

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

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In the Matter of:

SPRAIN BROOK MANOR NURING HOME, LLC,

Respondent,

Case Nos. 2-CA-040231

2-CA-040385

2-CA-072458

-and-

NEW YORK'S HEALTH AND HUMAN
SERVICES UNION 1199/SEIU,

Charging Party.

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

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PRELIMINARY STATEMENT

The National Labor Relations Board, via its Counsel for the General Counsel (hereinafter referred to as "GC" or "the Board"), and New York's Health and Human Services Union, 1199/SEIU (hereinafter referred to as the "Union" or "Charging Party") brought the instant Amended Consolidated Complaint against Sprain Brook Manor Nursing Home, LLC (hereinafter referred to as "Respondent" or "Sprain Brook") alleging that Sprain Brook violated Sections 8(a)(1), (a)(3), (a)(4) and (a)(5) of the National Labor Relations Act (hereinafter referred to as the "Act"). On May 7 and 8, 2012, the instant case was tried before Administrative Law Judge Mindy E. Landow (the "ALJ"). The ALJ issued her Decision on November 8, 2012 (the "Decision").

As will be seen below and as is evidenced by both the credible testimony of Respondent's witness, documentary evidence and the disingenuous testimony of GC's witnesses, Sprain Brook did not violate the Act, but rather:

- 1) Accepted the voluntary resignation of Catherine Alonso ("Alonso"); or, in the alternative, should the Board's theories prevail, lawfully terminated Alonso due to her continued and documented poor performance;
- 2) properly discharged Karen Bartko ("Bartko") for insubordinate conduct;
- 3) has continued to provide free physicals and PPD's to its employees;
- 4) has continued to provide hot lunches, when available, to its employees in accordance with its past practice;
- 5) for a limited period of time, simply permitted a check cashing service to use its premises for no remuneration or monetary benefit, until said check cashing service determined on its own that conducting business at Sprain Brook was not profitable; and
- 6) implemented a revised health care premium policy as a result of an annual budget review which revealed runaway, unsustainable costs which Sprain Brook long sought to negotiate with the Union.

Respondent has offered credible testimony as to each and every allegation set forth above. Sprain Brook's position that it has not violated any provision of the Act is fully supported by the credible testimony of its own witness, documentary evidence as well as GC's proffered witnesses. Conversely, GC's witnesses offered contradictory testimony, provided outright lies and otherwise obfuscated the issues as seen below.

Based on the foregoing, the ALJ's Decision should be overturned. Consequently, General Counsel's allegations that Respondent violated §§8(a)(1), (a)(3), (a)(4) and (a)(5) of the Act should be dismissed in its entirety.

STATEMENT OF FACTS

The case at bar involves a number of allegations all of which boil down to four (4) issues: 1) the voluntary resignation of Alonso (R. Ex. 1);^{1/} (2) the lawful and proper discharge of Bartko and, assuming *arguendo* that the Board's theories are adopted, Alonso; 3) alleged threats by Sprain Brook's then Administrator, Michael Reingold ("Reingold") alleged by GC to constitute violations of Section 8(a)(1) and (a)(4) of the Act; and 4) various unsubstantiated and false allegations concerning hot lunches, check cashing services, free physicals and medical expense reimbursement payments.

a. Catherine Alonso's voluntary resignation and Respondent's lawful discharge of Karen Bartko

GC takes the position that both Alonso and Bartko were terminated as a result of their union activity and Respondent's alleged retaliatory union animus. GC fails to acknowledge that the prior incidents involving Alonso that serve as the basis for their

^{1/} Parenthetical referenced beginning with the letter "T" refer to the Transcript of the instant action, followed by the page citation. Parenthetical references beginning with the letter "GC" refer to General Counsel's exhibits on the record before the Administrative Law Judge. Parenthetical references beginning with the letter "R" refer to Respondent's exhibits.

otherwise baseless retaliation claim occurred approximately five (5) to seven (7) years ago (i.e., 2005-2007). Similarly, while relying upon ancient events in an NLRB retaliation context and Bartko's choice of juice and lunch habits to justify its claims, GC entirely ignores Alonso's history of poor performance (R Exs. 2, 3) and Bartko's admitted insubordinate behavior toward Reingold (T. 145-146, 148-149, 151). It was this aforementioned conduct that led to Alonso's voluntary resignation and Bartko's legitimate and justified termination.

Moreover, the Union's and GC's reliance on both Alonso's and Bartko's purported union activity is a red herring. As the Board advised during the outset of this trial, a representation election occurred in this matter in 2005. Neither Alonso nor Bartko may hide behind the existence of ongoing contract negotiations in order to substantiate an action at the NLRB; nor may they use the existence of ongoing Union negotiations and presence as a sword (rather than a shield) to otherwise cover up their performance deficiencies and insubordinate behavior.

i. Catherine Alonso

As documented in the employment file previously produced to the Board, Sprain Brook had received various complaints about Alonso from residents as well as families of its residents. In response to these complaints, Sprain Brook's administrator, Reingold conducted an audit of the rooms which Alonso had purportedly cleaned in early November 2010. Reingold's investigation revealed that Alonso was either not mopping the bathrooms at all or was doing very poorly. Rooms that Alonso had claimed to clean had garbage and dust under the beds, bathroom floors had urine behind them, the closets were not cleaned. The floors in the residents' rooms remained sticky and dirty even though Alonso had

previously “cleaned” them. It was quite evident that all Alonso was doing as part of her cleaning duties was to wipe a rag around the rooms, vacuum, and occasionally pick up trash. In order to confirm that Alonso was not performing her job, Reingold also inspected the men’s locker room bathroom after Alonso had finished cleaning it. While Alonso purported to have cleaned the room as required, there was dried urine all over the seat and under the rim of the bowl. The bowl simply had not been cleaned nor had the floor been mopped. According to Reingold, the women’s locker room bathroom was worse.

On November 9, 2010, when confronted with her blatant failure to perform the most basic tasks with which she was assigned, and in light of the multiple complaints and prior warnings which Alonso had received (R. Exs. 2, 3), Alonso opted to immediately submit her resignation rather than be subject to additional written warnings and discipline, up to and possibly including termination. (R. Ex. 1). Nonetheless, as a reward for her many years of service to Sprain Brook, the company offered to provide her with a severance package as well as to provide her with all accrued vacation and/or sick time which she was entitled (R. Ex. 1).^{2/}

ii. Karen Bartko

Bartko was terminated for her insubordinate conduct on or about March 6, 2011. Two (2) days prior, both Bartko and Reingold, Respondent’s administrator, were entering the building. Reingold was carrying a number of packages and was unable to open the door. Knowing (and seeing) that Reingold was unable to maneuver the door handle while

^{2/} It is quite clear from Alonso’s testimony that Reingold’s statements regarding monies owed to her were in reference to the accrued, yet unpaid, sick and/or vacation time which Alonso was otherwise entitled to under New York Labor Law. Alonso’s meandering testimony and inability to recall any relevant facts regarding her discussion with Reingold and her receipt of recent paychecks evidences her lack of credibility and works against the Board’s coercive statement theory. (T. 60-63).

carrying a number of packages, she intentionally permitted the door to slam in her supervisor's face. Reingold confronted Bartko about this incident in the presence of Clarisse Nogueira ("Nogueira"), the union shop steward, as well as Sprain Brook's receptionist and Director of Marketing. Reingold asked Bartko why she let the door slam in his face when she could have very easily held the door open for him as a courtesy. Bartko's response was simply (and offensively), "I would hold the door for anyone in the building except you." (T. 148). While shocked at receiving such an insubordinate response, Reingold asked Bartko if she believed that her conduct was acceptable behavior.

In response to Bartko's patently offensive and insubordinate behavior, Reingold sent her home for the day. Perhaps unsurprisingly at this juncture, Bartko responded, inexplicably, that Reingold was the one who should be sent home. (T. 148). Immediately following the March 4, 2011 meeting with Bartko, Reingold also informed Adrian, a Union delegate, that she was not to come in that weekend.

Even though Bartko was instructed not to report to work until further notice, she nonetheless showed up for work on Sunday, March 6, 2011 in direct contravention of her supervisor's orders. Bartko testified that she relied upon the authority of Nogueira, the Union steward, in reporting to work on Sunday, March 6, 2011.

Based upon Bartko's egregiously insubordinate behavior on multiple occasions commencing on March 4, 2011 (*to wit*; (i) slamming the door in her supervisor's face; (ii) her insubordinate and hostile attitude during the meeting with Reingold; and (iii) reporting to work that weekend in direct contravention of Reingold's instructions), Sprain Brook decided to terminate her employment. Contrary to her otherwise baseless allegations, Bartko was not terminated because of any purported union activity nor was she dismissed

in retaliation for her participation in any prior Board proceeding.

iii. Allegations regarding unilateral changes to terms and conditions of employment including the termination of “hot lunches,” “on-site check cashing services,” and “free annual on-site physicals and PPD tests.”

Sprain Brook categorically denies that it has changed any policy and terminated any purported employee benefit regarding “hot lunches” or “free annual on-site physicals or PPD tests.” Respondent continues to offer lunches to all of its employees. When hot lunches are available (i.e., not consumed by the residents), they are made available to the employees. This is, and has always been Sprain Brook’s policy regarding meals. As to physicals and PPD tests, Respondent continues to make said exams available to its employees, at no cost. Any allegation to the contrary is simply false.

With regard to the allegation that Sprain Brook terminated “on-site check cashing services” to employees, such a claim is also false. A check-cashing company previously visited Respondent’s premises once a week (on Fridays) to cash checks for any employee that wished to use its services. The company did not contract with Sprain Brook, nor did Sprain Brook receive any compensation from the company for its services. At point did Sprain Brook ever seek out the company’s services. In mid- to late 2010, the check-cashing company decided to no longer come to Sprain Brook’s facility because not enough employees were utilizing its check-cashing services. From what Sprain Brook was told by the company when they informed Sprain Brook they would no longer be coming to the facility, Sprain Brook’s facility simply was not a profitable undertaking. At no time did Sprain Brook tell the company to cease visiting its facility, nor did Sprain Brook in any way involve itself in the company’s operations. The company simply decided that the

services it was offering to Respondent's employees were not in its best business interests.

Consequently, as Sprain Brook has not altered certain terms and conditions of employment as alleged, Sprain Brook is under no obligation to bargain over same with the Union.

LEGAL ARGUMENT

POINT I

ALONSO'S EMPLOYMENT WITH SPRAIN BROOK ENDED WITHOUT ANY CONSIDERATION GIVEN TO HER PURPORTED UNION ACTIVITY.

- e. Alonso voluntarily resigned her employment with Sprain Brook on November 9, 2010.

As set forth above, on November 9, 2010, when confronted with her blatant failure to perform the most basic tasks with which she was assigned as a housekeeper, and in light of the multiple complaints and prior warnings which Alonso had received (R. Exs. 2, 3), Alonso opted to immediately submit her resignation rather be subject to additional written warnings and discipline, up to and possibly including termination. (R. Ex. 1). Her denials and obfuscations notwithstanding, Alonso has demonstrated that she is not a credible witness and will say whatever she must in order to preserve her job.

- f. Alonso lacks credibility.

GC bases their entire case with regard to Alonso on the testimony of just one individual, Alonso herself. During her testimony, Alonso took a number of affirmative steps to prove her pronounced lack of credibility. Through her incredulous testimony regarding her outright denials regarding conversations with Reingold as well as her inability to recall basic facts concerning paychecks and compensation sources, Alonso has

effectively paralyzed this portion of GC's case against Sprain Brook. Fabrications such as these leave no option but to deem Alonso anything but a credible witness, and to treat her testimony as nothing more than one lie after another.

As to her resignation letter (R. Ex. 1), Alonso vehemently denied the existence of any same, although she admitted that her signature was on the document. When shown the document, Alonso's response was as follows:

Mr. Meyer: Ms. Alonso, if you could take a look at that document [R. Ex. 1], please? Once you've reviewed it please let me know.

Ms. Alonso: Oh. I never saw this, never.

Mr. Meyer: Is that your signature on it?

Ms. Alonso: That's my signature.

(T: 60).

With regard GC's allegation that Reingold threatened Alonso, Alonso further testified in response to a question about what Reingold meant by "the money coming to you":

Mr. Meyer: He said that to you? Isn't it possible that he could have meant the vacation and sick time that you had accrued that was coming to you?

Ms. Alonso: I don't know if that's what it meant.

Mr. Meyer: You don't know?

Ms. Alonso: No.

Mr. Meyer: So you don't know what he meant by saying you had money coming to you?

Ms. Alonso: Oh, yes. He said -- yes, I knew that. That I had the money coming to me that was from the old case.

Mr. Meyer: Well, how'd you know it was from the old case?

Ms. Alonso: It had to be. That was the only money I had coming to me.

Mr. Meyer: You didn't have accrued vacation or sick time?

Ms. Alonso: Yeah, I guess I did. I don't get that either.

Mr. Meyer: And that would have come to you as well, right?

Ms. Alonso: Yeah.

Mr. Meyer: Right. Once your employment ended on November 9, 2010, did you receive any checks?

Ms. Alonso: Yes, I received...

Mr. Meyer: And do you recall what those checks were for?

Ms. Alonso: For the money that I had from the old case.

Mr. Meyer: It came directly from Sprain Brook to you?

Ms. Alonso: Yes.

Mr. Meyer: Okay. Are you sure?

Ms. Alonso: I'm - yeah, I'm sure.

Mr. Meyer: How'd you get the other checks from the previous case?

Ms. Alonso: What other check?

Mr. Meyer: From the previous case.

Ms. Alonso: From the Labor Board. I think it was from the Labor Board.

Mr. Meyer: Those would come directly from the Labor Board?

Ms. Alonso: Yeah.

Mr. Meyer: But you're saying now that a check coming directly from Sprain Brook was for the same case?

Ms. Alonso: I don't know. I'm not sure now.

(T: 60-61). Alonso's flat denial of the existence of a payment from Sprain Brook for

accrued vacation and/or sick time, in the face of fact that said check(s) would come from Sprain Brook and not the Board, demonstrates her complete lack of credibility.

As her testimony shows, Alonso will say anything and do anything. Bias such as this cannot be accepted as credible. Alonso's false testimony on such critical matters casts doubt on the veracity of any other critical matters as to which she testified. "Falsus in uno, falsus in omnibus" applies to the entirety of Alonso's testimony which is substantially contradicted by other undisputed testimony. Forest Dodge, Inc., 145 NLRB 1463, 1469 (1964).

A review of Alonso's testimony shows that she outright lied or otherwise fabricated her story as to 1) her receipt of a check from Sprain Brook for accrued vacation/sick time, 2) her failure to clean the first floor men's bathroom, and 3) her documented resignation from Sprain Brook. Ms. Alonso should not be deemed a credible witness for any number of the reasons stated above, as each element of her testimony was refuted by the credible testimony of others.

g. **Assuming, *arguendo*, that Alonso was terminated, she was terminated for legitimate, non-pretextual reasons.**

Assuming that Alonso was discharged on November 9, 2010, her termination was based upon her abhorrent performance after accumulating no less than four (4) written warnings, not because of her purported union activity. When an employee is cited for an infraction, such as insubordination or substandard work, a written warning record is generated as is standard protocol at Sprain Brook. Alonso was no exception. On September 21, 2009, she received her first in a string of warnings for poor performance. Successive written warnings on October 2009 report the same kinds of generally

uncooperative and substandard performance. The warning records were kept in the ordinary course of business, and provided a detailed account of Alonso's disciplinary record. Accordingly, Alonso's refusal to improve her performance left Sprain Brook with no option but to terminate her employment.

Absent an unlawful motive, an employer cannot be held liable for a violation of §8(a)(3) where it is alleged that an employee has been discriminatorily discharged for union activity. Ogle Protection Serv., 149 NLRB 545 (1967). Wright Line, 251 NLRB 1083 (1980), *supra*, requires the GC to make an initial showing that protected conduct of union supporters was a motivating factor in an employer's decision to take disciplinary action. Embassy Vacation Resorts, 340 NLRB 846, 848 (2003). Should GC meet its burden under Wright Line, the burden then shifts to Sprain Brook to prove that it would have taken the same action even in the absence of the employee's union activity. *See* Manno Electric, 321 NLRB 278, 280 fn. 12 (1996); North Fork Services Joint Venture, 346 NLRB No. 092 (2006).

GC has failed to elicit competent evidence indicating that Alonso's termination was motivated by her union activity. Typically, in attempting to make such an initial showing, GC relies on circumstantial evidence, such as the timing of the employer's action, Collectramatic, 267 NLRB 866 (1983), the pretextual nature of the employer's asserted motivation, Philip Megdal, 267 NLRB 82, inconsistent or disparate treatment of employees, Carpenter's Health & Welfare Fund, 327 NLRB 262 (1998), or shifting justifications for discharge given by the employer to support the inference of unlawful motivation. Here, GC has failed to provide any such evidence of unlawful motivation on the part of Sprain Brook. All that General Counsel has submitted is that Alonso attended a

protest and a few negotiation sessions in the months prior to her termination. Not surprisingly, Alonso could not recall the dates of these events. (T: 45-46). Moreover, Alonso herself offered testimony that Sprain Brook terminated other employees for similar performance issues (e.g. Pat Miller). (T: 50, 57-58). Accordingly, GC has failed to establish a temporal connection between Alonso's purported activity and her termination, any pretext or inconsistent treatment,^{3/} or shifting justification that would constitute a violation of §8(a)(3).

Similarly, GC has failed to demonstrate that the progressive discipline and ultimate discharge of Alonso was motivated by her participation in union activity. Most notably, the record contains no evidence that Sprain Brook made any statement to Alonso incident to her discipline or ultimate discharge which tend to indicate a discriminatory motive. To the contrary, there is ample evidence to demonstrate that Alonso was simply discharged for poor performance only.

Sprain Brook's strict adherence to their policy of progressive discipline in this matter creates a strong inference of a non-discriminatory motive in the discharge of Alonso. Alonso accumulated no less than six (6) written warning spanning September 21, 2009 to November 9, 2010, all for fundamentally similar infractions. Had Alonso been terminated hastily after the first or second infraction, it is more likely inference could be drawn. However, here, Sprain Brook gave Alonso ample warning that her work habits and performance were substandard. Nonetheless, Sprain Brook retained Alonso's services. Only after Alonso's sixth disciplinary notice was she arguably terminated. This is hardly

^{3/} In fact, the Union failed and/or refused to file a charge on behalf of Pat Miller, who was released at or about the same time as Alonso. Accordingly, no argument can be made that Sprain Brook was inconsistent in its discipline and ultimate termination of Alonso.

evidence of a discriminating employer set on eliminating its pro-union workforce. Accordingly, the glaring lack of discriminatory motive behind Alonso's termination requires the dismissal of said allegations in their entirety.

- h. **Assuming, *arguendo*, that GC could show that Alonso's union activity was a motivating factor in her discharge, the overwhelming weight of evidence demonstrates that she would have been terminated even in the absence of the employee's union activity.**

Sprain Brook has demonstrated above that it would have taken the same action even in the absence of the employee's union activity. See Manno Electric, 321 NLRB 278, 280 fn. 12 (1996); North Fork Services Joint Venture, 346 NLRB No. 092 (2006). The Board has consistently held that, where an employer disciplines or discharges an employee for violating company policy or for their work record and not for their union activities, no §8(a)(3) violation will lie. Airborne Freight Co., 343 NLRB No. 072 (2004) (employer established that it would have discharged employee because of seven legitimate warnings pertaining to intimidating and profane behavior in dealing with management, regardless of whether employee had engaged in protected activity); Overnite Transportation Co., 343 NLRB No. 134 (2004) (discharge of six union supporters who had failed to disclose criminal records on their job applications was lawful, since the Board found the employer had sufficiently demonstrated it would have discharged them even in the absence of their protected concerted conduct.).

Assuming, *arguendo*, that Alonso's union activity was a motivating factor in her discharge, it is clear that Alonso would have been discharged even in the absence of such activity. Concerted activity does not insulate an employee from adverse employment action, up to, and including, termination, where the employee engaged in prohibited

behavior. Advanced Services, Inc., 2006 WL 2067932 (2006) (an employee's protected, concerted activity does not insulate them from adhering to standards established by their employer). As discussed at length above, Alonso had received six (6) written warnings over the span of approximately one (1) year, all citing essentially the same or similar infractions for poor performance. Because Sprain Brook would have discharged Alonso even in the absence of her union activity, the §8(a)(3) charge must be dismissed.

POINT II

SPRAIN BROOK HAD NON-DISCRIMINATORY, LEGITIMATE GROUNDS FOR TERMINATING BARTKO.

As set forth above, Bartko was terminated for her insubordinate conduct on or about March 6, 2011. Two (2) days prior, both Bartko and Reingold, Respondent's administrator, were entering the building. Reingold was carrying a number of packages and was unable to open the door. Knowing (and seeing) that Reingold was unable to maneuver the door handle while carrying a number of packages, she intentionally permitted the door to slam in her supervisor's face. Reingold confronted Bartko about this incident in the presence of Clarisse Nogueira ("Nogueira"), the union shop steward, as well as Sprain Brook's receptionist and Director of Marketing. Reingold asked Bartko why she let the door slam in his face when she could have very easily held the door open for him as a courtesy. Bartko's response was simply (and offensively), "I would hold the door for anyone in the building except you." (T. 148). While shocked at receiving such an insubordinate response, Reingold asked Bartko if she believed that her conduct was acceptable behavior.

In response to Bartko's patently offensive and insubordinate behavior, Reingold sent her home for the day. Perhaps unsurprisingly at this juncture, Bartko responded, inexplicably, that Reingold was the one who should be sent home. (T. 148). Immediately following the March 4, 2011 meeting with Bartko, Reingold also informed Adrian, a Union delegate, that she was not to come in that weekend.

Even though Bartko was instructed not to report to work until further notice, she nonetheless showed up for work on Sunday, March 6, 2011 in direct contravention of her supervisor's orders. Bartko testified that she relied upon the authority of Noguera, the Union steward, in reporting to work on Sunday, March 6, 2011.

Based upon Bartko's egregiously insubordinate behavior on multiple occasions commencing on March 4, 2011 (*to wit*; (i) slamming the door in her supervisor's face; (ii) her insubordinate and hostile attitude during the meeting with Reingold; and (iii) reporting to work that weekend in direct contravention of Reingold's instructions), Sprain Brook decided to terminate her employment. Contrary to her otherwise baseless allegations, Bartko was not terminated because of any purported union activity nor was she dismissed in retaliation for her participation in any prior Board proceeding.

a. Wright Line Standard

The United States Supreme Court, in N.L.R.B. v. Transportation Management Corp., 462 U.S. 393, 400-403 (1983), approved the Board's test for determining whether an employer acted with unlawful motive in making an adverse employment action, expressed in Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir.1981), cert. denied, 455 U.S. 989 (1982). Based on this test, Sprain Brook must show that "absent the improper motivation [it] would have acted in the

same manner for wholly legitimate reasons." Transportation Management Corp., 462 U.S. at 401. Stated differently, in order to meet its burden under Wright Line, Sprain Brook must set forth legitimate grounds for such action, establishing that it would have made the same decision regardless of the employee's union activity. However, if the reasons advanced by Sprain Brook for terminating Bartko are pretextual, that is, if the reasons either did not exist or were not in fact relied upon, it follows that Sprain Brook has not met its burden, and the inquiry is logically at an end. Wright Line, 251 NLRB at 1084. As Respondent's case makes clear, Sprain Brook terminated Bartko regardless of her protected activities. Bartko was discharged because she acted in an insubordinate manner toward a supervisor and otherwise failed to follow instructions with regard to her return to work. Therefore, as no other reason existed for the termination of Bartko, Sprain Brook has met its burden under Wright Line, which cannot be shown as pretextual by the GC.

b. **Bartko was terminated for legitimate, non-pretextual reasons, i.e. insubordination.**

In Continental Can Company, Inc., 148 NLRB 640 (1964), the Board found no unfair labor practices where an employee was discharged for insubordination demonstrated by his negative attitude and "insubordination and insolence toward his supervisors." Continental Can, at 641. See also Cotwool Manufacturing Corp. v. Morin, 115 NLRB 1018 (1956) (the Board found that the employer did not engage in unfair labor practices relative to Morin's termination where said discharge was based upon his insubordinate behavior). Similarly, the Board has held that employees may be lawfully discharged under Wright Line due to their insubordinate behavior rather than as a result of union activity. Davey Roofing, Inc., 341 NLRB No. 27, 2004 WL 342964, *1 (2004). The respondent

employer in Davey Roofing had a policy in place which, upon the employees' failure to comply with same, resulted in their discharge for insubordination which was deemed an adequate reason by the Board. Davey Roofing, at *4. Davey Roofing is especially relevant in that said employee's discharge for insubordination was lawful even though there were no comparable situations of similar insubordinate acts resulting in termination of other employees. Davey Roofing, at *4.

Sprain Brook has demonstrated that Bartko was terminated for her admitted insubordinate conduct, and for no other reason. (T:143, 148). By way of example, Bartko admitted that she was not told to return to work (T: 143), and that she verbally accosted Reingold, her supervisor (T: 148). In no way was Bartko singled out or otherwise discriminated against because of her union activity. It was insubordinate activity, and nothing more, which caused her to be discharged. Accordingly, as has been Sprain Brook's past practice, discharge for insubordination constitutes a legitimate, non-pretextual basis for discharge, thus warranting the dismissal of the instant allegations.

POINT III

THE SECTION 8(A)(1) VIOLATIONS ASSERTED BY GENERAL COUNSEL ARE WITHOUT MERIT.

Sprain Brook categorically denies that it has changed any policy and terminated any purported employee benefit regarding "hot lunches" or "free annual on-site physicals or PPD tests." Respondent continues to offer lunches to all of its employees. When hot lunches are available (i.e., not consumed by the residents), they are made available to the employees. This is, and has always been Sprain Brook's policy regarding meals. As to physicals and PPD tests, Respondent continues to make said exams available to its

employees, at no cost. Any allegation to the contrary is simply false.

With regard to the allegation that Sprain Brook terminated “on-site check cashing services” to employees, such a claim is also false. A check-cashing company previously visited Respondent’s premises once a week (on Fridays) to cash checks for any employee that wished to use its services. The company did not contract with Sprain Brook, nor did Sprain Brook receive any compensation from the company for its services. At point did Sprain Brook ever seek out the company’s services. In mid- to late 2010, the check-cashing company decided to no longer come to Sprain Brook’s facility because not enough employees were utilizing its check-cashing services. From what Sprain Brook was told by the company when they informed Sprain Brook they would no longer be coming to the facility, Sprain Brook’s facility simply was not a profitable undertaking. At no time did Sprain Brook tell the company to cease visiting its facility, nor did Sprain Brook in any way involve itself in the company’s operations. The company simply decided that the services it was offering to Respondent’s employees were not in its best business interests.

Consequently, as Sprain Brook has not altered certain terms and conditions of employment as alleged, Sprain Brook is under no obligation to bargain over same with the Union.

a. Sprain Brook continues to provide its employees with free physicals and PPD’s.

Contrary to the assertions made by General Counsel and the Union, Sprain Brook has continually offered its employees free physicals or PPD’s. (Mushell, T: 171-172). Notably, the witnesses presented by General Counsel could confirm nor deny that the offering of said physicals or PPD’s ever ceased. Rather, the entirety of General Counsel’s position hinges on an substantiated belief of said witnesses, who admittedly did not

research or seek to investigate the veracity of their claims. To wit, based upon testimony of General Counsel's witnesses, an employee by the name of Jessie would normally perform the physicals and/or PPD's. However, when asked if anyone spoke with Jessie about whether or not Sprain Brook continued to offer the free on-site physicals, witness Clarisse Nogueira responded: "I don't know. I didn't ask." (T: 121). Similarly, General Counsel witness Karen Bartko testified as follows:

Mr. Meyer: Okay. Since that memo was distributed in February of 2011 that your received in your paycheck, did you ever ask her if she would perform that service for you?

Ms. Bartko: No. Because the memo said...

Mr. Meyer: But you didn't ask her?

Ms. Bartko: No.

Mr. Meyer: Are you aware of any other employees who either got this service from Jessie or inquired about it?

Ms. Bartko: No.

Mr. Meyer: Okay. Did you speak with anybody else, other than Clarisse, about the issue?

Ms. Bartko: No.

(T:150). Accordingly, given Sprain Brook's clear position that the free on-site PPD's and physicals have never ceased, coupled with General Counsel's witnesses' inability to confirm or deny same, it is evident Sprain Brook has not changed any such term or condition of employment as alleged.

- b. Sprain Brook continues to abide by its past practice of providing its employees with hot lunches when available.

Similarly, Sprain Brook continues to provide its employees with free meals for breakfast, lunch and dinner – including those of the hot variety. According the Shlomo Mushell, Sprain Brook’s Administrator, such meals have always been provided to its employees every day and for free. (T: 172). Further supporting Sprain Brook’s position that no change has been made to the meal policy is Nogueira’s statements that, as a matter of practice: “We didn’t [get a] special lunch. Whatever they cooked for the residents is was [sic] for the whole employees.” (T: 111). Moreover, when questioned by Judge Landow, Nogueira astoundingly asserted that she had no idea what Sprain Brook’s meal policy was because she never had a discussion with the dietary staff about their procedures. (T: 111).

c. The check cashing vendor and its related services are not a mandatory subject of bargaining.

As set forth above, a check-cashing company previously visited Respondent’s premises once a week (on Fridays) to cash checks for any employee that wished to use its services. The company did not contract with Sprain Brook, nor did Sprain Brook receive any compensation from the company for its services. At point did Sprain Brook ever seek out the company’s services. In mid- to late 2010, the check-cashing company decided to no longer come to Sprain Brook’s facility because not enough employees were utilizing its check-cashing services. From what Sprain Brook was told by the company when they informed Sprain Brook they would no longer be coming to the facility, Sprain Brook’s facility simply was not a profitable undertaking. At no time did Sprain Brook tell the company to cease visiting its facility, nor did Sprain Brook in any way involve itself in the company’s operations. The company simply decided that the services it was offering to

Respondent's employees were not in its best business interests.

- d. Sprain Brook repeatedly sought to negotiate the health insurance issue with the Union, who refused to do so.

As Gregory Speller, the Union's vice president testified, the Union has not sought to negotiate with Sprain Brook since at least June 2011. (T: 34). Moreover, Speller admitted that Sprain Brook had contacted him, via letter, regarding a number of issues including health insurance and the closure of the housekeeping department. (T:34-35). Admittedly, the Union and Sprain Brook amicably resolved the housekeeping department subcontracting as well as the transfer of Clarisse Nogueira to another department at her current rate of pay. (T: 35). Such good faith negotiation and outreach to the Union is hardly indicative of an employer who is alleged to have unilaterally implemented a health insurance policy that had previously been raised with the Union and to which the Union had the full ability to negotiate. That the Union failed to do so does not create an unfair labor practice on behalf of Sprain Brook. Consequently, it is respectfully submitted that the instant 8(a)(5) allegation be dismissed in its entirety.

CONCLUSION

WHEREFORE, the Respondent respectfully requests that the ALJ's Decision be overturned and that Respondent be awarded such other relief as the Board deems just and proper.

Dated: Woodbury, New York
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