Mushroom Transportation Co. V. NLRB, 330 F.2d 683 (3d Cir. 1964)

⁹ Cadbury Beverages, Inc., 324 NLRB 1213, 1220 (1997), *affd.* 160 F. 3d 24 (D.C. Cir. 1998), citing Express Messenger Systems, 301 NLRB 651 (1991); U.S. Furniture Industries, 243 NLRB 159 (1989); El Gran Combo, 284 NLRB 1115 (1987), *affd.* 853 F.2d 996 (1st Cir. 1988); Jhirmack Enterprises, 283 NLRB 609 (1987); Scientific Atlanta, 278 NLRB 622 (1986); O’Hare Hilton, 248 NLRB 255 (1980); Pioneer Natural Gas Co., 253 NLRB 17 (1980); General Motors Corp., 239 NLRB 34 (1978).

constituted protected concerted activity.” Cadbury Beverages, Inc. v. NLRB, 160 F 3d. 24, 28 (D.C. Cir. 1998).

Similarly, the Board in Jhirmack Enterprises,¹⁰ found protected concerted activity where an employee, Allison, told a fellow employee, Ramsey, that Ramsey was the subject of complaints at a workplace meeting which he had not attended. Allison told Ramsey of the complaints against him in order to encourage him to take corrective action so that he might protect his job. Allison’s employer discharged her for undermining morale and breaching the confidentiality of the meeting. The Board found that Allison’s conduct was “clearly undertaken for the mutual aid and protection of a fellow employee and therefore constituted actual concerted activity.”¹¹

Contrary to Judge Parke’s findings, the facts in this case are wholly consonant with the Cadbury line of cases and, therefore, the conversation between George and Boros should have been found to be protected concerted activity. As in those cases, George was discharged for a conversation she had with another employee regarding that employee’s job and job security, which are core “subjects affecting employment.”¹² Upon learning of the conversation from Boros, it is undisputed that Mrs. Hill charged George with “stirring things up” and being “untrustworthy.” These types of characterizations are redolent of accusations of “spreading false and malicious rumors”¹³ or “undermining morale.”¹⁴

¹⁰ 283 NLRB 609 (1987).

¹¹ Id. at 609 n. 2.

¹² Cadbury Beverages, Inc., 324 NLRB at 1220.

¹³ Id. at 1216.

¹⁴ Jhirmack Enterprises, 283 NLRB at 619.

2. Judge Parke Incorrectly Concluded that George and Boros Failed to Plan Future Action About the Job Posting

George was engaged in protected concerted activity when she spoke with Boros about Respondent's job listing, which indicated that someone would be fired; a conversation regarding job security, an issue of common concern. Though George did not tell Boros he would be fired, it is undisputed that Boros inferred this from George's comments to him, and he acted upon it. After finishing his route, Boros told both Mr. and Mrs. Hill that George told him that he would be fired. However, before there could be any further discussions or activity between the coworkers, Respondent nipped George's supportive activity in the bud by discharging her for "stirring things up" and for being "untrustworthy."

Despite acknowledging the fact that Boros took action to protect his job after his conversation with George, Judge Parke inexplicably concluded that the employees' conversation regarding Respondent's job posting looked forward to no action whatsoever. Thus, she did not recognize the implicit message, and, to the extent Judge Parke found that the absence of an explicit statement warranted dismissal of the allegation, her finding is incorrect. In this regard, it is clear that the Board is willing to find implied reference to future action in order to deem a conversation concerted under the line of cases cited by the Acting General Counsel. See Cadbury Beverages, Inc. v. NLRB, at fn 12; See also, e.g. U.S. Furniture Industries, 293 NLRB 159 (1989) (an employee who spoke to temporary employees about the difference between their wages and benefits and those of permanent employees was engaged in protected concerted activity although he did not urge further action.) However, before there could be any further discussion between the co-workers, Respondent nipped George's supportive

activity in the bud by discharging her for “stirring things up” and for being “untrustworthy.”

3. Judge Parke’s Reliance on Daly Park Nursing Home is Misplaced

In rejecting the cases cited by the Acting General Counsel discussed above, Judge Parke improperly relied on Daly Park Nursing Home, 287 NLRB 710, 710-11 (1987), to find George’s conversation with Boros to be mere conjectural grousing, and not concerted activity. The facts in Daly Park Nursing Home are distinguishable.

In Daly Park Nursing Home, the alleged discriminatee, Herald, was retaliated against for comments she made about employee Davis’ discharge during a conversation she had with her co-workers. Specifically, Herald expressed the opinion that Davis’ discharge was not fair and that it was a shame that she (Davis), who was not present during the conversation, could not hire a lawyer and fight it. When one of the participants to the conversation opined that Davis would lose in a fight with the employer, Herald agreed. Thus, the Board concluded, “there [was] not even the suggestion that the employees might attempt to give mutual aid or protection to Davis by encouraging her to institute legal action to challenge her termination.” Id. at 711.

Unlike in Daly Park Nursing Home, George’s conversation with Boros related to one of their jobs being in potential jeopardy. It is clear that any prospective employee faced with that information would want to take protective action for his job.

4. Respondent Discharged George for Engaging in Protected Concerted Activity

Despite Respondent’s numerous asserted reasons for discharging George, the record evidence established that George was discharged because of the conversation she had with Boros. Mrs. Hill’s admission that she was not sure she would have

discharged George in the absence of this conversation, and Mr. Hill's reaction to hearing about Boros' conversation with George, support this finding. As George's conversation with Boros constituted protected concerted activity, Respondent's discharge of George on this basis violated § 8(a)(1) of the Act.

B. JUDGE PARKE FAILED TO FIND THAT RESPONDENT DISCHARGED GEORGE IN RETALIATION FOR HER UNION ACTIVITIES

Judge Parke correctly concluded that the Acting General Counsel had established its initial burden under Wright Line. She also properly found that George's employment record did not form any material basis for her discharge. Despite these findings, she improperly rejected the Acting General Counsel's argument that Respondent's remaining asserted reasons for discharging George – her leaving work on January 15 and her conversation with Boros – were pretextual in nature, and found that Respondent established it would have discharged George in the absence of her Union activities. In so doing, Judge Parke miscited and omitted record evidence, and failed to address key facts supporting the Acting General Counsel's case.

1. Judge Parke Erroneously Found that Respondent Would Have Discharged George Without Union Activity.

As Judge Parke correctly found, to establish a violation of § 8(a)(3), the General Counsel must first prove by a preponderance of the evidence that animus toward the employee's protected union activity was a substantial or motivating factor in the adverse employment action. Wright Line, Inc., 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

Once the General Counsel has made this showing, either through direct or circumstantial evidence, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. Wright Line, 251 NLRB at 1089. If, however, the evidence establishes that the reasons given for the employer's actions are pretextual — that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the Wright Line analysis. SFO Good-Nite Inn, LLC, 352 NLRB 268, 269 (2008) (citations omitted). The Wright Line analysis is appropriate regardless of whether the case involves pretext or dual motive, where the employer's proffered legitimate explanation for the adverse action has at least some merit.¹⁵

Though Judge Parke found that the Acting General Counsel established its initial burden under Wright Line, she miscited and omitted record evidence, and found that there was no direct evidence of animus and that Respondent established that it would have discharged George in the absence of her Union activities. At trial, Respondent raised several reasons on which it based its decision to discharge George. The first reason, *i.e.* George's work history, was correctly rejected by Judge Parke. From that point on, Judge Parke inexplicably faltered.

Despite the compelling citation to testimony from Mrs. Hill that she did not know if she would have fired George if her conversation with Boros had not occurred, and the Hills' announcement to employees that George was fired for telling people that they

¹⁵ Wright Line, 251 NLRB at 1083, n. 4 (“[T]here is no real need to distinguish between pretext and dual motive cases”). See also, United Rentals, Inc., 349 NLRB 190, 198 (2007).

were going to be fired, Judge Parke concluded that Respondent had met its burden of proving that it would have both discharged George for leaving work on January 15 and that it would have discharged George in the absence of the employees' union activity. (ALJD 8: 6-10). This is inexplicable and based on neither law nor evidence. Her rationale, as discussed below, is faulty.

a. Respondent's Animus

First, although she found that Respondent exhibited animus towards Union activity in general, Judge Parke concluded that there was no direct evidence of animus directed solely at George's Union activities. This is ill-conceived. Judge Parke clearly omitted and overlooked undisputed record evidence reflecting that from the inception of the Union's campaign until George was discharged, Respondent bore animus toward George for her involvement with, and support of, the Union.

Specifically, among the facts omitted by Judge Parke is that, within days of the Union notifying Respondent of its organizing activities, Respondent issued George a written warning. As George's unrebutted testimony at hearing established, although she had been told in the past by Mrs. Hill that she was a slow worker, George had never received a written warning about being too slow prior to February 2, 2009. (Tr. 65:6-67:17). This action unmistakably reflects animus and Judge Parke erred in not finding it to be so. In fact, the only evidence Respondent was able to produce of George being disciplined were warnings issued *after* the Union began its campaign. The record evidence established that, before that time, George had only received memos which Respondent admits do not constitute discipline. (RX 8, RX 9, RX 10, RX 11, Tr. 186:24-

187:7). Clearly, the only thing that changed George's memos to written warnings was George's Union activity.

Further evidence warranting a finding of animus includes the fact that after George provided testimony on the Union's behalf at the related R-case proceeding, and the Regional Director determined that she was not a supervisor, Respondent subjected George to harassment. This evidence was unrebutted and improperly ignored by Judge Parke. It is simply undisputed that at every turn, when George sought assistance from the Union, Respondent retaliated against her in some manner, and in May 2009, angrily interrogated her about why she had gone to the Union for help.

b. Respondent Did Not Establish It Would Have Discharged George For Leaving Work on January 15

Second, Judge Parke improperly rejected Acting General Counsel's arguments that Respondent's discharge of George because she left work without telling anyone on January 15 was pretextual. Although George had returned to work on Monday, January 18, and completed her route in order to retain her employment, Judge Parke erroneously concluded that this did not constitute evidence that George corrected her misconduct. She, instead, found that Mr. Hill's statement to Boros that George would be fired, and the memorandum issued to George on January 15 concerning her failure to service a customer that day suggested "quite the contrary." Her findings are not supported by the record.

Initially, the memorandum on which Judge Parke relies was issued to George ten days earlier, on January 5, not on January 15. (RX 15). Apart from this error, there is also a dearth of evidence that Respondent intended to discharge George for having left early on January 15, even if Respondent had wanted to discipline her. In fact, Mrs. Hill

testified she was not sure if she would have discharged George absent her conversation with Boros. (ALJD 6:50-51).

Had Respondent intended to discharge George for her leaving work on January 15, it makes little sense that she would have been required to work on January 18. Indeed, as discussed below, the undisputed evidence established that when Respondent spoke to its employees about George's discharge, George leaving work early on January 15 was not mentioned. An employer cannot simply present a legitimate reason for its action but must persuade, by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. W.F. Bolin Co., 311 NLRB 1118, 1119 (1993) *citing* Equitable Gas Co., 303 NLRB 925, 928-29 (1991). Respondent failed to prove it would have discharged George for leaving work early on January 15, and Judge Parke's finding to the contrary is clear error.

c. The Timing of George's Discharge Supports the Conclusion that George was Discharged for Her Union Activities

Third, Judge Parke, while omitting pertinent facts concerning the timing of Respondent's decision to discharge George, incorrectly found that the Acting General Counsel had not shown that "George's January 18 conversation had anything to do with union activity, that antiunion animus in any way motivated the Respondent's reaction to the incident, or that the Respondent seized upon the incident to retaliate against Ms. George for her union adherence." The Judge is mistaken.

Contrary to Judge Parke's finding, the timing of George's discharge suggests that Respondent's decision to discharge her was motivated by anti-Union animus. See, e.g.

Reno Hilton Resorts v. NLRB, 196 F.3d 1275, 1283 (D.C. Cir. 1999). Indeed, there is no dispute that George was discharged a mere two weeks after the Union election was to be conducted, at a time when the Union organizing campaign, and George's involvement in it was still fresh in Respondent's mind. Further, it is undisputed that George was one of the only two Union supporters who remained employed, and Mrs. Hill's statement that George was "stirring things up" by talking to Boros about the job listing suggests that she discharged George in order to "nip in the bud" any future efforts to revive the Union organizing drive.¹⁶

d. Respondent's Actions after Discharging George Further Establish its Discriminatory Motive

Conspicuously absent from Judge Parke's decision is the unrefuted evidence that *after* Respondent announced to employees that George had been discharged for "gossiping and spreading rumors, and telling people they were going to get fired," Mrs. Hill approached Boros to further investigate what George said to him. Even then, Mrs. Hill's primary concern had to do with whether Boros would testify in an investigation, rather than with whether George told Boros he was going to lose his job.

Lending further support to the Acting General Counsel's case is the fact that after Mrs. Hill followed up with Boros, she was specifically told George had not said that. Thus, she knew that George had told her the truth when she denied telling employees they would be fired. Clearly, the fact that Respondent continued to assert that it

¹⁶ See, Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) ("Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book").

discharged George based on George allegedly telling Boros he would be fired, after both participants in the conversation confirmed that was not the case, indicates unlawful motive.

C. CONCLUSION

For all the above reasons, the Acting General Counsel respectfully requests that the Board grant the Acting General Counsel's exceptions to the Decision of the Administrative Law Judge.

DATED at Portland, Oregon, this 18th day of January, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the Acting General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge was served by e-file, e-mail, and the United States post-paid regular mail on the 18th day of January 2011, on the following parties:

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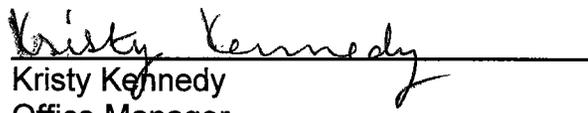
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