

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES**

SECURITY WALLS, LLC,

Respondent,

and

ORLANDO FRANCO,

An individual.

Case 28-CA-22483

RESPONDENT'S POST-HEARING BRIEF

George Cherpelis
Jeffrey W. Toppel
JACKSON LEWIS LLP
2390 E. Camelback Rd., Suite 305
Phoenix, Arizona 85016
(602) 714-7044



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RESPONDENT'S POST-HEARING BRIEF

Respondent Security Walls, LLC (hereinafter "Respondent" or "the Company") files its Post-Hearing Brief in the referenced unfair labor practice proceeding and respectfully shows the following:

THE PARTIES

Respondent is a business specializing in complete security and investigative services. The Company currently has a contract to provide security services at the federal government's Waste Isolation Pilot Program ("WIPP") site in Carlsbad, New Mexico. Security Walls satisfies the NLRB's commerce requirements and does not dispute the Board's jurisdiction.

The Charging Party, Orlando Franco ("Franco"), is an individual who was employed by Security Walls as a Security Police Officer ("SPO") at the WIPP site. Franco's employment with Security Walls terminated on February 24, 2009.

Jeff Ortega ("Ortega") is currently employed by Security Walls as an SPO at the WIPP site. Royal Jacobs ("Jacobs") is also currently employed by Security Walls as an SPO at the WIPP site.

SUMMARY OF THE ARGUMENTS

I. The Disloyal Conduct of Franco, Ortega, and Jacobs Did Not Constitute Protected Activity Under the National Labor Relations Act.

Despite two days of testimony, the record contains absolutely no evidence to establish that Respondent violated Section 7 of the National Labor Relations Act (the "Act" or "NLRA"). Quite to the contrary, the evidence establishes that Franco, Ortega,

and Jacobs (collectively referred to as “Discriminatees”) engaged in disloyal conduct intended to interfere with Respondent’s ability to perform its obligations under its contract with Washington Tru Solutions (“WTS”). The Discriminatees cannot simply ignore reasonable work rules established by Respondent while continuing to accept the wages and benefits paid to them by the Company. The decision by Franco, Ortega, and Jacobs to deliberately ignore Respondent’s need for SPOs to work the night of February 24, 2009 to provide fire brigade coverage at the WIPP site, significantly compromised Respondent’s contractual obligations to WTS. Moreover, by leaving Respondent without fire brigade coverage during that period, the Discriminatees’ conduct also exposed the WIPP site to a significant risk had an emergency occurred during that period. As will be explained below, the Discriminatees’ conduct was not protected under Section 7 of the NLRA.

II. Counsel for the General Counsel Did Not Satisfy the Burden to Demonstrate that Respondent Took Any Action Because of Conduct Protected by Section 7.

There was substantial evidence introduced to demonstrate that Respondent had a long history of encouraging its employees to engage in discussions concerning the terms and conditions of their employment. The evidence demonstrated that throughout his employment with Respondent, Franco made numerous complaints to the Company’s management about a variety of workplace issues and each time, Respondent listened to Franco’s concerns and provided him with a response. *Significantly, as Franco acknowledged at the Hearing, Respondent never disciplined him nor threatened to discipline him or took any other action against him (prior to his termination) for raising*

issues relating to the terms and conditions of his employment. There is absolutely no merit and no evidence to support the Board's claim that Respondent violated Section 7 with respect to its treatment of Franco, Ortega, or Jacobs.

III. Counsel for the General Counsel Failed to Establish that Respondent Created and Maintained Any Overly-Broad Confidentiality Policies.

The Board's claim that Respondent created and maintained overly-broad confidentiality policies that interfere with the Section 7 rights of its employees is also unsupported by the evidence in the record. Contrary to the Board's claim, the evidence introduced by the Parties demonstrated that Security Walls' employees – including Franco – were free to discuss their wages and the terms and conditions of their employment and often did so without fear of discipline or reprisal. Moreover, the evidence demonstrated that each of the allegedly overly-broad policies was established for a legitimate, business reason unrelated to any intent to restrict or interfere with the rights of Security Walls' employees to engage in activity protected under Section 7.

As will be explained below, the evidence is compelling and unequivocal that Respondent did not interfere with the Section 7 rights of any of its employees.

PROCEDURAL BACKGROUND

I. The Charge and the Board's Original Complaint.

On April 24, 2009, Franco filed an unfair labor practice charge with the National Labor Relations Board (the "Board" or "NLRB") alleging that Respondent interfered with his Section 7 rights. The Charge was subsequently amended to include additional allegations of unlawful conduct by Respondent.

On May 29, 2009, the Board issued a Complaint and Notice of Hearing alleging Respondent violated Section 8(a)(1) of the Act. Respondent filed an Answer to the Board's Complaint on June 10, 2009 denying all of the allegations of unlawful conduct.

II. The Board's First Amended Complaint.

On July 10, 2009, the Board filed an Amended Complaint once again alleging Respondent violated Section 8(a)(1) of the Act by:

- (1) Discharging Franco on or about February 24, 2009;
- (2) Reprimanding Ortega on or about February 27, 2009; and
- (3) Reprimanding Jacobs on or about February 27, 2009.

In the Complaint, the Board alleged Franco, Ortega, and Jacobs "concertedly complained to Respondent" and

engaged in concerted activities with each other for the purposes of mutual aid and protection regarding wages, hours and working conditions of the Respondent's employees by, among other things, complaining about and discussing among themselves the rate of pay received by security police officers, and other matters relating to wage, hours, and working conditions, and on about February 24, 2009, engaging in a protected, concerted protest regarding the Respondent's distribution of overtime hours among full-time and part-time employees of Respondent.

On July 15, 2009, Respondent filed its Answer to the Board's Amended Complaint once again denying any unlawful conduct.

III. The Hearing and the Board's Second Amended Complaint.

Administrative Law Judge Margaret Guill Brakebusch ("ALJ") held a hearing in this matter on July 28-29, 2009 in Carlsbad, New Mexico.¹ At the Hearing, Counsel for the General Counsel moved to further amend the Amended Complaint to allege that Respondent maintained three overly-broad confidentiality rules:

- Page 8 of Respondent's Employment Handbook, which relates to reports of discrimination and harassment, and provides Respondent:

will try to limit the sharing of confidential with employees on a 'need to know' basis. Employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided. Violation of confidentiality will result in disciplinary action.
- Page 11 of Respondent's Employment Handbook, which relates to the disclosure of the Company's confidential and proprietary information.
- Page 2 of Respondent's Restrictive Covenant Policy, which prohibits employee and terminated employees from disclosing certain of the Company's confidential information.

Despite the objections of counsel for Respondent to the last minute Motion to Amend, the ALJ permitted the Board to amend its Amended Complaint (the "Second Amended Complaint") to assert the additional allegations described above. In response to the additional allegations in the Second Amended Complaint, Respondent orally amended its answer to deny all of the new allegations added through these amendments, while preserving all other aspects of its answer to the Board's First Amended Complaint.

¹ Citations to the Transcript of the Hearing shall be cited as "TR [page]"; hearing exhibits introduced by Counsel of the General Counsel shall be cited as "GC Exhibit [number]" and exhibits introduced by the Respondent shall be cited as "R Exhibit [number]."

ARGUMENT

I. The Board Did Not Meet Its Burden to Establish Respondent Engaged in any Unfair Labor Practices With Respect to Its Treatment of Franco, Ortega, or Jacob.

The NLRB's Complaint asserts a number of claims, but the core of General Counsel's case is the allegation that Franco was terminated because he engaged in protected, concerted activity by refusing to accept overtime on the night of February 24, 2009 allegedly to protest the manner in which Respondent distributed overtime. The General Counsel did not meet its burden to establish a *prima facie* case that Franco (or Ortega or Jacobs) engaged in protected activity under Section 7. Moreover, Respondent has established an affirmative defense by showing Franco would have been terminated in the absence of protected activity for seriously compromising the Company's contract with WTS, the general contractor at the WIPP site. Counsel for the General Counsel did not introduce evidence of any valid comparator or meet the burden to show that the legitimate reason proffered by Respondent for discharging Franco was pretextual. *See Wright Line, A Div. of Wright Line*, 251 NLRB 1083 (1980), *enforced* 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

As for Ortega and Jacobs, the undisputed evidence established that Respondent has rescinded the 'write-ups' that these two employees received in connection with their refusal to work overtime as requested by their Employer. Therefore, the General Counsel failed to establish that Respondent interfered with the Section 7 rights of either Ortega or Jacobs.



A. The Refusal of Franco, Ortega, and Jacob to Work Was Not Protected Activity under Section 7.

Section 7 of the NLRA protects the rights of employees “to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Protected, concerted activities are those pursued by employees in a peaceful manner in the exercise of their Section 7 rights. Therefore, to be protected under Section 7, employee activity must be both “concerted” in nature and pursued either for union-related purposes aimed at collective bargaining or for other “mutual aid or protection.” In determining the scope of the protections afforded by Section 7, the Board has recognized the need to balance those protections against the legitimate interests of employers. *See, Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Moreover, the U.S. Supreme Court has concluded that the NLRA, “of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time.” *Id.* at 803.

It is clear that the right of employees to engage in conduct protected by Section 7 of the NLRA is not unlimited. The Board has long recognized that there are limits to the nature of the behavior in which employees may engage in support of their Section 7 rights. In delineating the scope of protected activity, the Board has noted that “there is a point where [an employee’s] methods of engaging in [protected activity] would take them outside the protection of the Act.” *St. Luke’s Episcopal-Presbyterian Hospital, Inc. v. NLRB*, 268 F.3d 575, 581 (8th Cir. 2001) quoting *NLRB v. Red Top, Inc.*, 455 F.2d 721, 726 (8th Cir. 1972). As will be explained below, the coordinated refusal of Franco,



Ortega and Jacobs to work overtime on the night of February 24, 2009 went beyond the protections of the NLRA.

While strikes are commonly employed by employees to protest the terms and conditions of their employment, and though undoubtedly concerted, strikes are not always subject to the protection of the Act. Ultimately, the Board must evaluate the manner in which the employees engaged in the strike to determine whether their conduct is protected under the Act. In the instant case, Franco, Ortega and Jacobs engaged in an impromptu refusal to work – before ever raising their concerns over overtime distribution with Respondent’s management – in a manner recklessly aimed at compromising Respondent’s contract with WTS. The Discriminatees’ conduct not only compromised Respondent’s contractual obligations, but also jeopardized the safety and security of the WIPP site. For these reasons, the conduct of the Discriminatees, while concerted, is certainly not protected under the Act.

1. The Discriminatees Failed to Provide Respondent the Opportunity to Respond to their Purported Grievance Prior to their Coordinated Refusal to Work.

It is undisputed that prior to engaging in the coordinated and sudden refusal to work, Franco did not raise his concerns over the distribution of overtime with De Los Santos or any other member of Respondent’s management. Franco specifically testified that he never raised any concerns relating to the overtime policy with Mr. De Los Santos prior to February 24, 2009:

Q So, actually, did you -- did you actually, at any time, request the opportunity to talk to Mr. De Los Santos about the overtime policy?

A Well, he -- it had never been addressed.

Q Did you ask for the opportunity to talk to Mr. De Los Santos about the augmentation list?

A Why would I? No.

Q I didn't ask why would you. I asked if you asked him or did not ask him.

A No.

[TR 235:9-17] While both Ortega and Jacobs testified that they informed the captain on duty with them that they disagreed with Respondent's action in offering the February 24, 2009 shift to Julie Ruiz -- who worked only part-time -- before offering it to them, there was no evidence that they provided Respondent an opportunity to address their concerns prior to making their decision to refuse to work. [TR 324:1-19, 345:19-346:10]

The record is clear that the Discriminatees never provided Respondent with the opportunity to address their concerns about the manner in which the Company distributed overtime before engaging in their coordinated refusal to work. Significantly, once the issues concerning the overtime augmentation list were brought to Mr. De Los Santos' attention, and after consulting with Juanita Walls, Mr. De Los Santos changed the policy on February 26, 2009 to address directly the concerns of the employees. [TR 69:18-70:17; GC 3] A change that Franco admitted improved the policy and made Respondent's overtime policy better than the policy Respondent inherited from its predecessor, Santa Fe Protective Services. [TR 235: 5-8]

As explained above, to be protected, the Discriminatees' conduct must have been for the purpose of "mutual aid or protection." In engaging in such concerted action, employees must articulate the goals of such conduct in order to permit the employer to respond to those goals. As the Court noted in *NLRB v. Marsden*, "[c]oncerted activities, to be protected, must be a means to an end, not an end in themselves." *NLRB v. Marsden* 701 F.2d 238, 242-43 (2d Cir. 1983). In *Marsden*, the Court concluded that the employees' *ad hoc* decision to walk out of work was not protected under Section 7 because the employees had failed to make any demand for change prior to the decision to walkout. According to the Court,

If [the employer] must bear the burden of a walkout, [it] is at least entitled to some notice of the employees' grievances so [it] may attempt to respond with a proposal of [its] own. The walkout here expressed no such grievance but was merely an *ad hoc* reaction to one day's weather. It is not, therefore, protected by the Act.

Marsden, 701 F.2d at 243. As in *Marsden*, the Discriminatees did not give the Respondent the opportunity to address their concerns relating to the distribution of overtime before engaging in the concerted refusal to work beginning on February 24, 2009. By failing to do so, the Discriminatees deprived Respondent of the opportunity to respond to their demands. Once again, it is also significant that once Mr. De Los Santos learned of the issues relating to Respondent's use of the augmentation list, he promptly changed the Company's policy. [TR 69:18-70:20; GC 3]

2. The Discriminatees' Unilateral Decision to Refuse to Work was Done in a Manner, which Removes the Conduct from the Protection of the Act.

Respondent does not dispute that work stoppages are generally considered protected, concerted activity under Section 7 of the Act. However, the right to engage in work stoppages, such as strikes, is not absolute. Both the Board and the courts have recognized the limitations on the rights of employees to strike:

the right to strike is not absolute, and Section 7 [of the NLRA] has been interpreted not to protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible.

International Protective Services, Inc., 339 NLRB 701 citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *See also, Liberty Mutual Ins. Co. v. NLRB*, 592 F.2d 595, 604 (1st Cir. 1979) (“While the Act clearly insulates organizing activity from retribution by the employer, it does not authorize carte blanche action by an employee in pursuit of the lawful end of union organization.”) It should be noted that here there is absolutely no evidence of Union activity by the alleged Discriminatees, or any anti-Union animus by Respondent.

It is well established that partial strikes and intermittent work stoppages are not protected activity under Section 7. *See Liberty Mutual Ins. Co. v. NLRB*, 592 F.2d 595 (1st Cir. 1979). As the Court pointed out in *Liberty Mutual Ins. Co.*, an employee is not permitted to create his or her own terms of employment and work only as he or she pleases:

We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. *It is not a situation in which employees ceased work*

in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.

Liberty Mutual Ins. Co., 592 F.2d at 606 (quoting *Home Beneficial Life Insurance Co. v. NLRB*, 159 F.2d 280, 286 (4th Cir.), cert. denied, 332 U.S. 758 (1947)). In *Liberty Mutual Ins. Co.*, the Court noted that “an employee cannot do only part of her work, and be a partial striker in that sense.” *Id.* Therefore, in *Liberty Mutual Ins. Co.*, the Court held the employee did not engage in protected activity under the Act when it refused to perform his job. According to the Court, the employer asked nothing more of the employee than

that he do his job, I. e., "behave as a Liberty Mutual salesman" and meet with Anthony on Thursday, March 25.

Liberty Mutual Ins. Co., 592 F.2d at 606.

Similarly, in *NLRB v. Montgomery Ward & Co.*, the employees remained on their job but refused to handle any clerical work originating from another of the employer's plants which was on strike. *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946). The Court held that the employees' refusal to keep the implied agreement on their part, to obey the reasonable instructions of the employer, was a proper ground for discharge:

While these employees had the undoubted right to go on a strike and quit their employment, *they could not continue work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or*

refuse openly or secretly, to the employer's damage, to do other work
(citations omitted).

Montgomery Ward & Co. 157 F.2d at 496 (emphasis added). Moreover, in finding that an employee who engaged in a similar type of work stoppage was not protected by the Act, the Court in *Home Beneficial Life Insurance Co.* recognized the slippery slope that would result if employees were permitted to selectively perform portions of their positions:

If [employees] had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment

159 F.2d at 286 (quoting *C. G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939)).

By refusing to work the requested February 24th night shift, Franco, Ortega and Jacobs were, much like the employees in *Liberty Mutual Ins. Co.* and *Montgomery Ward & Co.*, engaging in a partial strike, which is not protected by Section 7 of the NLRA. The credible evidence introduced demonstrated that all three of the Discriminatees were refusing collectively to respond to Respondent's request to work the shift on the night of February 24, 2009 because of an apparent disagreement with the manner in which the Company distributed overtime. However, other than their refusal to perform the requested overtime, all three employees remained in their positions and continued to accept the wages and benefits provided to them by Respondent until the principle conspirator, Franco, was terminated. Under well established precedent, Franco, Ortega, and Jacobs cannot be permitted to "continue work and remain at their positions, accept the wage paid to them, and at the same time select what part of their allotted tasks they

cared to perform of their own volition.” *Montgomery Ward & Co.* 157 F.2d at 496 (emphasis added).

Moreover, the Discriminatees are not entitled to the protections of the Act based on the manner in which they engaged in the concerted activity. As explained above, Section 7 has been interpreted to *not* protect “concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible.” *Washington Aluminum Co.*, 370 U.S. at 17. Significantly, the Board has held concerted activity “indefensible where employees fail to take *reasonable precautions* to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work.” *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1953), *enf. denied* 218 F.2d 409 (5th Cir. 1955)(emphasis added). In doing so, the Board has concluded that employees are under an obligation to take “reasonable precautions” to protect the employer's operations from such imminent danger as foreseeably would result from their sudden cessation of work. *International Protective Services, Inc.*, 339 NLRB at 702. As the evidence clearly established, the Discriminatees’ collective decision to refuse to work the evening shift on February 24, 2009 was made in conscious disregard of the security needs of the WIPP site. By refusing to work during that period, the Discriminatees were not only interfering with their employer’s ability to fulfill its contractual obligations to provide fire brigade services at the WIPP site, but they were also exposing the WIPP site to an increased and unnecessary safety and security risk.

The Board’s decision in *International Protective Services, Inc.* is particularly instructive in this case. 339 NLRB at 702. In that case, the respondent-employer



provided security guard services for United States Government buildings in Anchorage, Alaska, pursuant to a contract with the General Services Administration (GSA). *Id.* The security guards employed by the respondent were stationed at entrances to certain of the Alaska Federal buildings. *Id.* These security guards carried firearms and were required to be licensed to do so. *Id.* Moreover, the respondent reported to the Federal Protective Service (FPS), the law enforcement and security adjunct to GSA, who was responsible for ensuring that the respondent satisfied its contractual obligations to provide security guards with the required qualifications. *Id.* In March 1999, the respondent engaged in negotiations with the union on a new collective bargaining agreement. *Id.* After negotiations broke down, the union faxed over a letter to the respondent on the morning of April 21, 1999 setting forth certain demands and stating that they must receive affirmative responses by 11:00 a.m. that morning to avoid pending work stoppages. *Id.* When the union did not receive affirmative responses for the respondent, they commenced a strike at noon on April 21, 1999. *Id.* The Board upheld the Administrative Law Judge's finding that the union's strike was not protected by Section 7 of the NLRA. In doing so, the Board stated:

The judge concluded that the Union's strike was not protected by the NLRA *because it exposed the Federal buildings and their occupants to foreseeable danger.* The judge found that the Union during this period evinced "total disregard" for the security of the Federal buildings by attempting "to capitalize on the element of surprise" and that the Union's April 21 strike was in fact "designed" to compromise the security. *We have carefully reviewed the record evidence and find that the judge's conclusion that the strike was not protected is fully supported by his key factual findings.*

International Protective Services, Inc., 339 NLRB at 702-03 (emphasis added).



During the Hearing, there was substantial testimony concerning the important security services that Security Wall provided, through its SPOs, in maintaining the safety and security of the WIPP site. [TR 95-99] The testimony established that the SPOs were responsible for maintaining the integrity of the WIPP site, which was a highly sensitive facility operated by the U.S. Department of Energy. [TR 97:6-15] For example, Franco testified concerning the magnitude of his responsibilities:

Q And you are responsible to keep the facility safe from intruders, correct?

A Correct.

Q From people who are not authorized to be there?

A Yes.

Q And you have a right to -- under certain circumstances to even effect an arrest, isn't that right?

A That's correct.

Q And you have a right, if worse came to worse, to use a firearm in your own defense.

A Correct.

Q So, your job, as you understand it, is to act in a manner to protect the integrity of that facility; is that correct?

A Correct.

[TR 229:13-20, 230:17-19] The SPOs at the WIPP site receive significant training and have much of the same law enforcement authority as the security personnel in



International Protective Services, including the authority to arrest pursuant to Section 61(k) of the Atomic Energy Act. [TR 98:22-25] In addition, like in *International Protective Services*, the WIPP site has limited access and visitors must receive approval through either the U.S. Department of Energy or the U.S. State Department. [TR 99-101] Additionally, visitors to the WIPP site must pass their hand through a scanning device, which randomly selects individuals for a full search which is an extensive process similar to the one described for visitors at the federal facilities in *International Protective Services*. [TR 384:20-385:8; R 11]

Moreover, there was also substantial evidence introduced to demonstrate the need to have trained SPOs on fire brigade duty on the evening of February 24, 2009. Beyond the fact that Respondent was contractually obligated to provide these services, the evidence demonstrated the substantial risk posed by Respondent's failure to provide such services. As Mr. De Los Santos explained, those on fire brigade duty provide:

.protection for the responders and we are – we also provide support for the firefighters in the case there is a fire. We are trained to fight fires, just like a regular fireman is and we provide that support to the local fire department at the WIPP site.

[TR 101:20-24] Moreover, Mr. De Los Santos provided undisputed testimony concerning the significant consequences that may result from Respondent's inability to provide fire brigade services:

Q If under whatever circumstances you are unable to provide trained SPO's and fire brigade and the EST, what then happens?

A *Well, our ability to protect the facility is compromised, and we are required to inform our contract, Washington Tru Solutions that we - - we are short-handed and we couldn't meet the requirements.*



Q Under an ideal situation, who would cover for you if Security Walls, under the circumstances here on February 24th, 25th, and 26th, was unable to provide fire brigade and EST services?

A The Washington Tru Solutions responders would contact either Eddy County or Lea County or both to tell them, "Hey, look, we are short-handed tonight. We could use your help if anything happens," just to let them know just in case.

Q How far away from the site is the fire department of Eddy County from Carlsbad -- from the WIPP site?

A At least 32 miles.

Q And how far is the Lea County facility from the site?

A Close to forty miles.

Q And what would happen if there were an emergency that Security Walls could not cover and the Eddy County or Lea County Fire Departments could not cover for some thirty or forty minutes, and an individual was seriously injured and perhaps die?

A *It is not good.* The folks we have on-site are very well trained, but if an emergency is serious enough that a victim might not survive, if the facility that is on fire is large enough and out of control, it would not -- it could not be saved without the proper amount of people to protect it.

[TR 113:13 – 114:16 (emphasis added)]

The record is also undisputed that the Discriminatees decided to concertedly refuse to work the shifts in question *despite their full awareness of the consequences of this refusal to work.* At the Hearing, Franco testified unapologetically concerning his conscious disregard for the security needs of the WIPP site:

Q And you knew that Security Walls had the obligation to provide fire brigade protection on that shift, did you not?

A Yes.

Q *and did you know that that was going to cause a problem for Security Walls, didn't you?*

A Yes. Well, I knew that there was another crew that could work it, but I knew that we -- but I told him that we were not taking --

Q *So, you are not going to work it, and whatever problem that created, that was Security Walls' problem?*

A *Correct.*

Q *It was up to Security Walls, since it was their problem, to figure out how they were going to cover the fire brigade requirement; is that correct?*

A *That's correct.*

Q And what you did on February 23rd or 24th, in telling Captain Soto that you weren't going to work, "Don't bother to call," was a decision you made that you were not going to provide your services to protect that facility for that open position; is that correct?

A That's correct.

[TR 225:20 – 226:2; 227:8-16; 230:20-25 (emphasis added)] Moreover, both Ortega and Jacobs testified that they were aware Respondent needed someone to cover the night shift on February 24, 2009. [TR 324:1-11; 345:8-18]

Like the employees in *International Protective Services*, the Discriminatees' refusal to work the February 24, 2009 night shift exposed the WIPP site to a significant risk. The Discriminatees decided to engage in their concerted refusal to work fully

knowing that their conduct would compromise the ability of Respondent to provide the required security services to the WIPP site. In doing so, the Discriminatees failed to take reasonable precautions to protect both Respondent and the WIPP site from “foreseeable imminent danger.” As was the case with the strike in *International Protective Services*, the Discriminatees’ decision to strike and leave certain protections at the highly-sensitive WIPP site unmanned is “indefensible” and not entitled to the protections of Section 7 of the NLRA.

3. By Knowingly Engaging in Conduct which Compromised Respondent’s Contractual Obligations to WTS, the Discriminatees Engaged in Acts of Disloyalty Not Protected by the Act.

The Board and courts have also regularly held that acts of disloyalty are *not* entitled to the protections of Section 7 of the Act. In *NLRB v. Electrical Workers Local 1229*, the U.S. Supreme Court specifically stated:

Section 7 of the Act does not immunize an employee from discharge for acts of disloyalty or misconduct merely because those acts were associated with protected activity.

NLRB v. Electrical Workers Local 1229, 346 U.S. 464, 472 (1953); *see also, NLRB v. Knuth Bros., Inc.*, 537 F.2d 950 (7th Cir. 1976); *Bell Federal Savings and Loan Association v. Teamsters Local 250*, 214 NLRB 4 (1974). According to the Supreme Court, there is no more elemental cause for discharge of an employee than disloyalty to his employer. *Electrical Workers*, 346 U.S. at 472. Moreover, the Eight Circuit Court of Appeals has specifically stated that “unlawful interference with the employer's commercial interests has been recognized as presenting grounds for discharge. ” *NLRB v. Red Top, Inc.*, 455 F.2d 721, 726 (8th Cir. 1972).

In *Knuth Bros., Inc.*, an employee was terminated for contacting a customer to inquire whether the customer was aware that the employer, a printing company, was not entirely unionized. 537 F.2d at 951. The employer did not have a direct relationship with the customer, but dealt with a dealer who in turn worked with the customer. *Id.* It was critical to the employer's continued relationship with the dealer that the dealer's customers not know the identity of the print shop. *Id.* When the dealer learned of the employee's inquiry to the customer, the dealer contacted the employer upset about the inquiry and questioning whether it (the dealer) could continue doing work with the employer. *Id.* at 952. While denying the Board's petition seeking enforcement of an order to reinstate the employee, the Court agreed with the ALJ's finding that the employee's discharge was solely because of his inquiry to the customer. *Id.* at 954. The Court, however, disagreed with the Board concerning the significance of the employee's misconduct and determined that in revealing the information to the customer, the employee "acted in reckless disregard of his employer's business interests." *Id.* at 956. Therefore, the Court concluded:

Failure to use such care was an act of disloyalty to respondent. His avowed purpose of aiding the organizational campaign is insufficient to protect him from the effects of his misconduct and constituted cause for discharge.

Id. (emphasis added).

Similarly, in *Red Top, Inc.*, the Eighth Circuit Court of Appeals declined to enforce the Board's order seeking to reinstate several employees purportedly terminated in violation of Section 8(a)(1) of the Act. 455 F.2d 721. The employer was a company providing housekeeping and janitorial services to hospitals in several states. *Id.* at 722.

After a series of disputes concerning a variety of workplace issues, one of the terminated employees, Svoboda, wrote a letter to the employer's president threatening to take the issues to the hospital administration if the employees' concerns were not adequately addressed. *Id.* at 727. In denying enforcement of the Board's reinstatement order, the Court concluded that the employee's threat to take the problems to the hospital administration was an "act of disloyalty to the employer's business interests." *Id.* According to the Court, the employee's conduct "did not constitute a bid for public sympathy or support, such as peaceful picketing, but was clearly designed to hit the employer where it would hurt, by interfering with its business relations with its customers." *Id.* Ultimately, the Court concluded that employee's conduct – which was detrimental to the employer's business relationship – should not be afforded the protections of Section 7 of the Act. *Id.* at 728.

By conspiring to leave Security Wall without fire brigade coverage during the shifts in question, the Discriminatees engaged in disloyal conduct that was undisputedly detrimental to Respondent's business relationship with its contractor, WTS. At the Hearing, Mark Friend, a staff procurement specialist for WTS and the contract administrator for the subcontract for Respondent, testified at length regarding Respondent's obligation to provide fire brigade protection at the WIPP site. In describing Respondent's obligations under its subcontract with WTS [Exhibit R6], Mr. Friend explained that Respondent was required to provide officers that were fire brigade qualified on the site 24 hours a day, 7 days a week. [TR 404:15-23] Mr. Friend further

testified at length concerning the consequences in the event Respondent was unable to meet this contractual obligation:

Q And what if for one reason or another, Security Walls is unable to do that?

A If Security Walls was unable to do that, they would report that to us and WTS would do its best to cover that situation. However, if we could not, *then the plant would be shut down from waste handling operations.*

Q So what would that mean?

A *That would mean that we would not be allowed to handle waste, we would not be able to allow waste shipments to come in the gate until that situation was rectified.*

Q And what would that do to the relationship between WTS and the subcontractor?

A *Well, that would cause us to be in a position to take actions against Security Walls for being in default of their contract requirements.*

Q Now would that happen immediately every time there was a failure to provide the appropriate number of fire brigade?

A When it goes to security, yes. *We cannot have a failure in security.*

[TR 405:1-20 (emphasis added)] Mr. Friend also testified that WTS' response to Respondent's failure to provide fire brigade protection on the night in which the Discriminatees refused to work and the serious consequences of any further failures by Respondent:

Q Did WTS take any action against Security Walls on that occasion?

A *I believe that WTS had a stern conversation with Security Walls on that, probably between Scott Cassingham and Mr. De Los Santos. However, since it was the first incident that we've had with them, we showed some leniency, but only because we were able to cover the situation ourselves.*

Q If there was a recurrence of that type of incident, what would be the reaction of WTS?

A Yes reaction would be to formally, in writing go to the contractor and probably give them a Show Cause letter.

Q What do you mean by that?

A *I would ask them to show cause why we should not take further actions towards terminating the contract because of this breach.*

[TR 406:5-19 (emphasis)]

The undisputed evidence demonstrated that the Discriminatees' conduct was serious and significantly compromised Respondent's relationship with its contractor, WTS. Additionally, as explained above, there is evidence in the record that, at the very least, Franco was aware of Respondent's contractual obligation to provide the fire brigade protection and that his conduct would likely cause Respondent's "problems" in its relationship with WTS:

Q *-- and did you know that that was going to cause a problem for Security Walls, didn't you?*

A Yes. Well, I knew that there was another crew that could work it, but I knew that we -- but I told him that we were not taking --

Q *So, you are not going to work it, and whatever problem that created, that was Security Walls' problem?*

A *Correct.*

[TR 225:20 – 226:2; 227:8-10 (emphasis added)] Along these same lines, Jacobs admitted that the Discriminatees’ conduct constituted a “conspiracy.” [TR 348:22-25] Jacobs also testified that it was the intent of the three employees *to get even with the Respondent*. [TR 388:1-4, 388:18-20]

As the Supreme Court stated in its decision in *Electrical Workers*, Section 7 of the NLRA does not “immunize an employee from discharge for acts of disloyalty or misconduct merely because those acts were associated with protected activity.” 346 U.S. at 472. The Charging Party’s refusal to work on the evening of February 24, 2009 – while knowing full well that this decision would likely prevent their employer from fulfilling its contractual obligations – is the ultimate act of disloyalty and is not entitled to the protections of the Act.

B. The General Counsel Failed to Meet Its Burden To Establish that Respondent Took Any Adverse Action Because of the Charging Party’s Participation in Protected Activity.

Even if the Discriminatees’ conduct was “protected” under the Act (which it was not), the General Counsel still did not meet its burden to establish Respondent took any action against the Charging Party because of any alleged protected activity.

Under the *Wright Line* framework, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a substantial or motivating factor in the employer’s decision to discipline, discharge, or enforce its work rules. *Wright Line*, 251 NLRB 1083 (1980), *enf’d* 662 F.2d 899 (1st Cir. 1981). *See also NLRB v. Transportation Mgt.*, 462 U.S. 393, 399 (1982); *Amoco Fabrics Co.*, 260

NLRB 336, 344 (1982). If the General Counsel succeeds in making a *prima facie* showing, the burden then shifts to the employer to prove by a preponderance of evidence that the same action would have taken place even in the absence of the protected conduct. *Id.* The Board must also determine whether the reasons advanced by the employer were a pretext to disguise an unlawful motive. *See Sunbelt Enterprises, Inc.*, 285 NLRB 1153, 1167 (1987).

To establish its affirmative defense, an employer “must only show that it reasonably believed” that the employee engaged in conduct warranting the adverse employment action. *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995), *GHR Energy Corp.*, 294 NLRB 1011, 1012-13 (1989), *aff’d*, 924 F.2d 1055 (5th Cir. 1991) (Respondent met its burden because it “reasonably believed “employee engaged in serious misconduct). While action taken against, or discipline imposed upon, employees may appear extreme, however, it does not follow that the ascribed reason for such action or discipline is pretextual. If an improper motive is not involved, the question of proper discipline of an employee is a matter “left to the discretion of the employer” which may discharge an employee for “a good reason, a bad reason, or no reason at all.” *Gossen Company*, 254 NLRB 339, 355 (1981), *enforced in part, denied in part*, 719 F.2d 1354 (7th Cir. 1983); *NLRB v. Meinholdt Manufacturing, Inc.*, 451 F.2d 737, 739 (10th Cir. 1971). *See also, Goldtex, Inc. v. NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994) (“[u]nwise and even unfair decisions to discharge employees do not constitute unfair labor practices unless they are carried out with the intent of discouraging participating in union activities”); *West Covina Disposal*, 315 NLRB 47, 64 (1994) (deferring to employer’s

“business judgment” that employee should be discharged). As such, “it is not for the Board to substitute its judgment for that of an employer in deciding what are good or bad reasons” for taking the adverse action. *Kellwood Company*, 299 NLRB 1026, 1040 (1990); *Central Freight Lines*, 255 NLRB 509, 510 (1981), enforced, 666 F.2d 238 (5th Cir. 1982). See also *Ryder Distribution Resources, Inc.*, 311 NLRB 814, 816 (1993).

Thus, by merely proving that an employer had knowledge of an employee’s protected activity, an employee does not thereby “cloak himself with protection from discipline or discharge.” *Central Freight*, 255 NLRB 509, 510 (1981). As the Board has consistently recognized:

The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

Mac Tools, Inc., 271 NLRB 254, 255 n.6 (1984), quoting *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966).

Ultimately, however, *Wright Line* does not shift the burden of proof to the employer but imposes only a burden of proving an affirmative defense. *Transportation Management Corp.*, 462 U.S. 393, 400 (1983); *NLRB v. Associated Milk Producers, Inc.*, 711 F.2d 627, 629 (5th Cir. 1983); *Wright Line*, 251 NLRB at 1088 n. 11. Accordingly, the burden “never shifts” and “General Counsel always retains the responsibility to show that the employee’s protected conduct was a substantial and

motivating factor in the adverse action.” *Associated Milk Producers*, 711 F.2d at 629 (emphasis in original). Further, if the employer establishes its affirmative defense, Counsel for the General Counsel bears the burden of rebutting the defense. If Respondent “goes forward” with evidence supporting its affirmative defense, Counsel for the General Counsel “is further required to rebut the employer’s asserted defense by demonstrating that the challenged adverse action would not have taken place in the absence of the employee’s protected activities.” *Comcast Cablevision*, 313 NLRB 220, 253-54 (1993); *St. Luke’s Hospital*, 312 NLRB 425, 439 (1993).

As will be explained below, the General Counsel did not satisfy its burden under *Wright Line*.

1. Respondent Terminated Franco for a Legitimate, Business Reason.

Respondent terminated Franco not because he exercised his right to engage in concerted activity for the “mutual aid and protection” of his co-workers, but for two very different reasons: (1) his refusal to work on the night of February 24, 2009 compromised Respondent’s contractual relationship with its contractor, WTS; and (2) the fact that Julie Ruiz reported to Mr. De Los Santos that she was “upset” by the telephone call she received from Franco on February 23, 2009 telling her to “layoff the overtime.” This was confirmed by Ms. Ruiz’ affidavit. [R Exhibit 1; TR 49:21] Mr. De Los Santos – the manager who terminated Franco – provided clear testimony concerning the reason for his decision:

Q *Okay, and can you tell us the reason or reasons why you terminated him?*

A *Mr. Franco compromised our contract in a manner that was not acceptable and we -- I don't think I had a choice.*

Q In what way did he compromise the contract?

A We are obligated by contract from the Department of Energy all the way down through WTS (Washington Tru Solutions), to provide fire protection and security protection for the WIPP site, and Orlando in his attempt to -- to -- I guess emphasize his displeasure with the way we handle our overtime assignments, organized a situation. *As a result, we were not able to meet the requirements.* I did not have enough people on duty to provide the fire protection that I am required to provide by our contractor, WTS and the Department of Energy, and you know -- the catalyst was the phone call that he made to Ms. Ruiz by asking her -- and to tell her to lay off the overtime, because she was taking it from them.

[TR 38:2-24 (emphasis added)]

As explained above, Mark Friend – the individual at WTS primarily responsible for the administration of the Respondent’s contract – testified concerning the serious consequences Respondent faced as a result of the Discriminatees’ coordinated refusal to work on the evening at issue. [TR 406:5-19 (emphasis)] Moreover, Julie Ruiz testified concerning the telephone call she received on the evening of February 23, 2009 from Franco telling her to “layoff the overtime.” [TR 144:5-12] In testifying concerning her reaction to Franco’s February 23rd call, Ms. Ruiz stated:

Q And what was your reaction, emotionally, to that call?

A Well, whenever he told me about laying off the overtime, *I got defensive and upset*, and I was thinking to myself, “Why are you calling me? Why? There is no reason for you to call me and tell me not to work, or to go to work, or whatever. You are not the boss, okay,” and that is the feeling I got. I got upset. You know, why is he calling me about this. You know, we get paid the same, we work

about the same, and then him telling me, "Don't come in and work."
I am like, "What?" I just got upset.

[TR 145:21-146:5 (emphasis)] Additionally, Ms. Ruiz testified that she was so upset that after the call, she almost turned around and went back to the WIPP site to confront Franco. [TR 146:11-18] While she ultimately decided not to return to the WIPP site after the call, she instead chose to speak to Mr. De Los Santos about Franco's telephone the next day. [TR 148:12-25] Counsel for the General Counsel attempted to minimize the significance of Ruiz' concerns by having her testify that her affidavit [Exhibit GC8] was inaccurate or overstated.

Q Okay. How carefully did I read this?

A I just skimmed through it. I just skimmed through it. I just looked over it. I said, "Okay." I didn't think anything of it. [TR 161:16-19]

Again on cross examination she first testified:

Q Did you read it?

A I told you I glanced over it.

Q So, you are not sure of what was in it at that time?

A All I saw was right here, that I just glanced over it like that, and I said, "Okay, here you go. I am on my way to work."? [TR 169:21-25]

However on cross examination she recanted and testified that but for some irrelevant words in the affidavit, it was true, accurate and that the affidavit was in her words. [TR 184:20-185:3]. She also stated that she knew that Mr. De Los Santos was going to rely upon her affidavit.



Q And you have told Mr. – by signing it and giving it to Mr. De Los Santos, to Melissa who happened to be a notary, you knew he was going to rely on it.

A Yes. [TR 185:4-7]

As the evidence demonstrated, it was for these two legitimate, non-discriminatory reasons that led Mr. De Los Santos to terminate Franco's employment.

2. The Evidence Demonstrated that Respondent Permitted Its Employees, Including Franco, to Freely Exercise Their Rights to Engage in Protected Activity under the Act.

There was absolutely no evidence to demonstrate Respondent terminated Franco *because* he was opposing any Respondent's policy concerning the distribution of overtime. To the contrary, there was substantial, undisputed evidence demonstrating that, during his employment with Respondent, Franco regularly complained about the terms and conditions of his employment *and was never disciplined or even threatened with discipline by Respondent.*

At the Hearing, there was evidence introduced regarding concerns Franco and other employees had voiced about raises that Respondent's predecessor, Santa Fe Protective Services, provided to its employees once they received their Q-Clearance, but Respondent did not provide. Franco testified that he, along with other employees, raised the issue in approximately mid-2008, and went through the "chain of command" before discussing the issue with Mr. De Los Santos. [TR 195:16-196: 4] In response to these concerns, Mr. De Los Santos arranged a meeting in approximately September 2008 between Franco, another Security Police Officer named Naaman Martinez, and



Respondent's owner, Juanita Walls. [TR 196:24-197:6] At the meeting, Franco was permitted to freely discuss his concerns about the Q-Clearance pay. [TR 197:11-13] Both Mr. De Los Santos and Ms. Walls listened to the concerns raised by Franco, but ultimately informed him that the Q-Clearance raise was a policy of Santa Fe Protective Services. [TR 197:17-23] Ultimately, Ms. Walls informed Franco and the other employee that Respondent was not going to provide the Q-Clearance raise because, under its policy, raises were given based on merit. [TR 197:17-23; 220:6-13] Franco admitted that the meeting with Ms. Walls "ended under good terms. " [TR 200:16-18]

Franco also testified that he raised other issues during his employment, such as his belief that he was entitled to "equal pay" as a result of an article he read on Yahoo News concerning new workplace legislation. [TR 198-199, 222:11-223:6]

Significantly, although Franco raised numerous issues concerning the terms and conditions of his employment, Franco admitted that Respondent never disciplined him for any of this undoubtedly protected activity. [TR 220:16-221:3] Franco specifically testified that Respondent took no action against him following his September 2008 meeting with the Company's owner:

Q Okay, at that -- from the day you went to work for Security Walls until that time, you were never disciplined were you?

A No.

Q *And nobody told you to stop complaining --*

A *No.*

Q Anything like that?

A No.

Q You made your point, you got an answer, and that was it?

A Okay.

Q *And as a matter of fact, you never received any other discipline until roughly February 24th; is that correct?*

A *Yes, that's correct.*

[TR 220:16-221:3 (emphasis)]

There is simply no evidence to demonstrate that Respondent took any action against Franco in response to any conduct protected under Section 7 of the Act. To the contrary, the evidence shows that Respondent encouraged employees to raise issues concerning the terms and conditions of their employment. As explained above, when Franco raised issues concerning the terms of conditions of his employment, Respondent *listened* to his concerns and provided him a response. The General Counsel has failed to meet its burden to establish that Respondent was motivated by an unlawful animus.

3. The Evidence is Undisputed that Respondent Rescinded the Write-Ups Issued to Both Ortega and Jacobs.

The credible evidence introduced demonstrates that the write-ups originally issued to Ortega and Jacobs for their coordinated refusal to work were rescinded. Mr. De Los Santos testified that he rescinded the write-ups issued to both Ortega and Jacobs after issuing them. [TR 59:16-60:3] Although Jacobs' write-up was not rescinded immediately, there was no evidence introduced to demonstrate that the reason for this was anything other than "neglect" on the part of Mr. De Los Santos. [*Id.*; TR 71:24-72:1]



Moreover, as described above, Respondent encouraged its employees to raise issues concerning the terms and conditions of their employment and was responsive when they did so. Moreover, other than the allegations concerning Respondent's response to the Discriminatees' refusal to work, there was no evidence that Respondent otherwise ever took any adverse action against an employee for raising complaints or issues about the terms of their employment. [TR 334:18-335:1, 336:3-11, 336:21-337:3, 355:15-21] There is simply no evidence to support the Board's allegations that Respondent interfered with the Section 7 rights of either Ortega or Jacobs.

II. THE GENERAL COUNSEL FAILED TO MEET ITS BURDEN TO ESTABLISH THAT RESPONDENT CREATED AND MAINTAINED OVERLY-BROAD CONFIDENTIALITY PROVISIONS IN VIOLATION OF SECTION 7 OF THE ACT.

To establish that a confidentiality rule or policy violates the Act, the General Counsel must show that the policy's definition of "confidential information" expressly includes employee information, such that employees could reasonably believe that the rule restricts their Section 7 rights. *Cintas Corp.*, 344 NLRB 943 (2005), *aff'd Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007). In determining whether work rules tend to chill employees in the exercise of their rights, the Board will give the rules a "reasonable reading." *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *see also Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Under this standard, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the policy is unlawful. If it does not, the General Counsel may establish that a violation has occurred only if it can prove one of the following:



- (1) Employees would reasonably construe the language to prohibit Section 7 activity;
- (2) The rule was promulgated in response to union activity; or
- (3) The rule has been applied to restrict the exercise of Section 7 rights.

See Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004); *see also River's Bend Health & Rehabilitation Services*, 350 NLRB No. 16 (June 29, 2007). Moreover, the Board will also examine whether the employer has a legitimate business interests in support of its policy that outweighs the employees' interests in learning and discussing each other's wages. *See International Business Machines Corp.*, 265 N.L.R.B. 638 (1982).

In *International Business Machines Corp.*, the Board found that even though the employer's policy of classifying its wage information "muzzled" its employees by denying them this information to disseminate, thereby adversely affecting their Section 7 rights, it did not violate the Act. 265 NLRB 638. According to the Board, IBM did not bar its employees from compiling their own wage information, nor did it prohibit its employees from discussing their wages. Moreover, the administrative law judge found that the employer operated this secret or "closed salary" basis for *business and competitive* considerations. The administrative law judge further stated:

The General Counsel attempts to impugn these objectives, but it is unnecessary to answer each point specifically. It should be sufficient to say that the Board may not substitute its business judgment for that of Respondent, merely because it may be arguable that another approach is equally sound. On the other hand, a specious argument may be subject to attack if, by reason of other evidence, Respondent's alleged justification is patently false.

International Business Machines Corp., 265 NLRB at 642. See also, *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001)(recognizing an employer's need to prohibit abusive and threatening language outweighs its employees' rights to engage in potentially protected activity under Section 7).

The Board did not meet its burden to establish that Respondent promulgated and maintained a confidentiality policy that unlawfully interfered with its the Section 7 rights of its employee. Again, as described above, the great weight of the evidence establishes that Respondent employees were free to discuss the terms and conditions of their employment and regularly did without the threat of reprisals. Moreover, as the evidence demonstrated, Respondent had a legitimate, business justification for each of the allegedly overbroad policies.

A. The General Counsel Failed to Establish that Any of the Allegedly Overly-Broad Confidentiality Provisions Restricted the Rights of Employees to Discuss the Terms and Conditions of Employment.

At the Hearing, Counsel for the General Counsel failed to introduce any evidence to establish that Respondent created and maintained any policies that tended to chill employees in the exercise of their Section 7 rights. As described above, Respondent employees regularly exercised their right to discuss the terms and conditions amongst themselves without the fear of reprisal. There was compelling evidence introduced that Franco raised numerous issues concerning the terms and conditions of his employment prior to his termination without any consequences. [TR 195:16-196: 4, TR 197:11-13]

Consistent with this evidence, each of the Discriminatees testified that they were never told or warned that they could not discuss the terms and conditions amongst themselves. Specifically, Franco testified:

Q Were you ever told other than in this document by Mr. De Los Santos or any other Captain that you could not discuss any of these issues internally?

A *No. Not that I recall. No.*

Q So your answer is that you were never told you can't talk about them among yourselves?

A *No. No.*

Q And were you ever told you can't talk about them with a union?

A *No.*

Q But you didn't have a problem – you knew you could talk about it inside of Security Walls?

A *Yes.*

Q With no problems?

A *No problems.*

[TR 258:16-25; 261: 8-12 (emphasis added)] Moreover, Franco also testified that he understood the need for confidentiality prohibited employees from talking about the bid between Respondent and WTS, which he acknowledged was subject to a competitive bidding process. [TR 256:23-257:1; 261:62-7] While Franco also testified he did not understand how these provisions applied “as far as union are concerned,” he acknowledged that this understanding was based on his own subjective interpretation of

the Company's policy and not based on information that was communicated to him by Respondent. [TR 257:1-6; 258:7-15] There is no evidence in the record to support Franco's understanding of Respondent's confidentiality policy.

There was simply no evidence introduced to support the Board's allegation that Respondent maintained overly-broad confidentiality provisions in violation of Section 7 of the Act.

B. Respondent Articulated a Legitimate Business Interest for Each of the Allegedly Unlawful Policies that Outweighs any Purported Interference with the Section 7 Rights of its Employees.

As the Board recognized in its decision in *International Business Machines Corp.*, an employer may have a legitimate business interests that justifies a limitation on the discussion of the terms and conditions of employment. As explained below, Respondent presented compelling evidence to demonstrate a legitimate business interest in support of each one of its allegedly unlawful policies.

1. Anti-Harassment and Anti-Discrimination Policy.

At the Hearing, Counsel for the General Counsel introduced into evidence Respondent's Anti-Discrimination and Anti-Harassment policy, which provides in relevant part:

will try to limit the sharing of confidential with employees on a 'need to know' basis. Employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided. Violation of confidentiality will result in disciplinary action.

[GC Exhibit 4] Mr. De Los Santos' uncontroverted testimony established that Respondent has a legitimate, business interest for this policy that is wholly unrelated to

any intent to interfere with the Section 7 rights of its employees. According to Mr. De Los Santos, the reason for the policy's confidentiality requirement is the sensitivity of these discrimination and harassment issue and the need to protect those involved. [TR 30:1-32:6] Moreover, there was absolutely no evidence introduced to demonstrate that Respondent created or maintained this policy for an improper purpose or has discriminatorily applied its provisions.

The allegation concerning the Company's harassment and discrimination policy is simply without merit.

2. Confidentiality provisions in the Company's Employee Handbook and Restrictive Covenant Policy.

The Board also alleged the following two provisions were overly-broad in violation of Section 7 of the NLRA:

- **Page 11 of Respondent's Employee Handbook**

Confidentiality. All records and files of the Company are the property of the Company and considered confidential. No employee is authorized to copy or disclose any file or record. Confidential information includes all letters or any other information concerning transactions with customers, customer lists, payroll or personnel records of past or present employed.

[GC Exhibit 1]

- **Page 2 of Respondent's Restrictive Covenant Policy**

The specific "Confidential Information" any employee or terminated employee is prohibited to use or disclose is:

2. Insurance and benefits cost formulas and payment premiums.

6. Personal and/or sensitive information regarding any *Security Walls LLC* employee with particular emphasis on salary/hourly wage rate, benefits, promotions, demotions, disciplinary actions, bonuses or other actions which are clearly the authority of the Human Resource Department.

[GC Exhibit 3]

The credible evidence demonstrated that neither of these two policies in any way restricted any of the Discriminatees, or otherwise interfered with, the exercise of their Section 7 rights. To the contrary, the evidence established that Respondent employees were free to, and did, regularly exercise these rights without fear of reprisals. It was clear that these provisions were not meant to restrict the rights of employees to discuss among themselves (or even with a union), but rather to prevent disclosure to competition. In response to questions from Counsel for the General Counsel about the Employee Handbook provision, Mr. De Los Santos clearly articulated the need to for these provisions:

In this particular paragraph, it addresses the information that is exchanged in our daily businesses; how much we pay our employees, the benefits they receive, the cost of operations, and things like that, and we are a competitive business. If this information is released to our competitors, they can come in and undercut our bid, or even add bidders for the job we have now, so we ask our employees to keep that information to themselves. If they have got a concern about it, they can come discuss it with us, but that particular information is something that can be hurtful to us as a business, and it could have a negative impact on us, if it is given out to the wrong people.

[TR 32:24—33:10 (emphasis added)] As Mr. De Los Santos explained, the highly competitive nature is the reason Respondent requires its employees not to disclose this information to certain third-parties. [*Id.*] In light of the substantial evidence introduced

at the Hearing demonstrating Respondent's philosophy of openness, Mr. De Los Santos' testimony should undoubtedly be accepted. Moreover, the General Counsel did not introduce a scintilla of evidence demonstrating that these policies had any role in the decision to terminate Franco or discipline any other Respondent employee.

Counsel for the General Counsel did not prove, as she must, that Security has promulgated or enforced unqualified policies restricting employees from exercising their Section 7 rights and, therefore, these allegations should be dismissed.

CONCLUSION

The General Counsel has failed to satisfy its burden to establish any of the unfair labor practice allegations included in its Second Amended Complaint. The Discriminatees did not engage in conduct protected under Section 7 of the Act. Even if they did, however, Respondent did not take any negative employment actions against them because of this allegedly protected activity. To the contrary, the evidence establishes that Security Walls terminated Franco for legitimate, non-discriminatory reasons. Moreover, the General Counsel cannot demonstrate that Respondent created or maintained any overly-broad policies that interfered with the rights of its employees to engage in the activities protected under Section of the Act.

Therefore, the Board's Second Amended Complaint should be dismissed in its entirety.

Dated: September 16, 2009.

Respectfully Submitted,
JACKSON LEWIS, LLP

By s/George Cherpelis
George Cherpelis
Jeffrey W. Toppel
2390 East Camelback Road, Suite 305
Phoenix, Arizona 85016-3466
Counsel for Respondent Security Walls, LLC

THIS PLEADING WAS ELECTRONICALLY FILED
WITH DIVISION OF JUDGES
this 16th day of September, 2009.

Copy of the foregoing served
by United States Mail, postage pre-paid,
this 16th day of September, 2009, to:

Cornele A. Overstreet, Regional Director
National Labor Relations Board
Region 28
2600 N. Central Avenue, Suite 1800
Phoenix, AZ 85004

Three copies of the document mailed
this same date to:

Division of Judges, Atlanta Office
401 W. Peachtree St., NW, Suite 1708
Atlanta, Georgia 30308-3510

Courtesy copy e-mailed to: Liza.Walker-mcbride@NLRB.com

Suzanne Hickey, Secretary

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