UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

SHAMROCK FOODS COMPANY

and

THE BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO/CLC

Case No. 28-CA-150157

POST-HEARING BRIEF OF RESPONDENT SHAMROCK FOODS COMPANY

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I. INTRODUCTION

The General Counsel (the "GC") attempts to obscure the weakness of its arguments behind sheer bulk and dramatic hyperbole. The GC and the Union[1] claim that Respondent Shamrock Foods Company ("Shamrock") conducted a massive campaign of purported discipline, threats, interrogation and surveillance to discourage its employees from unionizing. Yet, out of hundreds of Shamrock employees, the GC produced only ***three (3)*** non-supervisory witnesses to testify concerning this allegedly widespread campaign.

The General Counsel's evidence fails to support its characterizations at a more granular level as well. Thomas Wallace—a purportedly "visible union supporter" that the GC alleges was unlawfully discharged to serve as an example—testified that he had no reason to believe Shamrock was even aware of his alleged union activities. The General Counsel's allegation concerning "confiscation of union literature" was, in truth, the disposal of flyers left unattended on a break room counter. The GC's surveillance allegations include a brief conversation in which a supervisor asked two employees who were conversing on the warehouse floor if they were on break.

In short, the General Counsel's claims are based on exaggeration and mischaracterization. The Complaint should therefore be dismissed in its entirety.

II. BACKGROUND FACTS

Shamrock is a wholesale foods distributer with a number of distribution centers in the western United States. (Tr. 138). The largest of these distribution centers is in Phoenix, Arizona, and is referred to as the "Arizona Foods" facility. (*Id.* at 138, 140). The Phoenix location includes a warehouse, a meat processing plant, cold storage facilities and administrative offices. (*Id.* at 138-39).

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[1] The Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, AFL-CIO/CLC is referred to herein as the "Union."

Shamrock's corporate offices are also located in Phoenix, but at a different location that is approximately thirty (30) minutes away from the distribution center. (Tr. 428).

Sometime in late 2014 or early 2015, the Union claims to have commenced an organizing campaign at the Arizona Foods facility. The Union, however, has never filed an election petition or otherwise identified the unit of employees it seeks to represent. As the campaign was failing, the Union filed its original unfair labor practice charge against Shamrock on April 15, 2015.[2] (GCX 1(a)). The Union alleged only that Shamrock discharged an unnamed employee for his Union activities and that it maintained unlawful rules in its employee handbook. (*Id.*). Subsequently, the Union's allegations increased in scope. (GCX 1(e)).

On July 27, Shamrock was served by the General Counsel with a complaint alleging (without merit) an expanded number of violations between January 25 and July 8. (GCX 1(g)). A trial in this matter was conducted before Administrative Law Judge Jeffrey D. Wedekind. The trial opened on September 8, and continued for seven (7) days (the "ALJ proceeding"). The same day that the ALJ proceeding commenced, the General Counsel filed a petition for injunctive relief under Section 10(j) of the National Labor Relations Act.

As explained herein and based on the evidence adduced at trial, the General Counsel's allegations lack merit.

III. THE VARIOUS EMPLOYMENT RULES AND POLICIES CHALLENGED BY THE GENERAL COUNSEL ARE LAWFUL AND CONSISTENT WITH THE GENERAL COUNSEL'S PUBLISHED GUIDANCE.

The GC alleges a series of purported violations based on Shamrock's Employee Handbook, as well as a number of other "rules" that Shamrock allegedly promulgated during the relevant period. (*See* Compl. ¶ 5(b)(1)-(15), 5(c), 5(d), 5(e), 5(r), 5(w)(3), 5(x)). A work rule does not violate Section 8(a)(1) of the Act unless the General Counsel proves that the rule "reasonably tends to chill

[2] All dates herein are 2015 unless otherwise noted.

employees in the exercise of their Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Absent an explicit restriction on Section 7 rights, this burden requires the GC to demonstrate that: "(1) the rule was promulgated in response to union activity; (2) the rule has been applied to restrict the exercise of Section 7 activity; or (3) employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47.

As the Board has recognized, this analysis cannot be applied in a manner that would "effectively preclude[] a common sense formulation by the [employer] of its rule and obligate[] it to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply." *Lafayette Park Hotel*, 326 N.L.R.B. at 826. Thus, "[i]n determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading, it must refrain from reading particular phrases in isolation, and must not presume improper interference." *Lutheran Heritage*, 343 N.L.R.B. at 646. The Board has further cautioned against finding violations "through parsing the language of [a] rule . . . and attributing to the [employer] an intent to interfere with employee rights." *Lafayette Park Hotel*, 326 N.L.R.B. at 825-826.

"Where a rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way." *Id.* at 647. Further, the Board should consider the realities of the workplace and the context in which the rules are imposed. *Lafayette Park Hotel*, 326 NLRB at 825-26. These admonitions are particularly relevant in cases where the employer "has not enforced the rule against employees for engaging in such activity, . . . [or] promulgated the rule in response to union or protected concerted activity." *Id.*

The General Counsel's work rule allegations in this case are meritless. As an initial matter, the work rules do not explicitly restrict Section 7 activity, and the GC has not presented any evidence that they have been enforced in such a manner. While a failure to show unlawful enforcement is not necessarily fatal in regard to a work rule allegation, the Board "may not cavalierly declare policies to be facially invalid without supporting evidence." *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19, 29 (D.C. Cir. 2001).

Here, the GC called a number of employees to testify during trial about their organizing efforts on the Union's behalf. None of these witnesses testified that he believed his organizing activities were prohibited, or even affected, by the challenged work rules. The GC's claim that a reasonable employee would read these rules to restrict Section 7 activity rings hollow given the absence of such testimony.

Even setting aside this omission, however, the General Counsel's work rule allegations fail for multiple reasons. These flaws are explained below.[3]

A. The General Counsel's Allegations Regarding The Shamrock Associate Handbook Rely On Unreasonable Readings Of Isolated Terms.

1. The Policy Protecting the Company's Confidential Information.

Complaint paragraph 5(b)(1) alleges that the Shamrock handbook provision concerning confidential information is unlawful. The Complaint, however, provides only a selective quotation from a small portion of this policy. In its entirety, the policy reads as follows:

> The Company's confidential information is a valuable asset and includes: information, knowledge, or data concerning costs, commission reports or payments, purchasing, profits, markets, sales, discounts, margins, customer histories or preferences, relationships with vendors, organization structures, associates, customers, surveys,

[3] In addition to its claim that the various work rules alleged in the Complaint are impermissibly overbroad, the GC asserts various cumulative theories that the contested rules also "threatened" employees, solicited employees to report on the concerted activities of their co-workers, and suggested that employees' concerted activities were under surveillance. (*See, e.g.*, Compl. ¶¶ 5(c) through (e), 5(x)(2), 5(x)(3)). However, because each of the work rules challenged by the GC is lawful and because the GC has introduced no evidence to show that any of these rules have been enforced in an unlawful manner, these cumulative allegations fail as well.

> customer lists, lists of prospective customers, customer account records, marketing plans or efforts, sales records, training and service materials, Company manuals and policies, computer programs, software and disks, order guides, financial statements and projections, business plans, budgets, supplier lists, contracts, calendars and/or day-timers that contain customer contact and other customer information, compensation schedules, proposals and quotes for business, notes regarding customers and prospective customers and pricing information.
>
> This information is the property of the Company and may be protected by patent, trademark, copyright and trade secret laws. All confidential information must be used for Company business purposes only. Every associate, agent and contractor must safeguard it. THIS RESPONSIBILITY INCLUDES NOT DISCLOSING THE COMPANY CONFIDENTIAL INFORMATION, INCLUDING INFORMATION REGARDING THE COMPANY'S PRODUCTS OR BUSINESS, OVER THE INTERNET, INCLUDING THROUGH SOCIAL MEDIA. This responsibility includes the safeguarding, securing and proper disposal of confidential information in accordance with the Company's Record Management Policy. This obligation extends to confidential information of third parties that the Company has rightfully received under Non-Disclosure Agreements. You are also responsible for properly labeling any and all documentation shared with or correspondence sent to the Company's attorneys as "Attorney-Client Privileged."

(General Counsel Exhibit ("GCX") 3 at 8-9).

This definition of confidential information is not unlawful. "[B]usinesses have a substantial and legitimate interest in maintaining the confidentiality of private . . . and proprietary information." *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). While the General Counsel's Complaint does not specifically identify the language alleged to be unlawful, the selective quotation of the policy suggests that the GC intends to focus on the reference to employee information in the confidentiality definition. However, in determining whether employees may reasonably read the policy to interfere with Section 7 rights, the policy must be read as a whole. *E.g.*, *Lutheran Heritage Village-Livonia*. 343 NLRB at 646. Reading the policy in its entirety, a reasonable employee would likely interpret the phrase "associates" to mean private, personally identifiable information about associates such as

addresses, phone numbers, social security numbers, banking information for direct deposit, and similar items.

This reading is consistent with relevant case law. For example, in *Community Hospitals of Central California v. NLRB*, the disputed confidentiality rule prohibited employees from the "release or disclosure of confidential information concerning patients or employees." *See* 335 F.3d 1079, 1088 (D.C. Cir. 2003). Focusing solely on the reference to "employees," the Board held that the policy unlawfully discouraged employees from "revealing information, such as wages or a disciplinary record, concerning [themselves]." *Id.* at 1089. The D.C. Circuit rejected this finding. Instead, recognizing that "confidential information is information that has been communicated or acquired in confidence," the Court found that a "reasonable employee would ***not*** believe that a prohibition upon disclosing information, acquired in confidence, concerning patients or employees would prevent him from saying anything about himself or his own employment." *Id.* (emphasis added). The Court went on to hold that, "to the extent an employee is privy to confidential information about another employee . . . he has no right to disclose that information contrary to the policy of his employer." *Id.*

In a similar case, the Board upheld the employer's "Proprietary Information" rule which contained several specific examples, including "customer and employee information." *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003). The Board found that while the phrase in question was "not specifically defined in the rule, it appears within the larger provision prohibiting disclosure of proprietary information, including information assets and intellectual property and is listed as an example of intellectual property. Other examples include business plans, marketing plans, trade secrets, financial information, patents, and copyrights." *Id.* at 278. Based on this context, the Board concluded that "employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of Respondent's proprietary business information rather than

to prohibit discussion of wages." *Id.*; *see also Echostar Technologies, LLC*, 2012 WL 4321039 at *19, 21 (2012) (ALJ opinion) (holding confidentiality provision that included "employee information" was not unlawful).

Here, Shamrock's confidentiality policy identifies 33 examples of confidential information. These examples focus on the Company's proprietary information, internal business strategies, confidential information, and customer and supplier information. Reading the provision as whole rather than as isolated phrases, employees would reasonably understand that it was designed to protect the confidentiality of Shamrock's proprietary business information. Contrary to *Lutheran Heritage Village-Livonia*, the GC's claim of a violation improperly focuses on a few references in isolation and "presume[s] improper interference with employee rights." 343 NLRB at 647.

2. <u>The Non-Disclosure Policy</u>.

General Counsel alleges in paragraph 5(b)(2) of the Complaint that Respondent's Non-Disclosure Agreement is unlawful. The Non-Disclosure/Assignment Agreement states:

> When you joined the Company, you signed an agreement to protect and hold confidential the Company's proprietary information. This agreement remains in effect for as long as you work for the Company and after you leave the Company. Under this agreement, you may not disclose the Company's confidential information to anyone or use it to benefit anyone other than the Company without the prior written consent of an authorized Company officer.

(GCX 3 at 9).

Nothing in this provision could be reasonably construed by employees to restrict Section 7 rights. Again, businesses have a substantial and legitimate interest in protecting their proprietary information. *Lafayette Park Hotel*, 326 NLRB at 826. Rules that protect the employer's legitimate interest in the confidentiality of its private business information do not restrict Section 7 rights and do not violate the Act. *Super K-Mart*, 330 NLRB 263, 263 (1999). This provision is therefore lawful.

3. **The Policy Concerning Requests By Regulatory Authorities.**

General Counsel alleges in paragraph 5(b)(3) of the Complaint that Shamrock's Request by Regulatory Authorities policy is unlawful. The provision states as follows:

> The Company and its associates must cooperate with appropriate government inquiries and investigations. In this context, however, it is important to protect the legal rights of the Company with respect to its confidential information. All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department. No financial information may be disclosed without the prior approval of the Company's President or Chief Financial Officer.

(GCX 3 at 11).

Again, the General Counsel's allegation improperly reads the policy in isolation, outside of its context in the Handbook. This provision falls under the umbrella of sub-section (E), "Handling the Confidential Information of Others." The introductory paragraph of that sub-section makes clear that these provisions pertain to "company[ies] and individuals" other than Shamrock. This paragraph reads in full:

> The Company has many kinds of business relationships with many companies and individuals. Sometimes the companies or individuals will volunteer confidential information about their products or business plans to induce us to enter into a business relationship. At other times, we may request that a third party provide confidential information to permit the Company to evaluate a potential business relationship with that party. In other circumstances, a company may provide us with confidential, personally identifiable information, such as health or financial records, about individuals that are customers of that company so that we may provide that company with services that use those records. Whatever the situation, we must take special care to handle the confidential information of others responsibly. We handle such confidential information in accordance with our agreements with such third parties and with all applicable laws.

(GCX 3 at 9).

Shamrock has a legitimate interest in protecting and managing its relationships with third parties, particularly in scenarios that may result in future litigation. This policy furthers that interest

by insuring that the Company is aware of and involved in the disclosure of sensitive information. In addition, there is no right under Section 7 to reveal confidential documents or information concerning third parties with whom Shamrock does business, or to take part in investigatory interviews concerning such entities without even alerting the Company. *Cf. Community Hospitals of Central Cal.*, 335 F.3d at 1089 (observing that Section 7 does not create right to disclose confidential information of other individuals). This allegation accordingly must fail.

4. <u>The Policy Concerning Requests For Public Statements On Shamrock's Behalf</u>.

In paragraph 5(b)(4) of the Complaint, the General Counsel claims that Shamrock's policy concerning requests for public comments is unlawful. The provision states:

> The Company has an established Spokesperson who handles all requests for information from the Media. Ms. Sandra Kelly at the Dairy is the person who has been designated to provide overall Company information or to respond to any public events or issues for which we might receive press calls or inquiries. If you believe that an event or situation may result in the press seeking additional information, please contact Ms. Kelly at the Dairy to advise her of the nature of the situation so that she may be prepared for any calls. Only the Company's CEO may authorize another associate to speak on behalf of the Company.

(GCX 3 at 11).

This provision also falls within subsection (E), "Handling the Confidential Information of Others." As explained above, the introductory paragraph of that subsection specifies that the provisions within it pertain to "company[ies] and individuals" outside of Shamrock. Moreover, the General Counsel stated in his recent memorandum that "employers may lawfully control who makes official statements for the Company." *General Counsel Memorandum* 15-04, "Report of the General Counsel Concerning Work Rules," March 18, 2015, at *12.

Here, the rule specifies that Ms. Kelly "has been designated to provide overall Company information or to respond to any public events or issues for which we might receive press calls or

inquiries." The last line of the rule further provides that "[o]nly the Company's CEO may authorize another associate to speak on behalf of the Company." The specific references to "Company information," "we," and "on behalf of the Company" demonstrate that this rule refers only to Shamrock's official messaging and public statements concerning third parties. Accordingly, the policy does not infringe on an individual employee's ability to speak to the media in any manner protected under Section 7.

5. <u>Policies Concerning Internet And Email Use</u>.

The General Counsel alleges in paragraphs 5(b)(5) through (12) of the Complaint that Shamrock's policies concerning Internet and email use are unlawful. The General Counsel failed, however, to introduce any evidence to show that Shamrock provides non-supervisory employees with email or Internet access. The absence of such evidence is particularly critical in light of unchallenged testimony from Shamrock Human Resources representative Natalie Wright that hourly associates ***do not*** have email access. (Tr. 375:17-18). In light of this testimony and the absence of any evidence to the contrary, the GC cannot sustain its burden to demonstrate that work rules pertaining to Internet and email use may reasonably be construed to interfere with Section 7 rights. Indeed, because there is no evidence that hourly associates have access to these tools, the GC cannot establish that the challenged rules have any impact at all.

Even beyond this issue, the work rules identified in Complaint paragraphs 5(b)(5) through (12) are lawful. Shamrock has a legitimate interest in limiting the use of its email and computer networks to business purposes and in protecting against the transmission or downloading of offensive, malicious or otherwise improper materials. Shamrock additionally has a legitimate interest in insuring that employee Internet postings, messages and other materials do not inaccurately convey the impression that they were transmitted on Shamrock's behalf or with Shamrock's approval.

The policies challenged in paragraphs 5(b)(5) through (12) of the Complaint, which include limitations on the use of Shamrock's logo, links to Shamrock's website, posting of Shamrock's proprietary information and downloading and transmission of materials through Shamrock's computer and email network, are properly tailored to these interests. As a result, they should be deemed lawful. To the extent that Board law holds otherwise, Shamrock respectfully submits that it should be overturned.

6. <u>The Guidelines To Appropriate Conduct</u>.

The General Counsel alleges that two provisions of Shamrock's Guidelines To Appropriate Conduct are unlawful. First, in Paragraph 5(b)(13)(A) of the Complaint, the GC challenges Shamrock's prohibition of:

> Theft and/or deliberate damage or destruction of property not belonging to the associate, including the misuse or unauthorized use of any products, property, tools, equipment of any person or the unauthorized use of any company-owned equipment.

(GCX 3 at 63).

The GC does not specify the basis upon which it believes this provision is unlawful, and the GC's theory of a violation is not obvious from the language of the rule. However, to the extent the GC intends to argue that this provision unlawfully restricts the use of Shamrock's email systems, such a reading would be unreasonable. First, as noted above, Shamrock hourly personnel do not have access to Shamrock's email system. (Tr. 375:17-18). Second, the rule concerning theft and property damage specifically pertains to ***physical*** property, *i.e.*, products, tools and equipment. A reasonable employee would not construe this provision to apply to intangible electronic systems. *See Verizon Wireless*, 2015 WL 5560242 (September 18, 2015) (ALJ opinion) (finding that rule prohibiting personal use of company equipment, vehicles, and machinery could not reasonably be read to include email systems).

Second, in paragraph 5(b)(13)(B) of the Complaint, the General Counsel claims that Shamrock unlawfully prohibited employees from engaging in:

> Any act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work, including sexual or any other harassment, wasting the associate's time, harming or placing the associate in harm's way, immoral or indecent conduct or conduct that creates a disturbance in the workplace.

(GCX 3 at 64). As with the GC's other allegations, this claim is unsupportable. Employers have a legitimate interest in establishing and maintaining a civil and decent workplace. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. Indeed, the General Counsel recently issued a memorandum approving of virtually identical "civility" rules, which included prohibitions against threatening, intimidating, coercing, or otherwise interfering with the job performance of coworkers. *General Counsel Memorandum* 15-04, "Report of the General Counsel Concerning Work Rules," March 18, 2015, at *11-12. The General Counsel "publish[ed] this report to offer guidance on [its] views of this evolving area of labor law," expressing hope that employers would conform their policies to the examples identified as lawful. *Id.*

Even aside from the General Counsel's memorandum, the Board has routinely recognized that rules designed to maintain order and avoid liability for workplace harassment are not unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. In *Palms Hotel and Casino*, for example, the Board upheld a policy restricting employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons" as lawful. 344 NLRB 1363, 1368 (2005). The Board held that the terms of the policy were not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." *Id.*

Courts have refused to enforce Board decisions that depart from these principles. For instance, in *Adtranz ABB Daimler-Benz Transp. v. NLRB*, the Board found a violation based on a work rule prohibiting "abusive or threatening language," harassment and other conduct that conflicted with the company's desire to maintain a "civil and decent workplace." 253 F.3d 19, 25 (D.C. Cir. 2001). In a sharp and extended rebuke, the D.C. Circuit refused enforcement of the Board's decision, holding that the NLRB's position "is not reasonably defensible. It is not even close." *Id.* at 26. The court went on to call the Board's decision "preposterous" and found that it failed to appreciate an employer's obligation to prevent and address workplace harassment:

> We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here. Under both federal and state law, 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.

Id. at 27-28. Like the Board in *Palms Hotel and Casino*, *supra*, the court in *Adtranz* specifically rejected the notion that it is "unfair to expect union members to comport themselves with general notions of civility and decorum when discussing union matters or exercising other statutory rights." *Id.* at 26.

Shamrock's prohibition on injurious conduct in the workplace is consistent with these principles. The policy is crafted to maintain order and prevent harassment. The terms of the policy are such that a reasonable employee would understand the types of conduct that are prohibited, and would not confuse them with an attempt to restrict Section 7 rights. The General Counsel's claim therefore should fail.

7. <u>The Solicitation And Distribution Policy</u>.

General Counsel alleges in paragraphs 5(b)(14) and (15) of the Complaint that Respondent's No Solicitation and No Distribution policy is unlawful. The provision states:

> Shamrock believes that the work time of our associates should be devoted to their work-related activities, and that it is neither safe nor

> productive for our associates to be distracted by individuals engaged in non-work related activities during work time or in work areas. Thus, the conducting of non-company business related activities is prohibited during the working time by either the associate doing the soliciting or the associate being solicited or at any time in customer or public areas. Associates may not solicit other associates under any circumstances for any non-company related activities.
>
> The distribution of non-company literature, such as leaflets, letters or other written materials by an associate is not permitted during the working time of either the associate doing the distributing or the associate to whom the non-company literature is being distributed, or any time in working areas or in customer and public areas.
>
> It is important that we keep our associates informed on all matters that involve them. Company bulletin boards/email is our primary means for posting notices and other materials related to our associates and our business. In order to avoid any confusion over what may or may not be posted on Shamrock bulletin boards, and to avoid obscuring important business-related materials with items which are of a personal nature, Shamrock bulletin boards are to be used solely for the posting of Shamrock business-related notices and materials. If you would like to post any Shamrock business-related materials, please see your Department Manager, the General/Branch Manager or the Human Resources Representative. Only these individuals are authorized to approve and post information on Shamrock bulletin boards.

(GCX 3 at 65).

This rule is consistent with decades of established Board law. "Working time is for work is a long-accepted maxim of labor relations." *Adtranz*, 253 F.3d at 28; *see also Peyton Packing*, 49 NLRB 828, 843 (1943). As a result, the NLRB has long held that "rules prohibiting solicitation during working time are presumptively lawful because such rules imply that solicitation is permitted during nonworking time, a term that refers to the employees' own time." *Our Way, Inc.*, 268 NLRB 394 (1983). The Board and the Supreme Court have both upheld prohibitions against solicitation in customer or public areas. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493, n.11 (1978); *Marriot Corp.*, 223 NLRB 978 (1976). Similarly, "an employer's prohibition against employee distribution in work areas at all times is presumptively valid." *Beverly Enterprises Hawaii, Inc.*, 326 NLRB 335 (1998).

Shamrock's policy quoted above only prohibits solicitation during "working time," and distribution during "working time" or in "work area[s]." These prohibitions comply with longstanding Board precedent. The policy accordingly is lawful, and the General Counsel's allegation should be dismissed. *See also*, *e.g.*, *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 615-621 (1962).

B. Shamrock's Offer Of A Severance Agreement To Thomas Wallace Does Not Constitute Promulgation of An Unlawful Work Rule.

In addition to the handbook violation discussed above, the General Counsel also claims that Shamrock violated the Act by offering a severance agreement to former employee Thomas Wallace following his discharge. (Compl. ¶ 5(r); GCX 26). The General Counsel affirmed during trial that it is pursuing this allegation based only on a theory that Shamrock's offer of the agreement constituted promulgation of an overly broad work rule:

> Q. (*By the ALJ*) Is it your position that this is a rule?
>
> A. (*By Counsel for the GC*) Our position's that this is a rule.
>
> Q. Is it based just on this or is it based on --
>
> A. It is based on this.

(Tr. 688-89). Consistent with the General Counsel's statements at trial, the Complaint alleges only a work rule violation under Section 8(a)(1). (Compl. ¶ 5(r)). The severance agreement is not alleged to violate the Act in any other respect.

As explained above, in contesting a work rule, the General Counsel must establish that a reasonable employee would construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). The severance agreement offered to Wallace falls far short of meeting this standard. As Wallace himself acknowledged, the severance agreement was never binding because he refused to sign it:

> Q. (*By Counsel for Shamrock*) Mr. Wallace . . . you understood if you signed the [severance agreement] you'd get the money?

A. (*By Mr. Wallace*) Right. Uh-huh.

Q. Okay. And if you signed the agreement you'd be bound by the agreement?

A. If I signed – yes. If I signed –

. . . .

Q. But you didn't sign the [severance agreement] to agree to it?

A. No, sir.

Q. And so you didn't get the money –

A. No, sir.

Q. -- and you're not bound by the agreement?

A. No.

Q. No. Okay. And you had 21 days to consider it, right?

A. Right.

Q. And then it was off the table?

A. Yeah, that was the writing in the back page.

(Tr. 689-90). In short, the severance agreement did not restrict Wallace in ***any*** way, in regard to his Section 7 rights or otherwise. The General Counsel's allegation concerning the severance agreement therefore must fail.

While the GC has not alleged any other violations in regard to the severance agreement, any such allegations would fail in any event. Unlike other cases involving severance agreements that broadly prohibited the employee from appearing as a witness, providing documents, assisting in the prosecution of claims and/or discussing ***any*** employment-related matters, the confidentiality provision in the severance agreement offered to Wallace was narrowly tailored. This provision only required confidentiality in regard to the terms of the severance agreement itself. (Compl. ¶ 5(r)(1)). This distinction precludes any claim that the provision is impermissibly overbroad. *Cf. Metro Networks*, 336 NLRB 63, 67 n.18 (2001).

Regarding the other confidentiality provisions from the severance agreement referenced in the Complaint, the General Counsel has again quoted selectively. For example, the GC claims that Paragraph 10 of the agreement unlawfully prohibits disclosure of Shamrock's confidential information, "including but not limited to financial, personnel or corporate information." (Compl. ¶ 5(r)(2)). The Complaint omits the portion of Paragraph 10 that further describes these restrictions as applying to "information regarding customers, customer lists, costs, prices, earnings, systems, operating procedures, prospective and executed contracts and other business arrangements and sources of supply." (GCX 26 at 2).

When viewed in context, this provision is a "narrowly tailored" one that "does not interfere with protected employee activity" while at the same time "accomplish[ing] the Company's presumed interest in protecting confidential information." General Counsel Memorandum 15-04, at *4. Thus, while Wallace's refusal to sign the agreement is fatal to the General Counsel's theory of a work rule violation, this allegation would fail even if the agreement had been executed.

C. <u>The General Counsel's Claim That Shamrock Unlawfully Prohibited Retaliatory Slowdowns Is Unsupportable</u>.

The GC alleges another purported work rule violation based on a May 5, 2015 conversation between Mark Engdahl, Shamrock's Vice President of Operations, and Mario Lerma, a Shamrock forklift driver. (Compl. ¶ 5(w)(3)). Engdahl received reports that Lerma and other forklift operators were either refusing to deliver or delaying delivery of items ("drops") to order selectors who did not sign Union authorization cards (in addition to engaging in other forms of harassment). (Tr. 238:16-240:2, 743:5-12, 746:11-748:16). Engdahl held the meeting to advise Lerma that such conduct was not appropriate, before the situation escalated to the point of discipline. (*Id.*) Notably, Lerma understood what Engdahl was referencing without asking for details, and did not deny that drops were being delayed. (*See* GCX 13(a)).

The General Counsel's effort to establish a work rule violation based on this conversation is unfounded. The GC did not introduce any evidence to rebut Engdahl's testimony concerning complaints that Lerma and other forklift drivers were harassing employees who declined to sign authorization cards. Lerma's failure to deny these complaints during his May 5 conversation with Engdahl further supports Engdahl's testimony in this regard. Because such conduct is not protected activity under Section 7, a reasonable employee would not interpret a directive to refrain from such activity as interfering with Section 7 rights. The General Counsel's attempt to establish a work rule violation based on this conversation must fail. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

D. Kent McClelland's May 8 Letter Was A Lawful Prohibition Against Threatening Conduct.

The General Counsel further alleges that Shamrock promulgated an overbroad work rule in a letter sent on May 8, 2015 from Kent McClelland, Shamrock's President and Chief Executive Officer. (Compl. ¶ 5(x)(1); GCX 14). The May 8 letter was sent after McClelland learned that a number of employees reported that they had been threatened at work. (Tr. 354:7-12). While not aware of the specifics concerning the threats, McClelland felt that it was imperative to remind employees that "unlawful bullying" and "threatening, violent, or unlawfully coercive behavior" would not be tolerated. (GCX 14). McClelland suggested in the letter that any employee who felt threatened should report the situation. (*Id.*)

As noted in Section III.A.5 above, the General Counsel's recent memorandum concerning permissible employment policies approved of virtually identical prohibitions against threatening, intimidating, coercing, and otherwise interfering with the job performance of coworkers. *General Counsel Memorandum* 15-04, "Report of the General Counsel Concerning Work Rules," March 18, 2015, at *11-12. Moreover, consistent with the admonishments of the court in *Adtranz ABB Daimler-Benz Transp. v. NLRB*, a review of such rules must be undertaken with an appreciation for

the fact that "employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment." 253 F.3d 19, 27-28 (D.C. Cir. 2001).

Like the rule at issue in *Adtranz*, the May 8 letter from Kent McClelland in this case was intended to prevent workplace harassment. Moreover, the letter was specifically limited to "unlawful bullying" and "threatening, violent, or unlawfully coercive behavior." This prohibition would not be reasonably understood to prohibit or prevent legally protected union solicitation. As the court observed in *Adtranz*, "America's working men and women are . . . capable of discussing labor matters in intelligent and generally acceptable language." 253 F.3d at 26. Thus, the Complaint allegations based on the May 8 McClelland letter must fail.[4]

E. Shamrock's Policy Prohibiting Musical Devices On The Warehouse Floor Is A Lawful Safety Measure.

At trial, the General Counsel amended the Complaint to include an additional charge that Shamrock's Head/Ear & Cell Phone Use policy is an "overly broad policy prohibiting and restricting cell phone use on its premises." (Tr. 750; GCX 27(a) and (b)). The GC claimed that the amendment is supported by the Board's decision in *Caesar's Entertainment*, 362 NLRB No. 190, 2015 NLRB LEXIS 663 (2015).[5] (*Id.*). A review of the *Caesar's Entertainment* decision confirms that this theory is unsustainable.

The policies at issue in *Caesar's Entertainment* prohibited employees from using cell phones, cameras (including camera phones) and videotaping equipment on its premises. 2015 NLRB LEXIS 663 at *12. The Board held that photographing and videotaping may be protected Section 7 activities in certain circumstances. *Id.* at *12-15. Because the employer had not tied the challenged

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[4] The GC also claims that McClelland's May 8th letter is an unlawful threat and that it asked employees to report on the concerted activities of their coworkers. (Compl. ¶¶ 5(x)(2) and (3)). Because the May 8th letter was a permissible effort to maintain a safe working environment as discussed above, these claims fail as well.

[5] The full name of the decision is *Caesar's Entertainment d/b/a Rio All-Suites Hotel and Casino*, 362 NLRB No. 190 (2015). In moving for the Complaint amendment, the General Counsel referred to the case as *Rio All-Suites Hotel and Casino*.

policies to any legitimate interests, the Board found that the policies were impermissibly overbroad. *Id.* Notably, the Board focused solely on the policies' prohibition of photography and videotaping, and did not recognize any general right to use cell phones in working areas. In fact, in quoting the cell phone policy, the Board emphasized in italics the portion that prohibited the use of camera phones to take photographs. *Id.* at *12.

Here, Shamrock's Head/Ear & Cell Phone Use policy contains no mention of photography or videotaping. Rather, the policy restricts "the use of all musical devices to include but not limited to cell phones and head/ear phone use within the warehouse." (GCX 27(a) and (b)). *Caesar's Entertainment* accordingly is inapposite.

Moreover, unlike the employer in *Caesar's Entertainment*, Shamrock ***has*** tied the Head/Ear & Cell Phone Use policy to a legitimate interest. As Mark Engdahl explained, the policy is intended to promote employee safety on the warehouse floor by ensuring that they remain alert and aware of their surroundings in an environment in which employees are "driving forklifts and heavy equipment around." (Tr. 758:22). These concerns are expressed in the policy itself:

> Beyond the impact of the individual noise level, personal music devices create a potential hazard. They impair a worker's ability to hear surrounding sounds and compromise the user's general alertness and concentration; therefore they may be considered a hazard within the workplace. This is especially true if working around moving equipment or in circumstances where a worker must be able to hear warning sounds.

(GCX 27(a) and (b)). The General Counsel's reliance on *Caesar's Entertainment* therefore is misplaced, and Shamrock's Head/Ear & Cell Phone Use should be upheld as lawful.

IV. THE GENERAL COUNSEL'S ALLEGATIONS OF UNLAWFUL CONDUCT ARE UNSUPPORTED AND BASED ON MISCHARACTERIZATION.

A. The General Counsel's Anticipated Request For Adverse Inferences In Addition To Sanctions Is Improper And Unsupportable.

Two weeks before the trial in this case commenced, the General Counsel served Shamrock with a subpoena *duces tecum* requesting 66 different categories of documents. (GCX 2(a)). Shamrock filed a motion to quash the subpoena on a number of grounds. (*Id.*) The Administrative Law Judge denied Shamrock's motion. (*Id.*)

After Shamrock was unable to collect, review and produce all responsive documents by the first day of trial, the General Counsel was awarded sanctions prohibiting Shamrock from introducing any document not produced and from conducting cross or direct examination concerning the duties performed by two purported Section 2(11) supervisors, Zack White and Art Manning. (Tr. 109:1-23, 123:10-11). The sanctions were later expanded to prohibit Shamrock from conducting cross or direct examination concerning the General Counsel's claim that Shamrock granted an allegedly unlawful wage increase in late May of 2015, after the GC realized that it had excluded this issue from its original sanctions request. (Tr. 911:20-925:25).

For the reasons explained in Shamrock's motion to quash and its Request for Special Permission to Appeal which was filed and served in this case on September 11, 2015, Shamrock respectfully renews its objections to the subpoena *duces tecum*. In addition, Shamrock respectfully reasserts its objection that the sanctions awarded to the General Counsel were overbroad in light of the breadth of the subpoena, Shamrock's production of more than 3,000 pages of documents and other issues that Shamrock raised during and before trial.[6] *Hedison Mfg. Co.*, 249 N.L.R.B. 791, 795 (1980) (ALJ properly barred employer from calling witness who had refused to comply with General

[6] *See*, *e.g.*, Tr. 113:12-25-115:16, 116:18-117:22.

Counsel's subpoena *ad testificandum*, but erred in further prohibiting the employer from presenting other evidence concerning topics upon which the General Counsel intended to examine him).

Aside from the sanctions, the General Counsel suggested that it may additionally request adverse inferences in regard to issues covered by subpoenaed documents. An adverse inference, however, requires more than a showing of noncompliance with a subpoena *duces tecum*. The party seeking an adverse inference must establish that the requested information was pertinent to the resolution of the case:

> [An] adverse inference is triggered by an adequate showing on the record from which it appears . . . that evidence of relevant (usually), potentially, controlling, vital, or dispositive nature, is in existence; is in the possession, or control, of one party; and has been withheld by that party. When that combination of fact is made to appear clearly enough of record, the basic nature of the adverse inference rule is such that, if such vital or best evidence has not been produced by the party in possession or control of it, fair inference is concluded to lie that it was not produced in resolution of materially joined issue, because it is not favorable to the party possessing it.

Peoples Transp. Service, 276 NLRB 169, 223 (1985); *see also Professional Air Traffic Controllers*, 261 NLRB 922 fn. 2 (1982) ("[W]e do not rely on the negative inference [the ALJ] drew from Respondent's failure to produce certain subpoenaed documents. Inasmuch as the record reflects a substantial degree of confusion concerning the nature, and indeed the very existence, of the documents in question, we cannot, under the circumstances, conclude that such an inference is warranted.")

In this case, the only potentially relevant document mentioned during trial that was not already in the General Counsel's possession was a one-page, internal processing form that identified the basis for Thomas Wallace's discharge (discussed below) as "insubordination." (*See* Tr. 422:15-423:22). The subpoena *duces tecum* requested production of Wallace's employment file, excluding all tax records, Workers' Compensation forms, and Social Security information. (GCX 2 at ¶ 28). Shamrock removed the materials that fell within the listed exclusions, and produced the remainder.

Unfortunately, the internal processing form identifying "insubordination" as the basis for Wallace's discharge had inadvertently been placed in Wallace's Workers' Compensation file, and was therefore excluded from the production. (Tr. 422:15-423:22). The one-page form was provided to the General Counsel immediately after the inadvertent exclusion was discovered. (*Id.*). The General Counsel did not allege to have been prejudiced by the error. (*Id.*). In fact, the processing form corroborated Shamrock's position concerning Wallace's discharge.

Under these circumstances, no adverse inference is appropriate. The only relevant document that was not in General Counsel's possession was excluded inadvertently and the exclusion was not prejudicial to the General Counsel's case. Moreover, to the extent that the GC experienced any undue prejudice in regard to Shamrock's document production (which Shamrock respectfully denies), the sanctions granted at trial fully extinguished any disadvantage. The alleged violations do not depend on the content of any document that is not already in the General Counsel's possession, and the General Counsel was permitted to introduce otherwise inadmissible secondary evidence on all relevant issues. Shamrock was furthermore prohibited from presenting evidence through direct and cross examination on a number of matters that are critical to its defense. In light of these sanctions, the compound penalty of an adverse inference would be improper.

B. <u>The Allegations Concerning Manning And White Should Be Dismissed Based On The General Counsel's Failure To Establish Supervisory Status</u>.

An additional threshold matter pertains to the General Counsel's allegations concerning the supervisory status of Shamrock floor captains Art Manning and Zack White. Supervisory status is construed restrictively under the NLRA because "the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Chevron Shipping* Co., 317 NLRB 379, 380-81 (1995). Section 2(11) of the Act thus limits supervisory status to individuals with meaningful authority involving the use of independent judgment:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C § 152(11). Thus, only employees with "genuine management prerogatives" may be deemed supervisors, as opposed to "straw bosses, leadmen…and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), *enf'd. in relevant part*, 794 F.2d 527 (9th Cir. 1986).

The party asserting that an individual is a supervisor must establish two elements with substantive, non-conclusory evidence:

(i) That the employee "actually possesses" one of the twelve (12) listed powers, ***and***

(ii) That the exercise of this authority "requires the use of independent judgment" and "is not of a merely routine or clerical nature."

NLRB v. Health Care & Ret. Corp. of America, 511 U.S. 571, 573-74 (1994); *Golden Crest Healthcare Center,* 348 NLRB 727, 731 (2006); *Dean* & *DeLuca of New York, Inc.,* 338 NLRB 1046, 1047 (2003). The independent judgment prong of this analysis requires "concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." *Franklin Hospital Medical Center,* 337 NLRB 826, 830 (2002). Any absence of such evidence is construed against supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 535 fn. 8 (1999); *Phelps Community Medical Center*, 295 N.L.R.B. 486, 490 (1989).

Here, the General Counsel failed to present any direct evidence concerning the floor captains' authority. This is particularly notable in light of the fact that the GC subpoenaed both

Manning and White to testify. Manning furthermore took the stand after being called by Shamrock, and General Counsel had ample opportunity to question him concerning his duties. General Counsel similarly called a number of other admitted Shamrock supervisors to the stand, yet failed to ask them a single question regarding the extent of the floor captains' authority.

Instead, the GC relies solely on the testimony of three (3) witnesses—Steve Phipps, Mario Lerma and Thomas Wallace—who have never held a floor captain position and who have no personal knowledge regarding the extent of the floor captains' actual authority aside from hearsay. Because the General Counsel bears the burden of proof on supervisory status, this showing is insufficient. In fact, the Administrative Law Judge should draw an adverse inference against supervisory status based on the General Counsel's failure to question Manning and White despite subpoenaing both individuals to testify. *See Desert Pines Golf Club*, 334 N.L.R.B. 265, 268 (2001) ("An adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge and it may be inferred that the witness, if called, would have testified adversely to the party on that issue.").

Presumably, the GC will complain that Shamrock did not produce all documents responsive to the 66 document requests in the General Counsel's subpoena *duces tecum* served on Shamrock two weeks prior to the hearing in this matter. The subpoena issue, however, is largely irrelevant. The Administrative Law Judge addressed the subpoena production by precluding Shamrock from conducting any direct or cross examination on the supervisory issue, and by allowing the General Counsel to submit secondary evidence.[7] But, these sanctions did not relieve the GC of its burden of

[7] For the reasons noted above and during the trial, Shamrock respectfully submits that the sanctions awarded to the General Counsel prohibiting the company from submitting evidence concerning White and Manning's duties were not merited in these circumstances. This is particularly the case, as Shamrock's counsel explained, in light of the substantial documentation that the General Counsel did receive concerning matters such as discipline. (Tr. 116-117; 775:7-23). While the GC complained that these documents were not authored by White or Manning, the fact is that White and Manning authored no such documents because they have no authority to discipline.

proof on the supervisory question. Moreover, as the Administrative Law Judge recognized, leave to submit secondary evidence was not intended to allow the General Counsel to rely on testimony unsupported by personal knowledge. (Tr. 772:11-20).

In any event, as recognized in the case law cited above, supervisory status depends upon an individual's actual authority. While the extent of that authority may be reflected in documents, that fact does not support a conclusion that such documents are the best evidence of a claimed supervisor's authority. Accordingly, the GC cannot ignore witnesses who were readily at its disposal to provide testimony simply on the basis of unproduced documents. *Cf. Hedison Mfg. Co.*, 249 N.L.R.B. 791, 795 (1980) ("[T]he issue as to whether the central stores department discharges were unlawful does not involve any underlying factual question about the contents of documents or tape recordings, but rather involves the issue of Respondent's motivation for the discharges. . . . Thus, the "best evidence" rule is not applicable.")

In truth, Manning and White are working leads with responsibilities of a routine nature consistently found by the Board to fall short of supervisory status. *See*, *e.g.*, *Croft Metals*, 348 NLRB 717-18 (2006) (lead persons not supervisors though they "direct[ed] the employees as necessary to ensure that the projects are completed on a timely basis"); *Pacific Beach Corp.*, 344 NLRB 1160-61 (2005) (lead person who assigned maintenance tasks to employees and monitored their performance did not exercise sufficient independent judgment to satisfy Section 2(11)'s threshold). Because these individuals are not Section 2(11) supervisors, Shamrock is not liable for their actions. *Clark Mills,* 109 NLRB 666, 670 (1954) ("He is not a supervisor, and his antiunion statements . . . may not be charged as activities for which the Respondent may be held responsible.")

C. **<u>The General Counsel's Allegations Concerning Threats And Other Purportedly Unlawful Remarks By Shamrock Representatives Are Based On Legally Permissible Statements</u>.**

The General Counsel's Complaint includes several allegations concerning statements purportedly made by Shamrock representatives. The GC's arguments, however, largely rely upon mischaracterization rather than fact. These allegations accordingly must fail.

For example, the General Counsel claims that Mark Engdahl "threatened" employees with a loss of benefits if they unionized and suggested that election of a union would be futile. (Compl. ¶¶ 5((g)(1), 5(t)(4)). In truth, Engdahl simply (and repeatedly) advised employees that all terms and conditions of employment are subject to negotiation, and that a union cannot force an employer to agree to its demands. These statements parallel the language of the Act itself. The Act explicitly recognizes that the "obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

Nonetheless, the General Counsel claims that Engdahl unlawfully told employees that "the slate is wiped clean . . . once bargaining begins" and that he made other statements suggesting that the employees may end up with less in terms of wages and benefits as a result of collective bargaining. (See Compl. ¶¶ 5(g)(1), 5(t)(2) through (4)). Such statements, however, are not *per se* unlawful. "An employer can tell employees that bargaining will begin from 'scratch' or 'zero' but the statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union." *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832-33 (1994). Thus, an employer does not violate the Act by "discuss[ing] the reality of negotiating and bargaining, which is that benefits can be both gained and lost." *Id.*

Engdahl's alleged comments are consistent with *Somerset Welding*'s guidance. He and other Shamrock managers (including, but not limited to, Warehouse Manager Ivan Vaivao) repeatedly told

employees that their total compensation and benefits package could be better, worse or the same after going through the collective bargaining process.[8] Shamrock managers furthermore told employees that they had the right to unionize and that they should do their own research concerning the issue. (Tr. 845:24-846:4). These facts confirm that Engdahl's comments were not made in a coercive manner or context, and that they were accordingly lawful.

The General Counsel also alleges that Vaivao, Brian Nicklen (a Shamrock manager) and an unnamed Human Resources representative suggested that unionizing would be futile in a meeting with employees on March 26, 2015 by saying that shifts could not be changed. (Compl. ¶ 5(o)). The transcript from this meeting, which the General Counsel submitted (GCX 10(a)), does not substantiate this allegation, as that statement does not appear to have been made. The GC did not submit any other evidence or testimony to support this claim. Accordingly, it should be dismissed.

The General Counsel claims that floor captain Art Manning threatened employee Steve Phipps by telling Phipps that he "should watch his back." (Compl. ¶ 5(s)(2)). As discussed above, this allegation must fail because Manning is not a supervisor. Moreover, Manning unequivocally denied making this comment. (Tr. 970:21-24). Manning was a credible and forthright witness, even acknowledging at one point that he could not deny certain allegations in the Complaint due to lack of memory. ((Tr. 970:15-20). His denial therefore should be fully credited.

In any event, Phipps' testimony on the stand differed from the relevant Complaint allegation. Phipps testified that Manning actually told him that he should watch his back because

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[8] Shamrock served a subpoena on the Union seeking production of recordings from meetings other than those that were introduced by the General Counsel. Steve Phipps, the GC's witness, testified that he had additional recordings and that he had turned them over to the Union as a complete collection. (Tr. 590:11-591:25, 593:4-11). This includes a recording made by an individual named Gilbert Jaquez that was not introduced at trial. (Tr. 568:18-23). Shamrock representative Ivan Vaivao further testified that there were "dozens" of meetings with employees to educate them concerning unionization (Tr. 902:4-7), and Phipps testified that he recorded "every meeting that [he] attended with management." (Tr. 590:14). The Union, however, failed to turn over any recordings in response to Shamrock's subpoena, and was not able to explain whether any such recordings had been destroyed. In these circumstances, Shamrock requests an adverse inference that those recordings would further corroborate the non-coercive context of Shamrock's discussions with employees concerning the possible results of unionization.

they were ***both*** being watched. (Tr. 545:22-24). In addition to weighing significantly against the GC's claim of supervisory status, this comment could not be perceived as coercive even if it had been made.

D. <u>The General Counsel's Interrogation Allegations Are Factually Incorrect And Legally Unsupportable</u>.

The General Counsel's claims concerning purported interrogation are similarly meritless. The Board has recognized that interrogation allegations must be viewed in a manner that is mindful of normal workplace communication:

> In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. Moreover . . . [i]f section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution.

Rossmore House, 269 NLRB 1176, 1177 (1984).

Determining whether a particular question amounts to coercive interrogation must be based on a totality of the circumstances. *Rossmore House*, 269 NLRB at 1178. This determination requires consideration of factors including: "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Id.* at 1178 n.20; *see also Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These and other factors are not to be mechanically applied. *Id.* Based on these factors, questions from low-level supervisors during brief conversations are typically deemed to be non-coercive. *See*, *e.g.*, *Toma Metals, Inc.* 342 NLRB 787, 789 (2004); *Hancock*, 337 NLRB 1223, 1224-25 (2002).

The General Counsel's allegations in this case fail under this framework. The GC alleges, for example, that first-level supervisor Jake Myers questioned employee Thomas Wallace in the warehouse about his Union sympathies. (Compl. ¶ 5(i)). In particular, Wallace testified that Myers asked him what he "[thought] about the union" after employees were shown a video explaining union authorization cards. (Tr. 649:14-16). Myers, however, simply asked employees on his team if they had any questions concerning the video. (Tr. 863:21-864:2). This video was shown in January 2015 after a Shamrock California distribution center had union activity, and was not related to the Arizona distribution center. (*Id.*; *see also* Tr. 894:2-895:5).

The General Counsel attempts to recast this event as coercive interrogation by stretching its arguments beyond its evidence. The GC, for instance, may claim (as it did in the 10(j) proceeding) that Myers is a supervisor two levels above Wallace. This is simply incorrect. Wallace testified that Myers was his "immediate supervisor." (Tr. 647:12-13; 680:10-18).

The GC may also claim (again, as it did in the 10(j) proceeding) that this discussion occurred while Shamrock was displaying "extreme hostility" toward "a fledgling organizing campaign." Shamrock, however, had no knowledge of the Union's organizing effort in January 2015.[9] (Tr. 894:19-895:11). Indeed, ***even Wallace*** testified that he had no knowledge of the Union's campaign as of the date of his conversation with Myers. (Tr. 650:19-23). The General Counsel's own witness thus undermines its argument.

General Counsel also claims that Zack White, a floor captain, "interrogated" employee Steve Phipps and created the impression of surveillance by asking Phipps on January 25 about rumors of union organizing. (Compl. ¶ 5(f)(1) and (2)). As explained above, White is not a Section 2(11) supervisor, and his statements therefore cannot be the basis for a violation. But, even accepting the

[9] As explained above, the meetings with employees in January concerning this subject were scheduled following union activity at one of Shamrock's California warehouses. (Tr. 863:9-20).

General Counsel's unsupported claim of supervisory status, White would be a low-level supervisor at most.

Aside from these issues, according to Phipps' testimony, White simply commented that he heard rumors of organizing. Phipps acknowledged that ***he*** then asked White what he knew, and White responded that he knew nothing. (Tr. 617:1-19). Phipps further admitted that rumors of the organizing campaign were spreading "like wildfire" at this time. (*Id.* at 613:10-13). The Board has held that such circumstances are insufficient to establish a violation. *South Shore Hosp.*, 229 NLRB 363, 363 (1977) (supervisor's remark concerning "rumors" of union organizing was not unlawful where there was no evidence indicating that employer could have only learned of rumor through surveillance).

Paragraph 5(y)(1) of the Complaint alleges that on May 25, 2015, Sanitation Supervisor Karen Garzon, interrogated employees about their union sympathies. The evidence does not support this conclusion. Garzon testified that she was sitting in the break room having lunch with two sanitation employees when Phipps approached their table and handed each of them a union flyer. (Tr. 872-874). One of the employees handed Garzon her flyer and asked her to translate it. (Tr. 875-876). When Garzon went to leave, she took the flyers that were handed to her or left on the table. (Tr. 876).

Phipps then approached the group and confronted Garzon, who reached out and offered the flyers back to the two employees. (Tr.626, 876). When the employees failed to reach out and take the flyers, Garzon asked "do you guys want it back" and the employees responded "no." (Tr. 876). Garzon then left the break room with the three flyers, which she subsequently discarded. (*Id.*)

The General Counsel's attempt to characterize Garzon's offer to return the flyers as unlawful interrogation is, at best, overreaching. Indeed, it is clear that Garzon only asked the two

employees if they wanted the flyers back because they each failed to take the flyers when Garzon physically offered to return them.

Further, there is no evidence to rebut Garzon's testimony that the employee handed her the flyer for translation. According to Phipps, Garzon was a native Spanish speaker as were the two employees. (Tr. 625-626). Phipps also admitted that he has no knowledge of Garzon's conversation with the employees or whether any of the employees asked Garzon to translate the flyer. (Tr. 626). While Phipps maintained that the flyer was already translated into Spanish, the alleged flyer was never submitted as evidence by the General Counsel.

Even setting these facts aside, and even assuming that Garzon's interaction with her co-workers constitutes a communication regarding union sympathies, it does not amount to the type of coercive interrogation that violates the Act. As the Board has recognized, treating instances of "casual questioning concerning union sympathies" as a violation of the Act "ignores the realities of the workplace." *Rossmore House*, 269 NLRB 1176, 1177 (1984).

In a similar case, *Toma Metals Inc.* 342 NLRB 787, 789 (2004), the Board found the questioning by a supervisor of an employee regarding rumors of union organizing was not an unlawful interrogation. *Id.* In finding the communication was lawful, the Board reasoned that the communication was by a "low-level supervisor, not a high-ranking manager; the supervisor and employee were friendly and engaged in daily conversations; the conversation occurred on the plant floor not in a boss' office; the employee did not hesitate to answer truthfully; the employee did most of talking; the conversation was brief; the conversation was general and not about specific employees or groups; and was not sustained or repeated. *Id.*

Similarly, Garzon is a low level supervisor who was friendly with other employees involved in the interaction. (Tr. 877). The conversation occurred in a common area, not in a coercive environment such as a boss' office. The conversation was brief, general, and not repeated. Further,

the conversation did not contain any threat of reprisal or promise of benefit. The General Counsel's attempt to establish a violation based on this incident therefore must fail.

E. **<u>The General Counsel's Allegations Concerning Solicitation Of Grievances Fail Based On Shamrock's Substantial and Undisputed History Of Soliciting Employee Feedback</u>.**

The General Counsel asserts multiple violations based on its theory that Shamrock began soliciting feedback on workplace issues from employees after learning of Union's organizing campaign. (*E.g.*, Compl. ¶¶ 5(g)(2), 5(h), 5(k), 5(l)). But, again, the General Counsel's own witnesses undermine its claims. Phipps admitted that Shamrock has conducted "hundreds" of employee roundtable meetings during his 20 years with the Company to solicit employee feedback. (Tr. 575:9-14). In addition to the employee roundtable meetings, Phipps acknowledged that he has taken advantage of Shamrock's open-door policy on multiple occasions to discuss issues directly with management. (*Id.* at 572-84).

An employer is permitted to continue employee feedback meetings during union organizing provided such meetings are consistent with its past practice. *Walmart Inc.*, 339 NLRB 1187, 1187 (2003) (employer may continue to use the same practices of soliciting grievances during a union campaign as it did prior to the start of the union campaign). Phipps' testimony described above unequivocally confirms that Shamrock did nothing more than continue its past practice of conducting employee roundtables. Moreover, no Shamrock manager suggested that the employees' concerns would be addressed only if they remained non-union. The General Counsel's allegation of unlawful solicitation therefore must fail.

The General Counsel also amended the Complaint at trial to add an allegation that Engdahl granted a benefit to employees on April 29, 2015 by announcing that Shamrock would not conduct layoffs prior to the 2015 summer slowdown. (Tr. 20:9-17). Engdahl testified without contradiction, however, that Shamrock began discussing plans to avoid a 2015 layoff shortly after a layoff in early

summer of 2014. (Tr. 737:20-738:17). Engdahl further explained that the 2014 layoff was the most significant that Shamrock experienced in at least 20 years, and caused a great deal of disruption. (Tr. 737:20-738:17; 739:2-9). Shamrock began implementing its plan to avoid a 2015 summer layoff by entering into a hiring freeze in December 2014, well before Shamrock had any knowledge of union organizing at the Arizona Foods facility. (Tr. 757:20-758:9). Moreover, Engdahl testified—again without contradiction—that employees were told that a 2015 layoff would be avoided if at all possible immediately after the 2014 layoff was conducted, and were kept apprised of the Company's plans in this regard. (Tr. 757:5-17). In light of these uncontroverted facts, the GC's attempt to establish a violation based on Engdahl's April 29th statement must fail.

F. The General Counsel's Claim That Shamrock "Confiscated" Union Literature Is Based On Nothing More Than Routine Cleaning Of Shamrock's Break Rooms.

The General Counsel complains that Shamrock "confiscated" Union literature by virtue of the fact that Sanitation Supervisor Karen Garzon discarded flyers left lying on break room counters. (Compl. ¶ 5(y)(2), 5(aa)). But, Garzon routinely discards ***any*** written materials left on break room counters other than health information that Shamrock puts out for employees to review. (Tr. 881:23-882:1). Garzon testified that, consistent with Shamrock policy, she has discarded Tupperware advertisements, business cards, and various other materials. (*Id.* at 882:2-5). Her testimony in this regard was undisputed.

These facts do not establish a violation of the Act. An employer is not required to allow union literature to be left unattended in locations where unattended flyers are not permitted. "While Section 7 is read to bestow upon employees the right to solicit or distribute literature on company premises in certain circumstances, it does not bestow upon them a right to use . . . plant surfaces for the posting of information." *Eastex, Inc.*, 215 N.L.R.B. 271, 272 (1974).

G. <u>The General Counsel's Allegations Of Implied And Actual Surveillance Are Meritless</u>.

The General Counsel's allegations of surveillance are similarly ineffective. The GC claims, for example, that Shamrock conducted unlawful surveillance because Art Manning attended a Union meeting at a local restaurant. (Compl. ¶ 5(j)). Manning, however, was ***invited*** to attend the meeting. (Tr. 967:19-968:9). He and other employees had conducted prior offsite meetings to discuss issues at Shamrock, and Manning believed that this meeting was for a similar purpose. (*Id.*).

When Manning arrived, he did not see any other Shamrock employees. (*Id.* at 968:19-969:5). After waiting for 30-45 minutes, he decided to leave. (*Id.* at 969:1-5). As he exited the restaurant, Joel Rodriguez (a Shamrock hourly employee) was standing by a railing in front of the door. (*Id.* at 969:5-12). Phipps and two other employees (who had been seated in the restaurant at a different location) followed Manning outside as he left and were standing behind him. (*Id.* at 969:9-21). Rodriguez asked Manning if he was "in or out." (*Id.* at 969:5-19). Manning asked several times what Rodriguez meant, and Rodriguez ultimately responded that he wanted to know whether Manning was "in the union or not." (*Id.*). Manning responded that he did not want to be involved. (*Id.*). Phipps and the other employees left at that point. (*Id.* at 969:23-24).

This event does not rise to the level of a violation. First, as explained above, Manning is not a supervisor. This fact is further corroborated by the invitation that Manning received to attend the union meeting. Because Manning is not a supervisor, his attendance cannot constitute unlawful surveillance.

Second, there is no evidence that Manning attended the meeting at the behest of Shamrock. To the contrary, Manning attended the meeting because he was invited by another employee. In addition, Manning was asked at the meeting if he would be part of the organizing effort. These circumstances would preclude any finding of a violation even if Manning was a Section 2(11) supervisor. *E.g.*, *Music Express East, Inc.*, 340 N.L.R.B. 1063, 1076 (2003) ("A supervisor has a right

to attend union meetings, as long as he is not directed to do so by the employer, and even to join the union, if admitted to membership.")

In another example of exaggerated mischaracterization, the General Counsel claims that Shamrock Safety Manager Joe Remblance engaged in unlawful surveillance and interrogation when he approached Phipps and another employee who were having a conversation in an aisle way. (Compl. ¶¶ 5(u)(1)-(2)). The General Counsel's sinister description of this event is again belied by its own witness. Phipps testified that Remblance simply asked the two employees what they were discussing and whether they were on break. (Tr. 620:2-621:9). Following the employees' responses, Remblance stayed to make "small talk." (*Id.*). Phipps himself testified in his affidavit that it was not unusual for Remblance to join such discussions. (RX 1 at 43). Remblance then left the area ***before*** Phipps and the other individual finished their conversation. (*Id.*). Phipps testified that this entire incident occurred over the course of three to four minutes. (Tr. 621:5-9).

Setting aside the General Counsel's characterizations, this incident amounts to nothing more than a supervisor engaging in an innocuous conversation with two employees who were on break. Such conversation does not amount to unlawful surveillance or interrogation regarding union sympathies. Moreover, even if Phipps and the other employee were discussing Union matters, and even if Remblance's conversation with them could somehow be characterized as surveillance, surveillance of Union activities conducted openly on the employer's premises is not unlawful. *See, e.g.*, *Airport 2000 Concessions, LLC*, 346 NLRB 958, 958-959 (2006) (supervisor did not conduct unlawful surveillance by observing and interjecting in employee conversations); *Jewish Home for the Elderly of Fairfield Cnty.*, 343 NLRB 1069, 1084 *citing Roadway Package Sys.*, 302 NLRB 961 (1991) ("Where employees are conducting their activities openly on or near the employer's premises, open observation of such activities is not unlawful.")

The General Counsel's allegations concerning implied surveillance are equally unsupported. An allegation of implied surveillance requires the General Counsel to show that an employer's allegedly unlawful statement would cause a reasonable employee to assume that his or her union activities had been placed under surveillance. *Schrementi Bros. Inc.*, 179 NLRB 853 (1969). The Board may find an impression of surveillance when the employer reveals specific information about union activity that is not generally known, and does not reveal its source. However, an employer does not create an impression of surveillance by merely stating that it is aware of rumors concerning union supporters so long as there is no evidence indicating that the employer could have only learned such information through surveillance. *South Shore Hosp.,* 229 NLRB 363, 363 (1977); *G.C. Murphy Company*, 217 NLRB 34, 36 (1975).

The General Counsel relies, in part, on a May 5 meeting between Mark Engdahl and Shamrock employee Mario Lerma. (Compl. ¶ 5(w)(2)). This meeting was held after Engdahl received reports that Lerma and other forklift operators were either refusing to deliver or delaying delivery of items to pickers who did not sign Union authorization cards. (Tr. 238:16-240:2, 743:5-12, 746:11-748:16). Engdahl held the meeting to advise Lerma that such conduct was not appropriate, before the situation escalated to the point of discipline. (*Id.*)

Nonetheless, the General Counsel claims that this conversation somehow implied surveillance because Engdahl described these incidents as "problems" involving "heckling" and "insulting" behavior on the floor. Engdahl, however, specified that the "problems" to which he was referring involved the unlawful slowdown. (Tr. 743, 746-48). As noted above, Lerma understood what Engdahl was referencing without asking for details. The General Counsel's effort to establish a violation based on this conversation is meritless.

The GC also alleges that several statements from Ivan Vaivao and other managers concerning their knowledge of the employees involved in the Union's organizing campaign

unlawfully implied that the Company was engaged in surveillance. (Compl. ¶¶ 5(m)(1)-(2), 5(n)(1)-(4), 5(t)(1)). These comments were made based on reports from employees and complaints concerning alleged harassment by Union supporters. (Tr. 904:5-18). Vaivao explained this to employees on multiple occasions. (Tr. 904:19-905:7; *see also*, *e.g.*, GCX 10(a) at 4-5, 9, 11).

These facts preclude the finding of a violation under established Board precedent. For example, in *SKD Jonesville Div., L.P*, 340 NLRB 101, 102 (2003), the Board held that a supervisor's statement to an open union supporter that the supervisor "heard" the employee was leading a union organizing effort did not create an impression of surveillance. The Board observed that this information could have been gleaned just as readily from the "grapevine" as it could from unlawful surveillance, and that "[t]here [was] no reason to infer the latter as the source over the former. *Id.* at 102; *see also Sheraton Plaza La Reina Hotel*, 269 NLRB 716, 717 (1984) (employer's comments identifying the names of union organizers did not create the impression of surveillance because the employer conveyed that she received the information from employees complaining about harassment).

The GC also claims that Manning implied surveillance of union activities by telling Phipps that he heard about Phipps' speech in the break room announcing that he (*i.e.*, Phipps) was leading the Union's organizing campaign. (Compl. ¶ 5(s)(1)). In addition to the fact that Manning is not a statutory supervisor, this allegation fails for the reasons explained in the preceding paragraph. The fact that Phipps publicly announced—on two successive days—his alleged leadership of the Union's organizing effort to an assembled group of individuals (including some supervisors) precludes a showing that Manning could only have learned of Phipps' announcement through unlawful surveillance.

In its final surveillance allegation, the General Counsel claims that supervisor Dave Garcia "search[ed] through [employee Mario Lerma's] personal belongings" in May 2015. (Compl.

¶ 5(v)(1)-(3)). The basis of this claim is an allegation by forklift driver Mario Lerma alleging that Garcia looked through a clipboard that Lerma left unattended on his assigned forklift. Lerma's claims regarding Garcia's illegitimate motivations are unsupported.

Garcia provided credible testimony that he saw a work schedule, attached to a generic company-issued clipboard, sitting in plain sight on top of a parked and unattended forklift and picked it up to review the schedule. (Tr. 945-948, 951). It is Garcia's practice to periodically review the schedule throughout the night to assess whether team members need to be shuffled around to work the busiest aisles. (Tr. 946-947). Garcia may shuffle his team around two or three times a night. (Tr. 947).

Garcia denies that he was aware that the clipboard belonged to Lerma when he initially picked it up. (Tr. 947, 951). Lerma's claim that Garcia would have known based on the forklift number lacks credibility. It is without dispute that Garcia had worked with this group of forklift drivers for only seven months and was not involved in the process of assigning forklifts to employees. (Tr. 940). Garcia confirmed that he did not memorize forklift numbers and, as of the hearing, could not state what forklift number Lerma generally used or even which one of the two brands of forklifts Lerma prefers or is generally assigned. (Tr. 943, 958).

Further, forklift drivers are not guaranteed the same forklift for every shift. (Tr. 940). Rather, forklifts are fungible and are reassigned for various reasons, including where an emplioyee from a prior shift is still using a forklift or where a forklift is taken out of rotation for maintenance reasons (Tr. 940-942). As such, it is undisputed that Lerma could have been assgined *any* forklift that day.

Lerma's characterization of the clipboard as being part of his "personal belongings" is also an exaggeration. There were no markings on the clipboard designating it "private" in any way or noting that it belonged to Lerma. (Tr. 949-951). Company issued clipboards are provided to all

employees who request them and countless clipboards be found throughout the facility with schedules, or other work-related paperwork attached, and can hardly be construed as "private" when left out in the open. (Tr. 945, 959). Indeed, employees are assigned a locker to put personal belongings and are warned not to leave valuable or personal items on their forklift, as there is no private compartment or space to maintain them. (Tr. 943-944). Both Lerma and Garcia confirmed that anyone who had walked by the forklift could have seen the clipboard, which was out in the open. (Tr. 838). To further support that there was no expectation of privacy in his clipboard, Lerma confirmed that he does not keep other personal belongings on his forklift. (Tr. 838).

Lerma's claim, which Garcia denies, that later in the day Garcia admitted that he had been looking through the clipboard for union cards is similarly not credible. (Tr. 951). Garcia is a seasoned manager and denies having had any conversations with Lerma where he made such a statement. Similarly, Garcia was not aware of any particular distribution of union cards and denies having accused Lerma of distributing a union card to another employee. (Tr. 952, 962). Finally, while Garcia does not recall having any specific conversation with Lerma, Lerma's suggestion that Garcia solicited grievances by reinforcing a long-standing open-door policy would not constitute solicitation of grievances in violation of the Act.

H. The May 2015 Wage Increases Were Unrelated To The Union's Organizing Activity.

The General Counsel claims that Shamrock unlawfully granted wage increases to employees in late May 2015 to discourage them from unionizing. (Compl. ¶ 5(z)). According to GC witness Steve Phipps, these individuals worked in the Returns, Will Call and Sanitation departments, and in one of Shamrock's thrower classifications. (Tr. 559:9-12). Phipps is a forklift operator and does not work in any of these classifications. (Tr. 484:21-23).

To be unlawful, a wage increase must be granted after the employer is aware that the affected employees are presently engaged in organizing activity, and must be specifically in response

to that activity. *See*, *e.g.*, *Hampton Inn NY--JFK Airport*, 348 N.L.R.B. 16, 18 (2006) (holding that promise of wage increase during union organizing was not unlawful because employer was not aware that employees at the affected site were involved); *see also Desert Aggregates*, 340 N.L.R.B. 289, 290 (2003) ("An employer's legal duty in deciding whether to grant a benefit during [union organizing] is to act as it would have if the union were not present."). Even where a wage increase is granted to employees who engaged in organizing activity, the increase is not unlawful if the employer reasonably believes that the activity is not ongoing. *See Sigo Corp.*, 146 N.L.R.B. 1484, 1485-6 (1964) (new health plan not unlawful where the employer "assume[d], reasonably, that the Union had lost interest in organizing the employees, or that the organizing campaign was to be held in abeyance.")

The General Counsel's reliance on the May wage increases in this case to establish a violation is misplaced. First, because no election petition was pending, Shamrock had no knowledge at the time of which employees the Union had targeted in its organizing effort. Indeed, because the Union has never filed an election petition, Shamrock ***still*** has no knowledge of the particular classifications that the Union is seeking to include in its proposed unit. Because Shamrock was not aware of the Union's apparent intention to include the affected employees in its organizing effort, the wage increases cannot be unlawful.

Second, Phipps testified in his May 21 affidavit that the Union's campaign was essentially dormant by that time. (RX 1 at 52-53). As the Board recognized in *Sigo Corp.*, *supra*, an employer does not violate the Act by granting a wage increase at a time when it reasonable believes that union organizing is being "held in abeyance for the time being." 146 N.L.R.B. at 1486. Thus, even aside from Shamrock's lack of knowledge and its legitimate business reasons, General Counsel's claim still would fail because the Union's campaign was not active at the time that the wage increases were granted.

V. GENERAL COUNSEL IS UNABLE TO ESTABLISH THE ELEMENTS NECESSARY TO SUPPORT ITS CLAIMS OF UNLAWFUL DISCIPLINE.

A. Allegations Concerning Unlawful Discipline Are Subject To The *Wright Line* Burden-Shifting Approach.

Finally, the General Counsel claims that Shamrock discharged Thomas Wallace and disciplined Mario Lerma on the basis of their Union activities. These claims are subject to the burden-shifting approach established in *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel must make an "initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision." *Am. Gardens Mgt. Co.*, 338 N.L.R.B. 644, 645 (2002). This showing requires four elements:

(i) That the employee engaged in protected, concerted activity;

(ii) That the employer knew of the employee's protected, concerted activity;

(iii) That the employee was subject to an adverse employment action; and

(iv) That a motivational link, or nexus, existed between the employee's protected activity and the adverse employment action.

Id. at 1089; *see also Tracker Marine*, 337 N.L.R.B. 644, 646 (2002).

The second and fourth prongs of the *Wright Line* test are both critical. A claim of unlawful discipline must fail if the General Counsel does not establish a link between the employee's protected activities and the relevant adverse employment action. *See Forsyth Electrical Co., Inc.*, 349 N.L.R.B. 635, 638-39 (2007); *see also Meyers Industries*, 268 N.L.R.B. 493, 497 (1984), *remanded on other grounds* 755 F.2d 941 (D.C. Cir. 1985) (*Meyers I*). Indeed, the Board has recognized that an "employer may discharge [an] employee for any reason, whether or not it is just, as long as it is not for protected activity." *Yuker Constr. Co.*, 335 N.L.R.B. 1072, 1073 (2001) *quoting Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993). The General Counsel cannot satisfy this requirement if it

does not establish the employer's knowledge of the employee's protected conduct. *Gestamp v. NLRB*, 769 F.3d 254 (4th Cir. 2014).

B. <u>The General Counsel Cannot Establish That Shamrock Had Knowledge Of Wallace's Alleged Union Activities</u>.

The General Counsel relies to a significant extent on the discharge of Thomas Wallace to support its case. (Compl. ¶¶ 5(a), 5(p), 5(q), 6(b)). Again, however, this reliance is misplaced. Wallace was discharged because he stormed out of a March 31 mandatory meeting after being told that Shamrock was not going to change its health insurance plan to pick up 100% of the cost. (Tr. 193:5-15).

Critically, while the General Counsel seeks to establish that Wallace's discharge was unlawful, there is no evidence that Shamrock was aware of Wallace's alleged Union activities. Wallace himself admitted this fact in his trial testimony. (Tr. 695:11-696:2). As explained above, the absence of such evidence precludes a finding of unlawful discharge. *E.g.*, *Gestamp v. NLRB*, 769 F.3d 254 (4th Cir. 2014).

The General Counsel attempts to cure this evidentiary lapse with a cobbled assembly of unrelated events, none of which support its claim. First, the GC points to the January 28 Union meeting that Manning was invited to attend, apparently insinuating that Manning saw Wallace. But, as discussed above, Manning is not a Section 2(11) supervisor. Furthermore, Wallace testified that he left early and never saw Manning at this meeting (Tr. 652:11), and there is no evidence that Manning saw him.

Second, the General Counsel relies on the January 28 interaction between Wallace and Jake Myers, his supervisor. There is no dispute, however, that Wallace never mentioned his support for the Union during this conversation. Indeed, Wallace was not even aware of the Union campaign at that point. (Tr. 650:19-23).

Third, the General Counsel claims that Wallace's question during the mandatory March 31 meeting as to whether Shamrock would pick up 100% of his health insurance costs revealed his role in the Union campaign. There is no basis for this asserted connection. Wallace testified that neither he nor anyone else mentioned anything about the Union during this meeting. (Tr. 695:11-696:2). In addition, a number of employees asked questions pertaining to health insurance during this meeting. (Tr. 675:15-676:7). The General Counsel's claim that this event identified Wallace "as a strong [Union] leader" accordingly rings false.

In sum, the General Counsel offers no probative evidence to establish Shamrock's knowledge of Wallace's Union activities. Because such knowledge is a required element of the General Counsel's burden to show that Wallace's discharge was unlawful, this claim must be denied.

1. **<u>The General Counsel Counsel Cannot Establish That Lerma Was Subject To An Adverse Employment Action</u>.**

Finally, the General Counsel claims that Engdahl's May 5 meeting with Lerma was disciplinary in nature, and in retaliation for Lerma's Union activities. (Compl. ¶¶ 5(w)(1), 6(a), 6(c)). As explained in Section V.A, *supra*, a claim of retaliatory discipline requires the General Counsel to establish (among other elements) that the employee was subjected to an adverse employment action. *E.g.*, *Am. Gardens Mgt. Co.*, 338 N.L.R.B. 644, 645 (2002). The General Counsel is unable to make that showing in regard to Lerma.

Engdahl, in fact, testified that this was a "friendly conversation" with "no accusations or anything like that." (Tr. 746:23-747:17). Engdahl further testified that he did his best to make Lerma feel comfortable and to dispel any nervousness. (*Id.*). Ivan Vaivao, Shamrock's Warehouse Manager who also attended the May 5 meeting, testified that this was a "casual conversation" and that Lerma was not being "scolded." (Tr. 245:2-19). The May 5 meeting was not, in any sense, disciplinary.

By definition, a claim of retaliatory discipline requires a showing of discipline. The General Counsel cannot establish that element in regard to its claim on behalf of Lerma. Indeed, even the General Counsel appears uncertain as to how it wishes to characterize this event. On the one hand, the General Counsel claims that Lerma was actually disciplined. (Compl. ¶ 6(a)). Yet, on the other, the GC alleges that Lerma was only subjected to threats of "unspecified reprisals" during this meeting. (Compl. ¶ 5(w)(1)). In any event, based on Engdahl's testimony, Lerma was neither threatened nor disciplined. Both allegations must fail.

VI. THE BOARD'S REQUESTED RELIEF IS NOT APPROPRIATE.

Section 10(c) of the Act directs the Board, if it concludes that a party before it engaged in an unfair labor practice, to order the offending party "to cease and desist from such unfair labor practice, and to take such affirmative action … as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). This authority is remedial. *Phelps Dodge Corp. v.* NLRB, 313 U.S. 177, 187 (1941); *see also Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 ("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes.") "The measure of the Board's remedial power cannot depend solely on the length or frequency of the Employer's conduct: the crucial factor is the effect of that conduct on the employees." *Teamsters Local 115 v. NLRB (Haddon House)*, 640 F.2d 392, 399 (D.C. Cir. 1981).

The requirement that a particular management official read the Board's notice of rights to employees does not effectuate the Act's policies. There is an element of humiliation in requiring that a company official personally and publically read such notice. *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 304 (2nd Cir. 1067). The Fifth Circuit denied such relief as "unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act." *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966).

In this case, the General Counsel has requested extraordinary relief in the form of having Shamrock's CEO (Kent McClelland) or, alternatively, a Board agent in the presence of 14 alleged supervisors and agents of Shamrock, publicly read the proposed notice to employees. This *ad hominem* attack does not serve the Act's remedial purpose. Although the General Counsel claims that this relief purportedly would "remedy the unfair labor practices alleged above in paragraphs 5 and 6" of the Complaint, the facts refute any such rationale.

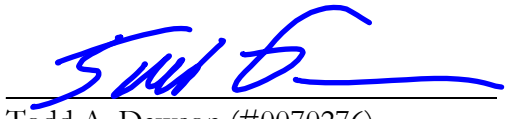
As discussed above, paragraphs 5 and 6 of the Complaint contain a litany of unfounded unlawful labor practices allegedly performed by numerous Shamrock representatives. Buried among the *pages* of paragraphs 5 and 6, there is only ***one (1)*** unlawful labor practice supposedly conducted by Kent McClelland, which consisted of the letter to employees reminding them that they should not engage in "unlawful bullying" or "threatening, violent, or unlawfully coercive behavior." (Compl. ¶ 5(x); GCX 14). Moreover, while paragraph 4 of the Complaint lists 14 supposed supervisors and agents of Shamrock, paragraphs 5 and 6 of the Complaint do not allege ***any*** unlawful conduct by four (4) of those individuals.[10] Thus, even setting aside the lack of merit in the General Counsel's allegations, its requested relief is improper. *See Haddon House*, 640 F.2d at 403-04 (concluding that it was unjustified to have a Company president publicly read a notice of rights because that individual had little personal involvement in the proven unfair labor practices).

[10] Paragraphs 5 and 6 of the Complaint do not allege that Dwayne Thomas, Armando Gutierrez, Jerry Kropman, and Leland Scott engaged in any specific unlawful labor practice.

VII. CONCLUSION

For the reasons above, the Amended Complaint should be dismissed in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of November, 2015, a true copy of the foregoing was filed electronically with the Division of Judges.

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