UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

MID-WEST TELEPHONE SERVICE, INC.		
and	**CASE**	**8-CA-38901**
WILFREDO PLACERES, AN INDIVIDUAL		
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MID-WEST TELEPHONE SERVICE, INC.		
and	**CASE**	**8-CA-39168**
DUSTIN PORTER, AN INDIVIDUAL		
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MID-WEST TELEPHONE SERVICE, INC.		
and	**CASES**	**8-CA-39297** **8-CA-39388**
BEN FANNIN, AN INDIVIDUAL		
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MID-WEST TELEPHONE SERVICE, INC.		
and	**CASE**	**8-CA-39334**
MIKE WILLIAMS, AN INDIVIDUAL		

ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE BOARD IN RESPONSE TO RESPONDENT'S EXCEPTIONS

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ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE BOARD IN RESPONSE TO RESPONDENT'S EXCEPTIONS

This matter is before the Board based upon a decision issued by Administrative Law Judge Mark Carissimi ("ALJ") on December 28, 2011. On June 24, 2011, the Regional Director for Region 8 issued a Second Amended Consolidated Complaint and Notice of Hearing alleging that Mid-West Telephone Service, Inc. ("Respondent") committed numerous violations of Sections 8(a)(1), (3) and (4) of the National Labor Relations Act. Respondent filed exceptions to the ALJ's decision on January 25, 2012. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the Acting General Counsel submits this Answering Brief in response to Respondent's exceptions and argues that the record evidence and cited case law fully support the ALJ's analysis and conclusions with regard to the exceptions taken by Respondent.[1]

I. BACKGROUND

Respondent is a family-owned company that installs voice and data communication and security wiring in new and existing buildings such as schools and courthouses. (Tr. 18) There were around nine (9) non-supervisory employees working for Respondent at the time it fired alleged discriminatee Ben Fannin and stopped scheduling alleged discriminatee Mike Williams. (G.C. Ex. 11(a) -11(o)) At all relevant times, George Vaughn, Jr. has been Respondent's Vice President and his wife, Mary Jo Vaughn is its President. (Tr. 18) Respondent's supervisors are Bryan Singleton, Mark Davis and Shawn Vaughn.[2] (Tr. 19, 20, 21)

[1] This brief will use the following citations. The transcript of the administrative hearing will be referred to as Tr. __, Respondent's exhibits will be referred to as R. Ex. __, Acting General Counsel's exhibits will be referred to as G.C. Ex. __, the ALJ's December 28, 2011 decision shall be referred to as J.D. __, and Respondent's Brief in Support of Exceptions shall be referred to as R. Brief __.

[2] Shawn Vaughn is George Vaughn, Jr.'s brother. (Tr. 25)

Employees and alleged discriminatees Ben Fannin and Mike Williams were hired by Respondent as wire-pullers, and each worked as non-supervisory foremen on one occasion. (Tr. 271-272, 274-277)

The Communication Workers of America, AFL-CIO Local 4300 ("Union") began representing Respondent's employees in around 2005. (Tr. 48-49) The most recent collective bargaining agreement expired on January 24, 2011,[3] and Respondent advised the Union that it would not continue to recognize the Union as the collective bargaining representative. (R. Ex. 13 and 14) Thereafter, the bargaining relationship ended. However, prior to January 24, former Union steward Greg Hillier filed a decertification petition. (Tr. 513)

II. THE ALJ CORRECTLY APPLIED THE SMALL PLANT DOCTRINE TO FIND THAT RESPONDENT HAD KNOWLEDGE OF THE SECTION 7 ACTIVITIES OF BEN FANNIN AND MIKE WILLIAMS

There is ample support in the record for the ALJ's determination that Respondent gained knowledge of Fannin's and Williams' Section 7 activities pursuant to the Board's small plant doctrine.

In *Hadley Manufacturing Corp.*, 108 NLRB 1641, 1650 (1954), the Board stated that an inference of employer knowledge of employees' union activities could not be based solely on the small size of the employer, without "supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, [r]espondent must have noticed them." Thereafter, the Board issued its decision in *Weise Plow Welding Co., Inc.*, 123 NLRB 616 (1959), often cited as the beginning of the Board's small plant doctrine. The *Weise* Board concluded that it would draw an inference of knowledge based on the following facts in that case: the small number of employees, the fact that the alleged discriminatee had spoken in favor of the union during his last week of employment, management's knowledge that he had been a

[3] In this brief, all dates refer to 2011 unless otherwise noted.

union member previously, the timing and abrupt nature of the discharge, and because another union supporter was discharged at the same time. *Id.* at 618. Thus, the Board will look at the record as a whole, not just the size of the workforce in determining whether it will infer that an employer had knowledge of an employee's protected activities.

Respondent had general and at times specific knowledge about the Section 7 activities of employees. Vaughn, Jr. admitted he knew that Fannin attended a Union meeting in September 2010. (Tr. 685) Respondent knew that during a January 28 meeting attended by admitted supervisors Shawn Vaughn and Mark Davis, Fannin spoke against the idea of an in-house union and also volunteered to investigate whether an "established" union would be interested in representing the Respondent's employees. (G.C. Ex. 40 and 41) Moreover, the record establishes that Vaughn, Jr. knew in advance that employees were going to meet to talk about the Union and forming an in-house union, because he discussed the same with Hillier immediately before the meeting. (G.C. 40 and 41) Respondent also clearly had knowledge about the filing of Board charges by Fannin, Fannin's brother Dustin Porter and Williams. (G.C. Ex. 1(o), 1(c) and 1(s))

In addition to the above, there is evidence that other protected activities were frequent topics of conversation throughout Respondent's operation. For example, Hillier testified that he found out it was Fannin who called the Union president to complain about Hillier being the Union steward. (Tr. 483). There is also evidence that Vaughn, Jr. knew about Fannin's actions in this regard because he mentioned the Union's removal of Hillier during the January 28 meeting. (G.C. Ex. 40 and 41) Williams told fellow employee Caicco about giving an affidavit to the NLRB and getting subpoenaed thereafter. (Tr. 261) Caicco related the foregoing to Hillier. (Tr. 261) According to Caicco, Hillier told him that Placeres previously informed him

that Williams was going to testify at the NLRB hearing. (Tr. 265) Placeres told Caicco he filed an NLRB charge, (Tr. 258-259) and also told Porter that he had contacted the NLRB. (Tr. 164) Caicco also learned about Porter's charge through "shop talk." (Tr. 259)

The timing of Fannin's discharge and Respondent's first refusal to schedule Williams suggests that Respondent had knowledge of their activities. With regard to Fannin, he talked to Caicco and Hillier about meeting with an International Brotherhood of Electrical Workers' representative the *day before* Respondent discharged him. Fannin announced to Caicco and Hillier at the end of the day on March 9 that he had set up a meeting between employees and an IBEW representative for March 11. In this connection, it is notable that it was Hillier who called Vaughn, Jr. after work hours and recounted Fannin's alleged profanity on the jobsite on March 7. (R. Ex. 12, Tr. 357) In light of the foregoing, the manner in which Fannin carried out his protected activities made it likely that management would come to know about them.

Regarding Williams, on January 27, Caicco informed Hillier that Williams had been called to testify before the NLRB and Hillier confronted Williams about it that same day. On January 28 Hillier met with Vaughn, Jr. to discuss forming an in-house union. (G.C. Ex. 40 and 41). That same day, when Williams called to find out what days Respondent wanted him to work the following week, Singleton told him he was not needed.

The substantial gap between the time Respondent learned of Fannin's alleged derogatory statements and his termination support the inference that Respondent found out about his efforts to have employees meet with the IBEW representative. Fannin's alleged statements were made and communicated to Vaughn, Jr. on Monday, March 7, yet his termination was not until Thursday, March 10. Moreover, Vaughn, Jr. had a casual conversation with Fannin on March 9 at a worksite, and Vaughn, Jr. never raised the issued of Fannin's alleged March 7 statement.

(Tr. 359-360) This fact further bolsters the inference that Respondent learned sometime between March 9 and the morning of March 10 the fact that Fannin had arranged the IBEW meeting.

Also suggestive of Respondent's knowledge is the abruptness of Fannin's discharge. While the ALJ credited Fannin's version of his conversation with Vaughn, Jr. on March 10, even Vaughn, Jr.'s account establishes that he gave Fannin no opportunity to respond to the alleged incident on March 7 before terminating him. (Tr. 681) Respondent had reason to act quickly to get rid of Fannin because Fannin was about to arrange for Respondent's employees to meet with the IBEW the following day.

Perhaps most supportive of the application of the small plant doctrine in this case is the following statement that Vaughn, Jr. made during the January 28 meeting he had with employees:

> …I know you guys had a little emergency meeting you know what I mean and we're a small shop it drifts through here. It really does **everything that happens here sooner or later comes back to me I don't care what you guys say to somebody I don't care where you're at we're a small company** there's so many people legally involved with everything we do okay? **It all comes back one way or another** so no but the problem is is anytime you guys did have a situation and this is what really bothered me there are rules and regulations which you guys had, right? And none of you ever complied to the rules…

(G.C. Ex. 41, p. 10) (emphasis added)

Vaughn, Jr.'s admission strongly supports the application of the small plant doctrine to the facts of this case. Therefore, considering the small size of Respondent coupled with the other record evidence, the ALJ correctly determined that, pursuant to the Board's small plant doctrine, Respondent came to learn about the protected activities of Fannin and Williams.

Contrary to Respondent's assertions, the Board has not adopted what Respondent refers to as the Sixth Circuit's criteria for application of the small-plant doctrine. (R.Brief 10) In *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir. 1986), the court merely quoted the

administrative law judge who concluded that the small plant doctrine was applicable "where the facility is small and open, the work force is small, employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity." Respondent then argues, citing the single case of *BLT Enterprises of Sacramento, Inc.*, 345 NLRB 564 (2005), that the Board has adopted the foregoing quotation as the "essential elements of the small plant doctrine." (R.Brief 10) While the administrative law judge in *BLT* did recite the above quotation, on appeal, the Board in that case made no specific mention of it.

The Board knows how to adopt a test employed by the Circuit Courts. *See, e.g., Blue Flash Express, Inc.*, 109 NLRB 591, 594 (1954) (adopting Second Circuit test for coercive statements). *Cf., Morgan's Holiday Markets, Inc.*, 333 NLRB 837, 837-841 (2001)(considering but ultimately declining to adopt test of District of Columbia Circuit); *Plastilite Corp.*, 153 NLRB 180, 183 (1965), *enforced, NLRB v. Plastilite Corp.*, 375 F.2d 343 (8th Cir. 1967) (explicitly refusing to adopt Fifth Circuit test). There is a reason Respondent cannot point to the case where the Board expressly adopted the four factors quoted by the Sixth Circuit in *Health Care Logistics*: there is no such case. Moreover, what Respondent conveniently fails to recognize is that the Board has decided a number of cases raising the small plant doctrine since the Sixth Circuit's decision in *Health Care Logistics,* yet it has permitted judges to decide them without any reference whatsoever to the supposedly adopted "essential elements." *See*, *Frye Electric, Inc.*, 352 NLRB 345, 351 (2008); *LaGloria Oil and Gas Co.*, 337 NLRB 1120, 1123 (2002) *aff'd, LaGloria Oil and Gas Co. v. NLRB*, 71 Fed. Appx 441 (5th Cir. 2003).

Respondent also points out that Williams denied his cooperation in the investigation and prosecution of the charge filed by Dustin Porter when Hillier questioned him. However, the

Board has recognized that such attempts at concealment do not necessarily foreclose the viability of the small plant doctrine. *Bros. Three Cabinets*, 248 NLRB 828, 841 (1980); *Ontario Gasoline & Car Wash*, 228 NLRB 950 fn. 2 (1977). Here, Williams' denials to someone who he feared would pass along the information to management (Tr. 230-231) were made after Caicco told Hillier of Williams involvement in Porter's charge. It is reasonable to infer that management, having heard about these events, would believe Caicco, who, unlike Williams, had nothing to hide.

III. EVEN IF THE BOARD'S SMALL PLANT DOCTRINE DOES NOT APPLY IN THIS CASE, THE RECORD EVIDENCE SUPPORTS THE ALJ'S CONCLUSION THAT RESPONDENT LEARNED OF THE SECTION 7 ACTIVITIES OF BEN FANNIN AND MIKE WILLIAMS

While inference based on the Board's small plant doctrine is one way Counsel for the Acting General Counsel can meet her burden of showing Respondent had knowledge of the Section 7 activities of Fannin and Williams, it is by no means the only way. Knowledge can also be inferred from circumstantial evidence, all of which was cited by the ALJ in his decision.

The Board has recognized in innumerable cases that a finding of knowledge can rest on circumstantial evidence from which a reasonable inference may be drawn. *Montgomery Ward & Co. Inc.*, 316 NLRB 1248, 1253 (1995) *enforced*, *Montgomery Ward & Co. Inc. v. NLRB*, 97 F.3d 1448 (4th Cir. 1996) . The Board in *Montgomery Ward* noted that it had inferred knowledge based on such factors as the timing of the allegedly discriminatory action, the respondent's general knowledge of employees' Section 7 activities, animus and disparate treatment. *Id.* (case citations omitted) Another factor the Board has considered in inferring knowledge is a delay between the employee's alleged conduct for which he was terminated and the actual discharge. *Id.* (case citations omitted). An inference of knowledge has been drawn

where the reason given for the employer's action is so "baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive." *Id.* (case citations omitted).

There is ample circumstantial evidence from which to draw the inference that Respondent had knowledge of the protected activities of Fannin and Williams. First, as set forth fully above, the timing of Fannin's discharge and Respondent's first refusal to schedule Williams suggest Respondent had knowledge of their activities. Second, Respondent had both general and specific knowledge about the Section 7 activities of employees.

The Respondent also demonstrated animus towards employees engaging in union activities. As found by the ALJ, Respondent's supervisor Mark Davis threatened alleged discriminatee Dustin Porter with termination if he ever caught Porter talking about the Union again. (J.D. 6) Further, Vaughn, Jr. repeatedly made anti-union statements (some specifically in reference to the IBEW) during his January 28 meeting with employees. (G.C. 40 and 41)

With regard to Fannin, and as more fully explained above, there was a substantial gap between the time Respondent learned of his alleged derogatory statements and his termination. This circumstantial evidence also supports the inference that Respondent gained knowledge in the intervening period of his efforts to have the employees meet with the IBEW representative.

Respondent's justifications for its failure to schedule Williams for work after January 27 were, as the ALJ aptly described them, "amorphous" and "unconvincing." (J.D. 34) Furthermore, Respondent admitted that it never informed Williams of its allegedly non-discriminatory reason for not scheduling him, instead telling him he should just keep calling to see if there was work. (Tr. 469) As explained above, the Board has found an employer's unreasonable or contrived justifications for adverse employment action to warrant an inference of knowledge. In light of the foregoing, that inference is clearly warranted with regard to

Respondent's knowledge that Williams had cooperated in the investigation of Porter's charge and was scheduled to testify regarding his termination.

Finally, Vaughn, Jr.'s comments about how everything the employees say eventually gets back to him came one day after Hillier questioned Williams about testifying before the NLRB on behalf of Porter. Notably, Hillier was in Vaughn, Jr.'s office talking to him about the in-house union earlier in the day on January 28. The timing of the above events supports the inference that Vaughn, Jr. learned about Williams cooperation in the NLRB's investigation and prosecution of Porter's charge.

In consideration of the above and the record as a whole, the ALJ correctly drew the reasonable inference that Respondent gained knowledge of Fannin's and Williams' Section 7 activities. Therefore, the ALJ also correctly concluded, using a *Wright Line* analysis, that Respondent violated Sections 8(a)(1), (3) and (4) when it terminated Fannin and Section 8(a)(1) and (4) when it refused to assign work to Williams.

IV. THE ALJ CORRECTLY CONCLUDED THAT VAUGHN, JR.'S STATEMENTS TO EMPLOYEES ABOUT FORMING AN IN-HOUSE UNION VIOLATED SECTION 8(A)(1) OF THE ACT AS ALLEGED

On January 28, Fannin recorded the meeting Vaughn, Jr. had with employees. (G.C. Ex. 40 and 41) The evidence is clear that Vaughn, Jr. made statements during this meeting encouraging employees to establish an in-house union. In this connection, he repeatedly played on employees' fears that an "outside" union would be as ineffective as the Union had been and would similarly be in it just for their dues. Vaughn, Jr. referred to an in-house union as "almost the best thing employees could do." (G.C. Ex. 40 and 41, p.10) Vaughn, Jr. told them he would get them a list of labor attorneys to help them establish their own union. (G.C. Ex. 40 and 41) It is also clear from Fannin's recording that Vaughn, Jr. and Hillier had previously discussed

establishing such a union, that they discussed it with another company that had an in-house union, and that Hillier called a meeting immediately prior to Vaughn, Jr.'s to begin setting up such a union. The ALJ found that Vaughn, Jr.'s statements strongly suggested that Respondent would look favorably *only* upon the choice to form an in-house union. (JD. 26) The ALJ therefore rightly concluded that the statements would reasonably tend to interfere with the free exercise of employee rights under the Act. (J.D. 26)

Respondent argues that since Vaughn Jr.'s statement contained no explicit or implicit threat of reprisal, it could not have been coercive of employees' Section 7 rights. (R.Brief 15)

While employers are granted the right under Section 8(c) of the Act to express their views about unionization in general or a union in particular, that right is balanced against the employees' right to be free from conduct which would tend to interfere with their rights under Section 7. *Mesker Door, Inc.*, 357 NLRB No. 59 at sl. op. p. 7 (2011). As the ALJ rightly noted, the decision to organize a union or refrain from doing so is a decision that rests with individual employees. (J.D. 26) Hence, the Board has repeatedly found violations of the Act where employers have solicited employees to form an in-house union. *See, Gregory Chevrolet, Inc.*, 258 NLRB 233, 237 (1981); *The M.O'Neil Co.*, 211 NLRB 150, 157-158 (1974), *enforced*, 514 F.2d. 894 (1975).

The facts in the instant case are distinguishable from those in *Best Western Executive Inn*, 272 NLRB 1315 (1984), cited by Respondent. In *Best Western*, pro-decertification employees approached management about talking to an attorney concerning the withdrawal of a decertification petition. *Id.* at 1316-1317. The employer arranged to have its attorney speak to the employees, and that attorney merely advised them to contact the NLRB concerning the withdrawal of the petition. *Id.* Here, it was Respondent who initiated the discussion about

providing the employees with names of attorneys. In addition, Respondent's purpose in providing the attorney list was to assist the employees in establishing an in-house union, in accordance with Respondent's wishes that they do so. Placed in that context, Respondent's encouragement of and assistance in the formation of an in-house union constitutes unlawful coercion of employees' Section 7 rights.[4]

In light of the above authority, the ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act when Vaughn, Jr. solicited employees to form an in-house union.

V. CONCLUSION

Accordingly, Counsel for the Acting General Counsel respectfully submits that Respondent's exceptions are without merit.

Dated at Cleveland, Ohio, this 17th day of February 2012.

Respectfully submitted,

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[4] *Times-Herald, Inc.*, 253 NLRB 524 (1980) does not stand for the proposition advanced by Respondent. Rather, in *Times-Herald*, the Board (at footnote 4) cites to *Solar Aircraft, Co.*, 109 NLRB 130 (1954), which does involve an employer's recommendation of an attorney. Similar to *Best Western*, the employees in *Solar Aircraft* initiated the contact with management, seeking information about crossing a picket line. *Id.* at 134. Furthermore, unlike the instant case where Vaughn, Jr. solicited employees to form an in-house union, there was no evidence in *Solar Aircraft* that the employer was soliciting employees to cross the picket line.

PROOF OF SERVICE

Copies of the foregoing Answering Brief of Counsel for the Acting General Counsel were sent this 17th day of February, 2012 to the following by electronic mail:

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