UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMAZON.COM SERVICES, LLC	
Respondent	
and	**Case Nos. 29-CA-277198** **29-CA-278982**
CONNOR VINCENT SPENCE, an Individual	
and	
NATALIE MONARREZ, an Individual	**Case No. 29-CA-277598**
and	
DERRICK PALMER, an Individual	**Case No. 29-CA-278701** **Case Nos. 29-CA-285445** **29-CA-286272**
and	
AMAZON LABOR UNION	

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN RESPONSE TO RESPONDENT'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

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STATEMENT OF THE CASE

In the spring of 2021, the Amazon Labor Union, "the ALU" or "Union," started an organizing campaign seeking to represent employees working for Amazon.com Services LLC, "Respondent" or "Amazon", at two Amazon warehouses in Staten Island, New York called "JFK8" and "DYY6." Respondent then embarked upon its own campaign aimed at stopping the nascent organizing drive by unlawfully threatening and interrogating employees, confiscating their pro-Union literature, soliciting their grievances, disparaging the Union's organizers, surveilling employees' Union activities and giving employees the impression that their activities in support of the Union were under surveillance. Respondent also sent employees that supported the Union home early, subjected them to closer supervision and altered their work schedules to discourage their activities in support of the Union.

In her November 21, 2023, Decision, Judge Lauren Esposito found that by the above conduct, Respondent violated the Act. (See ALJD pg. 75-76)[1] Respondent excepts to some of the ALJ's findings.[2] Specifically, Respondent excepts to the ALJ's findings that: Respondent's security guards are agents under Section 2(13) of the Act (Resp. Brf. Pgs. 14-23); the ALJ's failure to find that Respondent properly cured the unfair labor practices committed by the guards (Resp. Brf. Pgs.23-27); and the ALJ's imposition of evidentiary sanctions as a result of Respondent's refusal to provide

[1] Citations to Respondent's Brief in Support of Cross Exceptions will be referred to as "Resp. Brf. Pg. #." References to the ALJ's decision will appear as "ALJD pg. #." References to the hearing transcript will appear as "TR. Pg. #." Exhibits from the hearing will be referenced as either "GC- [exhibit #]" or "R-[exhibit #].

[2] Respondent's Cross-exceptions and Brief in Support are attached hereto as Attachment A.

documents that it was ordered to produce pursuant to a subpoena. (Resp. Brf. Pgs. 27-34).[3]

As will be discussed, with respect to Respondent's security guards and their unfair labor practices, Respondent raises nothing in its Cross-Exceptions that would require overturning the ALJ's well-reasoned and supported conclusion that the security guards were Respondent's agents within the meaning of Section 2(13) of the Act. Rather, Respondent ignores some facts, overstates others, and misapprehends certain legal frameworks. With respect to the sanctions imposed by the ALJ, the issue is rendered moot by the fact that the ALJ based her decision regarding the June 12th confiscations of Union literature on the record evidence and not on conclusions drawn from the evidentiary sanctions. With respect to Respondent's claim that it could not present a defense to the June 12th allegations, the ALJ fully considered the defense Respondent set forth in evidentiary proffers. In any event, the ALJ's evidentiary sanctions were properly levied pursuant well-established Board law.

Accordingly, CGC, respectfully requests that the Board reject Respondent's cross exceptions and enforce ALJ Esposito's Decision and Order.[4]

PROCEDURAL HISTORY

[3] Respondent did not except to the ALJ's findings that: the ALU is a labor organization under 2(5) of the Act; on May 4, 2021, Respondent by agent Bradley Moss interrogated employees regarding their Union activities, threatened employees that support for the Union was futile, disparaged the Union by appealing to racial prejudice and stereotyping, and solicited employee grievances; early September 2021, Respondent by Area Manager Wessum Khalil interrogated employees about their Union support; in late October 2021, Respondent dismissed employee Daequan Smith from his work shift earl in retaliation for Union support and protected, concerted activities; late October 2021, Respondent subjected Smith to closer supervision; and on October 31, 2021, Respondent by agent David Acosta threatened employees that if the Union came to the facility, strikes were inevitable and coercively interrogated employees.

[4] On January 26, 2024, CGC filed limited exceptions to the ALJ's failure to order a notice posting and distribution of the notice to all managerial personnel. Thus, CGC does not request that the Board uphold the ALJ's decision not to order these remedies. Rather, CGC stands on the limited exceptions already submitted on those two distinct issues.

The Regional Director for Region 29 issued a Consolidated Complaint on January 27, 2022, and an amended Consolidated Complaint on February 18, 2022, alleging that Respondent engaged in the following violations of Section 8(a)(1) of the Act: interrogating employees about their Union activities and sympathies; threatening employees that supporting the Union was futile; soliciting grievances from employees with a promise to remedy them; surveillance of employees Union activities and giving the impression of surveillance; prohibition against the distribution of Union literature on non-work time in non-work areas; confiscation of Union literature; and unlawfully disparaging the Union. The Amended Consolidated Complaint further alleged the following violations of Section 8(a)(3) of the Act: dismissing employee Daequan Smith early from his shift, changing Smith's work assignments, subjecting Smith to closer supervision, and then finally discharging him, all in retaliation for his activities in support of the Union.

The case was tried before Administrative Law Judge Lauren Esposito on June 6, 7, 8, 9, 10, and 16, 2022; August 8 and 11, 2022; November 7 and 8, 2022; January 31, 2023; and March 20, 21, 22, and 23, 2023.

Judge Esposito issued her Decision and Recommended Order on the Amended Consolidated Complaint on November 21, 2023, properly finding merit to the majority of allegations. However, as noted above, Respondent has filed cross exceptions to four specific areas of the Decision: the agency status of the security guards, whether Respondent cured the guards' violations under *Passavant,*[5] whether the ALJ had the

[5] *Passavant Memorial Hospital*, 237 NLRB 138 (1987)

authority to impose evidentiary sanctions, and whether imposing the sanctions was appropriate.

SUMMARY OF RELEVANT FACTS[6]

1. Metro One's Services to Amazon Establishes That Security Guards are Placed in a Position of Authority at JKF8.

ALJ Esposito found that according to Respondent's Master Contract and Security Guard Handbook with security company Metro One, the primary functions of Metro Security guards are to "ensure authorized persons who are allowed entry are screened," and "Keep unauthorized people from entering the property." The ALJ also found that Respondent places at least four guards at the security desk inside JFK8 who monitor computers, check employees' bags, and respond to lost and found questions from employees. (ALJD pg. 6, lines 25-32) In addition, non-employee visitors must approach a glass window where the guards determine whether to permit entry or not. At least one employee testified to witnessing guards deny access to individuals. (ALJD pg. 6, lines 32-36) Finally, the ALJ found that the guards checked employees' non-transparent bags as the left the facility. (ALDJ pg. 6, lines 42-43)

In addition to these findings by the ALJ, testimony from Amazon's Loss Prevention Manager Joe Troy establishes that as part of their duties, the security guards perform security roves throughout the facility and perimeter of the outside of the facility on each shift. (TR. 1079-1080) Troy also admitted that the guards regularly check employees' bags as they left the facility to ensure they were not in possession of unauthorized equipment. (TR. 1077)

[6] A full recitation of all facts can be found in Counsel for the General Counsels' Brief to the Administrative Law Judge. For the purposes of these exceptions, CGC has limited the facts to those pertinent to its Exceptions regarding the appropriate remedies.

Finally, record evidence established that Respondent expected its guards to engage in the following additional duties according to the Handbook for Security Officers Assigned to Amazon Facilities:

> Metro One Security Officers will utilize metal detectors, x-ray equipment, scanning wands and other equipment deployed by Amazon, and conduct inspection of visitor and Amazon employee clothing, bags, packages, and equipment for stolen Amazon inventory. Metro One Security Officers will conduct visual Personnel searches and observe Amazon associates, visitors, and vendors to report suspicious conduct, activity, or conditions.
>
> GC Exhibit 46, pg. 7

2. Security Guard Hill Confiscated Employee Spence's Union Literature and Respondent Did Not Repudiate Hill's Conduct to Anyone Other Than Spence.

The ALJ found that on May 16, 2021, at about 2:30 pm, Spence went to the first-floor breakroom to distribute Union fliers. Once in the breakroom, Spence handed fliers to employees and also placed fliers on the breakroom tables. There were about twenty employees in the breakroom when security guard John Hill entered the area. (ALJD pg. 14, lines 35-46) Hill approached Spence and informed Spence that Spence needed permission to distribute the fliers. Spence objected and claimed he did not need permission and that Hill could call his own boss or HR to confirm that Spence did not need permission. Hill then took a photograph of Spence's identification badge, and removed the fliers from the tables. Spence asked Hill "why are you even doing this? You know you don't work for Amazon." Hill replied, "I'm doing my job," to which Spence replied that it was not Hill's job to break the law. Hill refused to return the literature he had taken from the tables. (ALJD pg. 15 lines 4-23)

The ALJ found that two to three weeks after this incident with Hill, Human Resources Manager Tyler Grabowski called Spence to meet with him in the main office area at JFK8. During this meeting, Grabowski apologized to Spence for Hill's actions and then informed Spence that Hill was not acting on behalf of Amazon or at the direction of Amazon when he confiscated Spence's materials. Grabowski told Spence that Hill had been coached regarding Amazon's policy involving the distribution of Union literature and Grabowski affirmed that Spence had the right to distribute Union literature in the breakroom. (ALJD pg. 15 lines 25-38) Aside from this meeting with Spence, Respondent did not conduct any meetings with any other employees to discuss Hill's unlawful conduct, nor did Respondent send any emails to employees, or make any posts on the Voice of Associates Board ("VOA") regarding Hill's unlawful conduct. (ALJD pg. 16 lines 19-31)

The ALJ also found that on May 24, 2021, security guard Elena Koplevich stood at a small fence that separates the parking lot from the JFK8 facility, across the street from where the Union was holding a cookout and held her cellphone up in the direction of the employees at the cookout for about two to five minutes. (ALJD pg. 16, lines 41-44) Record evidence established that at the time that Koplevich unlawfully surveilled employees engaged in Union activities at the ALU tent, there were at least 3-4 employees present in addition to 2-3 Union organizers. (Tr. 548-549) It is unclear in the record whether there were other employees in the parking lot at the time. When Amazon Loss Prevention Manager Joe Troy heard about Koplevich's conduct, he immediately sought her removal from JFK8. Troy informed Respondent's agent and Metro One contact Kadee Bertone that Koplevich was acting outside of her authority by

taking videos or photographs of Union activity. (ALDJ pg. 17, lines 1-9) Troy also asked that Metro One provide training to security guards on labor law. (Id at lines 11-14)

The ALJ correctly found that Respondent did not meet with any of the employees who were subjected to Koplevich's unlawful conduct nor did Respondent take any action to inform those employees that Kopelevich's conduct was inappropriate or to affirm the employees' rights to engage in Union activities without being subject to Respondent's unlawful surveillance. (ALJD pg. 17 Lines 18-25)

3. Respondent Did Not Initiate Any VOA Post Reassuring Employees of Their Rights Under the Act.

In its Brief in Support of Cross Exceptions, Amazon argues that the following posts were uploaded to its "Voice of the Associates" or "VOA" Board in an effort to publicize to employees their rights to engage in the distribution of union literature on non-work time and in non-work areas, as a result of the guards' unlawful conduct. (Resp. Brf. Pg 7-8) However, Respondent did not cite the full post and conveniently left out employees' posts that precipitated the managerial response. A fuller recounting of the posts appears below:

October 11, 2021, VOA Post (in relevant part)

Employee: Still waiting on one of you to come explain why security is still violating the rights of amazon workers to unionize, especially because this time they crossed the line big time…

Amazon Response: Connor, we understand you are referring to the actions of a Metro One security guard who asked last week if you were authorized to engage associates in the parking lot. We have discussed this incident privately with you, but we think it is important for everyone to know where we stand on this. This guard's actions were a mistake, and we are taking measures to ensure it does not happen again. We do not believe union representation is in the best interests of you and your co-workers, but we respect each employee's right to make that decision for themselves. You and everyone else here at JFK8 should know, however, that Amazon's solicitation and distribution policy does not interfere with your right to distribute literature and flyers in non-working areas of the facility (such as the parking lot) during non-working time. No one from Amazon will interfere with you if you choose to do so…

July 15, 2021, VOA Post (in relevant part)

Employee: Anna and all of HR: please google the words “Solicitation” and “policy”, as well as the Bill of Rights of this country and the laws that govern us. There appears to be a disconnect in your collective understanding of human rights and dignity….

Amazon Response: Hi Dana. As previously discussed, we support employees’ right to solicit in accordance with Amazon policy. Additional information about this can be found in the Amazon.com Owner’s Manual within Inside Amazon. You can access this policy on AtoZ through the resources tab or on computer kiosks on site…

February 4, 2022, VOA Post (in relevant part)

Employee: So the "Union" is allowed to campaign on lunch break in the building in both break rooms? I might as well eat my meal out in the cold. What's going on Amazon?

Amazon Response: Hi Edward. Amazon’s solicitation and distribution policy does not interfere with an employee’s right to distribute literature and flyers in non-working areas of the facility (such as the break room) during non-working time. Similarly, you have the right to not accept solicitation from anyone for any reason and you should feel free to say “No, thanks!”…

R- Exh. 6

As can be seen, none of Amazon’s posts refer to the unlawful confiscation of Spence’s union literature in the employee breakroom on May 16, 2021, or to Koplevich’s unlawful surveillance of employees at the ALU cookout on May 24, 2021.

4. <u>The Record Evidence Established that Respondent Confiscated Union Literature from Employees on June 12, and Prohibited Employees From Distributing Union Literature.</u>

On June 12, 2021, employee Derrick Palmer brought about fifty pro-Union fliers to the third-floor breakroom and distributed them to employees by placing the fliers on the breakroom tables or by handing fliers to directly to employees. (ALJD pg. 17, lines 33, 36-37) However, while he was distributing the literature, Senior HR Associate Luke Wojahn entered the breakroom and removed the fliers from at least four tables where employees were sitting. (ALJD pg. 17, lines 40-43) Palmer had to place his hands on the fliers in Wojahn’s hands in order to get the fliers back. (ALJD pg. 18, lines 8-9)

Palmer did not immediately redistribute the fliers in the breakroom, although he believed that the fliers were eventually redistributed to employees. (Tr. 245)

Also on June 12, 2021, employee Spence decided to distribute pro-Union literature in the third-floor breakroom. (ALJD pg. 19, line 20) Spence entered the breakroom at about 12:30 pm and proceeded to distribute the literature by placing them on breakroom tables and by handing the literature to employees that requested it. (ALJD pg. 19, lines 23-25) Operations Manager Ariana Ovadia then entered the breakroom and proceeded to remove the pro-Union literature from the breakroom tables that Spence had just put down. (ALJD pg. 19, lines 26-27) Ovadia then rolled up the confiscated fliers and placed them in her vest pocket. (ALJD pg. 19, line 40) Although Spence requested to have the fliers returned to him, Ovadia refused. (ALJD pg. 19, line 46) Once Spence informed Ovadia that the Union had already filed charges over "exactly this type of behavior," Ovadia returned the fliers to Spence. (ALJD pg. 20, lines 1-2) There was no evidence presented that Spence re-distributed the confiscated fliers.

5. ALJ Esposito Imposed Evidentiary Sanctions on Respondent Because of Its Contumacious Refusal to Provide Key Documents.

Counsel for the General Counsel subpoenaed documents from Respondent regarding the confiscation of Union literature at JFK8. Petitions to revoke were filed but the ALJ did not rule on these motions because the parties were able to agree on the majority of the production. (ALJD pg. 5 lines 4-7) However, Respondent refused to produce certain allegedly privileged documents which prompted the Union to file a motion to compel, and which ultimately resulted in the ALJ's appointing of a Special Master. The Special Master rejected Respondent's privilege claim with respect to certain documents and required Respondent to turn over two labor reports concerning the

“status of ongoing ULP charges,” and the “investigation into…the confiscation of Union literature.” (*Id* lines 8-17, 30-33) Respondent filed a special appeal to the Board, and the Board summarily rejected the appeal and affirmed the Special Master’s Order. (*Id* lines 24-25) ALJ Esposito then adopted the Special Master’s Order. (*Id*, line 19) Notwithstanding the Special Master’s Order, the Board’s affirmation of the Order, and ALJ Esposito’s Order adopting the Special Master’s decision, Respondent continued to refuse to provide the two labor reports. (Id. Lines 30-33) As a result, Counsel for the General Counsel moved for evidentiary sanctions and the ALJ granted that request.

Specifically, the ALJ correctly precluded Respondent from presenting testimony regarding the alleged confiscation of Union literature at the Staten Island facility and from presenting any documentary evidence that had not already been provided to the Counsel for the General Counsel. In addition, the ALJ properly drew an adverse inference that had Respondent provided the two labor reports in question, they would not have supported their defense and rather would have “tended to show that Amazon unlawfully confiscated Union literature from Palmer and Spence on June 12, 2021, and prohibited them from distributing union literature in the breakrooms that day.” (ALJD pg. 5 lines 36-45.) In reaching this conclusion, the ALJ explained in her decision, read into the trial record, that the sanctions imposed were tailored to address the specific fact issues to which the withheld documents would have spoken. In this respect, she stated that: “There is no dispute that documents 75 and 77, which apparently are labor relations reports, address circumstances relevant to the allegations in this case, namely "allegations of confiscation of union literature related to charges 29-CA-278701 and 29-CA-278982."” (TR. 768)

6. Amazon Made Three Proffers of Evidence Regarding Testimony that it Would Have Presented But For the Evidentiary Sanctions.

In light of the ALJ's sanctions, Respondent requested and was granted the ability to read into the record proffers of evidence regarding the testimony of certain witnesses who would have testified to Respondent's defense to the June 12th confiscations—that the HR personnel did not confiscate Union materials on June 12, but rather, were engaged in housekeeping measures. In this regard, Respondent represented that certain witnesses would have testified that Respondent implemented enhanced cleaning measures as a result of the COVID-19 pandemic and those measures included increased "GEMBA" walks wherein human resource personnel would clean breakrooms to ensure all discarded papers and materials were thrown away. Two witnesses would have testified that housekeeping was historically a part of human resource assistants' duties. (TR. 812-813, 873, 891-893, 1213)

Employees Connor Spence and Derrick Palmer credibly testified, and the ALJ found, that managers never cleaned breakrooms. (ALJD pg. 20, lines 23-25) In addition, employee Natalie Monarrez credibly testified that she had never seen a manager or HR personnel cleaning a breakroom. (TR. 494)

ARGUMENT

1. THE ALJ DID NOT ERR IN FINDING THAT AMAZON'S SECURITY GUARDS ARE AGENTS OF RESPONDENT BECAUSE THE OVERWHELMING RECORD EVIDENCE ESTABLISHES THAT THE GUARDS POSSESS APPARENT AUTHORITY.

Respondent claims that the ALJ erred in finding that Amazon's security guards John Hill and Elena Koplevich were agents of the employer under Section 2(13) of the Act. Specifically, Respondent claims that the violations fell outside of the guards' job

duties and that no reasonable employee, including employee and Charging Party Connor Spence, could have concluded that the guards were acting on behalf of Respondent when they engaged in the alleged unlawful conduct. In asserting this exception, Respondent boldly ignores relevant case law and the plain language of the Act and instead relies on one inapposite case to claim that Respondent's security guards are not agents under Section 2(13) of the Act. However, as will be shown below, Respondent's exception is belied by the law and record evidence. The evidence, most notably Respondent's own Security Guard Handbook, plainly establishes that Respondent granted the security guards full authority to regulate ingress and egress at the facility, to patrol the facility to ensure compliance with security policies, in addition to granting the authority to search Amazon employees and confiscate materials from employees, if necessary, such that employees would reasonably believe the guards acting on behalf of Respondent when they engage in the unlawful confiscation and surveillance found by the ALJ.

A. The ALJ Did Not Ignore Any Governing Principles and Properly Concluded That Respondent Cloaked Its Security Guards With Apparent Authority Thereby Making Them Agents Under Section 2(13) Of The Act.

Respondent makes a sweeping erroneous claim in its Cross-Exceptions that the ALJ ignored governing principles and formulated her own new per se legal principle in concluding that the guards are agents under the Act. (Resp. Brf. Pg. 19) Nothing could be further from the truth. In concluding that the Metro One security guards are agents of Respondent, the ALJ carefully analyzed the Act and current Board law. In that regard, ALJ Esposito correctly reasoned that current Board law looks to common law agency principles in order to determine agency status. The ALJ explained that under Board law, an individual may be an agent where they have actual or apparent authority to act on

behalf of the party in question, *Cornell Forge Co.,* 339 NLRB 733 (2003). With respect to apparent authority, such a finding turns on whether under all the circumstances employees would reasonably believe that the agent was reflecting company policy and/or speaking and acting for management. *Pain Relief Centers, P.A*. 371 NLRB No. 70 (2022) quoting *Pan-Oston Co*., 336 NLRB 305, 305-307 (2001); *Kauai Veterans Express Co*., 369 NLRB No. 59 at pg. 9 fn. 4 (2020). The ALJ also noted that the language of Section 2(13) of the National Labor Relations Act provides that, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." ALJ Esposito then discussed how the Board has repeatedly found that security guards are agents of an employer where the guards are placed in a position to stop individuals from entering and exiting a facility and where they can confiscate materials ("security guard cases". *Purdue Farms,* 323 NLRB 345, 351 (1997); *T-Mobile USA, Inc*., 369 NLRB No. 50 at pgs. 19-20 (2020); *Harrison Steel Castings Company*, 262 NLRB 450, 455 and at fn. 6 (1982). Thus, the ALJ correctly analyzed the statute and relevant Board law to determine the appropriate analytical framework to determine the agency status of the security guards: whether, under all the circumstances, employees would reasonably believe that the guards were reflecting company policy and/or speaking on behalf of management—the fact that specific acts may not have been explicitly authorized is not controlling. To escape this standard, Respondent twists the ALJ's cogent analysis.

Respondent claims the ALJ relied on *Pain Relief Centers, P.A*. 371 NLRB No. 70 (2022) to conclude that "Metro One had the authority to effect Amazon's policy and speak and act on behalf of Amazon." (Resp. Brf. Pg. 19) This is a complete

mischaracterization of the ALJ's analysis. The ALJ did not rely on *Pain Relief Centers* alone, but rather, she relied on all of the above case law, including the cases where the Board found security guards to be agents. (ALJD pg. 50) The ALJ then analyzed record evidence to correctly conclude that: the guards were stationed at the entrances to and exits from the JFK8 facility, that they monitor all individuals as they enter and exit the facility, that they detain non-employees at the front desk window to speak with them before allowing or denying them entrance, and that they routinely search employee bags and belongings. Id. Only after considering these facts and the above cited case law, does the ALJ conclude that "Under these circumstances employees at JFK8 would reasonably believe the Metro One security personnel were reflecting company policy and speaking and acting on behalf of Amazon…" (ALJD pg. 51) The ALJ considered all relevant case law and record evidence to draw her conclusion and she did not create her own *per se* standard. Respondent's argument to this effect should be rejected.

Moreover, if anyone created its own standard based on an inapposite case, it was Respondent. Respondent heavily relied on *D.G. Real Estate, Inc. d/b/a Dick Gore Real Estate,* 312 NLRB 999 (1993) to assert that there are two requirements under Board law to establish apparent authority: 1) there must be a manifestation by the principal to a third party that, 2) supplies a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question. Respondent asserts that CGC failed to establish either prong in this case. However, not only is *DG Real Estate* completely inapposite, but Respondent is also incorrect that the CGC failed to establish the manifestation prong. First, the *D.G. Real* Estate case involved the question of whether a real estate agent was an agent of the employer,

where the real estate agent attended just one union meeting and was introduced to the union members as the employer's real estate agent. The Board rejected the claim of apparent authority finding insufficient evidence of the employer's manifestations of the agent's authority from the employer to the employees. These facts are nothing like the facts of the instant case or any of the guard cases since Amazon's manifestation to its employees is clearly established by its placement of the guards as enforcers of Respondent's access policies with authority to remove and admit individuals at will, and arbiters of all questions of safety in the workplace. Second as expounded upon below, there is overwhelming evidence in the record to conclude that the guards were acting within the scope of their authority when they engaged in the unlawful conduct.

B. Overwhelming Evidence Established that the Guards Acted Within the Scope of Their Duties When They Engaged in the Unlawful Conduct Found by the ALJ.

In addition to mischaracterizing the ALJ's analysis of the governing principles, Respondent also claims that the security guard cases cited by the ALJ (*Purdue Farms,* 323 NLRB 345, 351 (1997); *T-Mobile USA, Inc*., 369 NLRB No. 50 at pgs. 19-20 (2020); *Harrison Steel Castings Company*, 262 NLRB 450, 455 and at fn. 6 (1982)) are factually distinct from the instant case because in all the cited cases, the guards committed unlawful acts while exercising their principal duty of controlling access to the employer's property and facility. (Resp. Brf. Pg. 21) Respondent emphatically claims that there was "zero record evidence that Metro One guards had any authority to impede an associate's ability to distribute literature, to confiscate literature, to tidy up break rooms or surveil individual's off property activities." (Resp. Brf. Pg 22) Respondent's assertion is simply untrue since it ignores record evidence and the plain language of the statute itself. With respect to whether an individual can be considered agent of the principle

under the NLRA, Section 2(13) provides that "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." The statue is clear that the principle does not have to specifically authorize the conduct in question for an agency relationship to be found. Respondent would like to ignore this statutory mandate and create its own standard for agency that requires a showing that the principle authorized the specific conduct in question before a finding of agency can be made. That is simply not the law. The CGC does not have to show that Respondent specifically authorized the confiscation or surveillance that resulted in 8(a)(1) findings in order to establish that the guards were agents of Respondent and any argument to the contrary should be rejected.

Second, there is a wealth of evidence in the record concerning the guards' authority to "impede" associates' conduct, to confiscate materials, and surveil employees. In addition to the facts found by the ALJ as noted above showing the guards' authority (the guards were stationed at the entrances to and exits from the JFK8 facility, that they monitor all individuals as they enter and exit the facility, that they detain non-employees at the front desk window to speak with them before allowing or denying them entrance, and that they routinely search employee bags and belongings), Amazon's Security Handbook for Officers Assigned to Amazon Facilities (GC Exhibit 46) contains irrefutable proof that Respondent authorized its guards to engage in the precise conduct for which violations were found.

According to Amazon's Security Handbook for Officers Assigned to Amazon Facilities, Respondent granted and in fact expected its guards to engage in duties similar to the conduct that the ALJ found to be unlawful:

> Metro One Security Officers will utilize metal detectors, x-ray equipment, scanning wands and other equipment deployed by Amazon, and conduct inspection of visitor and Amazon employee clothing, bags, packages, and equipment for stolen Amazon inventory. Metro One Security Officers will conduct visual Personnel searches and observe Amazon associates, visitors, and vendors to report suspicious conduct, activity, or conditions.
> GC Exhibit 46, pg. 7

According to this Handbook, Amazon required that security guards perform searches of employees and their clothing and belongings for stolen Amazon inventory and observe employees and others who may be engaged in suspicious conduct, activity, or conditions. This is precisely the category of conduct in which guard Hill and Koplevich engaged that the ALJ found to be unlawful. Hill observed and then inspected employee Spence and his belongings (Union literature) and then observed/surveilled his Union activity, while Koplevich observed/surveilled employee and non-employee Union activities. In addition to this documentary evidence, testimony from Amazon Loss Prevention Manager Joe Troy established that the guards performed security roves throughout the facility and perimeter of the outside of the facility on each shift which would encompass Koplevich's surveillance of employees engaged in Union activities at the bus stop in front of the facility. (TR. 1079-1080) Troy also admitted that the guards regularly check employees' bags as they left the facility to ensure they were not in possession of unauthorized equipment. (TR. 1077) Thus, between the record evidence and testimonial evidence, it is clear that Respondent granted its security guards with the authority to engage in the precise conduct for which violations were found: unlawful surveillance (Handbook requires observation of suspicious conduct) and unlawful

confiscation of employee's union property[7] (Handbook gives guards the right to inspect employees' clothing and belongings for stolen inventory; Troy testified to right to search employees' belongings for unauthorized devices.) Thus, while the CGC does not have to show that the specific illegal acts were authorized by Respondent, the record evidence establishes that Respondent granted its guard with the authority to engage in surveillance, searches, and confiscation. Respondent cannot in good faith argue that there is insufficient evidence upon which to conclude that employees could believe that the guards acted on behalf of Amazon. Thus, any argument that the security guards acted outside the scope of employment in violating the NLRA, must be rejected.

Finally, Respondent also argues that agency status cannot be found because employee Connor Spence allegedly testified that he did not believe that the guards had authority to speak for Respondent or act on its behalf. With respect to employee Spence's supposed admission that he knew guard Hill was not acting at Amazon's behest and knew that the guard did not have authority to engage in the unlawful conduct, the ALJ correctly found that under Board law, the CGC only must show that under all the relevant circumstances employees would believe that the guard was acting for Respondent. Thus, the fact that Spence stated that the guard "did not work for Amazon" is of no moment since the CGC does not have to show either that the guard worked for Amazon or the specific beliefs of individual workers. (ALJD pg. 53) In any event, Respondent failed to cite the full exchange and left out the fact that guard Hill responded, "I'm doing my job." (ALJD pg. 15) Regardless of what Spence thought in

[7] Clearly, if stolen property was found or if unauthorized devices were secreted inside employees' bags, such items would be confiscated.

that moment, guard Hill made it clear that he was acting within the scope of his employment.

With respect to Respondent's reliance on Spence's comment to Hill that confiscating Union literature was "not his job," the ALJ correctly found that Respondent again failed to cite the entire statement. Spence actually told the guard that "it's not his job to break the law." Id. Thus, the ALJ correctly rejected Respondent's contention that the CGC cannot establish apparent authority because Spence did not believe that the guard had such authority.

Thus, for all the above reasons, Respondent has failed to state any grounds upon which to overturn the ALJ's determination that Respondent's security guards are agents under Section 2(13) of the Act, and her decision in this regard should be enforced.

2. AMAZON DID NOT CURE ITS VIOLATIONS UNDER *PASSAVANT*.

Next, Respondent argues that to the extent that it is concluded that the security guards were agents under the Act, Respondent cured the violations and the ALJ erred in rejecting this argument and evidence. As will be discussed, Respondent overstates the actions it took to "cure" the violations and failed to remedy the violations to all employees affected in a manner that would comply with the Board's holding in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), and its progeny.

In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board in reaffirmed that "under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct." In order to repudiate unlawful conduct, the Board set forth certain factors, all of which must be met in order to properly cure the

unfair labor practices: the repudiation must be “timely,” “unambiguous,” “specific in nature to the coercive conduct,” and “free from other proscribed illegal conduct.” *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. In addition, Respondent must adequately publicize the repudiation to the affected employees and Respondent cannot engage in any further unlawful conduct after the publication. *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977). The Board has held that such repudiation of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966) (“Merely making an apology to employees for the misconduct committed as ambiguous and insufficient, without clearly identifying the wrongdoing, indicating recognition of the employees' organizational rights, and assuring them against recurrence of the offenses committed.”); *Harrah's Club*, 150 NLRB 1702, 1717 (1965) (repudiation ineffective because it was couched in terms of a personal apology and did not give employees assurances that employees were free to engage organizational activities free from retaliation.)

Respondent argues that under the totality of the circumstances, Respondent cured the violations committed by guard Hill by meeting with Connor Spence to inform him that what Hill did was wrong and that Spence had the right to distribute Union literature, by informing the guard company Metro One not to remove Union literature from the breakroom, by meeting with Hill and informing him that he had no right take employees’ Union literature, by informing Metro One that Hill should not have taken employees’ Union literature and by asking Metro One to conduct training among the

guards regarding NLRA rights, by purportedly reminding associates via the VOA board of their rights to distribute Union literature under the NLRA, and by conducting training among Respondent's HR staff. With respect to Koplevich's conduct, Respondent asserts they cured the violation by immediately asking Metro One to permanently remove Koplevich from JFK8, by notifying Metro One that Koplevich should not have engaged in the surveillance of employees, by reminding employees via the VOA board of their right to distribute literature under the NLRA, and by providing training to its HR team. (Resp. Brf. Pgs. 24, 26-27) As will be discussed, these actions are insufficient to cure the guards' violations under *Passavant.*

First, Respondent did not adequately publicize the repudiation to all affected employees. The ALJ found that on May 16, 2021, when Spence entered the first-floor main breakroom to distribute literature and was confronted by security guard Hill, there were at least 20 other Amazon employees present. (ALJD pg. 14) Notwithstanding this, Respondent chose to repudiate Hill's conduct to Spence only—it did not repudiate Hill's conduct to any other employee. In this regard, the ALJ found that Respondent did not send any notification to employees regarding Hill's unlawful conduct, nor did Respondent hold any meetings concerning Hill's unlawful conduct. In sum, no evidence was presented that Respondent repudiated Hill's conduct to anyone other than Spence, even though there were at least 20 other Amazon employees in the breakroom at the time of the unlawful conduct. (ALJD pg. 16)

With respect to Koplevich, Respondent did not repudiate her unlawful conduct to any employee at all. Record evidence established that at the time that Koplevich unlawfully surveilled employees engaged in Union activities at the ALU tent, there were

at least 3-4 employees present in addition to 2-3 Union organizers. (Tr. 548-549) Notwithstanding, Respondent did not repudiate Koplevich's conduct to any employee or individual present at the tent. Thus, the ALJ correctly found that Respondent failed to repudiate Koplevich's conduct, including to employee Connor Spence. (ALJD pg. 17) Thus, even though these guards' violations affected about 25 employees, Respondent failed to repudiate the unlawful conduct to all the individuals involved. The failure to adequately publicize the repudiation of the unlawful conduct is fatal to Respondent's claim that it cured the violations. *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977).

Second, Respondent failed to timely assure employees that it would not interfere with their rights under Section 7 of the Act in the future as required under Board law. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966). Respondent claims that it informed employees of their rights to distribute Union literature in VOA posts dated July 15, 2021, October 11, 2021, and February 4, 2021. However, none of these posts are contemporaneous with Hill's unlawful conduct which occurred on May 16, 2021, or Koplevich's conduct which occurred on May 24, 2021, and none were posted with the specific purpose of assuring workers of their rights to engage in Section 7 activity free of Respondent's interference. Each VOA post is nothing more than a response to an employee's post—none of the offered posts were initiated by Respondent in an effort to reassure employees of their rights given the unlawful conduct that occurred. (Respondent's July post was in response to a post by an associate asking about pay for the Juneteenth holiday; the October post was a response to Spence's post about how Respondent was continuing to violate the law; and the February post was in direct response to a question about whether the Union was allowed to solicit in the

breakrooms.) None of Respondent's posts were made for the specific purpose of informing employees of their rights to cure the guards' violations. Moreover, only the October and February posts even mention employees' rights to distribute literature (the July post refers only to the solicitation policy) but neither is close in time to the guards' violations—the October post was about five months after and the February post was almost one year after the unlawful conduct. Thus, it is a gross mischaracterization of the evidence to claim that Respondent assured employees of their rights under Section 7 of the Act via the VOA board, and Respondent's failure to give proper assurances is also fatal to their claim of having cured the violations.

Finally, the alleged repudiations were not free of other proscribed conduct. Rather, Respondent engaged in additional violations after May 16 and May 24, including additional unlawful confiscation of Union literature on June 12. (ALJD pgs. 75-76) These additional unfair labor practices make it impossible to conclude that Respondent properly cured the guards' violations under *Passavant*. See *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977). With respect to the training given to Metro One guards and Respondent's own HR staff, and the removal of Koplevich, these efforts are irrelevant in the context of curing violations under Board law since Respondent failed to meet all of *Passavant's* requirements with respect to its employees (the alleged repudiations were not publicized to all employees affected, they were not timely, they were not specific in nature to the coercive conduct, and they were not free from other proscribed conduct.) *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977). Although Respondent asserts that these measures should be considered, *Passavant* and its progeny do not set forth a "totality of the

circumstances" test. Rather, the Board looks to the actions taken by a respondent with respect to the affected employees only and Respondent herein utterly failed to properly repudiate its unlawful conduct to the employees affected as the ALJ properly found.

Finally, Respondent claims that the ALJ based her rejection of its *Passavant* defense on an improper application of *T-Mobile USA, Inc.* 369 NLRB No. 50 (2020) to the meeting between Grabowski and Spence only. Respondent claims that the ALJ failed to consider the other measures that it took to repudiate its unlawful conduct—namely informing Metro One and guard Hill that Hill's conduct was improper, requiring Metro One to conduct immediate training on employee rights, requiring its HR personnel to participate in refresher training of NLRA rights, and allegedly posting on the VOA board about employees' rights to distribute Union materials. Respondent claims that the ALJ narrowed its argument and concluded that because Respondent did not put the repudiation in writing, it was ineffective. (Resp. Brf. Pgs. 24-25) This is simply untrue. The ALJ did not rely on the failure to put the repudiation in writing as grounds to reject it, but rather, she considered all the factors set forth in the relevant case law.

The ALJ cogently analyzed the requirements of *Passavant* and its progeny and properly centered her analysis on the following factors: whether the repudiation was timely and unambiguous, specific in nature to the coercive conduct, whether there was adequate publication to the employees involved, and no additional proscribed conduct on the part of the employer after such publication. (ALJD pgs. 53-54) In the context of this controlling case law, the ALJ considered the relevant record evidence. The ALJ considered Spence's meeting with Grabowski, Respondent's failure to publicize its repudiation to employees, Respondent's failure to post about the Hill incident to the

VOA board even though they initially said they did, and that Respondent's supervisors later committed the same violations. Based on all of these factors, the ALJ rejected Respondent's repudiation defense. (ALJD pgs. 54-55) Respondent is simply wrong that the ALJ failed to consider anything other than Grabowski's meeting with Spence. This argument should also be rejected.

3. THE ALJ CORRECTLY DECIDED THE JUNE 12TH CONFISCATION ALLEGATIONS ON THE RECORD EVIDENCE AND FULLY CONSIDERED RESPONDENT'S 'HOUSEKEEPING' DEFENSE RENDERING RESPONDENT'S SANCTIONS ARGUMENT MOOT.

Respondent argues that the ALJ lacked authority to levy the evidentiary sanctions she imposed and because of these improper sanctions, Respondent was unable to present a defense to the June 12th confiscation allegations. For this reason, Respondent requests that this portion of the case be remanded back to the ALJ so evidence can be taken with respect to Respondent's defense to the June 12th confiscations. Contrary to Respondent's assertions, remand is unnecessary because the ALJ fully considered its defense to the June 12th allegations and properly rejected the defense because the record evidence established that Respondent's managers had in fact confiscated employees' Union literature on June 12th and prohibited employees from distributing literature.

A. The ALJ Considered Respondent's Housekeeping Defense and Rejected it as Contrary to the Record Evidence.

During the hearing, ALJ Esposito levied evidentiary sanctions against Respondent based on its refusal to produce documents that the Special Master, the Board, and ALJ Esposito ruled they had to provide. Those sanctions included a preclusion order that Respondent could not present testimonial evidence or

documentary evidence that had not already been provided, regarding the June 12th confiscation allegations. In addition, the ALJ drew an adverse inference that had Respondent provided the documents in question, they would have shown that Amazon unlawfully confiscated Union literature on June 12. (ALJD pg. 5) As a result of these sanctions, Respondent recited certain proffers of evidence into the record regarding the testimony they would have adduced had they been permitted to present testimonial evidence.

To summarize, the proffers were that witnesses would have testified that HR personnel regularly engage in "GEMBA" walks whereby these HR associates regularly tidy up breakrooms. (TR. 812-813, 873, 891-893, 1213) Thus, Respondent argued to the ALJ in its post-hearing brief that its HR personnel, Wojhan and Ovadia, were not confiscating Union literature on June 12th, but rather, collecting abandoned materials pursuant to Amazon's housekeeping policy. (ALJD pgs. 58, lines 4-5 and 60, lines 29-30) Respondent also argues that HR Business Partner Christina Stone did not unlawfully prohibit Palmer and Spence from distributing Union literature, but rather informed them of Respondent's housekeeping rule. (ALJD. Pg. 61, lines 28-29) The ALJ fully considered these arguments and rejected them as contrary to the record evidence.

Specifically, with respect to Wojahn, the ALJ properly rejected this "housekeeping" defense because 1) the video of the incident corroborates Palmer's version of events that Wojahn entered the breakroom on June 12 to remove Union literature, ignoring other items on the breakroom tables, 2) Respondent did not call Wojahn to testify, thus Palmer's testimony that Wojahn told Palmer that Wojahn had received a notification to remove the Union literature, remains unrebutted, 3) this

testimony is corroborated by Wojahn's written statement that a Senior HR Associate instructed Wojahn to collect the literature, 4) HR Assistant Jeffrey Lin who accompanied Wojahn on the day in question, wrote a statement admitting that he and Wojahn were on a "site walk to find possible union pamphlets and materials" in breakrooms, and 5) the confiscated materials were not left on the tables for hours such that it could have been concluded they were abandoned. (ALJD pgs. 57-58, 60)

With respect to Ovadia, the ALJ also correctly rejected Respondent's housekeeping defense because 1) the video of the confiscation did not show Ovadia engaged in an overall cleanup effort, but rather that she was specifically removing Union fliers, and 2) Ovadia did not discuss any alleged housekeeping policy with Palmer when the two discussed Wojahn's confiscation, and she instead told Palmer Respondent could legally confiscate Union literature. (ALJD pg. 60)

Finally with respect to Christina Stone's prohibition against distribution of Union literature, the ALJ correctly rejected the housekeeping defense because 1) she was not speaking of a housekeeping policy in general, but was responding to Palmer and Spence's complaints of confiscations occurring that day, and 2) the video evidence does not support Stone's claim that either Wojahn or Ovadia were engaged in housekeeping versus confiscation. (ALJD pg. 61)

Based on all of the above, it is clear that the ALJ based her findings on the record evidence and not upon the evidentiary sanctions she levied. Thus, the issue of whether the sanctions were properly levied or whether the ALJ had authority to levy them is moot. In any event, based on well-established Board precedent discussed fully below,

the ALJ was fully authorized to levy sanctions against Respondent as a consequence of Respondent's contumacious refusal to provide documents.

B. Board Law Is Clear that ALJ's Have the Authority to Levy Sanctions and the ALJ's Sanctions Were Properly Tailored to Respondent's Non-compliance.

Respondent makes two basic claims with respect to the ALJ's authority to impose sanctions: 1) the ALJ did not have the authority to impose evidentiary sanctions because only a district court may enforce an administrative subpoena, and 2) since Respondent substantially complied with the subpoena and asserted a good faith defense of privilege, sanctions were not appropriate. Both arguments fail. Board law is clear that ALJ's have the authority to impose evidentiary sanctions, and the primary case cited by Respondent is a non-controlling Ninth Circuit case that lies in contrast with many other circuit decisions. With respect to Respondent's substantial compliance and privilege assertion, neither is a ground to undermine the ALJ's discretion in levying sanctions since Respondent did not act in good faith because their privilege claim was rejected by the Board, the Special Master, and the ALJ.

The Board Has Authority to Impose Evidentiary Sanctions

It is well-established that the Board may impose a variety of sanctions to deal with subpoena noncompliance where it opts not to enforce the subpoena in district court, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party. See, e.g., *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986) (precluding employer from introducing into evidence documents it had failed to produce in response

to the General Counsel's subpoenas). This authority flows from its inherent “interest [in] maintaining the integrity of the hearing process.” *NLRB v. C. H. Sprague & Son, Co.,* 428 F.2d 938, 942 (1st Cir. 1970); see also *Perdue Farms, Inc. v. NLRB,* 144 F.3d 830, 834 (D.C. Cir. 1998) (approving Board's application of the “preclusion rule” as being necessary to ensure compliance with subpoenas).

With respect to the preclusion rule, the Board stated in *Purdue Farms* , “The preclusion rule, we have said, prevents the party frustrating discovery from introducing evidence in support of his position on the factual issue respecting which discovery was sought. *Atlantic Richfield Co. v. U.S. Dep't of Energy,* 769 F.2d 771, 794 (D.C.Cir.1984).” In rejecting respondent’s defenses, the Board held, “Once a party's challenge to a subpoena has been rejected, however, the party cannot ‘pick and choose which parts ... it will obey and which parts it can ignore.’ *UAW v. NLRB,* 459 F.2d 1329, 1342 (D.C.Cir.1972). A party refusing to comply with a subpoena risks application of the preclusion rule: ‘Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and ofttimes has every incentive to refuse to comply.’ *Atlantic Richfield,* 769 F.2d at 795.” *Perdue Farms, Inc., Cookin' Good Div. v. N.L.R.B.,* 144 F.3d 830, 834 (D.C. Cir. 1998)

Many courts hold that the exercise of this authority to impose evidentiary sanctions is a matter committed in the first instance to the judge's discretion. See e.g. *NLRB v. American Art Industries,* 415 F.2d 1223, 1229-1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970) (finding trial examiner did not “abuse his discretion” in precluding employer from introducing evidence on number of employees in unit after

employer refused to produce relevant subpoenaed documents); *Nat'l Lab. Rels. Bd. v. Bannum Place of Saginaw, LLC*, 97 F.4th 351, 364 (6th Cir. 2024) ("We review the Board's decision to impose evidentiary sanctions—including adverse inferences—for an abuse of discretion.") *Shamrock Foods Co. v. Nat'l Lab. Rels. Bd.,* 779 F. App'x 752, 754–55 (D.C. Cir. 2019) (No abuse of discretion found in ALJ's decision to impose evidentiary sanctions, and court held, "The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party.") See also *Midland National Life Insurance* Co., 244 NLRB 3, 6 (1979) (discussing the discretion of a trial examiner to refuse to allow evidence where evidence is not made available pursuant to a subpoena); *Equipment Trucking Co*., 336 NLRB 277 fn. 1 (2001) (no abuse of discretion where the judge struck the respondent's answer regarding allegations related to agents who evaded subpoenas with the aid of the respondent). When considering whether sanctions were properly imposed, the courts utilize an "abuse of discretion" standard. See *Perdue Farms*, 144 F.3d at 834 (applying "abuse of discretion" standard).

Respondent relies in large part[8] on one Ninth Circuit case to claim that ALJs do not have the authority to impose evidentiary sanctions. In *NLRB v. International*

[8] Respondent also cites to *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 495 (4th Cir. 2011) for the proposition that agencies do not have power to enforce a subpoena. CGC does not aver that agencies have the power to enforce subpoenas, but rather, that they have the power to impose evidentiary sanctions short of subpoena enforcement, to protect the integrity of Board processes per the above-cited case law. In fact, *Interbake Foods* expounded on that right and gave agencies the right to assess claims of privilege. ("Thus, while *we do not preclude any administrative assessment of claims of privilege*, we do conclude that when an assessment of those claims is necessary to a court's determination of whether to enforce the subpoena, the assessment must be conducted by the court." Emphasis added) Respondent also cites to *Interstate Commerce Commission v Brimson,* 154 U.S. 447

Medication Systems, 640 F.2d 1110 (9th Cir. 1981) the court held that sanctions for failing to comply with a Board issued subpoena may not be imposed in administrative proceedings since enforcement of the subpoena must be pursued in Federal court. Notwithstanding this decision, many other circuits have disagreed with the Ninth Circuit. (See cases cited *supra*, and see *Hedison Mfg. Co.*, 643 F.2d 32, 34 (1st Cir. 1981); *NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970); *NLRB v. American Arts Industries*, 415 F.2d 1223, 1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970); *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).

Consequently, based on all of the above, it is clear that the Board via its administrative law judges does in fact have the authority to impose evidentiary sanctions in lieu of subpoena enforcement. While the Ninth Circuit may not agree, Board law is controlling, and in any event, many other circuits have affirmed the Board's authority.[9] Consequently, Respondent has failed to support its claim that "the Board is without authority" to impose evidentiary sanctions and this argument must be rejected.

The ALJ's Sanctions Were Justified by Respondent's Contumacious Refusal to Provide Documents

(1894). However, the Supreme Court in that case ruled that agencies cannot enforce their own subpoenas since they do not have the power to impose fines or imprisonment. However, as the DC Circuit noted, "*Brimson,* however, is wholly silent as to the power an agency acting in an authorized judicial or quasi-judicial capacity to impose sanctions *short of a fine or imprisonment* in order to compel compliance with discovery orders issued during the course of an adjudicatory proceeding. *Atl. Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 793 (D.C. Cir. 1984)

[9] Respondent also cited to *NLRB v Detroit Newspapers* 185 F.3d 602 (6th Cir. 1999) for the proposition that a preclusion order is improper where a party has asserted a privilege claim since only a district court can rule on such claims. Respondent misreads this case. Specifically, in that case, the court ruled on the issue of whether it was proper for the district court to refuse to rule on the privilege claim and instead remand the privilege issue to the ALJ. In that specific context, the 6th circuit found that the district court erred and should have ruled on the privilege issue. The court did not pass on the issue presented here of whether an ALJ may impose evidentiary sanctions short of subpoena enforcement.

As discussed, the Special Master rejected Respondent's privilege claims with respect to the two labor reports and he ordered that Respondent produce these reports. The Special Master's order was affirmed by ALJ Esposito and the Board. Notwithstanding this clear rejection of its privilege claims, Respondent flagrantly refused to provide the documents. Respondent now seeks to escape the consequences of its contumacious conduct by doubling down on its already-rejected privilege claim and such claim should be rejected.

First, Respondent cites *U.S. ex rel. Barko v. Halliburton Co*., 241 F.Supp.3d 37, (DDC 2017) and *Nabisco, Inc. v. PF Brands Inc*., 191 F.3d 208 (2nd Cir. 1999) for the proposition that a party cannot be penalized or sanctioned for invoking attorney client privilege. (Resp. Brf. Pg. 32) While it is true that mere invocation of the privilege may not necessarily warrant a penalty, that is not the case herein. Here, a Special Master, the Board, and the ALJ all ruled that there was no attorney-client privilege that attached to the two labor reports.[10] Thus, Respondent's situation is not like the respondent in *Barko* or *Nabisco*, since Respondent was not penalized for merely invoking the privilege but rather, for contumaciously refusing to provide the documents even after the documents were ruled not subject to the privilege.

Next, Respondent argues that the ALJ's sanctions were not justified because she did not take into consideration the fact that Respondent complied with the majority of the subpoena and provided "over 1,000 documents" nor did she consider that no bad faith was present. (Resp. Brf. Pg. 33) These arguments should be rejected because the fact that Respondent provided documents responsive to other issues in the case is

[10] Special Master Carter ruled that Respondent could make certain redactions but he ordered the documents to be turned over thereafter.

irrelevant to whether they provided documents they were directed to by the Special Master, the Board, and the ALJ. In addition, the ALJ's sanctions were narrowly tailored and addressed the two withheld documents only and applied to just six allegations in the Consolidated Complaint (paraphs, 10, 11 and 12) out of about twenty-three alleged violations. The sanctions were tailored to the subject matter of the documents alone (the June 12th confiscations) and did not touch upon or effect any other allegation or subject matter. While Respondent may have provided other documents related to other allegations, they contumaciously failed to provide these two key documents related to the June 12th confiscation—documents that likely were dispositive of the issue. With respect to good faith, Respondent cannot possibly argue that it acted in good faith since it refused to comply with the Board and ALJs' orders to turn over the documents. Consequently, Respondent's reliance on a case that discuss a respondent's bad faith as a factor considered by the judge (ie *McAllister Towing & Transp*., 341 NLRB 394, 396-397 (2004) is misplaced since that case actually supports the imposition of sanctions here where Respondent's bad faith is evident.

CONCLUSION

For all of the foregoing reasons, CGC respectfully requests that the Board affirm ALJ Esposito's well-supported decision and Order.[11] Respondent has utterly failed to offer any grounds in its cross exceptions on which to overturn Judge Esposito's findings. Her careful conclusions that Respondent's security guards are agents under the Act, that Respondent did not properly repudiate the guards' unfair labor practices under *Passavant*, and her findings that Respondent's HR personnel confiscated employees'

[11] With the exception of her failure to order a notice reading and hand delivery of the notice to all managerial personnel which is the subject of CGC Exceptions filed on January 26, 2024.

Union literature on June 12th and prohibited employees from distributing Union literature on June 12th, were all based on record evidence and well-established Board and court precedent, leaving no room for reversal. With respect to the sanctions she imposed, Judge Esposito did not rely on those sanctions to conclude that Respondent violated the Act on June 12th. Even if she had, her narrowly tailored sanctions are authorized and supported by Board and Circuit Court law. Thus, CGC respectfully requests that Respondent's cross exceptions be rejected, and ALJ Esposito's decision affirmed. The General Counsel also requests any further relief the Board deems appropriate.

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMAZON.COM SERVICES INC.	
and	
CONNOR VINCENT SPENCE, an Individual	**Case Nos. 29-CA-277198** **29-CA-278982**
and	
NATALIE MONARREZ, an Individual	**Case No. 29-CA-277598**
and	
DERRICK PALMER, an Individual	**Case No. 29-CA-278701**
and	
AMAZON LABOR UNION	**Case Nos. 29-CA-285445** **29-CA-286272**

AMAZON'S CROSS EXCEPTIONS TO THE ALJ'S DECISION AND ORDER

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Amazon.com Services, LLC ("Amazon" or "Respondent") makes the following cross exceptions to the November 21, 2023 Decision and Order ("Decision") of the Honorable Administrative Law Judge Lauren Esposito (the "ALJ") in the above-captioned case:

Cross Exceptions Regarding Analysis

1. Amazon excepts to the ALJ drawing an adverse inference as an evidentiary sanction based upon Amazon's refusal to produce privileged documents regarding the distribution and confiscation of Union literature on June 12, 2021. Decision at 35:41-45.
2. Amazon excepts to the ALJ's findings that Metro One security guards John Hill and Elena Koplevich were agents of Amazon within the meaning of Section 2(13) of the Act with

respect to the alleged events on May 16 and May 24, 2021. Decision at 49:43-51:5; 53:12-28, 55:40-41.

3. Amazon excepts to the ALJ's finding that the evidence establishes that Amazon violated Section 8(a)(1) when security guard John Hill told employees that they could not distribute literature on non-work time in a non-work area, conducted surveillance of employees' Union activities, and confiscated ALU literature on May 16, 2021. Decision at 51:9-52:2, 55:22-27.
4. Amazon excepts to the ALJ's finding that Amazon did not subsequently repudiate any violations committed by Hill such that further remedial action is unnecessary. Decision at 53:30-55:20.
5. Amazon excepts to the ALJ's finding that the evidence supports a finding that Amazon, through the acts of Elena Koplevich, created the impression that employees' union activities were under surveillance, in violation of Section 8(a)(1). Decision at 55:31-56:29.
6. Amazon excepts to the ALJ's finding that Amazon did not subsequently repudiate any violations committed by Koplevich such that further remedial action is unnecessary. Decision at 56:14-23.
7. Amazon excepts to the ALJ's finding that Wojahn did not collect ALU literature from the breakroom tables pursuant to Amazon's housekeeping policy. Decision at 59:15-60:14.
8. Amazon excepts to the ALJ's finding that the evidence establishes that Operations Manager Ariana Ovadia prohibited employees from distributing Union literature on non-work time and in a non-work area, and confiscated Union literature, in violation of Section 8(a)(1). Decision at 60:23-24, 60:38-40.

9. Amazon excepts to the ALJ's finding that Ovadia did not collect ALU literature from the breakroom tables pursuant to Amazon's housekeeping policy. Decision at 60:27-38.
10. Amazon excepts to the ALJ's finding that the evidence establishes that on June 12, 2021, Christina Stone unlawfully prohibited employees from distributing Union literature by telling employees that Amazon was legally entitled to remove Union literature from the breakroom. Decision at 61:1-26, 62:4-7.
11. Amazon excepts to the ALJ's finding that Stone was not describing Amazon's housekeeping policy but instead was specifically addressing the ALU literature which Wojahn and Ovadia had removed from the breakroom tables. Decision at 61:28-62:2.

Cross Exceptions Regarding the Conclusions of Law

12. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act through its agent John Hill telling employees that they could not distribute Union literature on non-work time and in a non-work area. Decision at 75:27-30.
13. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act through its agent John Hill conducting surveillance of employees' Union activities. Decision at 75:32-33.
14. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act through its agent John Hill confiscating Union literature from employees. Decision at 75:35-36.
15. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act through its agent Elena Koplevich creating the impression that employees' Union activity was under surveillance. Decision at 75:38-40.

16. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act by its HR Assistant Luke Wojahn telling employees that they could not distribute Union literature on non-work time and in a non-work area. Decision at 75:42-44.
17. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act by its HR Assistant Luke Wojahn confiscating Union literature from employees. Decision 76:1-2.
18. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act by its Operations Manager Ariana Ovadia telling employees that they could not distribute Union literature on non-work time and in a non-work area. Decision at 76:4-6.
19. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act by its Operations Manager Ariana Ovadia confiscating Union literature from employees. Decision 76:8-10.
20. Amazon excepts to the ALJ's conclusion of law that Amazon violated Section 8(a)(1) of the Act by its HR Business Partner Christina Stone prohibiting employees from distributing Union literature on non-work time and in a non-work area. Decision at 76:12-14.

Cross Exceptions Regarding the Remedy and Order

21. Amazon excepts to the ALJ's finding that Amazon engaged in unfair labor practices and her order that Amazon cease and desist therefrom and take certain affirmative action. Decision at 77:1-3.
22. Amazon excepts to the ALJ's order that Amazon post, in English and Spanish, at its Staten Island JFK8 and DYY6 facilities, the notice attached to the Decision as "Appendix." Decision at 77:16-26.
23. Amazon excepts to the ALJ's Order. Decision at 79:28-81:31.

Respectfully submitted this 8th day of March, 2024.

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ATTORNEYS FOR AMAZON.COM SERVICES LLC

CERTIFICATE OF SERVICE

I certify that on this 8th day of March, 2024, I caused the foregoing to be electronically filed with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served via e-mail on the following parties of record:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMAZON.COM SERVICES INC.	
and	
CONNOR VINCENT SPENCE, an Individual	**Case Nos. 29-CA-277198** **29-CA-278982**
and	
NATALIE MONARREZ, an Individual	**Case No. 29-CA-277598**
and	
DERRICK PALMER, an Individual	**Case No. 29-CA-278701**
and	
AMAZON LABOR UNION	**Case Nos. 29-CA-285445** **29-CA-286272**

AMAZON'S CORRECTED BRIEF IN SUPPORT OF ITS CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted,

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I. AMAZON'S EXCEPTIONS TO THE ALJ'S DECISION

In her November 21, 2023 Decision (the "Decision"), the Administrative Law Judge reached a number of erroneous findings that the Board should overturn on review. Amazon's cross-exceptions take issue with three specific areas of the ALJ's decision. First, the ALJ ruled that Amazon violated Section 8(a)(1) of the National Labor Relations Act (the "Act") due to the unauthorized acts of its onsite security contractor, Metro One. In reaching this conclusion, the ALJ erroneously found that Metro One security guards acted as Amazon's agents when they allegedly confiscated union literature from the breakroom of the JFK8 facility and allegedly surveilled individuals' off premise activities. The record does not establish that Metro One's security guards possessed actual or apparent authority to engage in these activities on behalf of Amazon. In fact, Connor Spence, the Charging Party's primary witness, testified that he knew Metro One guards did not have the authority to stop him from distributing union literature in non-working areas during non-working times. The evidence in the record simply does not permit a conclusion that any reasonable person would have thought that Metro One had the authority to carry out labor relations functions on behalf of Amazon.

Second, the ALJ erred in holding that, even if these security guards were Amazon's agents, Amazon failed to repudiate their actions such that further remedial action would be unnecessary. Amazon established that it took sufficient prophylactic measures after the alleged incidents, including: (1) immediately informing Metro One not to remove union literature from any breakroom, (2) meeting with Spence and reiterating that he had the right to distribute union literature in non-work areas during non-work time and that Amazon would not interfere with that right, (3) providing refresher training to Amazon's HR team regarding NLRA rights, (4) requesting the immediate dismissal of a guard that acted outside her authority, and (5) requiring Metro One

to conduct training for its guards regarding NLRA rights. Under extant precedent, these actions sufficiently repudiated Metro One's alleged misconduct.

Finally, Amazon excepts to the portion of the Decision in which the ALJ concluded that Amazon violated Section 8(a)(1) when it confiscated literature from certain ALU members on June 12, 2021. Here, the ALJ erred in levying an adverse inference and evidentiary sanctions against Amazon and precluding Amazon from presenting a defense regarding these allegations. The record reflects that Amazon substantially complied with its subpoena obligations and no evidentiary sanctions were warranted in this case. Even if sanctions were appropriate, only a federal judge has the authority to levy them, as the proper forum for subpoena compliance is a federal district court – not an agency proceeding. Moreover, the sanctions imposed were so severe that Amazon was effectively precluded from presenting a defense. This was inappropriate.

For these and for all of the reasons set forth below, Amazon requests that the Board dismiss Paragraphs 8 and 9 of the Complaint, remand Paragraphs 10, 11 and 12 of the Complaint back to the ALJ for the taking of further evidence, and decline to enforce the Decision's recommended Order.

II. THE RECORD EVIDENCE SUPPORTS AMAZON'S EXCEPTIONS

A. Allegations Regarding Actions of Metro One Security.

1. Amazon Contracts With a Third-Party Security Service – Metro One.

During the relevant time period, Amazon had a contract with Metro One for security guards at Amazon's JFK8 facility. *See* Tr. 47:18-23, 1062:16-19, 1074:19-22, 1075:7-10. The Metro One guards wore Metro One uniforms with the name "Metro One" on them. *See* Tr. 528:19-529:3, 1078:14-1079:6. The guards did not carry batons, guns, or any other weapons. *See* Tr. 1078:10-13.

Amazon's primary purpose for engaging Metro One security guards was to enforce Amazon's access policies to keep unauthorized people out of the facility. *See* Tr. 1075:11-17, 1078:6-9. As a result, the Metro One guards were posted at JFK8's main entrance and exits. *See* Tr. 47:24-48:2, 528:15-18, 1076:7-21. To get into the facility, associates would have to walk into JFK8's main entrance and scan their badges at turnstiles. *See* Tr. 46:14-19, 527:14-19, 23-25. To exit the facility, they could go through the main entrance or use emergency exits—including one in the main first floor breakroom—which were converted to standard exits during COVID-19 to permit social distancing while exiting the building. *See* Tr. 527:20-22, 528:1-14; *see also* Tr. 48:9-10. There were multiple guards posted at the main entrance and usually one at the repurposed exits. *See* Tr. 48:3-5, 48:22-49:17, 529:4-12, 1077:19-1078:5. In addition to keeping unauthorized people out of the facility, the guards checked non-clear bags as associates exited the facility to ensure that associates did not depart the facility with certain Amazon-issued equipment. *See* Tr. 47:18-23, 49:21-50:7, 1076:22-1077:18. The guards also moved about the facility to provide security services, scanning electronic check points along the way. *See* Tr. 1079:7-1080:9.

As Metro One employees, the guards reported to Metro One security guard supervisors at the facility, the guard supervisors reported to the Metro One account manager for Amazon, and the account manager reported to Amazon's loss prevention department. *See* Tr. 1071:25-1072:10. If there was a security incident, a guard could report the incident directly to Amazon's loss prevention department or the closest Amazon managerial employee, such as someone in Amazon's HR department. *See* Tr. 1072:15-24. The Metro One account manager for Amazon was Kaydee Bertone. *See* Tr. 1073:11-13. Amazon did not employ Bertone. *See* Tr. 1073:18-19.

During the relevant time period, Joseph Troy was Amazon's loss prevention manager at the JFK8 facility. Tr. 1061:14-19, 1071:17-21. In that role, Troy oversaw Metro One, among

other things. *See* Tr. 1061:20-1062:19, 1071:22-24, 1075:7-10. His primary contact at Metro One was Bertone. *See* Tr. 1062:20-25, 1073:11-13.

2. Security Guard John Hill's Interaction with Connor Spence on May 16, 2021.

On May 16, 2021, JFK8 associate Connor Spence took a break around 2:30 p.m. in the first floor main breakroom. *See* Tr. 512:20-513:1, 514:9-12, 538:3-10, 539:17-18. During that break, Spence went to the ALU tent, which was set up at a public bus stop across the street from JFK8, to pick up copies of a document and then went back to the breakroom to distribute the copies. *See* Tr. 538:11-16. The document that Spence distributed was part of the NLRB settlement agreement concerning an Amazon warehouse in Queens, notifying associates about their rights under the NLRA ("the Notice"). *See* Tr. 538:17-23; CP Ex. 1; *see also* Tr. 558:8-559:4, 1056:17-1057:10; R. Ex. 15. Spence handed the Notice to two or three associates who asked for it and placed the Notice on tables in the breakroom. *See* Tr. 539:7-16, 539:19-540:4.

After Spence began distributing the Notice, an associate reported to a guard posted at the exit of the breakroom that someone was putting papers on tables in the breakroom. *See* Tr. 1080:14-18, 1080:24-1081:4. The guard who received the report escalated it to Metro One on-shift part-time guard supervisor John Hill. *See* Tr. 1063:4-6, 1080:19-23. Neither the reporting guard nor Hill were given a copy of the document Spence was distributing. *See* Tr. 1080:24-1081:1.

In response to the report that he received, Hill entered the breakroom where Spence had distributed the Notice. *See* Tr. 1063:7-1064:2. As a Metro One guard, Hill was wearing the Metro One uniform, including a blue vest designating him as the security guard supervisor. *See* Tr. 540:15-19. Hill asked Spence who had given him permission to put the papers on the table. *See* Tr. 1064:3-4, 1081:8-11; *see also* Tr. 541:7-9 (Hill asked Spence "if [he] had permission to be

handing out papers"). Spence told Hill that HR gave him permission and to check with HR. *See* Tr. 541:21-24, 1064:5-6.[1] Hill therefore asked Spence if he could take a photograph of Spence's badge to verify with HR and Spence complied. *See* Tr. 541:25-542:6, 1064:6-10. Hill took a picture of Spence's badge. *See* Tr. 542:23-25, 1064:8-9, 1081:12-15, 1216:7-8. Spence continued to distribute the Notice, before stepping out of the breakroom to make a phone call. *See* Tr. 543:1-6. Hill collected the papers left abandoned on the tables after Spence left the room. *See* Tr. 543:7-12.

Spence then returned to the breakroom and saw Hill holding copies of the Notice that Spence had distributed. *See* Tr. 543:7-12. Spence approached Hill and asked Hill why he removed the papers from the tables. *See* Tr. 1064:12. Spence told Hill that the papers concerned a union. *See* Tr. 1064:12-14. Spence further said that Hill didn't "work for Amazon," and that it's not Hill's "job to break the law." Tr. 543:13-17. Approximately 20 Amazon associates were present in the breakroom at the time, s*ee* Tr. 545:18-21, but no one actually witnessed the interaction, *see* Tr. 561:25-562:8, 562:16-21. There is no evidence that Hill collected the Notice from any associates who had received it from Spence.

Amazon learned of Spence and Hill's interaction when Bertone notified Troy about it. *See* Tr. 1081:8-11. Upon learning about the incident, Troy immediately informed Metro One not to remove union literature from any breakroom. *See* Tr. 1064:15-19. In addition, Troy met with Hill to discuss the incident. *See* Tr. 1064:20-21. During that meeting, Hill confirmed that no one from Amazon ever told Hill to remove union literature or interact with "union solicitors" in any way

[1] According to Spence, Spence told Hill that he "didn't need permission [to give out papers]," Tr. 541:12-14, and had "the right to pass out union literature in a breakroom during [his] break." Tr. 541:18-19. Hill replied that Spence needed permission "to hand stuff out." Tr. 541:15-20. Spence reiterated that he had "this right" and invited Hill to "call his boss and confirm" and "call HR." Tr. 541:21-24.

and Troy reiterated that Hill was not to do so. *See* Tr. 1064:22-1065:2, 1065:20-1066:10, 1067:4-9, 1083:2-5; GC Ex. 50.

A few days later, Amazon Senior Human Resource Business Partner, Tyler Grabowski, along with Area Manager Ryan Tenney, followed up with Spence to address Spence's interaction with Metro One security guard Hill. *See* Tr. 549:8-22, 1202:13-21, 1205:11-17, 1214:16-18. Grabowski told Spence that Hill was employed by a third-party, that Hill was not acting on behalf of or at the direction of Amazon, and that he should not have acted in the manner that he did. *See* Tr. 550:15-551:4, 1205:18-1206:4, 1216:9-11. Grabowski affirmed that Spence had the right to distribute union literature in non-work areas during non-work time and that Hill had received coaching regarding the policy. *See id.* Spence did not say any additional action was needed. *See* Tr. 1206:11-13.

Just a few days after the incident, Troy also sent an e-mail to Metro One, which included Metro One's executive leadership, about the incident as well as Amazon's expectations related to union-related activity. *See* Tr. 1068:16-1069:6; GC Ex. 50. The e-mail noted that Hill "acted outside the scope of [his] post orders and without the direction of Amazon" and "acknowledged that he was not directed by anyone at Amazon to engage with Amazon associates regarding this kind of activity." GC Ex. 50. It further explained:

> Amazon expects that all Metro One personnel assigned to work at Amazon will act in compliance with applicable law, including the National Labor Relations Act. . . . Amazon expects that Metro One officers will confine their activities to their post orders. To be clear, Metro One security personnel should not photograph, videotape, or otherwise engage in surveillance of any lawful labor or union-related activity on or around the JFK8 facility. Metro One personnel should not verbally engage Amazon associates regarding their union activity, nor should they collect or attempt to collect union literature from associates. In accordance with Amazon's solicitation and distribution policies, Amazon associates are permitted to distribute literature during non-working time and in non-working areas of the

> facility (i.e., breakrooms, lunchroom). Metro One personnel should not attempt to interfere with these activities.

Id. In the e-mail, Troy also asked Metro One to conduct training related to permissible union-related activity. *See* Tr. 1068:16-1069:6; GC Ex. 50. Troy wrote:

> In an effort to ensure that your security officers act in compliance with all legal requirements, we request that you provide labor law training to your employees currently assigned to Amazon facilities. Going forward, we request that you provide such training to Metro One employees prior to being on-boarded at Amazon facilities. We also ask that you have your team train all Metro One personnel currently assigned to cover LDJ5 and JFK8 as soon as possible to ensure there is no confusion moving forward.

GC Ex. 50. Metro One subsequently confirmed that it provided the requested training to its employees and managers who work at an Amazon location. *See* Tr. 1070:3-21, 1081:22-1082:9.

Following Hill's interaction with Spence, Amazon repeatedly announced to all JFK8 associates (which included Spence) that they had solicitation and distribution rights and Amazon would not violate those rights; Amazon made this communication via its VOA boards, which are displayed throughout the facility in high traffic areas, and via the AtoZ application available on all associates' personal devices. *See* Tr. 551:12-552:6, 1206:14-1207:25, 1209:13-1210:2, 1216:16-20; R. Ex. 6. For example:

- On July 15, 2021, Amazon posted, "As previously discussed, we support employees' right to solicit in accordance with Amazon policy. Additional information about this can be found in the Amazon.com Owner's Manual within Inside Amazon. You can access this policy on AtoZ through the resources tab or on computer kiosks on site."

- On October 11, 2021, Amazon again posted, "You and everyone else here at JFK8 should know . . . that Amazon's solicitation and distribution policy does not interfere with your right to distribute literature and flyers in non-working areas of the facility (such as the parking lot) during non-working time. No one from Amazon will interfere with you if you choose to do so. If you or anyone else wants to review the solicitation and distribution policy, you can find it in the Owner's Manual on Inside Amazon ()."

- And, on February 4, 2022, in response to an associate's complaint about union campaigning in a breakroom while an associate was trying to take a break, Amazon posted, "Amazon's solicitation and distribution policy does not interfere with an employee's right

to distribute literature and flyers in non-working areas of the facility (such as the breakroom) during non-working time."

R. Ex. 6; Tr. 1208:1-1209:12, 1216:16-20.

In addition, Amazon conducted a training led by Grabowski for the JFK8 HR team, which reminded the team, among other things, that associates have the right to distribute union literature in non-working areas during non-working times. *See* Tr. 1210:4-24, 1211:14-1212:20; R. Ex. 16. The presentation reinforced that associates have the following rights:

- To organize a union to negotiate with the employer over terms and conditions of employment
- Distribute union literature
- Wear union buttons and t-shirts
- Solicit coworkers to sign union authorization cards
- Discuss the union with coworkers

R. Ex. 16. Grabowski conducted this training to ensure that the JFK8 HR team knew and understood Amazon's solicitation policy following Spence's interaction with Hill. *See* Tr. 1210:25-1211:7.

3. Connor Spence's Observation of Metro One Security Guard Elena Koplevich on May 24, 2021.

During the ALU's organizing campaign, Spence went to the ALU tent, which was set up at a public bus stop across the street from JFK8, "[a]lmost every day." Tr. 546:6-8. The ALU used the tent "to talk to workers about the Union, ask them to sign authorization cards, give them literature, and other organizing stuff like that." Tr. 546:10-18. The ALU had a cookout at the tent on May 24, 2021. *See* Tr. 546:19-547:7. During the cookout, Spence observed Elena Koplevich, a Metro One security guard, walk up to a fence across the street from the public bus stop during her meal break and hold up her phone in the direction of the cookout. *See* Tr. 547:10-16, 548:15-

18; GC Ex. 50 (" . . . Koplevich was observed while on her meal break.").[2] At the time, there may have been two to four associates at the ALU tent. *See* Tr. 548:22-549:7.

Amazon learned about Koplevich's conduct the same day it occurred from a social media post that Bertone shared with Troy alleging Koplevich took photographs of ALU activity taking place at a public bus stop adjacent to JFK8. *See* Tr. 1067:10-18, 1081:19-21. Troy immediately asked Bertone to have Metro One remove Koplevich from JFK8 because she was acting outside of her authority, as Metro One guards are only allowed to take photographs or make videos during an active investigation. *See* Tr. 1067:19-1068:12, 1069:7-14, 1069:21-24; GC Ex. 51. In an e-mail, Troy wrote:

> Koplevich . . . was observed taking unauthorized pictures while on duty today under no direction from Amazon, and not related to an investigation or as part of her regularly scheduled post orders.
>
> Effective immediately we are going to as[k] that [Koplevich] is removed from all Amazon accounts.

GC Ex. 51. Metro One immediately removed Koplevich from JFK8 and she has not returned to JFK8 since. *See* Tr. 1068:13-14.

In addition, three days later, Troy addressed the May 24th incident in the same e-mail he sent Metro One about the May 16th incident. *See* Tr. 1068:16-1069:6; GC Ex. 50. The e-mail noted that Koplevich "acted outside the scope of [her] post orders and without the direction of Amazon" and "acknowledged . . . [she was] not acting under the direction of Amazon." GC Ex. 50. Troy explained:

> Koplevich was not on a routine tour of the facility at this time. Koplevich was not directed by anyone from Amazon to photograph this activity, nor was she asked by her supervisor to report on this activity. Taking pictures, recording videos, or utilizing the CCTV system in a way that is not related to an ongoing investigation is a violation of our policy. In response to this incident, we asked

[2] Spence incorrectly identifies Kopelvich as "Arlena Popovich." Tr. 548:1-2.

> Bertone to remove Koplevich from all Amazon accounts effective immediately.

Id. The e-mail further laid out Amazon's expectations that Metro One comply with the NLRA and conduct training related to permissible union-related activity, which Metro One subsequently provided. *See* Tr. 1068:16-1069:6, 1070:3-21, 1081:22-1082:9; GC Ex. 50.

Following Spence's observation of Koplevich, Amazon repeatedly announced to all JFK8 associates via the VOA boards and the AtoZ application that they had solicitation and distribution rights, and that Amazon would not violate those rights. *See* Tr. 1206:14-1207:25, 1209:13-1210:2, 1216:16-20; R. Ex. 6. These posts were made by Grabowski and other HR managers. *See* Tr. 1208:1-1209:12, 1216:16-20; R. Ex. 6.

In addition, Amazon conducted the previously noted training led by Grabowski for the JFK8 HR team, which reminded the team of the associates' rights under the NLRA. *See* R. Ex. 16.

B. Allegations Regarding June 12, 2021 Alleged Confiscation of Union Literature.

1. Amazon's Lawful Housekeeping Policy

As part of its standard housekeeping practice, and to ensure the safety and cleanliness of Amazon facilities, Amazon managers regularly participate in GEMBA walks, where they walk around the warehouse to identify safety concerns and other areas of improvement. *See* Tr. 573:16-23, 859:1-11.[3] GEMBA walks are an opportunity for management to scan the building for anything out of place, that may be a safety concern, or that is dirty and needs to be cleaned up. *See* Tr. 881:15-22. GEMBA walks are conducted throughout the entire fulfillment center, including

[3] GEMBA walks were conducted regularly to ensure that site cleanliness was up to Amazon standards. *See* Tr. 873:1-2 (proffer). Human Resources Associates performed GEMBA walks as part of their standard work and historic practice at JFK8. *See* Tr. 873:4-6 (proffer). The GEMBA standard protocol included cleaning up break areas and discarding leftover papers and trash on breakroom tables. *See* Tr. 873:7-14 (proffer). (Amazon had to proffer this evidence due to the evidentiary sanctions imposed by the ALJ, as fully explained in Section III.C below.)

breakrooms, with the specific goal of maintaining the tidiness of the breakroom and ensuring that the cleaning staff can come in and sanitize the break area quickly. *See* Tr. 882:6-20. The importance of these safety and cleanliness practices greatly increased during the COVID-19 pandemic.[4]

2. June 12, 2021 Collection and Return of Notices Abandoned on Breakroom Tables by Derrick Palmer.

Around 10:30 a.m. on June 12, 2021, Derrick Palmer passed out copies of an official NLRB Notice to Employees in the third floor breakroom of JFK8. *See* Tr. 60:12-61:1; CP Ex. 1; R. Ex. 15. The Notice was part of the NLRB settlement agreement concerning an Amazon warehouse in Queens. *See* Tr. 61:2-9; R. Ex. 15 at 1, 3. Due to the COVID-19 pandemic, the breakroom where Palmer distributed the Notices consisted of two rows of tables and chairs, with each set partitioned off from the others with plastic barriers. *See* Tr. 231:10-25; GC Ex. 39. When passing out copies of the Notice, Palmer would either put the Notice on the table, or hand the Notice directly to the associate. *See* Tr. 76:14-18.

At some point after Palmer passed out the Notice, Human Resources Assistant trainee Luke Wojahn entered the third floor breakroom. *See* Tr. 77:10-16, 859:12-860:11. As a Human Resources Assistant, Wojahn was an hourly, non-supervisory Amazon employee. *See* Tr. 860:12-17. On June 12, Wojahn performed a GEMBA walk through the breakroom and gathered copies of the Notice that Palmer left strewn on the tables, but did not take any Notices from associates who had already received the Notices. *See* Tr. 78:3-9; GC Ex. 39 at 0:03–0:32. Shortly thereafter,

[4] Due to the COVID-19 pandemic, Amazon had an increased emphasis on the safety and cleanliness of employee break areas. *See* Tr. 812:9-12, 872:13-15 (proffer). Specifically, during the pandemic, the break areas were cleaned more frequently by the cleaning staff than before COVID-19, and management also focused on minimizing the amount of debris, papers, and other materials on the break tables so that the cleaning staff could quickly clean/disinfect the surfaces between employee breaks. *See* Tr. 813:8-18 (proffer). Understandably, associates were concerned about exposure risks, including things that other people had touched, and the cleanliness of break areas, which is where associates ate, was of the upmost concern for both employees and Amazon. *See* Tr. 872:18-24 (proffer).

Palmer approached Wojahn and told him that he wasn't allowed to remove any literature from the breakroom and asked for the collected Notices back. *See* Tr. 78:13-22, 80:12-15, 236:5-9. Wojahn did not object, gave the Notices back to Palmer, and left the breakroom. *See* Tr. 80:14-17, 81:2-4, 244:4-9; GC Ex. 39 at 5:29-5:43. The conversation between Palmer and Wojahn only lasted a few minutes. *See* Tr. 236:7-9. After Wojahn gave Palmer the Notices back, Palmer immediately redistributed them in the breakroom. *See* Tr. 245:8-10; GC Ex. 39 at 5:24-5:39. The video of the third floor breakroom during the relevant time on June 12th shows that Palmer distributed the Notices without any interference from Amazon and that associates who had already received the Notices were permitted to keep them. *See* GC Ex. 39 at 5:24-5:39. Finally, the dialogue between Palmer and Wojahn was quiet, calm and brief in duration. *See* Tr. 236:7-9, 242:1-8.

3. June 12, 2021 Collection and Return of Notices Abandoned on Breakroom Tables by Connor Spence.

Spence also distributed the same Notices and union literature in the third floor breakroom on June 12, 2021 around 12:30 p.m. *See* Tr. 557:1-3, 558:12-22, 560:17-19; CP Ex. 1; GC Ex. 10. It is undisputed that Spence gave the Notices and/or union literature to associates who asked for it, and placed copies of the Notice and/or union literature down onto empty tables. *See* Tr. 560:24-561:3; GC Ex. 67 at 0:00-0:06. At one point between breaks, Operations Manager Ariana Ovadia entered the breakroom through the side door and began collecting the discarded papers scattered on the breakroom tables. *See* Tr. 561:4-8, 18-20, 798:8-10; GC Ex. 67 at 0:11-0:29.[5] Ovadia began to clear the papers so that associates coming in for the next break would have a clean space to sit. *See* GC Ex. 77. Spence approached Ovadia and asked her what she was doing. *See* Tr. 563:1-2; GC Ex. 66 at 0:31. She folded the papers that she picked up and put them into the pocket

[5] On June 12, 2021, Ovadia went into the third floor breakroom to have lunch and cleaned up the discarded papers in the breakroom as part of her standard practice of cleaning up employee break areas, removing trash, papers, and other materials on the eating surfaces, particularly during the COVID-19 pandemic. *See* Tr. 812:17-25, 813:19-25 (proffer).

of her vest. *See* Tr. 563:11-13; GC Ex. 66 at 0:33. Spence testified that Ovadia responded that she was just cleaning up the break area. *See* Tr. 563:1-5; GC Ex. 77. When Spence asked her if the papers were union literature, she responded that she did not know. *See* Tr. 563:6-7, 13-16. Spence grabbed one of the papers from the table that had the ALU logo at the top of the page and showed it to Ovadia. *See* Tr. 563:13-19; GC Ex. 67 at 0:49-0:55. He told Ovadia that the papers she collected were his union literature and that he had already filed charges with the NLRB for this type of behavior. *See* Tr. 564:1-12. Ovadia immediately returned the collected papers to Spence and left the breakroom. *See* Tr. 564:12-18; GC Ex. 66 at 1:10-1:20.

4. June 12, 2021 Recitation of Amazon's Housekeeping Policy

Later that same day, around 1:15 p.m. or 1:30 p.m., Palmer and Spence approached the main HR office of JFK8 demanding an apology for the alleged removal of abandoned papers that they had left in the breakroom. *See* Tr. 87:21-88:11, 565:5-6, 17-18, 855:4-9; R. Ex. 8. Human Resources Business Partner Christina Stone and Senior Human Resources Associate Purvisha Shukla were the only people in the HR office at the time that Palmer and Spence entered. *See* Tr. 87:3-16, 566:2-3; R. Ex. 8. Palmer and Spence were on the phone with their attorney, Seth Goldstein, who complained about Amazon's collection of Notices and literature earlier in the day. *See* GC Ex. 9 at 0:17-0:35. This discussion was recorded by Spence. *See* GC Ex. 9. Stone spoke on behalf of the Human Resources team and informed Palmer, Spence, and Goldstein of Amazon's housekeeping policy under which managers or HR representatives who see papers or messes in the breakroom are to take ownership of the mess and clean it up. *See* Tr. 254:22-5, 566:13-17; GC Ex. 9 at 0:52-1:17. She explained that as part of its standard practice, the HR team conducts GEMBA walks throughout breakrooms and the distribution center floor looking for empty water bottles, paperwork, trash, and anything that's on an empty or vacant table is removed. *See* GC Ex. 9 at 0:52-1:24. Additionally, Stone stated that COVID initiatives require that Amazon keep the

breakrooms tidy and clean. *See* GC Ex. 9 at 1:24-1:30. Palmer and Spence continued to pepper her with questions regarding the housekeeping policy, and Stone reiterated that the HR team followed standard operating procedures and that COVID restrictions required that JFK8 maintain clean, vacant spaces for associates to take breaks. *See* GC Ex. 9 at 3:36-4:00. Palmer continued to ask Stone to which policy she was referring. *See* GC Ex. 9 at 6:05. Stone restated that Amazon's policy was to maintain clean public spaces. *See* GC Ex. 9 at 6:15-6:17. Stone reiterated that in maintaining clean public spaces, managers were expected to tidy up loose papers and remove any trash that has been left behind. *See* Tr. 254:22-5, 566:13-17; GC Ex. 9 at 0:52-1:17. At no time did Stone say that Amazon had the right to remove union literature from breakrooms. *See* GC Ex. 9.

III. THE ALJ ERRED IN HER FINDINGS WITH RESPECT TO AMAZON'S THIRD-PARTY SECURITY GUARDS AND WITH RESPECT TO LEVYING EVIDENTIARY SANCTIONS

A. The ALJ Erred in Concluding that Metro One Security Guards John Hill and Elena Koplevich Were Acting As Amazon's Agents. (Cross Exceptions 2, 3, 5, 12, 13, 14, 15, 21, 22, 23)

Under extant law, the Metro One security guards cannot be found to be Amazon's agents because they had neither actual nor apparent authority to act on behalf of Amazon with respect to the alleged violations at issue in this case. These alleged violations arose outside of Metro One's primary purpose of ensuring the physical security of, and access to, the JFK8 facility, i.e. its actual authority. The alleged violations were so wholly outside of Metro One's actual authority that it was not reasonable for any third party to believe that Amazon had authorized its guards to engage in the acts in question. This is all the more evident because Spence admitted, and indeed contemporaneously informed the Metro One security guards, that he knew the guards had no such authority. For the reasons set forth below, the ALJ erred in concluding that the Metro One security guards were acting as Amazon's agents when it engaged in the alleged behavior.

1. The Relevant Case Law Governing Agency Status.

"An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party." *Cornell Forge Co.*, 339 NLRB 733, 733 (2003). "The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful." *Id.* The burden of proving an agency relationship rests with the party asserting such a relationship. *See D.G. Real Estate, Inc., d/b/a Dick Gore Real Estate*, 312 NLRB 999, 999 (1993).

The Board applies common law agency principles. Whereas actual authority is created through a manifestation by the principal to the purported agent, "[a]pparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question." *Dick Gore Real Estate*, 312 NLRB at 999. Two conditions must be met for apparent authority to exist. First, "there must be some manifestation by the principal to a third party." *Id.* Second, "**the third party must believe** that the extent of the authority granted to the agent encompasses the contemplated activity." *Id.* (emphasis added).

In *Dick Gore Real Estate*, the Board dismissed an allegation that an individual was the employer's purported agent despite the agent's presence at the job "almost daily" and his attendance with the employer at a meeting with the union because those circumstances did not provide "any reasonable basis for union members to believe [the alleged agent] was authorized to deal with the [u]nion on behalf of the [employer]." 312 NLRB at 999.

2. The General Counsel Failed to Satisfy its Burden of Proving that Hill Acted As Amazon's Agent with Regard to the Specific Conduct Alleged to Be Unlawful.

The ALJ erred in concluding that the General Counsel met its burden to prove that Hill was acting as Amazon's agent during his May 16th interaction with Spence. As an initial matter, the General Counsel offered no evidence to even suggest that Amazon actually authorized the conduct

by Hill that is alleged to be unlawful. In fact, the record evidence proves that Amazon did not authorize the conduct by Hill. *See, e.g.,* GC Ex. 50 (stating that Hill "[a]cted outside the scope of [his] post orders and without the direction of Amazon" and "acknowledged that he was not directed by anyone at Amazon to engage with Amazon associates regarding this kind of activity."); *see also* Tr. 1065:20-1066:10, 1067:4-9.

The General Counsel's case must therefore rest on a theory that Hill acted with apparent authority. That theory, however, fails for two reasons: (1) because the General Counsel has presented no evidence that Amazon (the principal) manifested to Spence (the third-party) that Hill had authority to act on behalf of Amazon to enforce its solicitation and distribution policy, *see Dick Gore Real Estate*, 312 NLRB at 999; and (2) because Spence himself testified that he knew that Hill did not have the authority to stop Spence from lawfully distributing union literature in non-working areas during non-working times. Thus, Spence did not believe that the authority granted to Hill encompassed the actions at issue. *See id.* ("the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity.").

First, as to the manifestation of Hill's authority by Amazon to Spence or other associates, the evidence adduced by the General Counsel fails to include any evidence that Amazon had imbued the Metro One security guards with any authority to enforce its solicitation policy. The evidence only shows that the Metro One security guards were involved in the physical security of and access to the JFK8 facility. Furthermore, the record is devoid of any evidence that Metro One security guards had ever been involved in enforcing any HR policies such as the solicitation and distribution policy. *See* Tr. 47:18-48:5, 48:22-49:17, 49:21-50:7, 528:15-18, 529:4-12, 1075:11-17, 1076:7-1078:9, 1079:7- 1080:9. The record is completely devoid of any manifestation beyond this limited scope. As a result, there is no factual basis in the record to find that Hill had any

apparent authority to enforce, or seek to enforce, its solicitation and distribution policy as to Amazon associates.

Second, and more importantly, Spence's testimony confirms that ***he actually knew*** that Hill lacked such authority at that time. Spence unequivocally informed Hill that he had permission from HR to distribute the literature, directed Hill to "call HR" to confirm, and continued to distribute the Notice without hesitation. *See* Tr. 541:24, 543:4-5, 1064:5-6.38. Further, when Spence subsequently saw that Hill collected the Notice, Spence told Hill "you don't work for Amazon" and that what Hill was doing was "not his job." Tr. 543:15-17. The only reasonable interpretation of this testimony is that Spence knew that Hill had no authority whatsoever to address issues related to Amazon's solicitation policy. As a result, the General Counsel failed to establish that Hill had either actual or apparent authority to act on behalf of Amazon with respect to its solicitation policy. Based on this failure of proof, Hill's actions cannot be imputed to Amazon.

In sum, Spence's actions and statements demonstrate that Spence knew Hill's conduct was contrary to Amazon policy and was done independent of Amazon's instructions. Spence knew Amazon permitted the distribution of union literature in non-working areas during non-working times irrespective of what Hill did or said about it during their May 12th interaction, and specifically stated that he had approval from Amazon's HR department to do so. Thus, the ALJ erred in concluding that Hill was acting as Amazon's agent with regard to the specific actions at issue and the allegation against Amazon concerning Hill should be dismissed.

3. The General Counsel Failed to Satisfy its Burden of Proving that Koplevich Acted as Amazon's Agent with Regard to the Specific Conduct Alleged to Be Unlawful.

The ALJ erred in concluding that the General Counsel met its burden to prove that Koplevich acted as Amazon's agent with regard to the specific conduct alleged to be unlawful. As

a preliminary matter, the General Counsel offered no evidence that Amazon actually authorized the conduct by Koplevich that is alleged to be unlawful.[6] The General Counsel instead relies on the theory, and the ALJ wrongfully concluded, that Koplevich acted with apparent authority, which requires evidence that Spence reasonably believed Amazon had authorized Koplevich to photograph or video the cookout. The record is devoid of such evidence.

Koplevich worked for Metro One, not Amazon, a fact of which Spence was aware on May 24th. *See* Tr. 547:10-22. At the time she pointed her phone in the direction of the cookout, Koplevich was on a meal break and at a fence near the outskirts of the parking lot across the street from a public bus stop. This is not where guards are stationed when performing their duties on behalf of Amazon. *See* Tr. 47:24-48:2, 48:3-5, 48:22-49:17, 547:10-16, 548:15-18; GC Ex. 50. The work performed by the Metro One guards primarily concerns the security of the interior of the JFK8 warehouse. They are stationed at the entrance and exits inside the building to keep unauthorized people out of the facility. *See* Tr. 528:15-529:12, 1075:11-17, 1076:7-21, 1077:19-1078:9. The Metro One guards also will check non-clear bags when people exit JFK8 to ensure Amazon equipment or product is not taken out of the facility. *See* Tr. 49:21-50:7, 1076:22-1077:18. On occasion, they will move about the immediate exterior of the building to monitor the building's security, and scan various security points along the way. *See* Tr. 1079:7-1080:9. There is no record evidence to indicate that Metro One guards are tasked with surveilling activities that occur off Amazon property; rather, the record evidence shows the complete opposite. Amazon policy prohibits guards from taking pictures or making videos unless part of an active investigation. *See* GC Ex. 50. Spence did not testify that Metro One security guards had ever

[6] The record demonstrates that Amazon never actually authorized the conduct by Koplevich. *See, e.g.,* Tr. 1068:3-10 (" . . . she was acting outside of her authority. . . . They are only directed and only allowed to take pictures and/or video recordings during the course of an active investigation."); *see also* Tr. 1069:7-14, 1069:21-24; GC Ex. 50; GC Ex. 51.

performed work where Koplevich was located that day or that he was aware of any conduct by which Amazon had authorized the Metro One security guards to use their phones to take pictures or make recordings.

Put simply, the General Counsel failed to present adequate evidence to establish apparent authority of Koplevich and the allegation concerning Koplevich's conduct must therefore be dismissed.

4. The ALJ Erroneously Relied on Certain Board Cases to Find that the Metro One Security Guards Acted as Amazon's Agents at All Material Times.

The ALJ ignored the governing principles above and, instead, erroneously relied on factually specific findings in distinguishable cases to arrive at a forced finding of agency. Specifically, the ALJ extrapolated language specific to a case regarding the authority of an ***office manager*** to "reflect[] company policy and speak[] and act[]for management" and, without any analysis as to the actions taken by Metro One, interposed that principle onto other cases regarding security officers enforcing no trespassing policies. *See* Decision at 50:20-51:5. In doing so, the ALJ formulated an entirely new *per se* legal principle—namely, that security guards have the apparent authority to reflect company policy and speak and act for management regardless of the actions at issue. *See id*. Yet, each of these cases upon which the ALJ relied are wholly distinguishable from Metro One's actions that are at issue in this case.

First, the ALJ cited *Pain Relief Centers, P.A*, 371 NLRB No. 70 (2022) for the all-encompassing proposition that Metro One had the authority to "effect Amazon's policy" and "speak and act on behalf of Amazon." Decision at 50:11-12, 51:1-2. But *Pain Relief Centers* involved the agency status of an ***office manager*** whose ***actual*** job responsibilities involved communicating with employees on behalf of the medical office and enforcing the medical office's policies. *See id.* at 20. At issue in *Pain Relief Centers* was the office manager's termination of

four medical assistants and a nurse practitioner; but the medical center argued that only Dr. Hansen, the owner and operator of the medical center, had the authority to terminate anyone. *See id.* The Board affirmed the ALJ's finding that the officer manager's agency status "is not open to serious question" as the record evidence showed that the office manager "called staff meetings, conducted meetings, corrected employees, approved schedules and vacations, answered payroll questions, and, notably, threatened employees with termination on multiple occasions." *Id.* The office manager even terminated the four medical assistants in front of Dr. Hansen, who did nothing to disavow the termination. *Id*. Thus, the Board upheld the ALJ's finding that the office manager was "reflecting company policy and speaking and acting for management" when she terminated the employees because this act was well within her role as office manager. *Id*.

But *Pain Relief Centers* has no bearing on the facts of this case as it is evident that an office manager's role is quite different than that of the Metro One guards.[7] As the ALJ found, the Metro One guards' primary task was to protect Amazon's property and the JFK8 facility from unauthorized intrusions and to prevent employees from leaving the building with expensive Amazon equipment. There is zero record evidence that Metro One guards had any authority to impede an associate's ability to distribute literature, to confiscate literature, to tidy up the break rooms, or to surveil individuals' off property activities. Furthermore, there is zero record evidence

[7] Indeed, even the case upon which *Pain Relief Centers* relies—*Pan-Oston Co.*, 336 NLRB 305 (2001)—compels a very different outcome than that reached by the ALJ in this case. In *Pan-Oston* the Board overruled the ALJ's finding of apparent agency. "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question." *Id*. at 305-06. In *Pan-Oston*, the record evidence showed that the individual was a group leader and attended supervisory meetings. However, the Board found that he was not acting with the employer's apparent authority when he attended a union meeting, asked employees about the union meeting or told the employees that they were being watched. The Board found the record devoid of any evidence that the employer did anything to indicate to its employees that it had sent the group leader to a union meeting or that he spoke for management. Therefore, the Board held that it could not conclude based solely upon the individual's position as a group leader that he was speaking or acting on behalf of the employer and thus overruled the ALJ's finding of apparent agency. *Id*. at 306.

that Metro One guards ever performed these activities or that it was reasonable for Spence to believe that Amazon had tasked the Metro One guards with the authority to do so. Thus *Pain Relief Center*'s lofty language about "reflecting company policy" and "speaking on behalf of management" is specific to the facts of that particular office manager in that particular case and bears absolutely no relation to the actual role of the Metro One guards or their challenged actions at JFK8.

The ALJ also relied on three cases in which the Board considered the apparent agency of various security guards to ultimately hold that "Metro One security personnel were reflecting company policy and speaking and acting on behalf of Amazon." Decision at 51:1-2. Yet, each of these cases are factually distinct from the present circumstances because they all involve security guards who allegedly committed unlawful acts ***while exercising their principal duty of controlling access to the employer's property and facilities.*** For example, in *Perdue Farms*, 323 NLRB 345, 351 (1997), the complained of action took place at the security guard gate where the security guard refused to allow employees to enter the building until they surrendered union handbills and stickers. It was within the security guard's primary duty to control who came in and out of the building at the guard gate and the employer testified that the United States Department of Agriculture prohibited employees from wearing stickers in the processing areas of the facility. *See id.* at 351. The Board upheld the ALJ's "find[ing] that by placing the guard in a position to stop persons entering the plant premises and to confiscate materials the Respondent had cloaked the guard with at least apparent authority as the Respondent's agent." *Id.* Again, the ALJ recited this particular finding, which was specific to the security guard at issue in *Perdue Farms*, to make a blanket conclusion regarding the apparent authority of security guards in general and does so in the absence of *any* discussion or analysis of the actions at issue in this case. *See* Decision at 50:21-

24 ("In particular, the Board has found that by 'placing the guard in a position to stop persons entering the plant premises and to confiscate materials,' an employer has 'cloaked the guard with at least apparent authority' as its agent"). While discussed above at length, it is worth repeating here that, unlike the security guard in *Purdue Farms*, there is zero record evidence that Metro One guards had any authority to impede an associate's ability to distribute literature, to confiscate literature, to tidy up the break rooms or to surveil individuals' off property activities.

The ALJ also cited two other security guard cases, *T-Mobile USA, Inc.*, 369 NLRB No. 50 (2020) and *Harrison Steel Castings Co.*, 262 NLRB 450 (1982), for its conclusion that Amazon had cloaked the Metro One guards with apparent authority. Yet again, both of these cases involve the alleged agent engaging in the very type of activity that they were hired to perform. Both of these cases involved security guards who were stationed at the entrance of the plant and precluded individuals—employees, off duty employees and third parties—from entering the employer's property. *See* T-*Mobile*, 369 NLRB No. 50at 19; *Harrison*, 262 NLRB at 454-55. This very act of enforcing the integrity of the employer's facility and preventing these individuals from (what the security guards believed to be) trespassing onto the employer's premises was done directly within the confines of these security guards' actual authority—to prevent intrusion onto the employer's property. Again, these Board decisions are distinguishable because none of the actions at issue in this case came within Metro One's purview of ensuring the security of the JFK8 premises and there is no evidence to suggest that it was reasonable for anyone to believe that Amazon had tasked the Metro One guards with the authority to engage in the alleged actions.

In sum, none of the cases cited by the ALJ upend the notion that the General Counsel failed to carry its burden of establishing that Metro One security guards Hill and/or Koplevich acted as Amazon's agent with regard to the specific conduct alleged to be unlawful. Nowhere in its agency

discussion did the ALJ consider the alleged wrongful acts of the Metro One guards. Indeed, as the very case cited by the ALJ counsels: "the fact that one is a guard or plant security representative ***does not establish agency, per se, for all purposes***" and instead the action complained of must be within the security guard's entrusted apparent authority. *Harrison*, 262 NLRB at 451 fn. 6 (emphasis added). Because the ALJ failed to consider the specific conduct alleged to be unlawful within the context of the Metro One guards' role at JFK8 and because there is no record evidence to support a conclusion that it was reasonable for Spence, or any associate, to believe that Amazon had tasked the Metro One guards with the authority to perform the acts of which they are accused, the ALJ erred in finding that Metro One security guards were acting as Amazon's agents. For these reasons, the portions of the Complaint alleging that Hill and Koplevich, as agents of Amazon, violated the Act must be dismissed.

B. The ALJ Improperly Concluded that Amazon Failed to Repudiate the Conduct of John Hill and Elena Koplevich (Cross Exceptions 4, 6, 21, 22, 23)

Even if Hill and Koplevich were agents of Amazon for purposes of their challenged conduct and their conduct was indeed unlawful, Amazon effectively repudiated their conduct. An employer repudiates unlawful conduct if the repudiation is "timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct." *T-Mobile USA, Inc.*, 369 NLRB No. 50, 2020 WL 1660063 at *1 (2020). In *T-Mobile*, the Board decided that an employer effectively repudiated an incorrect statement that a security guard made to an employee about the employee's right to distribute union literature simply by telling the employee that the guard's statement was "in error" and that the employee had the right to distribute union literature in non-working areas during non-working times. *Id.* at *1-2.

1. To the Extent There Was Anything Improper about Hill's Conduct, Amazon Repudiated Such Conduct.

Here, following Hill's interaction with Spence, Amazon proactively took many actions to repudiate Hill's conduct and to reiterate that associates have the right to distribute union literature in non-working areas during non-working times:

- Amazon immediately informed Metro One not to remove union literature from any breakroom. *See* Tr. 1064:15-19.
- Amazon met with Hill and told him that he should not have done what he did under the assumption that the NLRA protected Spence's conduct. *See* Tr. 1064:20-1065:2, 1065:20-1066:10, 1067:4-9; 1083:2-5; GC Ex. 50.
- Amazon met with Spence and told Spence that Hill should not have done what he did under the same assumption, that Spence had the right to distribute union literature in non-work areas during non-work time and that Amazon would not interfere with that right. *See* Tr. 550:15-551:4, 1205:18-1206:4, 1216:9-11.
- Amazon notified Metro One, including its executive leadership, in writing that Hill should not have done what he allegedly did and asked Metro One to conduct training for its guards regarding NLRA rights, which Metro One did. *See* Tr. 1068:16-1069:6, 1070:3-21, 1081:22-1082:9; GC Ex. 50.
- Amazon's HR department at JFK8 repeatedly reminded Amazon associates, via the VOA board and the AtoZ application, of their rights to distribute under the NLRA and that Amazon would not violate these rights. *See* Tr. 551:12-552:6, 1206:14-1207:25, 1209:13-1210:2, 1216:16-20; R. Ex. 6.
- Amazon provided refresher training regarding NLRA rights to its HR team. *See* Tr. 1210:4-24, 1211:14-1212:20; R. Ex. 16.

The ALJ wrongfully rejected Amazon's argument that it repudiated Hill's conduct under *T-Mobile*. First, the ALJ mischaracterized Amazon's repudiation argument and instead analyzed the *T-Mobile* standard solely within the context of Grabowski's conversation with Spence: "Amazon further contends that Grabowski's statements to Spence constituted an effective repudiation pursuant to *T-Mobile USA, Inc.*, 369 NLRB No. 50 (2020)." Decision at 55:1-4. However, Amazon's contends that it is the totality of its actions—Amazon's immediate admonition to Metro One of its actions, Amazon's requirement to Metro One to conduct immediate

training on associates' NLRA rights, Amazon's refresher training to its HR team regarding associates' NLRA rights, Amazon's posting on the AtoZ app and the VOA board regarding associates' rights under the NLRA including their right to solicit and distribute materials and a statement that Amazon would not violate these rights, ***in addition to*** Grabowski's conversation with Spence—that formed the effective repudiation under *T-Mobile*. As the Board concluded in *T-Mobile* "***[u]nder all the circumstances***, employees would not reasonably conclude that [Amazon] would prohibit them from distributing union literature in nonwork areas during nonworktime." *Id*. at *2 (emphasis added).

In narrowing the context of Amazon's argument, the ALJ erroneously concluded that Amazon's repudiation was not effective under *T-Mobile* because it was not given in the form of a written statement. As an initial matter, nowhere does *T-Mobile* state that in order for a repudiation to be effective it must be in writing. In fact, *T-Mobile* does not require particular formalities but instead explains that the repudiation inquiry focuses on whether the employer makes it known to the employee that the employer's actions were wrong and that the employee is free to resume the activity that had been wrongly prohibited. *See id.* Amazon's actions did just that: Grabowski told Spence that Hill was not acting on behalf of or at the direction of Amazon, that Hill should not have acted in the manner that he did, that Hill had received coaching regarding his actions and Amazon's policy, and affirmed that Spence had the right to distribute union literature in non-work areas during non-work time. Indeed, Grabowski's face to face repudiation to Spence allowed Spence to participate in a conversation about Hill's actions and voice his concerns in a way that a one-sided written statement does not allow. Finally, contrary to the ALJ's finding, Amazon ***did*** provide written statements to all of its associates via the VOA board and the AtoZ app assuring

associates of their NLRA rights, including their right to solicit and distribute literature, and stating that Amazon would not violate these rights.

The ALJ also relied heavily on its erroneous finding that Amazon did not repudiate its actions to the 20 associates allegedly present in the breakroom. Again, Amazon did in fact notify ***all*** associates via the VOA board and AtoZ app of their solicitation and distribution rights and assured associates that Amazon would not violate these rights. Regardless, there is zero record evidence that any other associate witnessed Hill and Spence's interaction in the breakroom and therefore there is no evidence to compel a conclusion that repudiation beyond Spence was required. Indeed, if any associates did observe the discussion between Spence and Hill they would have seen Spence continue to distribute the Notice after his conversation with Hill, thereby eliminating any possible perception that Hill had interfered with Spence doing so.

The prophylactic measures Amazon took were more than sufficient under *T-Mobile* to repudiate any inappropriate conduct by Hill so as to render improper a finding that Amazon violated Section 8(a)(1).

2. To the Extent There Was Anything Improper about Koplevich's Conduct, Amazon Repudiated Such Conduct.

The allegation regarding Koplevich's conduct concerns employees' rights to engage in union activity under the NLRA. Following Koplevich's alleged actions, Amazon proactively took various actions to reiterate that associates have such rights, some of which overlap with the actions in took with respect to Hill as the alleged conduct occurred within a week of each other.

- Amazon immediately asked Metro One to remove Koplevich from JFK8 because she had acted outside of her authority. *See* Tr. 1067:19-1068:12, 1069:7-14, 1069:21-24; GC Ex. 51.
- Metro One immediately removed Koplevich from JFK8 and Koplevich did not return to the facility. *See* Tr. 1068:13-14.

- Amazon notified Metro One, including its executive leadership, in writing that Koplevich should not have done what she allegedly did and asked Metro One to conduct training for its guards regarding NLRA rights, which Metro One did. *See* Tr. 1068:16-1069:6, 1070:3-21, 1081:22-1082:9; GC Ex. 50.

- Via its VOA boards and the AtoZ application, the JFK8's 'HR department repeatedly reminded associates of their rights to distribute under the NLRA. *See* Tr. 1206:14-1210:2, 1216:16-20; R. Ex. 6.

- Amazon provided refresher training regarding NLRA rights to its HR team. *See* Tr. 1210:4-24, 1211:14-1212:20; R. Ex. 16.

Amazon's actions far exceeded the legal standard for effective repudiation considering the totality of Koplevich's conduct. Koplevich's conduct did not reasonably tend to interfere with, restrain, or coerce associates' NLRA rights. The General Counsel offered no competent evidence that she held her phone up in the direction of a single associate, let alone the tent where union activity occasionally took place. As was the case with Hill, there is no record evidence that anyone other than Spence witnessed this alleged incident.

C. The ALJ Erred in Levying An Adverse Inference and Evidentiary Sanctions Against Amazon with Respect to the June 12, 2021 Allegations. (Cross Exceptions 1, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20)

1. The ALJ erroneously levied considerable evidentiary sanctions that effectively precluded Amazon from mounting a defense to the allegations related to June 12, 2021. At the outset, Amazon substantially complied with its subpoena obligations and made good-faith privilege assertions with respect to the two withheld documents. This good-faith compliance alone obviates the need for any evidentiary sanctions. Further, even if Amazon did not comply with the subpoena, the proper forum to enforce subpoena compliance is a federal district court and the ALJ here did not have the authority to levy sanctions in this proceeding. Finally, the sanctions imposed were so severe that Amazon was effectively precluded from presenting a defense – a punishment far harsher than the 'crime' of withholding two documents. Accordingly, Amazon excepts to the imposition of these sanctions and respectfully requests that the portion of the case related to the June 12, 2021 allegation be remanded for the collection of additional evidence – namely Amazon's defenses to the allegations. Amazon Substantially Complied with its Subpoena Obligations.

The General Counsel and the Charging Party served Amazon with Subpoenas *Duces Tecum* in advance of the Hearing. While Amazon filed petitions to revoke the Subpoenas, the ALJ did not rule on these petitions because the parties were able to meet and confer to resolve most of Amazon's issues with the Subpoenas. *See* Decision at 5:5-7. During these conferences, the Charging Party agreed to accept the same set of responsive documents from Amazon that Amazon had provided to the General Counsel as satisfactory compliance with its own Subpoena. In response to the Subpoenas, Amazon produced more than 1,000 documents consisting of more than 8,500 pages, as well as a privilege log listing responsive, privileged documents withheld from production.

On August 15, 2022, the Charging Party filed a Motion to Compel disclosure of ***every document*** listed in Amazon's privilege log, without providing substantial reasons for the production of each document as required by the rules. Such an abuse of process should never be permitted. Regardless, Amazon timely filed an opposition to the Charging Party's motion on August 22, 2022. Both the General Counsel and the Charging Party filed replies to Amazon's opposition.

On September 19, 2022, the ALJ issued an order requesting that the Chief Administrative Law Judge appoint a Special Master to decide the issues of privilege/work product alleged in the Charging Party's Motion to Compel. Chief ALJ Robert Giannasi then appointed ALJ Geoffrey Carter to be Special Master.

In response to the Special Master's initial request for the privileged documents, on October 18, 2022, Amazon sent a letter to the Special Master providing additional information and seeking to protect its privileged documents by requesting an assurance that the Special Master would not disclose to the Charging Party or any other individual entity documents found to be non-privileged.

On October 19, 2022, ALJ Carter ordered that Amazon submit an updated privilege log with a more detailed description of each document, and Amazon complied on October 24, 2022. Respondent also provided all of the documents contained on its privilege log to the Special Master for *in camera* review.

On November 4, 2022, ALJ Carter issued his Special Master's Report and Recommendation Regarding Documents on Respondent's Privilege Log ("Report and Recommendation"). The Report and Recommendation found that Amazon correctly asserted privilege over the vast majority of the documents on its privilege log and recommended that Amazon produce the 19 documents that the Special Master found non-privileged. The ALJ adopted the Report and Recommendation when the Hearing resumed on November 7, 2022. Amazon filed a Request for Special Permission to Appeal this ruling on November 8, 2022.

On January 4, 2023, the Board issued an Order granting Amazon's Request for Special Permission to Appeal and denied the appeal on its merits. Subsequently, Amazon produced 17 of the 19 documents it was ordered to produce subject to the ALJ's adoption of the Special Master's Report and Recommendation. Amazon continued to assert the privileged nature of two documents, which Amazon described in its privilege log as "labor relations reports describing, among other things, the status of ongoing ULP charges. . . . including the investigation into allegations of the confiscation of union literature" and related to the June 12, 2021 allegations. The General Counsel responded by filing an Amended Brief in Support of its Motion for Evidentiary Sanctions, arguing that Amazon's refusal to produce two documents warranted a preclusion order and adverse inferences. Amazon filed a Reply Brief.

The ALJ granted the General Counsel's Motion for Evidentiary Sanctions. *See* Tr. 761-778. The evidentiary sanctions precluded Amazon from "presenting or inducing [sic] testimony

regarding the alleged confiscation of union literature at the Staten Island facility," and "presenting documentary evidence regarding the alleged confiscation of union literature which has not already been provided to the General Counsel." Tr. 775-77. In addition to the preclusion sanctions, the ALJ drew an adverse inference to the effect that the two documents, had they been produced, would have mitigated against proving Amazon's defenses with respect to the allegations involving the distribution of Union literature, and would have "tend[ed] to show that Amazon unlawfully confiscated union literature from Palmer and Spence on June 12, 2021, and prohibited them from distributing union literature in the breakrooms that day." Tr. 776.

Despite Amazon's substantial compliance with the Subpoenas—producing over 1,000 documents, and all but 2 privileged documents, and prevailing on almost all of the Charging Party's objections to Amazon's privilege claims—the ALJ levied evidentiary sanctions that completely undermined Amazon's ability to present a defense to the underlying allegations. Amazon was left with no option but to proffer salient testimony related to these allegations that ultimately was not considered by the ALJ in the Decision.

2. The ALJ Does Not Have the Authority to Impose Evidentiary Sanctions.

The NLRA and the Board's Rules compel the Board to seek enforcement of administrative subpoenas in the appropriate district court, but the Act is silent as to alternative remedies available should a party decline to seek such enforcement. *See* 29 U.S.C. § 161(2); 29 C.F.R. § 102.31(d). It is judicial canon that the executive branch, and its agencies acting in an adjudicative role, do not have the power to enforce a subpoena. Rather, that authority resides within the exclusive jurisdiction of an Article III district court. *See N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 497 (4th Cir. 2011); *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894). It is clear that Congress, in drafting the "elaborate provision for obtaining and enforcing subpoenas . . . "inte[nded] that this machinery be utilized." *N.L.R.B. v. C.H. Sprague*

& Son Co., 428 F.2d 938, 942 (1st Cir. 1970). Thus, the Board is without authority to bypass the exclusive Article III subpoena enforcement mechanism and instead chose to impose evidentiary sanctions as a means to coerce parties into compliance. *See N.L.R.B. v. Int'l Medication Sys., Ltd.*, 640 F.2d 1110, 1116 (9th Cir. 1981), *cert. denied* 102 S.Ct. 1712, 455 U.S. 1017, 72 L.Ed.2d 134; *see also Nat'l Lab. Rels. Bd. v. Sanders-Clark & Co.*, No. 2:16-CV-02110 CAS(AFMx), 2016 WL 2968014, at *5 (C.D. Cal. Apr. 25, 2016) (relying on *Int'l Medication* to hold that a finding of waiver of the attorney-client privilege was, at base, a discovery sanction which the ALJ did not have authority to determine).

In *Int'l Medication*, the Ninth Circuit specifically addressed whether a preclusion order was appropriate given the respondent's refusal to comply with a Board subpoena, and held that the authority to impose such an order was exclusively within the jurisdiction of the district court. *See* 640 F.2d at 1113. Thus, Article III judges are the proper arbiters of privilege, and a preclusion order premised on a party's zealous defense of its privilege that has not been subjected to district court review is improper. *See id*. at 1115; *N.L.R.B. v. Detroit Newspapers*, 185 F.3d 602, 606 (6th Cir. 1999). Because the circumstances of the instant case involve the coercive use of sanctions in an attempt to force Amazon to abandon its claims of privilege, such a decision can only be made by an Article III court. Accordingly, Amazon excepts to the imposition of such sanctions because the ALJ was without the authority to impose the preclusion sanction and an adverse inference in this case.

3. Evidentiary Sanctions Were Improper Given Amazon's Substantial Compliance with its Subpoena Obligations and Good-Faith Defense of Its Privilege.

Respondent has a valid reason for not fully complying with the Charging Party's subpoena, notwithstanding the ALJ's adoption of the Report and Recommendation, namely that Amazon stands on its privilege assertion, which, had the Board properly sought Article III enforcement,

would have been subject to judicial appeal. Indeed, the NLRB Division of Judge's Bench Book (2022) notes that one of the "valid reasons" for not imposing discovery sanctions is that the documents in question were claimed to be privileged. *See* §8-720 at 109. That section cites in the first instance a recent holding by the District Court of the District of Columbia that adverse inferences cannot be drawn from the invocation of the attorney-client privilege.[8] *See id.* (citing *U.S. ex rel. Barko v. Halliburton Co.*, 241 F.Supp.3d 37, 54–55 (D.D.C. 2017), affd. 709 Fed. Appx. 23, 29 (D.C. Cir. 2017)). The court in *Halliburton* collected cases—including case law from the Second Circuit—standing for the proposition that an assertion of privilege cannot create an adverse inference, because "[s]uch a penalty for invocation of the privilege would have seriously harmful consequences." *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999) abrogated by *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 123 S.Ct. 1115, 155 L.Ed.2d 1 (2003). The Board itself has recognized the important interest embodied in the attorney-client privilege and work product doctrine in declining to impose evidentiary sanctions for a respondent's failure to produce documents for *in camera* inspection. *See Douglas Autotech Corp.*, 357 NLRB 1336, 1352-53 (2011). As such, Amazon should not be penalized for its principled stand asserting privilege.

Amazon does not concede that the Board has the authority to levy sanctions to enforce subpoenas, but even if it did, Board law is clear that evidentiary sanctions should be proportional to the conduct related to the noncompliance. *See Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1 n. 1 (2018); *see also Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (reversing ALJ's dismissal of the complaint as sanction for party's noncompliance with subpoena as disproportionate), enfd. in relevant part 577 F.3d 70 (2d Cir. 2009)). Board precedent

[8] While the Bench Book goes on to cite Board law for the opposite proposition, those cases predate *Halliburton* by over 20 years.

establishes that such a calculus should be influenced by a noncompliant party's motivation for refusal to turn over document—*i.e.*, where "bad faith" is present. *See McAllister Towing & Transp.*, 341 NLRB 394, 396–397 (2004) (respondent did not act in good-faith by providing subpoenaed documents at hearing, and thus sanctions were justified); *see also Station Casinos, LLC*, 358 NLRB 1556, 1569 (2012) (noting that the standard for delayed disclosure is whether the *willful* refusal caused prejudice to opposing party) (citing *People's Transp. Serv.*, 276 NLRB 169, 225 (1985)). The ALJ in *McAllister Towing* was particularly persuaded to impose sanctions due to the respondent's lack of diligence in producing the records prior to the hearing, even though upon the threat of sanctions, the respondent produced the documents "within one hour." 341 NLRB at 396. Similarly, in *Curaleaf Massachusetts, Inc.*, No. 01-CA-262554, 2021 WL 3036484 (July 15, 2021), the ALJ rejected the General Counsel's request for sanctions based on an allegation that respondent-managers failed to conduct a diligent search of records and therefore must have withheld responsive documents. In so doing, the Judge stated, "This was not a situation where [manager] ignored the subpoena or took no or minimal steps to comply, and I cannot conclude that she acted in bad faith. I therefore do not agree with the General Counsel's characterization of her conduct." *Id.*

In this case, Amazon cannot be accused of lacking diligence. Amazon provided over 1,000 documents in response to the Subpoenas, in addition to a detailed log of responsive, yet privileged, documents and produced all but two of the documents it was ordered to produce. Nor is this a situation in which Amazon has acted in bad faith; Amazon has asserted its good faith claims of attorney-client privilege and work product protection at every procedural opportunity. In fact, despite the fact that Charging Party made a baseless challenge to the privileged status of ***every document*** listed on Amazon's privilege log, the Report and Recommendations found that nearly

all of the documents listed on Amazon's privilege log were privileged. *See Mitre Sports Int'l Ltd. v. Home Box Off., Inc.*, No. 08 Civ 9117 (GBD)(HBP), 2010 WL 11594991, at *10 (S.D.N.Y. Oct. 14, 2010). Therefore, it is not appropriate to impose evidentiary sanctions upon Amazon in light of its diligence and good faith motivation for refusal to produce the two documents at issue.

4. The Evidentiary Sanctions Precluded Amazon from Presenting a Full Defense to the June 12, 2021 8(a)(1) Allegations and the Case Should be Remanded for the Taking of Additional Evidence on These Allegations.

Due to the evidentiary sanctions, Amazon was effectively barred from presenting any testimony or evidence in defense of the June 12, 2021 allegations. Indeed, Amazon had to proffer witness testimony that it was precluded from entering into the record. *See, e.g.* Tr. 812:17-25, 813:19-25, 872:13-15, 873:4-14 (proffer). The ALJ erred when she imposed the preclusion and adverse inference sanction on Amazon because doing so exceeded the authority of the Board or an ALJ. Even if the ALJ did possess such authority, Amazon's conduct and motivation for withholding two documents based on its good faith assertion of privilege does not warrant the imposition of any sanctions. Accordingly, Amazon excepts to the ALJ's findings with respect to the allegations related to June 12, 2021 and requests remand of that portion of the case for the taking of additional evidence and an opportunity for the General Counsel to properly seek enforcement of its subpoena in district court, should it choose. *See Int'l Medication Sys., Ltd.*, 640 F.2d at 1112,1116 (ordering remand of the portion of the case in which the ALJ barred Respondent from rebutting the General Counsel's evidence, cross-examining witnesses, or presenting other evidence because the NLRB "lacked authority" to impose such sanctions).

IV. CONCLUSION

For the above reasons, Amazon respectfully requests that the Board dismiss the allegations contained in Paragraphs 8 and 9 of the Complaint and decline to enforce the ALJ's recommended

Order. Amazon also requests that the Board remand the allegations contained in Paragraphs 10, 11 and 12 of the Complaint back to the ALJ for the taking of additional evidence.

Respectfully submitted this 11th day of March, 2024.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of March, 2024, I caused the foregoing to be electronically filed with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served via e-mail on the following parties of record:

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