

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-38901

WILFREDO PLACERES, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-39168

DUSTIN PORTER, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

**CASES 8-CA-39297
8-CA-39388**

BEN FANNIN, AN INDIVIDUAL

MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-39334

MIKE WILLIAMS, AN INDIVIDUAL

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

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I. INTRODUCTION.

An examination of the record and of the applicable law unequivocally establishes that the Acting General Counsel did not meet his *Wright Line* burden concerning Mid-West Telephone Services, Inc.'s ("MWTS") termination of Ben Fannin or its decision not to assign work to Mike Williams. In particular, the ALJ's finding that the Acting General Counsel met his burden of proving MWTS' knowledge of the protected activity of Ben Fannin and Mike Williams is erroneous. The Acting General Counsel's "proof" consists only of the small plant doctrine inference (inappropriately described and applied as a *presumption* by the ALJ) which, as a matter of law, does not apply to these facts. And without such proof of knowledge, as the Board has repeatedly held, the Complaint cannot survive. *BLT Enterprises of Sacramento, Inc.*, 345 NLRB 564 (2005) ("[C]redible evidence of 'employer knowledge' is a necessary part of the General Counsel's burden, and without it, the Complaint cannot survive.").

II. STATEMENT OF THE CASE.

In these consolidated cases, the NLRB filed an Amended Consolidated Complaint and Notice of Hearing based on the charges of Wilfredo Placeres, Dustin Porter, Ben Fannin, and Mike Williams. The Amended Consolidated Complaint alleged violations of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. A trial on the allegations of the Amended Consolidated Complaint commenced on October 11, 2011 in Cleveland, Ohio and ended on October 13, 2011. On December 28, 2011, the ALJ issued his Decision and Order dismissing most of the unfair labor practices alleged in the Amended Consolidated Complaint but affirming some others.

Contrary to the ALJ's legal and factual findings, the unfair labor practices alleged by Ben Fannin and Mike Williams are not supported by the record.¹

III. QUESTIONS PRESENTED.

A. Mike Williams.

1. Whether the ALJ erred in applying the small plant doctrine to infer that George Vaughn, Jr. or MWTS knew that Mike Williams provided an affidavit and received a subpoena to testify at an NLRB hearing where the Acting General Counsel failed to establish the threshold requirements of the small plant doctrine. (See Exceptions, 1).

2. Whether the ALJ erred in finding that the Acting General Counsel established a prima facie case under *Wright Line* that MWTS failed to assign work to Mike Williams because of the NLRB affidavit and subpoena where, absent the small plant doctrine, there is no evidence that George Vaughn, Jr. or MWTS knew about the affidavit and subpoena. (See Exceptions, 2).

B. Ben Fannin.

1. Whether the ALJ erred in applying the small plant doctrine to *presume* that George Vaughn, Jr. and MWTS knew on the evening of March 9, 2011 that Ben Fannin scheduled a meeting with the IBEW on March 11, 2011 where the Acting General Counsel failed to establish the threshold requirements of the small plant doctrine. (See Exceptions, 3)

2. Whether the ALJ erred in finding that the Acting General Counsel established a prima facie case under *Wright Line* that MWTS terminated Ben Fannin because of

¹ While MWTS disagrees with many of the ALJ's findings relating to other alleged unfair labor practices not related to Ben Fannin and Mike Williams, including but not limited to, the ALJ's application of the small plant doctrine to allegations relating to Dustin Porter, it is not addressing those issues here.

his role in scheduling the March 11, 2011 IBEW meeting where, absent the small plant doctrine, there is no evidence that MWTS knew on the evening of March 9, 2011 about the March 11, 2011 IBEW meeting or about Ben Fannin's role in scheduling it. (See Exceptions, 4).

3. Whether the ALJ erred by finding that George Vaughn, Jr. violated the Act by expressing his opinion that MWTS employees would be better off forming their own union and by offering to provide a list of attorneys if that was their choice. (See Exceptions, 5).

IV. BACKGROUND AND RELEVANT FACTS.

A. MWTS' Operations and Employees.

MWTS is a family-owned telecommunications cabling company that specializes in the installation of voice and data fiber optic security systems. (Tr. 17-19, 561). Mary Jo Vaughn and George Vaughn, Jr. founded Mid-West in 1992. (Tr. 17-18, 411). MWTS employs wire pullers, wire foreman and supervisors. (Tr. 562-565). At all relevant times, only the following persons were MWTS supervisors: (1) Brian Singleton; (2) Shawn Vaughn; and (3) Mark Davis. (Tr. 565). Greg Hillier was a non-supervisory job foreman until he resigned his employment with MWTS. (Tr. 434, 479-480, 500).

Although MWTS' administrative office is located in Girard, Ohio, the overwhelming majority of its work is conducted at offsite jobs. (Tr. 19, 42-44). Most times, MWTS is involved in several different jobs, at several different jobsites and for several different lengths of time. (Tr. 42-44). Supervisors are often not to be present at a jobsite. (Tr. 44).

B. Mike Williams.

MWTS hired Mike Williams as a wire-puller on December 1, 2009. (Tr. 209). MWTS laid Mike Williams off (along with many other MWTS employees) in September 2010. (Tr. 212). When MWTS recalled Mike Williams to work in mid-January 2011, he had a full-time job

making more money than he did at MWTS. (Tr. 234-235). Although Mike Williams was not willing to give up that job, he agreed to work part-time a few hours a week when MWTS needed additional manpower. (Tr. 221-223).

Under Mike Williams' limited, part-time arrangement with MWTS, he would call Brian Singleton to see when, and if, he was needed. (Tr. 223-224). Initially, Mike Williams worked three days (one full day and two half days) on the Ashtabula job. (Tr. 223-225; Respondent's 15). But, as this job slowed down in late January, so did MWTS' need for Mike Williams. (Tr. 231-233; ALJ Opinion, pgs. 32-33). Thus, when, Mike Williams called Brian Singleton at the end of January, Brian Singleton told Mike Williams that MWTS would probably not need him until the third school in Ashtabula started. (Tr. 232).

Sometime after he was laid off but before he was recalled, Mike Williams gave an affidavit as part of the NLRB's investigation into a charge filed by Dustin Porter. (Tr. 226-228). During his layoff from MWTS, Mike Williams received an NLRB subpoena to testify at Dustin Porter's hearing. (Tr. 226-228). He told his friends, and fellow MWTS employees, Joe Caico and Ben Fannin, about the subpoena. (Tr. 226).

The conversation with Joe Caico and Ben Fannin occurred during Mike Williams' layoff. (Tr. 226-228). Thus, Mike Williams' conversation with Joe Caico and Ben Fannin could not have taken place at work in an area where it could be observed by a supervisor. He was not even working for MWTS at the time.

At some point, Joe Caico told Greg Hillier about Mike Williams' NLRB subpoena. (Tr. 239-240). There is no evidence that this conversation took place at work or in an area where it could be observed by a supervisor. Further, when Greg Hillier asked Mike Williams about the subpoena, Mike Williams denied that he received the subpoena. (Tr. 230).

There is no evidence that Greg Hillier told George Vaughn, Jr. about the subpoena. Indeed, although Greg Hillier testified at the trial, the Acting General Counsel never asked him whether he told George Vaughn, Jr. about the subpoena, even though such employer knowledge is an essential element of his burden of proof.² George Vaughn, Jr. testified that he did not know about the subpoena until Mike Williams' filed his charge in February 2011. (Tr. 686).

Mike Williams filed a charge with the NLRB on February 9, 2011, at a time that, as the ALJ observed, the record evidence clearly confirms MWTS' employees work hours had decreased. (ALJ Opinion pgs. 32-33).

The ALJ dismissed some of Mike Williams' unfair labor practice allegations, but affirmed the allegation that MWTS failed to assign Mike Williams work in violation of Sections 8(a)(1) and 8(a)(4) of the Act. (ALJ Opinion, pgs. 33-35). In so doing, the ALJ found that the Acting General Counsel met his burden of proving that MWTS knew about Mike Williams' NLRB affidavit and subpoena. (ALJ Opinion pg. 34). The ALJ's finding, however, was based solely on a gross misapplication of the small plant doctrine. (ALJ Opinion, pg. 33).

C. Ben Fannin.

MWTS hired Ben Fannin as a wire-puller in August 2009. (Tr. 290). MWTS laid Fannin off (along with many other employees) in September 2010. (Tr. 303). MWTS recalled Fannin to work as a wire-puller in mid-January 2011 – after he (and his brother, Dustin Porter) filed his charge against MWTS with the NLRB.³ (Tr. 316).

² George Vaughn, Jr. makes all hiring and firing decisions as well as decisions relating to employees' work schedules. (Tr. 561, 572-576).

³ Mid-West hired Ben Fannin to do carpentry work the day after he was laid off. Mid-West continued to offer this type of work to Ben Fannin during lay-off, but Ben Fannin refused to accept the work. (Tr. 373, 376).

After MWTS' 8(f) contract with the Communication Workers of America ("CWA") expired in January 2011, the employees met to discuss their options. (Tr. 319-320, 329). One of the options discussed was to form an in-house union, and the other was to seek outside representation. (Tr. 329, 485). Following this meeting, Ben Fannin researched various unions on his own time (and away from work) and then contacted the IBEW. (Tr. 329-330, 349-350, 352). He scheduled a meeting with the IBEW and MWTS employees on March 11, 2011. (Tr. 352).

Ben Fannin told Greg Hillier and Joe Caico about the meeting at the end of the workday on the Ashtabula job on March 9, 2011. (Tr. 360-361). There is no evidence that any MWTS supervisor was in the vicinity of Ben Fannin when he had this conversation with Greg Hillier and Joe Caico, or that a MWTS supervisor was even on the job. Likewise, there is no evidence that Greg Hillier told George Vaughn, Jr. about the meeting.

Indeed, although Greg Hillier testified at the trial, the Acting General Counsel never asked him whether he told George Vaughn, Jr. about the meeting, even though such employer knowledge is an essential element of his burden of proof. George Vaughn, Jr. testified that he did not know about the meeting. (Tr. 685).

On March 7, 2011, while working on the Ashtabula job, Ben Fannin had a conversation with Greg Hillier and a contractor on the job. (Tr. 490-495). During that conversation, Ben Fannin said that George Vaughn, Jr. could "go fuck himself". (Tr. 490-495). Greg Hillier told George Vaughn, Jr. about this statement. (Tr. 496). George Vaughn, Jr. decided to take a cooling-off period and allow Ben Fannin an opportunity to apologize. (Tr. 678). Indeed, the perfect opportunity for apology presented itself on March 9, 2011 when George Vaughn, Jr. talked to Ben Fannin on the Ashtabula job. (Tr. 359-360). Unfortunately, Ben Fannin did not

apologize. (Tr. 678). As a result, George Vaughn, Jr. terminated Ben Fannin's employment on March 10, 2011. (Tr. 678).

Ben Fannin filed his first charge with the NLRB against MWTS in January 2011 (before George Vaughn Jr., brought him back to work) and his second charge in March 2011. The ALJ dismissed many of Ben Fannin's unfair labor practice allegations, but affirmed the allegation that MWTS discharged Ben Fannin in violation of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. (ALJ Opinion pgs. 25, 26, 28, 30). In so doing, the ALJ relied "principally" on his finding that the Acting General Counsel met his burden of proving that George Vaughn, Jr. knew on the evening of March 9, 2011 about Ben Fannin's role in scheduling the March 11, 2011 IBEW meeting. (ALJ Opinion pg. 28). The ALJ's finding, however, was based on a gross misapplication of the small plant doctrine. (ALJ Opinion, pg. 28).

V. LAW AND ARGUMENT.

A. The Acting General Counsel's Burden of Proof.

It is not the employer's burden to disprove an alleged unfair labor practice. On the contrary, the burden of proving an unfair labor practice rests solely with the Acting General Counsel. *See, NLRB v. Pentre Elec.*, 998 F.2d 363, 370-371 (6th Cir. 1993). The Board applies the *Wright Line* analytical framework to all cases alleging a violation of Sections 8(a)(1), (3), and (4) and involving employer motivation. 251 NLRB 1980, enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *See Praxair Distribution, Inc. and Placo Rivera and Abram P. Tarango*, 2011 NLRB LEXIS 538, at * 2; *Newcor Bay City Division*, 351 NLRB 1034, fn.7 (2007).

Under the *Wright Line* framework, the General Counsel must prove the following elements by a preponderance of the evidence: (1) the employee engaged in protected concerted

activity; (2) the employer had knowledge of the employee's protected concerted activity; and (3) the employer bore animus toward the employee's protected activity, and that animus was a substantial motivating factor in the adverse action. *See Praxiar*, 2011 NLRB LEXIS, at * 2. Specifically, the burden of proving knowledge of protected activity rests squarely with the NLRB. *American Manufacturing Associates, Inc. v. NLRB*, 594 F.2d 30, 33 (4th Cir. 1979). A finding of knowledge cannot rest alone on "suspicion, surmise, implications, or plainly incredible evidence". *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 484 (1951); *see also NLRB v. Meinholdt Manufacturing, Inc.*, 451 F.2d 737, 738-740 (10th Cir. 1971) (evidence which is based on pyramiding of inference is insufficient).

B. The Small Plant Doctrine.

The essence of the small plant doctrine "rests on the view that an employer at a small facility is likely to notice union activities at the plant **because of the closer working environment between management and labor.**" *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir. 1986) (internal citations omitted) (emphasis added). The doctrine does not give rise to a presumption of knowledge, but rather merely permits an inference of knowledge *only* when the requirements of the small plant doctrine are established. *Id.*

Two essential threshold requirements must be met for the small-plant doctrine to apply. *Id.* First, the essential elements of the doctrine must be established by the Acting General Counsel by a preponderance of the evidence. Then, once the elements are established, the Acting General Counsel must present other evidence of the employer's knowledge of a particular activity. *Id.*

With regard to the first requirement, the Board has adopted the Sixth Circuit's recitation of the essential elements of the small-plant doctrine, which are as follows:

- The facility is small and open;
- The workforce is small;
- Employees made no great effort to conceal their protected activity; and
- Management personnel are located in the immediate vicinity of the protected activity.

BLT Enters. Of Sacramento, Inc., supra.; NLRB v. Health Care Logistics, Inc., supra. The smallness of the plant and workforce are not dispositive. Again, the *heart* of small plant doctrine is that in a small plant certain activities *are likely to be noticed. Id.*

C. **Mike Williams.**

1. **The ALJ Misapplied The Small Plant Doctrine Inference As A Matter of Law.**

Sometime in December 2010, Mike Williams gave an affidavit as part of the NLRB's investigation of Dustin Porter's charge. (Tr. 226-228). Later, Mike Williams was subpoenaed to testify at Dustin Porter's NLRB hearing. (Tr. 226-228). Mike Williams told his friends and fellow coworkers, Joe Caico and Ben Fannin, about the subpoena during his layoff. (Tr. 226-228). Joe Caico then told Greg Hillier. (Tr. 239-240). When Greg Hillier asked Mike Williams about it, however, Mike Williams **specifically denied it.** (Tr. 230).

Given there was no evidence of MWTS' knowledge of the affidavit or subpoena, the ALJ applied the small plant doctrine to infer it. (ALJ Opinion, pg. 33). The ALJ's application of the small plant doctrine was in clear error because the Acting General Counsel did not satisfy the requirements of the small plant doctrine.

At best, the Acting General Counsel presented proof as to **one** of the **four** required elements of the small plant doctrine – that the MWTS workforce is small. Proof of the remaining three elements, however, is glaringly absent:

- The overwhelming majority of the time, MWTS employees work at off-site jobs, not in MWTS’ “small and open” facility. (Tr. 42-44). At the time in question, Mike Williams was working on a large school project in Ashtabula, Ohio. (Tr. 229-230).
- The evidence affirmatively establishes that the activity – receiving the NLRB subpoena or participating in the NLRB investigation – took place while Mike Williams was laid off from MWTS. (Tr. 226-228). Likewise, the affirmative evidence proves that Mike Williams told Joe Caico and Ben Fannin about the subpoena during his layoff. (Tr. 226-228). Consequently, it is impossible to conclude that the “activity” was conducted in a place or manner that MWTS would have observed it.
- Mike Williams specifically attempted to conceal his activity. When asked about it by Greg Hillier, Mike Williams expressly denied his activity. (Tr. 230). This intentional concealment alone renders the small plant doctrine inapplicable as a matter of law. *Hotel Employees and Rest. Employees Int’l Union Local 26*, 344 NLRB 567 (2005) (“If however, the alleged discriminatee made efforts to hide his or her activity, then the General Counsel can’t use the small plant doctrine to infer knowledge.”)

Misunderstanding the requirements of the small plant doctrine, the ALJ justified his application of the small plant doctrine inference based on only one of the doctrine’s threshold requirements – the “other evidence of knowledge” requirement. But as discussed above, inquiry into the application of the small plant doctrine is two-fold, and the “other evidence of knowledge” prong is only *one* of the two requirements. The other essential requirement is that all of the elements of the doctrine are met. And, here, they are not. Thus, the ALJ’s application of the small plant doctrine to infer MWTS’ knowledge of Mike Williams’ NLRB affidavit and subpoena should be reversed.

2. The ALJ Erred In Relying On The Small Plant Doctrine To Find That The Acting General Counsel Met His *Wright Line* Burden Of Proving Requisite Knowledge.

Without proof of MWTS' knowledge of Mike Williams' NLRB affidavit and subpoena, the Acting General Counsel's prima facie case fails. Relying on the small plant doctrine inference, the ALJ found that the Acting General Counsel established MWTS' knowledge: "I find the small plant doctrine again provides a basis to infer that Respondent had knowledge of Williams' [NLRB] activities in this regard." (Opinion, pg. 33, lines 11-15). But as discussed above, the small plant doctrine does not apply here. Accordingly, there is no evidence of the essential element of MWTS' knowledge. Thus, it was clear error for the ALJ to find that the Acting General Counsel met his *Wright Line* burden of proving this essential element.

D. Ben Fannin.

1. The ALJ Erred In Applying The Small Plant Doctrine To Presume MWTS's Knowledge of Ben Fannin's Scheduling An IBEW Meeting.

Sometime between January 28, 2011 and March 11, 2011, Ben Fannin allegedly scheduled a meeting with the IBEW. (Tr. 352). At the end of the workday on March 9, 2011 on the Ashtabula job, Ben Fannin told Joe Caico and Greg Hillier about this meeting. (Tr. 360-361). Although there is **no evidence** that any MWTS supervisors were in the vicinity, or even on the jobsite, when Ben Fannin told Joe Caico and Greg Hillier about the March 11 meeting, the ALJ applied the small plant doctrine to *presume* George Vaughn, Jr. learned of the IBEW meeting **on the evening of March 9, 2011**. (Decision, pg. 28, lines 23-26). In doing so, the ALJ not only ignored the essential elements of the doctrine, he erroneously afforded the small plant doctrine too much weight by allowing it to create a ***presumption***, rather than merely a discretionary inference. *Health Care Logistics*, 784 F.2d at 236 (rejecting ALJ's finding that

small plant doctrine created a presumption of knowledge). That extension of the small-plant doctrine alone is reversible error. *Id.*

The Board's decision in *BLT Enterprises* is also instructive here. In that case, the Board approved the ALJ's rejection of the General Counsel's attempt to apply the small plant doctrine to infer an employer's knowledge of union activity. In *BLT Enterprises*, the alleged activity took place in the employer's truck yard, at landfills used by the employer and over CB radios. The Board and the ALJ recognized that the truck yard was large with wide-open areas. Likewise, no supervisors were usually present at the landfills and supervisors did not have access to CBs. Thus, because the activity was not conducted in a manner likely to be observed by supervisors, the Board and ALJ determined that the small-plant doctrine could not apply as a matter of law. *BLT Enterprises of Sacramento, Inc., supra; See also, Avecor, Inc. v. NLRB*, 931 F.2d 924 (D.C. Cir. 1991) (small plant doctrine did not apply where activity consisted of a five minute encounter with fellow employee on employer's premises during work hours on a break outside the presence of supervisors).

The evidence supporting the small plant doctrine in Ben Fannin's case is even less substantial than in *BLT Enterprises* or *Avecor*. The sum of Ben Fannin's activity that the ALJ determined "principally" resulted in Ben Fannin's termination, is a single thirty-second conversation with Greg Hillier and Joe Caico that took place at the end of the workday at a jobsite that is approximately fifty miles from MWTS' offices. (Tr. 360-361). There is no evidence that any MWTS supervisor witnessed this conversation, or that any MWTS supervisor was even at the offsite job at the time the conversation took place. Thus, the small plant doctrine simply does not apply to these facts as a matter of law.

And, even if it did, it does not create the omniscience presumed by the ALJ that allowed him to conclude that George Vaughn, Jr. learned of the meeting on the evening of March 9, 2011 – nearly immediately after it was communicated by Fannin. *Avecor, supra*. It was clear error for the ALJ to find to the contrary. Accordingly, the ALJ’s finding that the small plant doctrine supports a *presumption* of George Vaughn, Jr. and MWTS knowledge on the evening of March 9, 2011 of Ben Fannin’s scheduling the March 11, 2011 IBEW meeting should be reversed.

2. The ALJ Erred In Relying On The Small Plant Doctrine To Find That The Acting General Counsel Met His *Wright Line* Burden Of Proving Requisite Knowledge.

Without proof of MWTS’ knowledge of Ben Fannin’s role in scheduling the March 11, 2011 IBEW meeting, the Acting General Counsel’s prima facie case fails. Relying again on the small plant doctrine, the ALJ found that the Acting General Counsel established MWTS’ knowledge: “Although there is no direct evidence to establish that the Respondent knew of Fannin’s pivotal role in attempting to secure IBEW representation for the Respondent’s employees by arranging this meeting, I draw the inference that the Respondent, and specifically, Vaughn Junior, was apprised of this on the evening of March 9. This inference is supported by the application of the small plant doctrine, which presumes the Respondent’s knowledge of such activity.” (Decision, pg. 28, lines 20-26). But as discussed above, the small plant doctrine does not apply here and does not create a presumption of knowledge as claimed by the ALJ. Accordingly, there is no evidence of the essential element of MWTS’ knowledge. Thus, it was clear error for the ALJ to find that the Acting General Counsel met his *Wright Line* burden of proving this essential element.

3. The ALJ Erred By Finding That George Vaughn, Jr. Violated the Act By Expressing His Opinion.

Section 8(c) provides that expressions of views that “contain no threat of reprisal” do not constitute coercion and therefore do not violate the Act. 29 U.S.C. § 158. Employees cannot objectively fear reprisal **unless** the employer’s statement actually contains an explicit or implicit threat of reprisal. *See Quantam Electric*, 341 NLRB 1270, 1271 (2004). A statement containing an employer’s opinion about the union does not violate § 8(a) unless the statement threatens reprisal:

It is well-settled that Section 8(c) of the Act gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits. Here, Wichter was merely sharing with the employees his own negative views about the union. **Because these particular comments by Wichter contained no threats or promises, we shall reverse the judge’s finding that they violated Section 8(a)(1).**

Poly-America, Inc., 328 NLRB 667, 669 (1999) (internal citations omitted).

George Vaughn, Jr. never made any threats during the January 28, 2011 meeting. He was merely explaining to the employees the option of forming an in-house union and “strongly suggest[ed]” it only because it gave his employees the ability to control their own money. (GC 41). George Vaughn, Jr. did nothing more than express his opinion and offer to provide a list of attorneys, if the employees wanted to pursue the option of forming their own union. This conduct is expressly protected by Section 8(c) and the ALJ’s finding to the contrary is reversible error. *Id.*; *See also, Best Western Executive Inn*, 272 NLRB 1315, 1316-1317 (1984)(employer arranging for an attorney to meet with employees did not violate the Act); *Times-Herald, Inc.*, 253 NLRB 524 (1980)(no violation of the Act where employer advised employee to seek an attorney).

VI. CONCLUSION.

For the foregoing reasons, MWTS respectfully requests that the Board reverse the ALJ's findings that the Acting General Counsel established a prima facie case under *Wright Line* that MWTS: (1) failed to assign Mike Williams work in violation of Sections 8(a)(1) and 8(a)(4) of the Act; (2) discharged Ben Fannin in violation of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act; and (3) violated the Act by offering his opinion that employees would be better off forming their own union and dismiss the Complaint allegations relating to same.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent's Brief in Support of Respondent's Exceptions to Administrative Law Judge's Decision was sent this 25th day of January, 2012 to the following via electronic mail:

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