UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

ARKEMA INC.

AND

CASES 16-CA-26371 AND
16-CA-26392

UNITED STEEL WORKERS OF
AMERICA, LOCAL 13-227

ARKEMA INC.,

Employer

AND

GREG SCHRULL,

CASE 16-RD-1583

Petitioner

AND

UNITED STEEL WORKERS OF
AMERICA,
LOCAL 13-227,

Union

ARKEMA INC.'S REPLY IN SUPPORT OF ITS EXCEPTIONS

Arkema Inc. ("Arkema") files this Reply in Support of its Exceptions to the Administrative Law Judge's ("ALJ's") Decision and Recommended Order and states:

A. Arkema Did Not Violate the Act in Disciplining Mark Saltibus.

Arkema agrees that *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), provides the proper framework for analyzing whether it violated the Act by disciplining Mark Saltibus for threatening Susan Russell. Under this standard, the Act is violated if the General Counsel shows: (1) the discharged employee was at the time engaged in protected

activity, (2) the employer knew it was such, (3) the basis of the discharge was an alleged act of misconduct in the course of that activity, and (4) the employee was not in fact guilty of the misconduct.[1] *Id*. at 23.

Arkema concedes that Saltibus approached Russell about the decertification election and that his advocacy for the Union in this regard was protected. Russell, however, reported to the Chief Operator on her shift, Randy Joy, that during the course of his advocacy for the Union, Saltibus threatened her by telling her, "You're not going to have the male assistance that you need if your name is on the list, me or any other Union member." (Tr. 365-66; *see also* R. Ex. 11).[2] There is also evidence in the record that Saltibus threatened her with job loss if she did not support the Union. (R. Ex. 11). There is no evidence in the record that Arkema had reason to disbelieve these complaints at the time they were made. Further, Saltibus's statements to Russell in this regard were unprotected. *See Contempora Fabrics, Inc*., 344 NLRB 851, 852 (2005).

In an effort to prove that Saltibus did not engage in misconduct, the General Counsel attacks Arkema's investigation of this situation. He argues that the fact Freeman prepared a disciplinary letter for Saltibus before talking to Saltibus is evidence of a rush to judgment and bad faith. This argument ignores evidence that Freeman and Turley decided that whether the letter would be issued to Saltibus or not depended on the results of the interview with him and, in fact, was not issued until Saltibus had related his version of events. (Tr. 77, 82, 210, 288-89, 323-24). The General Counsel further argues

[1] Both the ALJ and the General Counsel attempt to improperly require Arkema to prove that it acted in good faith. Given the very clear test set forth by the Supreme Court, its is the General Counsel's burden to establish that Saltibus did not engage in the misconduct for which he was disciplined, which is tantamount to proving a lack of good faith.

[2] Both Saltibus and Russell knew before this conversation that she needed help from time to time in performing some of the heavier, required tasks. (Tr. 78, 364).

that Akrema's alleged failure to "fully investigate" the incident somehow proves that Saltibus did not engage in the misconduct for which he is accused. This argument ignores the fact that Arkema interviewed the only two parties to the conversation—Russell and Saltibus, and it further ignores that there is no evidence that anyone else was within hearing distance of the conversation.

The General Counsel further relies on Saltibus's and Shepherd's testimony that what Saltibus told Russell (and what he reported during the interview) was that "he wasn't going to do her job for her" and that "she was going to have to carry her own load." (*E.g.*, Tr. 226, 284). While Saltibus's admission in this regard may not go as far as Russell's allegation, it certainly confirms that Saltibus went beyond mere advocacy on behalf of the Union and made a personal threat not to help Russell if she did not support the Union. This evidence is enough to establish that Arkema reasonably believed Russell's version of events. *See Contempora Fabrics*, 344 NLRB at 852.

The General Counsel argues that Arkema's reference to another complaint against Saltibus in the disciplinary letter issued to him is evidence of bad faith. His and the ALJ's assertion that this incident "had not been investigated" is pure speculation—there is no evidence in the record one way or the other on this point. Further, the fact that this comment was contained in the letter is evidence that Arkema had knowledge that Saltibus had been accused of improperly confronting another employee, who he identified as Plattner. (Tr. 289). Finally, the General Counsel did not present any evidence that Arkema did not receive a complaint from Susan Plattner, either. She was (and is) a

bargaining unit employee equally available to both parties. No adverse inference is warranted or justified in this regard.[3]

The General Counsel next argues that Arkema's alleged lack of an honest belief is evidenced by its treatment of Shepherd's hearsay report to Freeman about what Trevino said to Shepherd, and Shepherd could not even recall the exact words he used. (Tr. 234). Of course, Arkema's handling of Trevino's report to Shepherd has nothing to do with whether Saltibus engaged in the misconduct for which he was disciplined. In any event, Trevino's complaint to Shepherd simply is not comparable to Russell's complaint because, by her own admission, Trevino told Shepherd that "she would consider it harassment" if she was approached again about the decertification effort. (Tr. 120). Considering something as potential "harassment" if something else happened to her in the future, is very different from a report that an employee, in fact, had been threatened.

Finally, as the Supreme Court has recognized, illegal harassment has both an objective and a subjective component. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (requiring an objectively hostile or abusive environment as well as the victim's subjective perception that the environment is abusive in order to bring harassment or hostile work environment claim). In other words, harassment is, at least in part, in the eyes of the beholder. Based on Arkema's full investigation of the incident by talking to the only two people involved, it made a business determination, based on the evidence presented, that Saltibus engaged in misconduct worthy of discipline. It is not the Board's role to second guess this decision. *See NLRB v. McGahey*, 233 F.2d 406, 412-13 (5th Cir. 1956) (stating, "Management is for management. Neither Board nor court can

[3] This is particularly true where Board precedent restricts and limits a respondent in meeting with and interviewing a rank and file employee, which restrictions do not apply for the GC. *See Johnnie's Poultry Co.*, 146 NLRB 770 (1964), *enf. denied*, 344 F.2d 617 (8th Cir. 1968).

second-guess it or give it gentle guidance by over-the-shoulder supervision."); *Lamar Advertising*, 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004).

B. Turley's July 23 E-Mail Did Not Violate the Act.

The General Counsel (like the ALJ) insists on ignoring the content and context of Turley's July 2008 e-mail. He also ignores the development of Board law regarding use of the word "harassment" in communications to employees. For example, the General Counsel relies on pre-*Lutheran Heritage* and *River's Bend* case law to argue that Arkema's request that employees report harassment is somehow unlawful. As the District of Columbia Circuit recognized in *Adtranz ABB Daimler-Benz Trans. v. NLRB,* 253 F.3d 19, 27 (D.C. Cir. 2001), "employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment triggering liability under state or federal law … [and] the 'only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with other statements, may lead to a hostile environment.'" (internal citation omitted). Recognizing this issue, the Board has held that requests to report "harassment" are not unlawful under the Act because they do not necessarily solicit reports of protected activity. *See River's Bend Health & Rehab. Servs.*, 350 NLRB 184, 186-87 (2007). Further, requesting employees to report "harassment" is no different legally under the Act than requesting employees to report "threats" or "intimidation," and should not be unlawful. *See id.*; *Champion Home Builders Co*., 350 NLRB 788, 790 (2007) (stating that it is well settled than an employer may lawfully assure employees that it will not allow them to be threatened and it may ask them to report such conduct); *Ithaca Industries, Inc.*, 275 NLRB 1121, 1126 (1985) (holding request for employees to report coworkers who threaten or intimidate them was lawful). To hold otherwise would

render anti-harassment policies that request employees to report harassment under lawful policies required under Title VII to avoid liability,[4] are nonetheless unlawful under the Act. Such a result would be absurd.

The General Counsel also ignores the content and context of Turley's e-mail. The memorandum portion of this e-mail clearly states, "You have the right to not be harassed, intimidated or threatened in way—physically or verbally-**by anyone**, including the union, for refusing to support a strike or certification." (GC Ex. 2). It is therefore not limited to alleged harassment by Union supporters. Furthermore, none of the conduct set forth in the memo is protected conduct under Board law. *See, e.g., Teamsters, Local 705 K-Mart*, 347 NLRB 439, 442 (2006); *IBEW, Local 45*, 345 NLRB 7, 10 (2005); *Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208 (1969) (holding that fining union members for filing a decertification petition was unlawful); *Seafarers (Spitler-Demmer, Inc.)*, 184 NLRB 608 (1970) (holding union discipline for adverse testimony unlawful). The memo is also protected by section 8(c) of the Act.

C. Arkema Properly Withdrew Recognition from the Union.

Arkema properly withdrew recognition from the Union. The Fifth Circuit has held that employers may withdraw recognition from a union upon learning the results of a decertification vote. *See Selkirk Metalbestos, N. Am. v. NLRB*, 116 F.3d 782, 790 (5th Cir. 1997; *Dow Chem. Co. v. NLRB*, 660 F.2d 637, 655-57 (5th Cir. 1981); c*f. Weather Shield Mfg. Co. v. NLRB*, 890 F.2d 52, 60 & n.5 (7th Cir. 1989).

Furthermore, in *Shaw's Supermarkets*, the Board recognized the Fifth Circuit's and Seventh Circuit's concern about employees being saddled with a union they had

[4] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-09 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

rejected for years afterward while the Board's election processes play out, especially where those employees had at least three years of past experience with the union. 350 NLRB 585, 588-89 (2007). In this case, Arkema's Houston employees had over 47 years of experience with the Union, 10 of which were under the leadership of Fred Shepherd. (Tr. 202-03). *See Selkirk*, 116 F.3d at 790 (noting that the Board's unfair labor practice findings were unreasonable in light of the fact that the election at issue involved decertification of a long-time union). Thus, this is a classic case of Arkema's Houston employees' demand for change in the workplace being stifled by the Board's lengthy processes in an attempt to saddle them with a Union they do not want, for years to come.

The General Counsel also argues that Arkema's withdrawal was unlawful to the extent that it occurred prior to the expiration of the Contract Bar on September 18, 2008. While Arkema generally agrees with the General Counsel's propositions of law on this point, he ignores the fact that Arkema did not make any substantive changes to its Houston employees' terms and conditions of employment until September 1, 2008, when a new Sickness and Accident Policy went into effect. (GC Ex. 12). The fact that Arkema jumped the gun by 17 days is a de minimis violation in light of the Union's demonstrable loss of majority support.[5]

D. Arkema's Actions Towards Fred Shepherd Did Not Violate the Act.

Laying aside the various liberties taken without record citation, record support, or simply outright speculation, in General Counsel's Brief (*e.g.*, pp. 12-13, 15, 23 and n.6, p. 35), Arkema agrees the issue is whether Shepherd, if disciplined at all, was disciplined

[5] Arkema's other changes to terms and conditions of employment occurred later. Thus, Arkema did not stop remitting dues to the Union until September. (Tr. 171). Arkema's "confirmation" that it was refusing to process grievances and new, post election arbitrations, its removal of Union bulletin boards provided for by the Collective Bargaining Agreement occurred on September 5, 2008. (Tr. 54-56; GC Ex. 9). Its changes to 401(k) participation and the Time Off Policy occurred after expiration of the Contract Bar on September 22 and October 15, 2008 respectively. (GC Exs. 14, 16).

for engaging in protected Union activities. And, if the General Counsel establishes that by a preponderance of the evidence, Respondent must establish it would have taken the same action notwithstanding those activities. *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983); *Merillat Inds., Inc.*, 307 NLRB 1301, 1303 (1992) (employer's defense does not fail simply because there is contrary evidence).

Contrary to the General Counsel's conclusionary assertions, the record here fails to show (i) that the August 19 meeting with Shepherd was other than to investigate reported inappropriate conduct and to discuss with him the need to avoid confrontational approaches in his leadership role as a group leader,[6] and (ii) that the subsequent letter given to Shepherd on September 5 somehow "tainted" the Company's lawful and, indeed, necessary right to investigate reports of misconduct, particularly in the safety sensitive environment of a chemical plant.

The only argument advanced by the General Counsel is that since the September 5 letter was deemed disciplinary, the investigatory interview itself, *ipse dixit*, was also disciplinary. As discussed in Respondent's main brief (pp. 35-36), this backward "reasoning" is contrary to established law and principles. An interview about an event may *lead* to discipline, but that fact *does not* turn the investigatory interview itself into discipline. *See, e.g., NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 258-59 (1975) (right to representative in investigatory interview arises **only** when the employee reasonably believes disciplinary action **may** occur as a result of the investigation); *Anheuser-Bush, Inc.*, 351 NLRB 644 (2007) (same). Here, too, the evidence shows that the added gloss of the dissenting opinion in *Anheuser-Busch* – that an independent basis for suspicion needs to exist – is met.

[6] Indeed, the record is essentially uniform among all three witnesses in this regard.

The General Counsel's arguments regarding the delivery of the September 5 letter (GC Ex. 7) adds nothing to challenge Arkema's position that the letter was not disciplinary, and the ALJ's simple misfocus on a single sentence, rather than the letter as a whole, was error.

The General Counsel's argument on anti-union animus and "timing" (Brief pp. 34-35, 36-37) simply ignores and fails to address the points raised by Arkema in its Brief in Support of Exceptions (pp. 26-31). One can hear the refrain of the song, "Stairway to Heaven" in viewing the "building block" crescendo of General Counsel's argument to reach the desired conclusion concerning the September 5 letter to Shepherd.[7]

While General Counsel alludes to it, dances around it and does everything but say it, his contention is that Freeman issued the September 5 letter (GC Ex. 7) when he did because he was irritated with Shepherd's e-mail (GC Ex. 9) sent an hour or so earlier – with good reason. Shepherd's e-mail is one more example of his twisting facts and misrepresenting conversations in which he was involved. (*Compare* Tr. 223 with GC Ex. 9). The General Counsel's argument is simply that – not fact, not reasonable inference. Indeed, this sequence tends to establish that Shepherd's continued inability to be truthful and accurate led to the issuance of the reminder letter – not his Union activities.[8]

Finally, General Counsel's attempts to argue Arkema did not satisfy its *Wright Line* burden (Brief pp. 36-37) and again misstates the record testimony and attempts to impose an inference against it for failing to call a rank and file hourly employee as a

[7] This effort is punctuated by concocting sinister motives which are simply unsupported by the record (GC Brief p. 35, n.29). In fact, the testimony is well girded in common sense to confirm the conversation and protect against later revisionist history.

[8] In this same vein, the General Counsel (Brief p. 36, n.30) simply ignores the timing explanations given by Arkema (and supported by the evidence), while at the same time failing to address the issues raised regarding Shepherd's credibility in this *and other* aspects of his testimony (Arkema Brief pp. 34-35).

witness, whom the General Counsel had subpoenaed, who was present at court, and from whom the General Counsel had taken a statement. (Tr. 223; Brief p. 36 and n.36). This is contrary to Board law. Simply put, Duncan was equally available to the General Counsel and no negative inference is proper or warranted. Indeed, if any inference were to be drawn, the General Counsel's failure to call a Union supporter (Duncan) (Tr. 215, 273) and make his affidavit available to Respondent dictates that an adverse inference be drawn against the General Counsel. *See Property Resources Corp.*, 285 NLRB 1105, n.2 (1987), *enf'd,* 863 F.2d 964 (D.C. Cir. 1988).

Arkema will conclude by simply pointing out, contrary to General Counsel's repeated assertions (*e.g.*, Brief pp. 12-13, 15, 34-36) that *none* of the incidents triggering the August 19 meeting were "substantiated," the evidence *clearly* demonstrates Shepherd *admitted* two of the incidents (albeit placing both [rather than just one] pre-election (Tr. 249-251) and simply denied the third had occurred (throwing things).

Substantial evidence fails to support the General Counsel's speculation, unreasonable inferences and *ipse dixit* reasoning. For the reasons more fully set forth in Arkema's Brief in Support of Exceptions, the ALJ's decision should be reversed and the Amended Complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this the 25th day of November, 2009, a true and correct copy of the foregoing was forwarded by electronic mail or certified mail to:

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