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	

REPLY BRIEF OF RESPONDENT MIDWEST TELEPHONE SERVICES, INC. TO THE BOARD IN RESPONSE TO THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

MORROW & MEYER, LLC.

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I. THE ALJ MISAPPLIED THE SMALL PLANT DOCTRINE.

The Acting General Counsel admits (and the Administrative Law Judge confirmed) that there is no direct evidence of employer knowledge to support the allegations contained in the Amended Complaint relating to Fannin and Williams. The Acting General Counsel is therefore left only with twisting the small plant doctrine to an unrecognizable form to fabricate employer knowledge where there is none.

The Acting General Counsel's skewed interpretation of the small plant doctrine, however, not only eliminates the Acting General Counsel's burden to prove employer knowledge, it effectively requires the employer to disprove knowledge. This improper burden shifting has been admonished by the Board. *BLT Enterprises of Sacramento, Inc.*, 345 NLRB 564 (2005).

A. The Factors Applied By The Sixth Circuit Have Been Affirmed By The Board And Are Otherwise Required By Long-Established Board Precedent.

The small plant doctrine only applies when its essential requirements are met. In *NLRB v. Health Care Logistics*, the Sixth Circuit succinctly organized those various requirements as follows: "the facility is small and open, the workforce is small, employees made no great effort to conceal their union activities, **and** management personnel are located in the immediate vicinity of the protected activity." 345 NLRB 564 (2005) (emphasis added).

The Acting General Counsel does not dispute the validity of the Sixth Circuit's small plant doctrine requirements. Rather, the Acting General Counsel merely argues that the Board has not expressly adopted them. But, the Board has not rejected them either. To the contrary, the Board has applied and/or approved each of the elements identified by the Sixth Circuit in *Health Care Logistics*. *See, e.g., BLT Enterprises of Sacramento, Inc.*, 345 NLRB 564 (2005)(adopting ALJ's decision which specifically recites the *Health Care Logistics* factors as set forth by the Sixth Circuit); *Frye Electric, Inc.*, 352 NLRB 345, 351 (2008)(adopting ALJ's

decision which relied on the following proposition of law in applying 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 activities at the plant **because of the closer working environment between management and labor."**)(emphasis added).[1]

Moreover, the Acting General Counsel specifically admits that the activity must be conducted in such a way that "management would have noticed it" – i.e., that it was conducted in the presence of management. (Acting General Counsel Answering Brief at pg. 3).

B. <u>The ALJ Misapplied The Small Plant Doctrine To *Presume* MWTS' Knowledge Of Ben Fannin's Role In Scheduling A Meeting With the IBEW, Which Was The Only Protected Activity Considered By The ALJ</u>.

The only relevant inquiry relating to the alleged violation regarding Fannin's discharge is whether MWTS terminated Ben Fannin after learning of his role in scheduling an IBEW meeting. (ALJ Decision, pg. 29)("I find what greatly concerned Vaughn Junior was the knowledge he gained on the evening of March 9, that Fannin had organized a meeting with the IBEW….; "Respondent's discharge of Fannin principally resulted from his efforts to seek IBEW representation").[2]

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[1] The Acting General Counsel argues that the Board has decided cases raising the small plant doctrine since *Health Care Logistics* and has not applied the Sixth Circuit's requirements. That argument holds little water because the Board considered only the small size of the plant in *LaGloria* – which Acting General Counsel admits is improper. *LaGloria Oil and Gas Co. v. NLRB*, 337 NLRB 1120 (2002). And, as for *Frye*, as indicated above, that case supports Respondent's view that <u>all</u> of the Sixth Circuit's requirements have been adopted by the Board. *See, Frye Electric, Inc.*, 352 NLRB 345, 351 (2008).

[2] The ALJ also makes a casual reference that Fannin's filing of an unfair labor practice charge as a potential reason for the termination decision, but the record is devoid of any evidence that George Vaughn, Jr. or MWTS bore any animus as a result of Fannin filing an unfair labor practice charge. Indeed, as indicated above, MWTS brought Fannin back after the charge was filed and continued to employ him until he told George Vaughn, Jr. to "go fuck himself".

At the end of the workday on March 9, 2011, on the Ashtabula job, miles away from MWTS' facility, Ben Fannin told Joe Caico and Greg Hillier that he scheduled a meeting with the IBEW on March 11, 2011. (Tr. 360-361). There is **no** evidence that there were any supervisors in the vicinity, or even on the jobsite, when Ben Fannin made this announcement. There is **no** evidence that Greg Hillier or Joe Caico told any MWTS supervisors about Ben Fannin's announcement (and the Acting General Counsel had the opportunity to ask each of them about this at the hearing).

The fact that Ben Fannin told Greg Hillier – **a non-supervisor** – outside of the presence of any supervisors does not satisfy the essential (and undisputed) requirement that the "activity" was conducted in such a manner that **management would notice it**. Thus, the essential requirements of the small-plant doctrine have not been met and the ALJ's decision to the contrary should be reversed on these grounds alone. *See, BLT Enterprises, supra* (small plant doctrine did not apply where activity that took place away from facility where no supervisors were present was not likely to be observed by supervisors).

To compound his error, however, the ALJ not only applied an inference of knowledge but a ***presumption*** of knowledge based on the small plant doctrine. As explained in Respondent's Exceptions Brief, this was clear error. *See Health Care Logistics, supra.* (rejecting finding that small plant doctrine created a presumption of knowledge).

Further, despite the fact that the ALJ made crystal-clear that the only protected activity he found substantially motivated MWTS was Fannin's role in scheduling the IBEW meeting, the Acting General Counsel goes to great lengths in his brief to discuss MWTS' knowledge of other irrelevant Section 7 activities. That activity should be ignored by the Board as it was not considered by the ALJ. Further, such activity does nothing to establish a discriminatory motive

by MWTS.[3] *See American Gardens Management Company*, 338 NLRB 644 (2002) (General Counsel burden to prove motivational link between specific activity and alleged discrimination).

C. The ALJ Misapplied the Small Plant Doctrine to Infer MWTS' Knowledge of Mike Williams' NLRB Affidavit and Subpoena, Which Is The Only Protected Activity Considered By The ALJ.

With regard to Mike Williams, the only relevant inquiry is whether MWTS had knowledge of Mike Williams' NLRB affidavit and subpoena.[4] Importantly, this activity occurred while Mike Williams was laid off. (Tr. 226-228). So too did Mike Williams' conversation with Joe Caico about the affidavit and subpoena. (Tr. 226-228). Accordingly, **it is impossible to conclude that MWTS management would have noticed this activity**. It was not even done while Mike Williams was working for MWTS.

The only conversation that took place while Mike Williams was working for MWTS occurred with Greg Hillier – **a non-supervisor** – on the Ashtabula job site (located an hour's drive away from MWTS' facility). There is no evidence that this conversation took place in an area where it could be observed by MWTS management or that any supervisor was even at the

[3] For example, MWTS knew that Ben Fannin attended a Union meeting in September 2010. And, after that meeting, MWTS hired Ben Fannin to do carpentry work during a Company layoff, even though it had no obligation to do so.[3] (Tr. 373, 376). Additionally, there were other MWTS' employees that attended that meeting they are still employed with MWTS today. (Tr. 685). MWTS also brought Ben Fannin back from layoff after the September 2010 meeting and after he and his brother filed NLRB charges against the Company. (Tr. 316). Further, although MWTS knew of the January 28, 2011 meeting and of Ben Fannin's interest in researching outside unions, the testimony is unrefuted that union representation was beneficial for the Company. (Tr. 281, 329-330, 349-350, 525-526, 662). It is simply illogical to conclude based on these facts that MWTS harbored any animus towards any of these Section 7 activities, and the ALJ did not find that it did.

[4] Indeed, with regard to Mike Williams, the ALJ affirmatively stated this fact. (ALJ Decision at pg. 33)("The only overt union activity Williams engaged [sic.] was attending one union meeting in September 2010. However, Respondent recalled Williams to work in mid-January 2011, thus establishing that his attendance at that meeting several months earlier was not something that it was concerned with.")

job-site. And, during this conversation, **Mike Williams specifically denied the affidavit and subpoena to Greg Hillier**. (Tr. 230). This fact alone defeats the application of the small plant doctrine. *See, Hotel Employees and Rest. Employees Int.'l Union Local 26,* 344 NLRB 567 (2005) ("If however, the alleged discriminate made efforts to hide his or her activity, then the General Counsel can't use the small plant doctrine to infer knowledge"); *Gold Coast Restaurant Corp.,* 304 NLRB 750 (1991)("Where such an effort is made to conceal the employees' organizing effort, the small plant doctrine cannot by itself support the inference that the Respondent knew of the union activities….") *BLT Enterprises, supra; Health Care Logistics, supra.* [5]

II. THE RECORD DOES NOT SUPPORT A FINDING THAT MWTS LEARNED OF BEN FANNIN'S ROLE IN SCHEDULING THE IBEW MEETING OR THAT IT LEARNED OF MKE WILLIAMS' AFFIDAVIT AND SUBPOENA OR THAT SUCH KNOWLEDGE LED TO ANY ADVERSE EMPLOYMENT ACTION.

Without the improperly applied small-plant doctrine inference, the Acting General Counsel's case collapses with regard to both Fannin and Williams because all that remains is a coincidence of timing. (ALJ Decision at pg. 29, 34). But that is not enough. *Boardwalk Regency Corp.*, 344 NLRB 984 (2005). "As the Board has noted, coincidence, at best, raises a suspicion. However, "mere suspicion cannot substitute for proof." *Id. quoting Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1024 (1999); *See also, Amyx Industries, Inc. v. NLRB,* 457 F.2d 904 (8th Cir. 1972) (mere coincidence in time between employee's activity and discharge does not raise inference of knowledge).

[5] Read in conjunction with this substantial authority, the cases cited by Acting General Counsel, at best, stand for the proposition that any small-plant inference is negligible (and, thus, cannot stand on its own) where there is, as here, deliberate concealment of protected activity.

1. The Evidence Does Not Show MWTS Knew Of The IBEW Meeting.

With regard to Fannin, the relevant events are as follows:

- Ben Fannin says that **George Vaughn can "go fuck himself"** on a jobsite on March 7, 2011. (Tr. 490-495).
- Greg Hillier tells George Vaughn, Jr. about the conversation at the end of the day on March 7, 2011. (Tr. 496).
- George Vaughn, Jr. decides to take a cooling-off period before making any decisions concerning Ben Fannin's employment. (Tr. 678).
- George Vaughn, Jr. goes to the jobsite where Ben Fannin is working on March 9, 2011 to see if Ben Fannin will apologize for telling George Vaughn Jr. that he can "go fuck himself". (Tr. 678).
- Ben Fannin does not apologize.
- Ben Fannin tells Joe Caico and Greg Hillier (non-supervisors) about the March 11, 2011 meeting. (Tr. 360-361). No evidence exists that Fannin, Caico or Hillier told George Vaughn, Jr. about the meeting or that he otherwise learned of it.
- After further contemplating the matter during the "cooling off" period, and after receiving no apology, George Vaughn terminates Ben Fannin's employment on March 10, 2011. (Tr. 678).

There is **no** other evidence in the record that could support a finding that the Acting General Counsel satisfied his burden of proving MWTS knew of Ben Fannin's role in scheduling the IBEW meeting. Indeed, the two employees who Ben Fannin told about the meeting testified at the hearing, and neither of them admitted to telling George Vaughn, Jr. or any other MWTS supervisor about the meeting.

The fact that Ben Fannin was terminated the day after he made the announcement is unconvincing since the announcement came just a few days after he told his boss to "go fuck himself". Indeed, the Board expressly rejected a finding of knowledge or animus in *Syracuse Scenery & Stage Lighting Co.* under similar circumstances:

> while the employees' union activities and the discharges did occur within a relatively brief period, so too, was there a close proximity in time between the employees blatant misconduct and the Respondent's decision to terminate them. Under these circumstances, **the factor of timing is too weak a foundation on which to base a finding of pretext.**

342 NLRB No. 65 (2004)(emphasis added).

The Acting General Counsel makes much, however, of George Vaughn, Jr.'s statement that things "eventually" get back to him. But "eventually" does not mean "instantly" (as is necessary in both the Fannin and Williams matters) and presumably only includes matters that supervisors could become aware of and report to him. But, no supervisor was told about or learned of the IBEW meeting (or of Williams' subpoena or affidavit).

Further, there is simply no evidence that MWTS harbored any animus towards an affiliation with the IBEW.[6] Joe Caico and Greg Hillier – both of whom the ALJ affirmatively found had no reason to lie – both testified that George Vaughn, Jr. told them they could join whatever union they wanted. (Tr. 281, 525-526). Without proof of this animus, the alleged violation cannot stand. *See American Gardens Management Company*, 338 NLRB 644 (2002) (General Counsel burden to prove motivational link between specific activity and alleged discrimination).

Additionally, it defies imagination that an employee telling his boss that he could "go fuck himself" is an insufficient reason for discharge. It is true that employees at MWTS occasionally use rough language. But that is easily distinguishable from directing such language at the Vice-President of the company in an intentionally insulting manner.

[6] In his opinion, the ALJ incorrectly states Caico and Hillier stated that George Vaughn, Jr. told them he did not want them to join the IBEW. Both Caico and Hillier testified at the hearing and neither of them testified about this alleged conversation.

Finally, George Vaughn, Jr.'s explanation of the reason for the delay in Ben Fannin's termination (*i.e.,* that he wanted to give Fannin an opportunity to apologize) is not only reasonable but is also supported by the record. (*See* Tr. 185) (testimony of Ben Fannin's brother that George Vaughn, Jr. offered to give him another chance even after he broke several Company rules).

2. The Evidence Does Not Show That MWTS Knew Of The Affidavit And Subpoena.

With regard to Mike Williams the ALJ did exactly what the Board has rejected in *Boardwalk Regency Corp.* and *Amyx Industries, Inc., supra.* – he found that the Acting General Counsel "clearly" presented a prima facie case of discrimination based only on "suspicious" timing. (ALJ Decision, pg. 34). As discussed above, suspicions are not the equivalent of proof and therefore cannot support a prima facie case. Moreover, the record establishes the timing was not "suspicious" at all. Mike Williams agreed to work a few hours a week when he was available and when MWTS needed him. (Tr. 221-223). And, he did. (Tr. 223-225). Mike Williams worked a few days in January. (Tr. 223-225). At the end of the month in January, Joe Caico told Greg Hillier about Mike Williams' NLRB subpoena, which Mike William's denied to Greg Hillier. (Tr.230, 239-240). The ALJ suspected that because there was no work available for Mike Williams the next day, Greg Hillier told MWTS. (ALJ Decision, pg. 34). But the record clearly shows that there was no work available because the job that Mike Williams worked on slowed down – which even the ALJ admitted. (Tr. 231-233; ALJ Decision, pgs. 32-33). Thus, MWTS did not need Mike Williams.

III. THE ALJ AND THE ACTING GENERAL COUNSEL HAVE *STILL* NOT IDENTIFIED ANY THREAT OR PROMISE MADE BY MWTS AT THE JANUARY 28, 2009 MEETING.

The ALJ admits that it is black-letter law that an employer may offer opinions as to incumbent and prospective unions provided such opinions do not contain any threats or promises. *Poly-American, Inc.*, 328 NLRB 667, 669. Neither the ALJ nor the Acting General Counsel have pointed to any record evidence of any threat or promise by MWTS when George Vaughn, Jr. expressed his personal opinion (as he was permitted by law to do) regarding the employees' union options.

IV. CONCLUSION.

For the foregoing reasons, and the reasons more fully articulated in Mid-West Telephone Company, Inc.'s initial brief in support of its exceptions, the ALJ's decision should be reversed as described and requested in Mid-West's exceptions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Brief of Respondent Midwest Telephone Services, Inc. to the Board in Response to the Acting General Counsel's Answering Brief* was sent this 2nd day of March, 2012 to the following via electronic mail:

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