

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

**UNITED AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW**

Charging Party,

FLEX-N-GATE TEXAS, LLC

Respondent.

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) **Case Nos. 16-CA-27742 and**
) **16-CA-27790**
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**RESPONDENT FLEX-N-GATE'S
REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO ALJ'S DECISION**

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I. Introduction and Summary

General Counsel's Answering Brief ("AB") confirms why the ALJ's decision was in error and must be reversed. Like the ALJ, General Counsel:

- makes repeated errors of fact that are clearly contradicted by the record;
- bases argument on presumptions and imputed knowledge rather than evidence;
- sidesteps General Counsel's burden of proof under *Wright Line*;
- substitutes their own judgment for that of the Company on staffing levels at the facility;
- expands a simple stipulation about financial documents beyond its limited purpose; and
- fails to credit the team leads' own testimony that showed supervisory status.

The uncontested evidence showed Flex-N-Gate has been following lean manufacturing principles for years. Its ongoing review of staffing levels led to the elimination of other team leader and supervisor positions before and after the terminations at issue here. The decision maker concluded there were too many team leaders at the plant before the election petition was filed and had no knowledge of them engaging in protected activity. The reductions were based solely on seniority and redundancy and were consistent with the Company's past practice and employee handbook. The ALJ's decision is in error and should be reversed.

II. Discussion

A. General Counsel Failed to Demonstrate Actual Knowledge

General Counsel failed to show (AB, p. 11) the decision maker responsible for the termination at issue knew the employees were involved in union activities.¹ General Counsel argued Connolly knew about one pro-union shirt worn by one of the alleged discriminatees. (AB,

¹ General Counsel effectively conceded that the ALJ erred by finding knowledge based on the so-called "small plant" doctrine by failing to develop this point in the AB beyond one passing reference in a footnote. (AB, p. 14, fn 2).

pp. 11-12). However, Connolly was asked only if he knew “*some people* wore union shirts” [Tr. 389] (Emphasis added) not if he knew whether the three alleged discriminatees wore union shirts (or buttons or other union paraphernalia). Likewise, General Counsel asked Connolly if he “heard that *someone* wore a shirt with Luckie’s name on it.” [Tr. 389] (Emphasis added). They did not ask him if he knew whether one of the three alleged discriminatees wore a shirt with Luckie’s name on it.

General Counsel argued Chris Rainey was vocal about his alleged union support (AB, p. 12) but failed to connect the dots to Connolly or show Connolly had any personal knowledge about Rainey or his alleged support. The ALJ conceded Rocky Lloyd was very low key about his union support as he only “wore my pin at work *one time.*” [Tr. 232] (Emphasis added). Connolly was not at that one meeting and both the ALJ and General Counsel made a clear error of fact regarding that meeting, claiming the Company made a big deal about his pin. (AB, p. 13). Lloyd conceded under oath no one ever asked him about his pin [Tr. 198] and that Rick Schmidt only approached him once – not twice – to see if he was okay. [Tr. 230].²

General Counsel subpoenaed Connolly to testify in its case in chief and then failed or refused to ask him whether he knew if the three team leaders supported the union. The case law is clear the General Counsel bears the burden of *proving* knowledge. The Company does not have to *disprove* knowledge.

B. The ALJ Erred in Imputing Knowledge

Because General Counsel did not and could not prove actual knowledge, they argued alleged knowledge of pro-union activity by lower-level supervisors should be imputed to Connolly. The Company demonstrated in its opening brief that numerous court decisions have

² It was hot at that time of year and Lloyd confirmed it was perfectly normal for Schmidt to ask him if he was doing okay. [Tr. 231].

rejected such a tactic and General Counsel failed to adequately distinguish the *Vulcan Basement Waterproofing* case cited by the Company. (AB, p. 14). The facts were nearly identical as the General Counsel in both instances urged the ALJ to impute knowledge from a subordinate to a superior (and even cited the same *GATX Logistics* case cited by our judge here). General Counsel ignored the fact that the 7th Circuit in *Vulcan* pointed out *GATX Logistics* does not support imputing knowledge to a superior. Moreover, the Company cited numerous other circuit cases that squarely reject imputing knowledge to a superior because it impermissibly removes the General Counsel's burden of proof and General Counsel failed to address those cases.

C. Flex-N-Gate's Lawful Speech does *not* establish Animus

The paucity of actual evidence to support General Counsel's case is underscored by their argument (AB, p. 16) that Flex-N-Gate's *protected speech* is somehow evidence of anti-union animus.³ This not only tramples the Company's statutorily protected rights, but would effectively eviscerate all lawful company responses to union organizing activity. Indeed, the Company's conduct throughout the election did not result in any post-election charges.

In addition to being counterintuitive, this position flies in the face of the plain language of the Act guaranteeing employer free speech rights. Section 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

Id. The Board and Courts alike have routinely enforced this protection of employer speech. Indeed, the United States Supreme Court, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), stated section 8(c) "merely implements the First Amendment," and "an employer's free

³ One of the cases General Counsel cited, *Ross Stores*, was overturned in *Carney Hospital*, 350 NLRB 56, (2007).

speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.” *Id.* at 617-619 (quotations omitted).

Applying this black letter law, Courts have explicitly rejected the General Counsel’s argument regarding lawful speech, both verbal and written in handbooks. For example, in *BE & K Constr. Co. v. NLRB*, 133 F.3d 1372, 1376 (11th Cir.1997), the Court held that in inferring anti-union animus from the lawful communications by the company, the Board violated the express and mandatory provisions of the Act. *Id.* at 1375-77) (Emphasis added). *See also, Sasol N. Am., Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002) (employer statements did not even remotely constitute evidence of a threat of reprisal or force or promise of benefit and cannot be used as evidence of an unfair labor practice); *Medeco Security Locks, Inc., v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998) (rejecting the argument that the employer’s anti-union propaganda campaign constituted animus), *citing Alpo Pet Foods, Inc., v NLRB*, 126 F.3d 246, 252 (4th Cir. 1997) (“Speech protected by [Sec. 8(c)] cannot be used by the General Counsel to establish an employer’s anti-union animus); *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 753 (5th Cir. 1979) (“Any company has a perfect right to be opposed to a union, and such opposition is not an unfair labor practice”).

D. Lack of Nexus

General Counsel argues (AB, p. 17) the alleged “threat” from lower level supervisor Joe Lee to Lloyd about Rainey and Irving must have been related to the union but fails to offer any proof to support this conclusion. The Company showed Lee had already written up Rainey for misconduct long before the petition was filed and Rainey was suspended for three days as a result. His comments were more plausibly related to Rainey’s ongoing poor performance and disciplinary problems, not pro-union support. Lloyd admitted Lee made similar comments in the past – before the union campaign started. There was also no evidence anyone other than Lloyd

ever heard the statements as Lloyd admitted he never passed them along to Rainey, Irving or anyone else. General Counsel also failed to tie the alleged comments to any action by the Company as Joe Lee played no part in the decision regarding the reduction in force. Also, Flex-N-Gate established in its opening brief that such “stray remarks” unconnected in time and substance to the terminations are not actionable and General Counsel failed to rebut this point or distinguish the cases cited.

The “gesture” allegation (AB, p. 17) lacks any credibility and is also not evidence of nexus. Even the alleged discriminatees could not get their stories straight as their testimony conflicted with one another and their prior, sworn statements to the Board. The ALJ cannot base a finding of animus on such wildly contradictory statements by the union’s own witnesses.

Finally, General Counsel’s timing argument (AB, p. 18) is predicated upon a completely erroneous factual basis. The record evidence shows Connolly made the conclusion about being overstaffed in *July*, before the petition was filed and despite General Counsel’s best efforts to put words in his mouth about August. [Tr. 380]. The Company cited numerous cases to support its conclusion that the timing at issue here was not evidence of retaliation and General Counsel did not rebut or distinguish that authority.

E. The ALJ Erred in Refusing to Consider other Reductions at the Plant

General Counsel attempts (AB, pp. 18-19) to rehabilitate a fatal and reversible error by the ALJ by seeking to distinguish prior team leader and supervisor reductions in force at the facility. As noted in the Company’s opening brief, however, the ALJ failed to consider this evidence in her opinion which necessitates reversal.

Flex-N-Gate eliminated several other team leader and supervisor positions at the facility as part of its ongoing “lean manufacturing” process – including the first shift IT team leader, the same job Rainey performed on second shift. This process continued after the three terminations

at issue here. The ALJ did not consider any of this evidence in reaching her decision and the General Counsel's belated attempt to distinguish these facts is without merit.

F. The Staffing Comparisons

Like the ALJ, General Counsel tries to "second guess" the Company's assessment of its own statistics. (AB, p. 21). Neither General Counsel nor the ALJ know Flex-N-Gate's operations better than its General Manager charged with preparing the reports at issue and knowing what they mean.

General Counsel's unsupported allegation (AB, p. 21) that the Company did not offer any testimony to explain the reports is demonstrably wrong. Connolly testified he was tasked with reviewing staffing levels across the plastics division of the Company, including Arlington and considering best practices when it came to staffing. [Tr. 380, 391]. He prepared the staffing comparisons across those plants. [JT. Exs. 1(a), 1(b) and 2]. Connolly personally reviewed the reports and concluded based upon his experience and first hand knowledge that the number of supervisors (including Team Leaders) to other hourly employees at Arlington was out of proportion to other facilities:

Q Did you do charts? Did you do graphs? Or did you just say, oh, I think --

A No. I used my manpower comparison and just say, Listen, here's the difference; here's the difference that I see from the other plants. I said, This is something -- again, I always have to ask the question when I look at the operations and say, Okay, this operation can run with one person at this many people; what's the comparison here. You have to look at the operations.

Oh, just actually when I looked at that and going across, I mean, those Team Leaders are much like supervisors. I said, comparably at Arlington, when I looked at that, the Team Leaders are much like a supervisor. I compared even the supervisor status at Ada, which is 350 people with 13 supervisors, and we had 80 people at Arlington with ten Team Leaders.

[Tr., 386-87].

With Rainey, an IT Team Lead, the Company's evidence and testimony showed the number of IT support to total employees at Arlington "was definitely way out of whack" [Tr. 385] and it had already eliminated Rainey's team lead counterpart on first shift.

G. The Stipulation as to Financial Records

General Counsel offered no factual rebuttal (AB, pp. 20-21) to the Company's statements regarding the very limited stipulation entered into by the parties. The stipulation is clear on its face and applies only to the production of financial records and documents. It did *not* undercut in any way the Company's stated position that as part of its lean manufacturing process, it is "always going to be looking at staffing levels" to make sure their operations are as lean as possible. [Tr. 372].

H. The Company followed its Employee Handbook and Past Practice

General Counsel failed to rebut (AB, p. 23) the Company's uncontested evidence that it followed its employee handbook and past practice when making the termination decisions. The employee handbook specified "the least senior people in that classification" should be let go. [Tr. 384, 430] [GC Ex. 11, p. 9, "Seniority, as defined above, will be the governing factor for . . . layoffs."]. The Company followed this policy.⁴

Likewise, General Counsel failed to show (AB, p. 23) antiunion motive when none of the terminated team leaders were given an opportunity to accept a demotion and "bump" back from a management position to an hourly position. The "Bumping Procedure" policy in the employee handbook by its express terms and as verified by testimony of the plant manager Luckie, only applies on moves from shift to shift and not in cases of termination. [ALJ21]. Luckie confirmed

⁴ General Counsel's passing argument about seniority (AB, p. 26, fn. 5) is demonstrably false. Seniority is measured by date of hire per the handbook. [GC Ex. 11, p. 9] [Tr. 429-30] and Lloyd and Irving were the two least senior Team Leaders by date of hire. [Tr. 366-368, where Mr. Luckie identified the seniority of all Team Leaders; 428-30] [GC Ex. 18]. Rainey was a different case as he was the only remaining IT team leader after the company had already eliminated the IT team leader position on first shift.

in the entire time he has been Plant Manager, there has never been a case where a Team Leader has been allowed to “bump” a production employee. [Tr. 432].

I. The Team Leaders were Supervisors under the Act

General Counsel failed to adequately rebut (AB, p. 26) the Company’s exceptions and arguments on the issue of supervisory status. Indeed, the Team Leads’ *own testimony* shows they were supervisors under the Act: Irving and Lloyd specifically admitted they could recommend discipline for employees on the teams they led. [Tr. 153; 229]. Irving testified he “managed 13 to 15 people” and it was his job to manage those people. [Tr. 145]. Lloyd managed 5 other people on his team. [Tr. 214]. Irving agreed it was a Team Leader’s job “to make sure that they [his team] were all doing their job.” [Tr. 145-46]. Irving confirmed when the Superintendent is out of the building, Team Leads run the plant. [Tr. 418]. Irving even confirmed Team Leads could effectively recommend who to hire or fire when he testified, “Yes, sir. I can say, I think this guy’s doing a good job, and, you know, I think you should hire him if you want him in the building.” [Tr. 150]. Lloyd also confirmed this fact and agreed if a temp employee was doing a bad job, he “could recommend that the person [temp] not be hired” or, if they are doing a good job, recommend that the temp be hired. [Tr. 219].

Lloyd also confirmed as a Team Leader, he could recommend discipline. [Tr. 229]. Lloyd confirmed it was his “responsibility to make sure that hotshots got done in a hurry.” [Tr. 215]. Rainey agreed he “had a great deal of responsibility” in his job. [Tr. 83-84] and confirmed the plant would shut down and could not produce parts if he was not there to fix issues. [Tr. 83, 423].

J. There was no Coercion by the Company

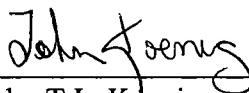
General Counsel failed to rebut (AB, p. 5) the Company's factual citations regarding the testimony of employee Jamie Nickerson who could not even recall the full name of the person he alleged offered him a "no means no" sticker, said in his mind the person was *not* a supervisor [Tr. 297] and said no supervisor ever asked him to wear such a sticker. [Tr. 296]. Likewise, General Counsel did not address (AB, pp. 4-5) and therefore concedes the Company's exception to Garcia's leading testimony on this issue. General Counsel likewise did not rebut the facts shown by the Company that Lloyd felt like employees were only joking [Tr. 191-92] when they asked him once or twice about the stickers.

Regarding the alleged "interrogation," Castaneda was the only employee to testify on this issue. General Counsel ignores (AB, p. 6) Castaneda's own testimony where he admitted he voluntarily initiated both conversations [Tr. 311-12] and the second conversation was after the election. [Tr. 307]. The evidence clearly shows there was no coercion involved in any of these minor instances and therefore no violation.

III. Conclusion

For all of the foregoing reasons and those set forth in its exceptions and opening brief, Respondent Flex-N-Gate Texas, LLC, respectfully prays for judgment in Respondent's favor on all counts and claims set forth in the Complaint, that Charging Party take nothing by way of the Complaint, and for all other just and proper relief.

Respectfully submitted,



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STATEMENT OF SERVICE

This is to certify that I have served a true and correct copy of the foregoing upon the following person, by first class mail:

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Mr. Danny Trull, Jr.
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This 22nd day of February, 2012.



John T.L. Koenig

ORDER SECTION
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