

**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 Nos. 28-CA-177035  
28-CA-178621  
28-CA-181714  
28-CA-182541

**RESPONDENT SHAMROCK FOODS COMPANY'S  
ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE  
LAW JUDGE**

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## I. INTRODUCTION

General Counsel's exceptions eschew sound legal reasoning in favor of melodrama and mischaracterization. The GC,<sup>1</sup> for example, insists that Shamrock was "desperate" in the face of organizing activity by a minority of its employees, and that it therefore "bribed" the "fallen" Thomas Wallace to "turn his back on the [Union's] campaign." In truth, Shamrock simply negotiated a settlement with Wallace under which he dismissed an EEOC disability discrimination claim and agreed that he would waive any right to reinstatement. Remarkably, *General Counsel's position that such arrangements are unlawful conflicts with its own guidance and Case Handling Manual*. Even aside from that considerable flaw, none of the various and novel theories scattered throughout General Counsel's brief can obfuscate the fact that Wallace signed this agreement voluntarily, or his admission that he understood throughout the entire negotiation process that he was welcome to return to work.

General Counsel's exceptions concerning D'Juan Williams, similarly lack merit. As determined by the ALJ, the General Counsel presented no evidence or argument to support that Shamrock, through Armando Gutierrez, blamed unfair labor practices for the purported stricter enforcement of work rules. Indeed, this proposition is contrary to the General Counsel's argument that the purported stricter enforcement of the rules was driven by Williams' alleged participation in the union campaign.

General Counsel's exceptions therefore should be rejected, and the ALJ's recommended dismissal of the relevant allegations should be adopted.

## II. STATEMENT OF THE CASE

### A. Background.

#### 1. The Parties.

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<sup>1</sup> Administrative Law Judge Eleanor Laws will be referred to herein as the "ALJ." General Counsel will be referred to as the "GC." The Bakery, Confectionery, Tobacco Workers and Grain Millers Union, AFL-CIO/CLC will be referred to as the "Union" or the "Charging Party." Respondent Shamrock Foods Company will be referred to as "Shamrock."

Shamrock Foods Company (“Shamrock”) is a family-owned company that specializes in the preparation and distribution of food and food-related products. Shamrock maintains a distribution center in Phoenix, Arizona that is the subject of the Region’s complaint. [Tr. 27:13-19 (Engdahl)]. The Union claims to have commenced an organizing campaign at the Phoenix distribution center in late 2014. [See, e.g., Compl. ¶ 5(b)(1)]. The Union, however, has never filed an election petition or otherwise requested recognition.

2. **The Union’s Unsuccessful Organizing Campaign At Shamrock’s Phoenix Facility.**

The Union began its organizing campaign at Shamrock’s Phoenix facility after being contacted in November 2014 by former Shamrock employee Steve Phipps.<sup>2</sup> [Tr. 416:23-24, 436:20-22 (Phipps)]. Ultimately, the Union targeted a group of approximately 240 employees in the Phoenix warehouse operation. [Id. 461:20-22]. As of August 31, 2015, the Union had authorization cards from 107 individuals. [Id. 449:22-24]. After August of 2015, however, the Union was only able to collect a total of *eight (8)* additional cards, for a total of 115. [Tr. 468:16-17]. Accordingly, the Union never obtained authorization cards from a majority of the employees it sought to represent. [Id. 450:11-13].

In September 2015, approximately 10 months after commencing its organizing campaign, the Union filed an unfair labor practice charge seeking a remedial order forcing Shamrock to recognize the Union as the representative of its employees in lieu of a secret ballot election. [ALJD 9:37-39]. The Regional Director approved the Union’s withdrawal of the charge one month later, on October 15. [See Docket, Case No. 28-CA-160100]. Thereafter, while some leafletting continued into 2016, Phipps admitted on cross examination that all of the leafletting was conducted by the same group of seven (7) individuals. [Id. 417:10-15, 418:12-16, 420:11-14, 458:7-21]. Phipps is no longer seeking to organize Shamrock employees on the Union’s behalf. [Id. 416:21-22].

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<sup>2</sup> Phipps was discharged in June 2016. [Tr. 416:6-10 (Phipps)].

**B. Thomas Wallace's Settlement Agreement.**

Thomas Wallace worked as a loader in Shamrock's Phoenix warehouse. [Tr. 66:18-25 (Engdahl)]. He was discharged in April 2015 for insubordination during an employee meeting. [Tr. 480:5-11 (Wallace)]. Claiming that Wallace's discharge was in retaliation for protected, concerted activity, General Counsel filed a request in the United States District Court for the District of Arizona for injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j). [G.C. Ex. 24 at 6]. On February 1, 2016, The Honorable U.S. District Court Judge Diane Humetewa issued an order requiring Shamrock to offer reinstatement to Wallace within five (5) days and to post a notice advising employees that the offer was made. [Tr. 485:20-24 (Wallace); G.C. Ex. 24].

Although Shamrock appealed the Court's 10(j) Order, it decided to offer Wallace a choice between reinstatement or a lump sum payment in exchange for waiver of his reinstatement rights. [Tr. 73:11-16 (Engdahl)]. The company made this offer based on multiple statements by Wallace during his employment that he did not wish to remain in the warehouse as a loader. [Tr. 72:7-10 (Engdahl)]. He specifically told Shamrock Human Resources Specialist Natalie Wright that he was planning to go into Human Resources. [Tr. 234:8-13 (Wright), 494:10-15 (Wallace)]. In fact, Wallace was receiving tuition reimbursement from Shamrock to cover the costs of his education at the time of his separation. [Tr. 494:10-15 (Wallace)]. In addition, Shamrock was aware that Wallace had secured employment elsewhere.<sup>3</sup> [See G.C. Ex. 9].

Shamrock communicated its reinstatement/settlement offer to Wallace by letter dated February 5, 2016. [ALJD 12:28-35; Tr. 489:8-14 (Wallace); G.C. Ex. 9]. As an alternative, Shamrock offered Wallace a lump sum settlement of \$78,000 to waive reinstatement. [*Id.*]. This offer was subject to a number of critical caveats which were specifically explained in the letter:

- (i) Acceptance of the offer would not preclude Wallace from testifying or otherwise participating in any proceeding against Shamrock;

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<sup>3</sup> While Shamrock was not aware of the specific details regarding Wallace's subsequent employment, Wallace acknowledged on cross-examination that he was, in fact, hired by Sysco Foods (a competitor of Shamrock). He resigned from Sysco voluntarily after approximately two (2) months. [Tr. 514:8-11 (Wallace)].

- (ii) Acceptance of the offer would not preclude the General Counsel from seeking a remedial posting concerning Wallace's discharge;
- (iii) Rejection of the offer would not be held against Wallace at any time or in any way.

[ALJD 12:28-35; G.C. Ex. 9]. In addition to the settlement offer, Shamrock's February 5 letter advised Wallace that all records of his April 6, 2015 discharge would be removed from his personnel file. [*Id.*].

Wallace contacted Heather Vines-Bright, Shamrock Human Resources Manager, on February 8, 2016 to discuss his reinstatement. [ALJD 12:38-39; Tr. 489:21-490:1 (Wallace)]. Wallace told Vines-Bright that he was rejecting the offer of \$78,000 and that he was planning to return to work. [*Id.* 491:3-11]. Wallace asked what shift he would be working. [*Id.* 492:5-7]. Vines-Bright responded that she would speak with a supervisor regarding Wallace's anticipated schedule and get back to him. [*Id.*].

Vines-Bright called Wallace later that day or the following day (*i.e.*, February 9).<sup>4</sup> [ALJD 12:41-13:1; Tr. 491:15-22 (Wallace)]. She advised Wallace that, if he chose to return, his schedule would be the same as it was at the time of his discharge. [*Id.* 492:10-13]. Vines-Bright also told Wallace that the company was willing to increase its offer to \$178,000 in exchange for his waiver of reinstatement.<sup>5</sup> Wallace responded, "Is that it?" [Tr. 493:16-20 (Wallace)]. He further remarked that "the offer is still kind of low." [*Id.*]. Nonetheless, Wallace said he would consider it. [*Id.* 494:16-20].

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<sup>4</sup> Vines-Bright could not recall whether she reached Wallace again by telephone, or if she simply left the relevant information regarding Wallace's schedule in a voicemail for him. [Tr. 216:3-22 (Vines-Bright)]. In any event, it is undisputed that Vines-Bright notified Wallace of his schedule.

<sup>5</sup> Although Wallace testified that Vines-Bright contacted him regarding the increased offer, Vines-Bright did not recall this conversation. [Tr. 216:9-13 (Vines-Bright)]. Furthermore, Shamrock Human Resources Specialist Natalie Wright testified that she was the representative who communicated the increased offer to Wallace because Vines-Bright was out of town. [Tr. 232:5-17 (Wright)]. Notably, Wallace acknowledged that he spoke with Wright in this timeframe regarding the increased offer. [Tr. 495:4-11, 496:2-7 (Wallace)]. Again, however, this variation in the relevant testimony is not material in light of the parties' agreement that an increased offer was authorized and communicated to Wallace sometime between February 8 and 10.

Because Vines-Bright was on vacation starting February 9, Shamrock Human Resources Specialist Natalie Wright took over responsibility for Wallace's reinstatement arrangements. [ALJD 13:1-3; Tr. 231:15-20, 232:15-19 (Wright)]. Wright contacted Wallace on February 10 to discuss his status. [Tr. 495:8-9 (Wallace)]. Wallace told Wright that he had finished his Associate's degree in Human Resources, and that he was working on his Bachelor's degree. [Tr. 521:15-16 (Wallace)]. He further explained that he wanted "to move on and let Shamrock move on." [Tr. 521:18-20 (Wallace)].

Nonetheless, Wallace advised Wright that he was declining the increased offer of \$178,000, and instead wanted \$350,000 plus three (3) years of fully paid medical insurance. [ALJD 13:4-5; Tr. 496:5-7 (Wallace)]. Wright expressed surprise at Wallace's settlement demand and told him that it was too high. [*Id.* 496:9-10]. Wallace disagreed, and said that acceptance of his demand was in Shamrock's "best interests" because the warehouse was "going to go bananas" after his return.<sup>6</sup> [*Id.* 496:13-21, 497:5-6, 523:9-524:19]. Wallace further mentioned that, in exchange for the \$350,000 plus medical, he would also drop a disability discrimination complaint that he had filed with the Equal Employment Opportunity Commission regarding his discharge. [*Id.*]. Wallace then told Wright that Shamrock needed "to come in strong" and asked for Shamrock's final offer.<sup>7</sup> [*Id.* 496:24-25; 525:7-11]. Wright responded that she would get back to Wallace. [*Id.* 497:10-12].

Wright contacted Wallace the following day, on February 11. [Tr. 499:2-24, 525:12-17 (Wallace)]. While Shamrock was not willing to accept Wallace's demand of \$350,000 and three (3) years of medical insurance, Wright advised him that Shamrock was willing to increase its offer to \$214,270.30. [*Id.*]. She explained that this offer was calculated by adding the anticipated cost of health care coverage to Shamrock's prior offer. [*Id.* 526:3-13, 527:6-8]. Wallace responded that the

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<sup>6</sup> Although Wallace testified that the Union was planning "a party or some sort of special thing" for his return [Tr. 498:7-9], there is no evidence that Shamrock had any knowledge of this intention. In fact, in referring to the Union's plans, Wallace only told Wright that "there was [*sic*] things that you don't know that I know that's going to happen upon my return." [Tr. 496:19-20].

<sup>7</sup> Wallace later changed his testimony and claimed that he could not remember whether he asked for Shamrock's final offer. [Tr. 525:18-21].

offer “sound[ed] good,” but that he wanted to speak with his wife. [*Id.* 499:17-19]. Wright said that she needed Wallace’s response soon so that she could either have the necessary settlement paperwork prepared or arrange for Wallace’s return. [*Id.* 499:17-19].

Wallace called Wright back later that day and accepted Shamrock’s offer. [Tr. 500:6-20, (Wallace)]. Wright told Wallace that she would send him a draft agreement for him to review, and that he should come to the Phoenix facility to sign the agreement. [*Id.*]. Wright sent the draft agreement to Wallace that afternoon. [*Id.* 501:3-9; G.C. Ex. 16]. Wallace signed the agreement the following day, and received the money three (3) days later, on February 15. [*Id.* 506:17-20; G.C. Ex. 8]. After signing the agreement, Wallace told Wright that “all [he] wanted to do was get his schooling done, advance [himself], and become part of the team.” [*Id.* 504:19-20].

On cross-examination, Wallace testified that he understood throughout this entire process that he was always welcome to return to work at Shamrock. [Tr. 532:25-533:5 (Wallace)]. Wallace further admitted that he never sent a copy of his settlement agreement to the Union, that he never sent a copy of the agreement to Phipps despite his earlier commitment to do so, that he stopped speaking with Phipps, and that he was not even aware that the Union filed an unfair labor practice charge regarding his settlement until he was contacted by General Counsel. [*Id.* 533:16-25, 535:1-25].

**C. D’Juan Williams Request to Leave Early.**

D’Juan Williams works in Shamrock’s Phoenix warehouse as a loader.<sup>9</sup> [Tr. 283:1-2 (Williams)]. Williams also served in the warehouse as an order selector, commonly known as a picker. [Tr.283:4 (Williams)]. Since 2011, Williams’ regular schedule has been to work Sunday through Thursday, starting at 9:45 or 10:00 AM, with his shift ending at varying times between 5:30 and 9:00 PM. [Tr. 283:20-284:1 (Williams)]. Williams concedes that his end time “depends on how many trucks and how many cases we [Shamrock] have for the day.” [Tr. 284:2-5 (Williams)].

Williams’ alleges that from October 2014 through May 2016, he left work early every third Wednesday of the month to attend PTA meetings at his children’s school that began at 5:00 PM although time records show that he rarely left that early. [Tr. 286:21-23, 287: (Williams)]. In August

2016, Williams effectively demanded the he leave early every third Wednesday for the 2016-2017 school year. [Tr. 313 (Williams)]. Gutierrez told Williams he could not accommodate Williams' request to leave early every third Wednesday and suggested that Williams speak to Human Resources. [Tr. 295:7-22 (Williams)]. The issue was then addressed by HR Manager Heather Vines-Bright who contacted Ivan Vaivao to review the matter. [Tr. 205:2-9 (Vines-Bright)]. Williams testified that in response, Vaivao looked into whether it was operationally feasible to allow Williams, who served as a day-shift loader, to leave early from "a business aspect" because the company was "high in cases."<sup>12</sup> [Tr. 329-330 (Williams)]. Williams' request was denied by Vaivao because Shamrock's business needs had increased to level where they could no longer allow Williams, who was serving exclusively as a loader, to leave his shift without it negatively impacting Shamrock's operations. [Tr. 329-330 (Williams); Tr. 167:11-14, Tr. 583:2-5, Tr. 575:24-280:20 (Vaivao), R. Ex. 8; see also, Appendix "A" to Respondent's Brief]. These business reasons were corroborated by Williams. [Id.].

### **III. QUESTIONS PRESENTED**

- 1) Did the ALJ properly dismiss General Counsel's claim that Wallace's settlement violated Section 8(a)(3) of the National Labor Relations Act?
- 2) Is General Counsel's claim that Wallace's settlement violates Section 8(a)(3) conflict with the GC's own guidance and Case Handling Manual?
- 3) Did the ALJ properly find that General Counsel's theory of a violation in regard to Wallace's settlement agreement would improperly require a determination regarding Shamrock's settlement motives?
- 4) Regardless of the ALJ's rationale, did General Counsel fail to establish a violation of Section 8(a)(3) in regard to Wallace's settlement agreement?
- 5) Did the ALJ properly conclude that the General Counsel presented no evidence that Armando Gutierrez blamed stricter enforcement of work rules on the Union's filing of unfair labor practice charges?

- 6) Regardless of the ALJ's rationale, did the General Counsel fail to establish a violation of Section 8(a)(1) based on the allegation that Armondo Gutierrez blamed stricter enforcement of work rules on the Union's filing of unfair labor practice charges?

#### **IV. SUMMARY OF ARGUMENT**

General Counsel claims that the ALJ erred in rejecting its theory that Shamrock violated Section 8(a)(3) by offering compensation to Wallace in exchange for waiver of his right to reinstatement and withdrawal of his EEOC charge. This claim conflicts with General Counsel's own guidance, its Case Handling Manual, and relevant precedent from the Board. A 2013 memorandum from then-General Counsel Lafe Solomon explicitly recognizes that, although reinstatement is the preferred remedy, front pay is similarly remedial in nature. Moreover, General Counsel amended its Case Handling Manual to specify that offers of compensation in exchange for reinstatement waivers are *not* improper, and that the decision whether to accept such an arrangement rests solely with the alleged discriminatee. The Board has similarly recognized that such arrangements can be binding upon individual employees who agree to them. General Counsel's position in this case is meritless.

Even aside from its contradictions, General Counsel's claim that Wallace's settlement agreement violates the Act is unsupportable. Although the GC expounds upon multiple theories and arguments in opposition to the ALJ's dismissal recommendation, none can overcome the fact that Wallace voluntarily accepted the agreement while fully aware that he was welcome to return to work if he so desired. In addition, despite General Counsel's struggle to characterize Wallace's waiver as being responsible for the Union's inability to attract support, the undisputed evidence confirms that the Union's organizing campaign was all but abandoned at the time.

General Counsel's other exceptions related to D'Juan Williams are equally flawed in that the General Counsel failed to present any evidence to support that Gutierrez blamed unfair labor practice charges for his purported stricter enforcement of work rules.

V. **THE ALJ PROPERLY REJECTED GENERAL COUNSEL'S CLAIM THAT WALLACE'S AGREEMENT WAS UNLAWFUL.**

General Counsel claims that the ALJ should have found that the voluntary settlement agreement between Wallace and Shamrock was unlawful under Section 8(a)(3). Under the GC's theory, Shamrock violated the Act by offering compensation to Wallace in exchange for his waiver of reinstatement. As explained below, this claim contradicts Board authority and General Counsel's own guidance pertaining to waivers of reinstatement. In addition, the ALJ properly recommended dismissal of this allegation on the basis that a party's motivations for negotiating a settlement are too complex to be probative. The GC's exceptions concerning this allegation should therefore be rejected.

A. **General Counsel's Novel Theory Regarding Wallace's Settlement Agreement Is Contrary To The GC's Prior Pronouncements And Board Precedent.**

1. **The GC's Theory Contradicts Its Own Guidance And Case Handling Manual.**

In GC Memorandum 13-02, former General Counsel Lafe Solomon explicitly adopted a policy permitting the inclusion of front pay in lieu of reinstatement in formal Board settlements. *Memorandum GC 13-02* (Jan. 9, 2013) He began the memorandum explaining that “*parties and discriminatees are free to negotiate a waiver in return for a monetary amount.*” *Id.* at 1 (emphasis added). Prior to the GC's 2013 policy change, such arrangements could only be memorialized in private agreements between employers and alleged discriminatees. *Id.* General Counsel did not include such arrangements in formal Board settlements because the NLRB does not award front pay. *Id.*

Noting that pay in lieu of reinstatement “is a remedial concept that is well recognized by courts,” General Counsel Solomon observed that there was no justification for excluding such arrangements from Board settlement agreements:

Currently, CHM §10592.8 states that settlement terms for greater-than-one hundred-percent backpay in return for a waiver of reinstatement (*i.e.*, front pay) cannot be included in a Board settlement, and must be in a “side letter separate from any of the documentation regarding the Agency settlement.” Thus, any negotiated resolution that includes front pay must, at least with

respect to the terms regarding front pay, be a non-Board agreement. In practice, it appears that most settlement agreements involving greater-than-one-hundred-percent backpay are entirely non-Board. Agency policy should favor Board settlements, not discourage them. Accordingly, CHM §10592.8 will be revised to permit front pay in Board settlements.

*Id.* at 1-2.

Notably, General Counsel's 2013 memorandum did not purport to supplant or preclude the negotiation of private reinstatement waivers. Rather, the GC simply changed its policy to allow parties the option of a Board settlement even if they wished to negotiate such a waiver. Moreover, in adopting the policy change, General Counsel recognized that "it is ultimately the discriminatee who chooses whether to insist on reinstatement, or waive it in return for compensation." *Id.* at 2. In fact, General Counsel Solomon specified that, while not encouraging waivers, Regional offices should advise alleged discriminatees of any offer of compensation in lieu of reinstatement.<sup>8</sup> *Id.*

The policy changes announced in GC Memorandum 13-02 subsequently were incorporated into General Counsel's ULP Case Handling Manual. The revisions to Section 10128.2 included an explicit recognition that, "[o]f course, for a variety of reasons, individuals may elect to waive reinstatement in response to a settlement offer from a charged party." *ULP Case Handling Manual* § 10128.2(e). Section 10592.8 of the Compliance Case Handling Manual was revised to emphasize that the Region must communicate offers of compensation in lieu of reinstatement, but should leave the decision whether to accept such offers to discriminatees:

Though Regions should never pressure discriminatees to waive reinstatement, see ULP Manual Sec. 10128.7, agreed-upon front pay can serve as appropriate compensation for a discriminatee's voluntary waiver of the right to reinstatement. If a respondent offers a discriminatee more than 100 percent of backpay (that is, front pay) in lieu of reinstatement, or a discriminatee proposes front pay as compensation for a waiver of reinstatement, the Region should relay the settlement proposal, but should make it clear to respondent and discriminatee that the Region is not seeking front pay in formal proceedings.

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<sup>8</sup> Despite this admonishment, the Regional Director in this matter refused to discuss any such arrangement with Shamrock in regard to Wallace.

*Compliance Case Handling Manual* § 10592.8(a).

**2. The Board Has Similarly Recognized That Compensation In Lieu Of Reinstatement Is Proper.**

The issue of compensation for waiver of future employment was presented to the Board in *Al-Hilal Corp., Inc.*, 325 N.L.R.B. 318 (1998). The complaint in *Al-Hilal Corp.* alleged that the employer had committed multiple violations, including discharging two union supporters for protected activity and disciplining a third, interrogating employees, assaulting employees, refusing to bargain, bargaining in bad faith, promising benefits in exchange for decertification, reducing hours, withholding a wage increase, promulgating new work rules, assigning additional duties and implementing a new disciplinary system without bargaining. *Id.* at 318. After the hearing opened, the employer offered to pay \$7,500 to each of the three alleged discriminatees in exchange for the discriminatees' resignations, a disclaimer of interest from the union, and a dismissal of the various ULP allegations in the complaint. The union and the individual discriminatees accepted the offer, but General Counsel objected. The ALJ accepted the settlement over the GC's objection and dismissed the entire complaint.

The Board revoked the settlement and the accompanying dismissal in a 3-2 decision. *Id.* at 319-20. Although the GC claims that this holding supports its position, a closer examination of the Board members' opinions reveals otherwise. Members Fox and Liebman authored the majority opinion, and found that the settlement was not sufficient to resolve the entire case under the factors established in *Independent Stave Co.*, 287 N.L.R.B. 740 (1987).<sup>9</sup> *Id.* at 318-20. Chairman Gould and Member Brame authored separate dissenting opinions, and would have found that the settlement agreement was sufficient to justify dismissal. *Id.* at 321-23.

Member Hurtgen, the swing vote in the case, authored a separate, concurring opinion. *Id.* at 320-21. He agreed with the majority that the settlement was insufficient to dismiss the entire case

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<sup>9</sup> The *Independent Stave* factors are discussed in Section V.D, *infra*.

because it provided no remedy for most of the alleged violations. *Id.* However, Member Hurtgen found that the settlement **was** sufficient in regard to the individual discriminatees and the union:

On the other hand, the settlement does offer a remedy to two alleged 8(a)(3) discriminatees, and a remedy for one other employee. These three employees and the Union do not object to these remedies, and I see no basis for disapproving them. Similarly, since the Union has chosen to disclaim representation, and does not object to the settlement, I see no basis to quarrel with the lack of a remedy for the alleged bad-faith bargaining or the alleged refusal to provide information.

*Id.* at 320. Thus, reading Member Hurtgen’s concurrence together with Chairman Gould and Member Brame’s dissents, a majority of the Board agreed that the settlement was proper and binding in regard to the union and the three alleged discriminatees, despite General Counsel’s objection.

3. **The GC’s Sweeping Position Would Preclude All Reinstatement Waivers, Despite The Board And General Counsel’s Guidance.**

The above authority is fatal to General Counsel’s claim concerning Wallace’s settlement agreement. General Counsel insists that Section 8(a)(3) prohibits an employer even from **offering** a private reinstatement waiver to a purported discriminatee. Although General Counsel does not articulate its position in such broad terms, its arguments confirm the true scope of its position:

- General Counsel argues in its brief that Shamrock violated the Act immediately upon offering compensation to Wallace in exchange for his waiver of reinstatement. [G.C. Br. at 14, 21, 23]. The GC offers no explanation as to why Shamrock’s offer is different from similar offers in other matters.
- General Counsel claims throughout its exceptions that such arrangements are unlawful because they frustrate the GC’s interest in vindicating “public rights” under the Act. The interest in vindicating public rights is present in every ULP case.
- General Counsel insists that Shamrock violated Section 8(a)(3) because it did not want Wallace to return to work. As the ALJ observed, “this is always the case when an employer decides that it will settle a case in exchange for an employee waiving reinstatement.” [ALJD 15:23-25].

Together, these assertions confirm that the GC’s position would prohibit **any** waiver of reinstatement in exchange for compensation.

This broad prohibition cannot be reconciled with the authority explained in Sections V.A.1 and V.A.2, *supra*. GC Memorandum 13-02 recognized that private, non-Board arrangements to waive reinstatement are commonplace and proper, and modified GC policy to provide the same option in Board settlements. The Case Handling Manual specifies (among other relevant provisions) that the decision whether to accept such an arrangement belongs exclusively to the discriminatee, effectively negating the GC’s “public rights” argument in this case. *See Compliance Case Handling Manual* § 10592.8(a). Finally, while the ALJ-imposed settlement in *Al-Hilal Corp.* was not sufficient to remedy the complete catalog of violations that General Counsel alleged, a majority of the Board found that it was sufficient to remedy the violations alleged in regard to the individual discriminatees.

General Counsel’s position on Wallace’s settlement cannot be reconciled with these tenets. In short, while the GC argues that Shamrock violated the Act by negotiating Wallace’s reinstatement waiver, its 2013 memorandum explicitly recognizes that “parties and discriminatees are *free to negotiate a waiver* in return for a monetary amount.” *GC Memorandum 13-02* at 1 (Jan. 9, 2013) (emphasis added). The ALJ’s recommended dismissal of this claim should be adopted.

4. **General Counsel’s Statements During The Section 10(j) Appeal Confirm That Its Current Position Is At Odds With Its Own Policy.**

As noted above, Shamrock appealed the 10(j) order requiring Wallace’s reinstatement. During trial, judicial notice was taken of the audio recording of the oral argument on Shamrock’s appeal before the United States Court of Appeals for the Ninth Circuit. During that oral argument, General Counsel made a number of statements that reflect the divergence between its existing policies and the position it is taking in this matter. For example, at 23:21, General Counsel conceded that Wallace’s settlement was sufficient to remedy his individual interests:

*(By Counsel for the General Counsel)* What was protected, and what was addressed within this settlement, the private settlement between Wallace and the employer, was Wallace’s individual rights.

At 24:43, the GC acknowledged that Shamrock’s offer of reinstatement was sufficient:

- Q. (By the Hon. Marsha S. Berzon) But the injunction, doesn't the injunction require the reinstatement of Wallace?
- A. (By Counsel for the General Counsel) The injunction requires an offer of reinstatement.
- Q. Right.
- A. Which my understanding is that Shamrock has, well they did make the offer of reinstatement.
- Q. That part of [the injunction] is moot, then?
- A. We would concede that point.

These statements, while consistent with the GC's 2013 memorandum and its Case Handling Manual, cannot be reconciled with its claim that Wallace's agreement was unlawful. This contradiction further confirms that the ALJ's recommendation of dismissal should be adopted.

**B. The ALJ Correctly Held That The GC's *Wright Line* Theory Would Require Consideration Of Non-Probative Evidence Concerning Settlement Motives.**

While the above authority is independently dispositive, a review of General Counsel's arguments concerning Wallace's settlement confirms that its claim would fail in any event. General Counsel insists that Wallace's agreement should be analyzed under the *Wright Line*<sup>10</sup> framework for allegations of unlawful discrimination. As the ALJ recognized, however, a *Wright Line* analysis would improperly enmesh the Board in a determination of the parties' motives for settling pending litigation. General Counsel's exceptions to this holding are meritless.

**1. The ALJ Properly Cited FRE 408 In Rejecting General Counsel's *Wright Line* Theory.**

In rejecting the GC's *Wright Line* argument, the ALJ referred to the principles underlying Rule 408 of the Federal Rules of Evidence ("FRE 408"), which requires exclusion of evidence pertaining to settlement discussions. FRE 408's exclusionary rule is founded on the twin principles that (i) voluntary settlements should be encouraged, and (ii) a party's motivation in seeking settlement lacks probative value. *See, e.g.*, 1972 Advisory Committee Notes to FRE 408 (noting that

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<sup>10</sup> 251 N.L.R.B. 1083 (1980), *enfd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

evidence concerning settlement is inadmissible because parties may have multiple motives and because exclusion promotes public policy favoring settlement). The Board has adopted a similar, “long-standing policy of ‘encouraging the peaceful, nonlitigious resolution of disputes.’” *Al-Hilal Corp., Inc.*, 325 N.L.R.B. 318, 319 (1998), quoting *Independent Stave Co.*, 287 N.L.R.B. 740, 741 (1987).

The ALJ correctly found that the GC’s *Wright Line* theory would be inconsistent with these notions. First and foremost, as explained in Section V.A.3, *supra*, General Counsel’s position would preclude parties from ever reaching a voluntary compliance settlement that includes a reinstatement waiver. In fact, General Counsel’s claim that an individual contract can never impact NLRB proceedings (addressed in Section V.B.4, *infra*) would eviscerate **all** non-Board settlements. This result would be contrary to the public policy (and Board policy) favoring voluntary resolution of disputes.

Second, regarding the parties’ motives for settlement, application of the *Wright Line* framework would go beyond the ills underlying FRE 408. As reflected in the Advisory Notes, Rule 408 bars actual evidence—even direct evidence—of a party’s motivations for settling litigation because such motives are too complex to be probative. Application of the *Wright Line* approach, on the other hand, would essentially permit “guessing by inference” to determine a party’s settlement motives. If the probative value of direct evidence concerning such matters is slight, the probative value of an inference concerning this issue is nonexistent.

General Counsel’s conclusory proclamation that Wallace’s EEOC claim was an “afterthought” reflects the very dangers of “guessing by inference” that led to the ALJ’s rejection of its *Wright Line* theory. Appointing itself as the arbiter of the parties’ subjective motivations, the GC declares that Shamrock was unconcerned with Wallace’s EEOC claim until Wallace raised the issue himself. [G.C. Br. 13-14]. This assertion is incorrect. Shamrock’s February 5 letter to Wallace—the first communication on the reinstatement issue—specified that any lump sum payment would be conditioned upon his waiver of reinstatement **and** “any further payments or other relief in regard to [his] employment with Shamrock.” [G.C. Ex. 9]. This reference confirms that Shamrock sought a full release from Wallace (including, but not limited to, his EEOC claim) from the beginning.

General Counsel's speculation as to what was and was not important to the company is simply wrong, and is illustrative of the flaws in the GC's *Wright Line* argument.

**2. The ALJ Did Not "Apply" FRE 408 Or Its Underlying Principles.**

General Counsel's exceptions to the ALJ's rejection of its *Wright Line* theory all revolve around the assertion that the ALJ "applied" either FRE 408 or the exclusionary principles upon which it is based. [See, e.g., G.C. Br. 13-14]. But, if the ALJ had "applied" FRE 408 or its underlying policies, she would have excluded all testimony and other evidence pertaining to Wallace's settlement. A review of the ALJ's decision as well as the transcript from the hearing demonstrates that she did no such thing. Instead, the ALJ recognized that a party's motives for entering into a settlement are too complex to be probative. Her citation to FRE 408 was only in support of this conclusion. General Counsel's exceptions mischaracterize the ALJ's reasoning, and should be rejected.

**3. The Fact That Wallace's Discharge And EEOC Claim Were Not Before The ALJ Is Irrelevant.**

The GC also claims that the ALJ erred in referring to Rule 408 because the validity of Wallace's underlying claims was not before her. The GC attempts to support this assertion by arguing that Rule 408 only bars evidence intended to prove liability concerning the claim "under negotiation." [G.C. Br. 12-13]. But again, the ALJ did not *exclude* evidence under Rule 408. She merely cited to the rule as reflecting the fact that an inquiry into a party's settlement motives is disfavored.<sup>11</sup>

General Counsel's argument furthermore conflates "under negotiation" with "under litigation." According to the GC, FRE 408 bars settlement evidence only in regard to claims that are being litigated in the same case in which the evidence is offered. Its failure to cite a case

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<sup>11</sup> General Counsel appears to argue that Wallace's agreement was not a "settlement" because it did not resolve a substantive claim. The GC provides no authority for the proposition that settlements related to compliance matters such as reinstatement are entitled to lesser dignity. In addition, it should be noted that the GC's own Case Handling Manual deals with reinstatement waivers in the "Settlements" section of the ULP segment (Sec. 10130.04), and refers to reinstatement waivers as "settlements" in the Compliance segment (Sec. 10592.8).

exemplifying this notion is not surprising, as FRE 408 is not so limited in its application. As explained above, Rule 408 is founded in part on the recognition that a party's settlement motives are too complex to have probative value. That remains the case regardless of whether the settled claim is being litigated in the proceeding in which settlement evidence is offered. General Counsel's reading of FRE 408 accordingly is unsupported.

4. **General Counsel's "Public Interest" Arguments Are Unresponsive Due To The Limited Scope Of Wallace's Settlement Agreement.**

General Counsel also argues that the ALJ erred in rejecting its *Wright Line* theory because allowing individuals to "contract away rights guaranteed in the Act" would interfere with the GC's responsibility to protect the "public interest." This assertion fails on three grounds. First, Wallace's agreement does not interfere with the GC's ability to seek public interest remedies. If General Counsel ultimately prevails on its claim that Wallace's discharge was unlawful, it still can seek a posting stating that Wallace's discharge violated the Act. [G.C. Ex. 9]. This caveat was explicitly conveyed to Wallace in Shamrock's February 5 letter. [G.C. Ex. 9].

Second, the only matter impacted by Wallace's settlement is his reinstatement remedy, which is not an issue of "public interest." Rather, as General Counsel has recognized, "parties and discriminatees are free to negotiate a waiver [of reinstatement] in return for a monetary amount." *GC Memorandum 13-02* at 1 (Jan. 9, 2013). Furthermore, "it is ultimately the discriminatee who chooses whether to insist on reinstatement, or waive it in return for compensation." *Id.* at 2; *see also Compliance Case Handling Manual* § 10592.8(a). Thus, regardless of the GC's authority to enforce the Act, it can no more force a discriminatee to accept reinstatement than an employer can force a waiver.

Third, reinstatement is not a substantive right under the Act. The precedent upon which General Counsel relies reinforces this point. For example, in *National Licorice Co. v. NLRB*, the employer unilaterally replaced its employees' chosen union with an in-house, employer-dominated committee with which it purported to "negotiate" a collective bargaining agreement. 309 U.S. 350, 353-54 (1940). The employees were required, as a condition of "protecting their jobs" and receiving

wage increases, to sign the agreement. *Id.* Among other provisions, the agreement included a waiver of the employees' right to unionize. *Id.* at 355. Recognizing that the right to unionize is a core right under Section 7 of the Act, the Supreme Court found that these actions were unlawful. *Id.* at 360.

In *J.H. Stone & Sons*, the employer gave a speech regarding strikes to employees one day after a union presented a demand for card check recognition. 33 N.L.R.B. 1014 (1941). In the speech, the employer presented statistics concerning the number of hours lost in the United States due to strikes, which the Board found was intended to “convey the impression that unionization and steady work were mutually exclusive alternatives.” *Id.* at 1019. The employer furthermore required employees to elect “monitors” to prepare vacation schedules and act as the employees' representatives in handling grievances. *Id.* at 1018. Following the meeting, the employer distributed contracts to employees under which the employees were guaranteed raises and “steady work,” and were required to address any disputes with the employer individually. *Id.* at 1020-21. The Board found that the employer offered the contracts to avoid its obligation to bargain collectively with the union, thus interfering with the employees' Section 7 rights. *Id.* at 1023-24.

Similarly, in *Morris v. Ernst & Young, LLP*, the employees were required as a condition of employment to waive their right to institute or participate in class-based employment litigation. 834 F.3d 975 (9<sup>th</sup> Cir. 2016). After finding that participation in class litigation is “concerted activity” within the meaning of Section 7 of the Act, the Ninth Circuit held that the waivers were not enforceable. *Id.* at 981-983.; *see also Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014) (class waiver unenforceable).

In this case, contrary to General Counsel's dramatic assertion that Shamrock “bribed” Wallace to “turn[] his back on the [Union's] campaign” [G.C. Br. 14], nothing in Wallace's agreement required him to withdraw support from the Union or waive any other substantive right under Section 7 of the Act. Wallace's agreement only included a waiver of reinstatement. Reinstatement is a remedy, not a substantive Section 7 right. The fact that the GC's own Case Handling Manual recognizes the appropriateness of front pay in lieu of reinstatement confirms this

distinction, as does the provision stating that it should be left to the individual discriminatee whether to accept such an offer.

Wallace's agreement is further distinguishable on the basis that the waivers in the cases discussed above were presented as a condition of employment. In that regard, the Ninth Circuit observed that "Section 7 rights would amount to very little if employers could simply *require* their waiver." 834 F.3d at 983 (emphasis added). In this case, Shamrock did not (and could not) require Wallace to waive reinstatement. Wallace, in fact, testified that he understood he was able to return to work throughout the entire process, from his receipt of the February 5 letter until his signing of the settlement agreement. [Tr. 532:25-533:5 (Wallace)]. He chose instead to accept the payment. While General Counsel may disagree with his decision, it cannot establish that it was unlawful.

5. **General Counsel's Impracticability Argument Misconstrues The ALJ's Holding And Is Contradictory.**

In its final argument regarding FRE 408, General Counsel claims that applying the rule to exclude settlement evidence in Board cases is "impracticable" due to the "public interests" at stake. This argument fails for the same reasons as the GC's other arguments. First, the ALJ did not "apply" FRE 408, as evidenced by the fact that she did not exclude evidence. Second, Wallace's agreement does not implicate "public interests" because the decision whether to waive reinstatement in exchange for front pay belongs solely to the individual discriminatee. Third, in the event that the GC prevails on its claim that Wallace's discharge was unlawful, the settlement agreement would not preclude a posting to this effect.

In addition, General Counsel claims that "application" of FRE 408 is impracticable in light of "the invariable imbalance of power between labor and management." [G.C. Br. 16]. This assertion is inconsistent with the GC's earlier recognition that "Wallace [went] all-in and leverage[d] as much as he could out of the situation." [G.C. Br. 14]. The facts recited above further confirm that there was no such imbalance of power between Shamrock and Wallace, as Wallace persuaded Shamrock to increase its offer three different times. He furthermore made his own counterproposal of \$350,000 plus three years of paid medical insurance, accompanied by his threat that giving in to

this demand was in Shamrock’s “best interests.” [Tr. 496:13-21, 497:5-6, 523:9-524:19]. In light of these undisputed facts, General Counsel’s resort to the concept of unequal bargaining power rings hollow.

**C. General Counsel’s Claim Would Fail Even Under *Wright Line*.**

Even if *Wright Line* was the appropriate standard (which it is not), General Counsel’s argument still would fail. The *Wright Line* framework requires a showing that the purported discriminatee engaged in protected activity, that the employer had knowledge of that activity, that the employer bore animus toward the activity, and that the employee was subjected to an adverse employment action. If these elements are established, the employer can rebut the resulting inference of discrimination by demonstrating that it would have taken the same action regardless of the employee’s protected activity. Applying the *Wright Line* framework to the undisputed facts in this matter demonstrates that the GC’s theory of a violation is unsustainable for multiple reasons.

**1. General Counsel’s Argument Is Based Upon Oversimplification.**

Unable to cite a single case in which a voluntary waiver of reinstatement was analyzed under *Wright Line*, General Counsel begins its argument attempting to establish a foundation for *Wright Line*’s application in this context. To this end, the GC asserts that “[o]n one day, Wallace had a right to return to work, and, after Respondent engaged in its conduct, he did not.” [G.C. Br. 17]. This spurious syllogism completely ignores Wallace’s role in waiving reinstatement.

In truth, Wallace’s reinstatement right continued until the moment **he** voluntarily chose to sign the settlement agreement in exchange for the compensation that Shamrock offered. General Counsel’s 2013 memorandum discussed above and its Case Handling Manual both confirm that Shamrock did not violate the Act by offering Wallace this choice, and that the decision whether to accept it belonged entirely to Wallace and not to General Counsel. Wallace furthermore admitted on cross-examination that he understood he was welcome to return to work throughout the entire process. [Tr. 532:25-533:5 (Wallace)]. General Counsel’s attempt to dismiss this testimony as “bullying” by Shamrock’s counsel only reflects how seriously Wallace’s admission undermines the GC’s *Wright Line* theory. [G.C. Br. 26].

2. **General Counsel Is Unable To Establish Animus.**

a. **The “Inherently Destructive” Theory Of Animus Is Not Applicable.**

Turning to the elements of proof required by *Wright Line*, General Counsel argues that it should not be required to establish animus because waivers of reinstatement are “inherently destructive” of employees’ Section 7 rights. But, accepting this premise requires the conclusion that General Counsel explicitly approved of “inherently destructive” conduct in its 2013 memorandum and multiple Case Handling Manual provisions, all of which recognize that front pay is an appropriate (although not preferred) substitute for reinstatement. This assertion furthermore is contrary to the Board’s decision in *Al-Halil Corp.*, *supra*. It should therefore be rejected as untenable.

b. **Wallace’s Settlement Negotiations Do Not Establish Animus.**

Aside from its “inherently destructive” theory, General Counsel unsuccessfully attempts to show animus based on the context of Wallace’s settlement. First, the GC argues that animus is established by the “frenzied timing of Respondent’s unsolicited, exorbitant offers.” [G.C. Br. 21]. General Counsel fails to mention, however, that Shamrock was required under the federal court’s Section 10(j) order to offer “immediate reinstatement” to Wallace within five (5) days. [G.C. Ex. 24].

While Shamrock satisfied that obligation with its February 5 letter, the company understandably wanted to resolve the question shortly thereafter. Wallace, in fact, testified that Wright said she would meet him at the facility on February 11 *either* to process his reinstatement paperwork *or* to have him sign the settlement agreement. [Tr. 527:10-21 (Wallace)]. He further testified that Vines-Bright told him he was scheduled to start work at 9:00 am the following Sunday (February 14). [Tr. 519:4-6 (Wallace)]. These facts confirm that Shamrock simply wanted to conclude the matter expeditiously, either by returning Wallace to work or by reaching a settlement.

In addition, General Counsel’s myopic pronouncement that Wallace’s settlement amount was “exorbitant” ignores several relevant considerations. The GC bases this assertion on the fact

that Wallace's settlement amount was significantly larger than his likely back pay award in the event that General Counsel ultimately prevails on its claim that his discharge was unlawful.<sup>12</sup> Yet, General Counsel introduced no evidence, such as tax returns or other documentation, of Wallace's earnings prior to his separation or his anticipated back pay award. The GC also overlooks Wallace's EEOC claim (with the associated possibility of front pay, compensatory and punitive damages, and attorneys' fees) and the fact that Wallace irrevocably surrendered any right he might have to return to Shamrock.

General Counsel additionally ignores the fact that approximately \$24,000 of Wallace's settlement payment was to cover healthcare costs. [Tr. 526:3-13, 527:6-8 (Wallace)]. If the Board ultimately adopts the ALJ's finding regarding Wallace's discharge, Shamrock would have been required (but for the settlement) to reimburse Wallace separately for any healthcare costs he incurred that would otherwise have been covered by his insurance through the company. *Cliffstar Transportation Co. Inc.*, 311 NLRB 152, 166 (1993); *Roman Iron Works, Inc.*, 292 NLRB 1292, 1294 (1989). Shamrock has no evidence or knowledge of those costs, and therefore could only speculate regarding the extent of its potential liability. In light of these additional factors omitted from General Counsel's analysis, the assertion that Wallace's settlement amount was "exorbitant" is unfounded.

**c. The Involvement Of Human Resources Specialist Natalie Wright Does Not Reflect Animus.**

General Counsel also claims that Shamrock demonstrated animus by involving Human Resources Specialist Natalie Wright in the final stages of the negotiations with Wallace. While the GC curiously refers to Wright as "the closer," the undisputed testimony is that Wright took over the negotiations from Heather Vines-Bright because Vines-Bright left for vacation. [ALJD 13:1-3; Tr. 217:13-22 (Vines-Bright); 231:15-20, 232:15-19 (Wright)]. Notably, Wright previously held the

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<sup>12</sup> Wallace's base rate as a loader was \$12/hour, and he testified that various incentives and other add-ons increased his typical hourly rate to \$27. [Tr. 512:13-17, 513:9-11 (Wallace); ALJD 12:25-26]. 12:25-26]. Based on a 2,080-hour work year at \$27/hour with no overtime, Wallace would earn slightly more than \$56,000 annually.

position of Human Resources Manager at the warehouse, the same position that Vines-Bright held at the time of Wallace's settlement. [Tr. 200:24-201:9 (Vines-Bright); 234:1-7 (Wright)]. Wallace himself testified that there was nothing unusual about Wright's involvement. [Tr. 521:8-12].

The GC also complains that Wright asked Wallace to leave the property after signing the agreement, and suggested that he should not discuss it. General Counsel claims that these comments were unlawful under *Pratt (Corrugated Logistics), LLC*, 2014 NLRB LEXIS 127 (Feb. 21, 2014). Setting aside the fact that Wright's comments were not alleged as violations, the GC's reliance on *Pratt* is misplaced. The employer in that case offered severance agreements to laid off employees that included non-disparagement and confidentiality provisions. Although the ALJ held that these provisions were unlawful, he explicitly based his holding on the fact that employees were required to agree to these provisions as a condition of receiving severance pay. 2014 NLRB LEXIS 127 at \*68-69. Here, Wright's comments were nothing more than suggestions offered *after* negotiations were complete and *after* Wallace signed the settlement agreement. His receipt of the settlement amount was not conditioned upon his acceptance of these terms.

**d. Offering Compensation In Lieu Of Reinstatement Does Not Demonstrate Animus.**

General Counsel next attempts to prove animus based on the fact that Shamrock negotiated the reinstatement waiver because it did not want Wallace to return to work. But, as the ALJ observed, "this is always the case when an employer decides that it will settle a case in exchange for an employee waiving reinstatement." [ALJD 15:23-25]. The GC's argument therefore provides further confirmation that its position would preclude *any* reinstatement waiver. As discussed above, this position is inconsistent with General Counsel's 2013 memorandum concerning front pay and reinstatement waivers, multiple provisions of the GC's Case Handling Manual, and the Board's decision in *Al-Hilal Corp.*, *supra*. The GC's argument therefore must fail.

General Counsel's citation to *Carnegie Linen Svcs., Inc.*, 357 N.L.R.B. 2222 (2011), does not support a contrary conclusion. The employee in *Carnegie Linen* was offered \$3,000 to stop discussing union organizing. Discussion of union organizing is a substantive right under Section 7 of the Act.

In contrast, as explained above, reinstatement is a remedy rather than a substantive right. The difference between the two is amply reflected in the authority discussed in Section V.A, *supra*, all of which explicitly recognize the propriety of reinstatement waivers. *Carnegie Linen* is irrelevant.

e. **The Impact Of Wallace’s Settlement Agreement On The Union’s Campaign Is Exaggerated And Irrelevant.**

While not explicitly identified as a basis for finding animus, the GC focused heavily on the impact that Wallace’s settlement purportedly had on the Union’s campaign. Steve Phipps testified that Wallace’s decision to accept a settlement in lieu of returning to work caused the Union’s organizing effort to “basically hit a brick wall.” [Tr. 425:19-426:4 (Phipps)]. The flaws in this argument are numerous.

First, Phipps was not a credible witness. He was involuntarily discharged approximately seven (7) months prior to testifying at the trial in this matter. [Tr. 416:6-10 (Phipps)]. He attempted to challenge his dismissal by filing an unfair labor practice charge, but was unsuccessful. [Id. 435:15-436:7]. Phipps therefore had motivation to skew the facts.

Second, Phipps’ testimony actually demonstrates that the Union’s campaign had largely failed well before Wallace’s settlement agreement. He admitted, for example, that he provided an affidavit to General Counsel in May 2015 stating under oath that the campaign “had pretty much stalled” by that date—nearly ten (10) months prior to Wallace’s settlement. [Tr. 442:23-444:22 (Phipps)]. Phipps attributed that decline to the discharges of three individuals who are not at issue in this proceeding (Victor Martinez, Robert Perez and Dajaune Scott). [Id. 450:23-451:4]. In addition, while Phipps claimed that his co-workers stopped talking with him after Wallace declined reinstatement [Id. 427:13-20], he admitted on cross examination that co-workers began avoiding him as early as May 2015. [Id. 451:5-8]. Attendance at Union meetings was already in decline by that time, and most of the people attending had already signed cards. [Id. 451:12-14].

Phipps furthermore testified that the Union was collecting an average of 30 cards per month during the height of the campaign, between December 2014 and February 2015. [Tr. 447:12-17 (Phipps)]. Thus, by the end of February, the Union had approximately 90 cards. Based on Phipps’

admission that the Union had only 107 cards as of August 31, 2016, [*Id.* 449:22-24], the Union was only able to collect a total of approximately 17 cards during the months of March, April, May, June, July and August, an average of less than 3 cards per month. Its success rate plummeted even further thereafter, as it was only able to collect an additional eight (8) cards after August 2015.

Third, the impact on the Union's organizing campaign is simply irrelevant. As explained above, General Counsel has recognized that "it is ultimately the discriminatee who chooses whether to insist on reinstatement, or waive it in return for compensation." *GC Memorandum 13-02* at 2 (Jan. 9, 2013); see also *ULP Case Handling Manual* § 10128.2(e) ("Of course, for a variety of reasons, individuals may elect to waive reinstatement in response to a settlement offer from a charged party"); *Compliance Case Handling Manual* § 10592.8(a) ("[A]greed-upon front pay can serve as appropriate compensation for a discriminatee's voluntary waiver of the right to reinstatement"). The fact that Wallace's uncoerced decision was not beneficial to the Union does not establish a violation.<sup>13</sup>

f. **The Prior ALJ Decisions Upon Which General Counsel Selectively Relies Do Not Support A Finding Of Animus.**

Lastly, General Counsel relies upon two prior ALJ decisions finding that Shamrock harbored animus toward the Union's organizing campaign. The GC's reliance on these decisions is misplaced for two reasons. First, neither decision has been adopted by the Board. Accordingly, as General Counsel acknowledges, these decisions are not independently sufficient to establish animus. Because the GC's other arguments concerning animus fail for the reasons explained above, its citation to the two prior ALJ opinions cannot rescue its *Wright Line* claim from failure.

Second, General Counsel omits any mention of a third case involving Shamrock. That case involved the discharge of a purported Union supporter that occurred months after Wallace's discharge. In rejecting the GC's claim that the discharge was unlawful, Administrative Law Judge

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<sup>13</sup> Because Shamrock had no knowledge of whether General Counsel would file exceptions to the ALJ's dismissal of its claim regarding Wallace's settlement, the company filed a contingent exception (Exception No. 38) to the ALJ's finding that "Wallace's termination and subsequent failure to return to work impacted negatively on the Union's organizing efforts." [ALJD 14:7-8]. To the extent it becomes necessary to address the issue, Shamrock requests that the above argument be considered in support of that exception.

Keltner Locke concluded without equivocation that Shamrock *did not* bear animus toward the Union's organizing activity:

[I]f the fire of animus found in a past case continued to burn, there would be at least a flicker of it in the present record. However, in the record before me, I find no manifestation of animus, not even a cinder too spent and cold to ignite discrimination.

*Shamrock Foods Co.*, 2016 NLRB LEXIS 430 at \*49-50 (June 10, 2016). The fact that there are conflicting ALJ opinions concerning animus further demonstrates that General Counsel cannot rely upon prior decisions to establish animus.

### **3. General Counsel Cannot Establish An Adverse Employment Action.**

In addition to its inability to establish animus under *Wright Line*, General Counsel also cannot demonstrate that Wallace was subjected to an adverse employment action. The GC's argument concerning this issue focuses exclusively on the Board's decision in *Clark Distribution Systems, Inc.*, 336 N.L.R.B. 747 (2001). According to the GC, the Board recognized in *Clark Distribution Systems* that an employer violates Section 8(a)(3) by entering into an agreement with an employee union supporter under which the employee waives his/her right to future employment. This reading of the Board's *Clark Distribution* decision misconstrues its actual import.

The employer in *Clark Distribution Systems* instituted a layoff in which employees were selected for reduction based upon the number of disciplinary occurrences they received in the prior year. The employer used the prior year's discipline as the selection criterion specifically because it would capture the employees that the employer had identified as union supporters. In addition, the company instructed a supervisor to target union supporters for additional discipline. *Id.* at 749.

After being advised of the criterion, employees were given an opportunity to accept a voluntary separation before the employer executed the involuntary layoff. As an incentive, the employer announced that employees who voluntarily separated would receive severance pay. Two of the union supporters accepted this offer, knowing that they would be involuntarily separated in any event under the employer's announced criterion. Both employees signed severance agreements

under which they received severance pay and waived all claims against the employer.<sup>14</sup> The severance agreements furthermore prohibited the employees from serving as witnesses or otherwise assisting in any claims against the company, including charges filed with the NLRB. *Id.* at 748-49.

The ALJ and the Board both found that the two employees who signed severance agreements were, in effect, unlawfully discharged. *Id.* at 749. They based this conclusion on the fact that, “[i]f [the two individuals] had not accepted the severance package, they would have been laid off under the Respondent’s selection criterion.” *Id.* The Board further held that the severance agreements’ provision prohibiting cooperation with the NLRB was unlawful, and ordered the employer to rescind it. *Id.* at 748-49. Although the Board found that the remainder of the agreement did not constitute an enforceable waiver under *Independent Stave, supra*, it did not otherwise comment. *Id.* at 750-51.

In relying on *Clark Distribution*, General Counsel again overlooks the critical flaw in its claim; specifically, that ***Wallace voluntarily waived his right to reinstatement***. While the employer in *Clark Distribution* argued that the employees who signed severance agreements resigned voluntarily, both the ALJ and the Board concluded otherwise. They based their conclusion on the indisputable fact that the employees would have been laid off if they had not resigned voluntarily.

Here, on the other hand, there is no question that Wallace acted voluntarily. He testified unequivocally that, throughout the entire process of negotiating the settlement agreement, he understood that he could return to work at any time. [Tr. 532:25-533:5 (Wallace)]. Shamrock furthermore assured Wallace in its February 5 letter that his rejection of the settlement offer would not be held against him in any way. [G.C. Ex. 9]. Wallace’s rejection of Shamrock’s first two offers, his demand for \$350,000 plus three (3) years of paid medical insurance, his threatening statement that giving in to his demand was in Shamrock’s “best interests,” and his admitted statement that he wanted “to move on and let Shamrock move on” further buttress this conclusion. [Tr. 521:18-20

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<sup>14</sup> Six more union supporters were separated during the involuntary layoff phase, but did not receive severance pay. *Id.*

(Wallace)]. As the ALJ recognized, *Clark Distribution Systems* therefore does not support the GC's case. [ALJD 15:13-14 n. 27].

In fact, *Clark Distribution Systems* substantially undermines General Counsel's attempt to establish a Section 8(a)(3) violation based on Wallace's settlement agreement. The only portion of the severance agreements at issue in *Clark Distribution* that were found to be unlawful were the provisions prohibiting cooperation with the NLRB. Regarding the severance waivers, the Board held that the waivers were not binding upon the employees but did *not* find that the employer violated the Act by offering them. The absence of such a finding undercuts the GC's *Wright Line* argument.

**4. General Counsel's Assertion That Shamrock Provided No Evidence Of Its Motives Is Incorrect And Reflects The Flaws In Its Argument.**

General Counsel's *Wright Line* theory furthermore fails because Shamrock provided unchallenged evidence that it would have offered the settlement to Wallace regardless of his alleged Union activity. The GC's claim that Shamrock did not provide such evidence is, again, incorrect. Shamrock Vice President of Operations Mark Engdahl testified that Shamrock offered the reinstatement waiver to Wallace based on Wallace's prior statements that he did not intend to remain in the warehouse and that he instead wanted to pursue a degree in Human Resources. [Tr. 72:3-10 (Engdahl)]. Notably, Wallace testified that he did, in fact, graduate with a Human Resources degree after his separation. [Tr. 508:4-8 (Wallace)]. General Counsel's claim therefore would fail under *Wright Line* on this basis as well, even setting aside the fact that its reliance upon *Wright Line* is misplaced.

**D. General Counsel's Arguments Under *Independent Stave* Are Premature And Unsupportable.**

**1. *Independent Stave* Does Not Apply.**

Finally, General Counsel claims that the ALJ should have found that Wallace did not waive his right to relief under *Independent Stave*, 287 N.L.R.B. 740 (1987). The ALJ held that Wallace's

agreement is not subject to *Independent Stave* because it does not resolve an alleged violation of the Act.<sup>15</sup> [ALJD at 14 n.25]. General Counsel’s 2013 memorandum concerning reinstatement waivers supports this conclusion by virtue of its statement, without reference to the *Independent Stave* standards, that “parties and discriminatees are free to negotiate a waiver in return for a monetary amount.” *GC Memorandum 13-02* at 1 (Jan. 9, 2013). The GC’s exceptions on this issue are meritless.

Furthermore, although Wallace’s waiver is indisputably enforceable based on the authority explained in Section V.A, that issue was not before the ALJ. The GC again relies upon *Clark Distribution Systems, Inc.*, 336 N.L.R.B. 747 (2001), claiming that the Board proceeded in that case to a determination on the enforceability of the waivers even after determining that the employer had violated the Act. [G.C. Br. 26]. But, the Board reached that issue in *Clark Distribution* because the employer argued that the waivers precluded relief for the violations found. *Id.* at 750. Here, that issue has not been raised. The GC’s exceptions pertaining to *Independent Stave* fail on that ground as well.

2. **Even If *Independent Stave* Did Apply, Its Factors Should Be Applied In A Modified Fashion In This Context.**

In determining whether a settlement agreement is proper under *Independent Stave*, the Board examines a number of factors:

- (1) Whether the charging party(ies), the respondent(s), and any of the individual discriminate(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement;
- (2) Whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation;
- (3) Whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and

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<sup>15</sup> While Shamrock originally argued that, to the extent any standard is applicable, *Independent Stave* provided the appropriate framework. However, Shamrock will not contest the ALJ’s conclusion on this issue.

- (4) Whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.”

*Independent Stave Company, Inc.*, 287 NLRB at 743. As explained above, the ALJ correctly held that these factors cannot be applied in this case because Wallace’s agreement does not purport to resolve any substantive claims under the Act. Even if *Independent Stave* did apply, however, its standards should be analyzed in a modified fashion in light of the limited scope of Wallace’s reinstatement waiver.

a. **Wallace And Shamrock Agreed To Be Bound By The Settlement.**

Regarding the first prong of the *Independent Stave* analysis, both Shamrock and Wallace agreed to be bound by the settlement. The fact that the respondent and discriminatee have both agreed to be bound, even over the objection of the Charging Party and General Counsel, is sufficient to uphold the agreement. *BP Amoco Chemical*, 351 NLRB 614, 615 (2007). While the GC insists that its objection should be given near-absolute deference, the cases it cites for this proposition all involve non-Board settlements that resolved substantive claims. As the ALJ recognized, Wallace’s agreement deals solely with the issue of remedy (*i.e.*, reinstatement). [ALJD at 14 n.25]. Given this fact, as well as the Case Handling Manual provisions recognizing that the choice of whether to waive reinstatement in exchange for a lump sum belongs solely to the alleged discriminatee, the GC’s objection should be given little weight in this matter. The same is true of the Union’s objection as well.

b. **Wallace’s Agreement Is A Reasonable Resolution Of Various Outstanding Matters.**

The second prong similarly supports Shamrock’s position, as Wallace’s agreement is reasonable in all respects. General Counsel appeared to concede at trial that any back pay to which Wallace might have been entitled would be substantially lower than the final settlement amount. [See, *e.g.*, Tr. 71:14-16 (Engdahl), 90:8-91:8 (Beake)]. In addition, Shamrock explained to Wallace (i) that all references to his discharge in his personnel file had already been removed, (ii) that the settlement would not prevent him from testifying against Shamrock and (iii) that the settlement

would not preclude the posting of a notice stating that his discharge was unlawful (if the Board ultimately orders such a posting). [G.C. Ex. 9]. In short, Wallace's settlement provided him with full relief without interfering with the Board's ability to insure protection of the public interest in the form of obtaining Wallace's testimony or a posting advising other employees that Wallace's discharge was unlawful (if the Board so holds).

General Counsel nonetheless argues that Wallace's agreement is not reasonable because (1) the GC professes confidence that it will prevail on the issue of whether Wallace's discharge was lawful, and (2) because Wallace's reinstatement is "only a fraction of the remedies" that General Counsel is seeking in the underlying litigation. Neither issue is proper for consideration in this context. Wallace's agreement does not preclude further proceedings regarding his discharge, nor does it preclude the GC from continuing to seek remedies for other purported violations alleged in the case. Given the fact that these claims have not been extinguished, the risk of continued litigation is irrelevant.

The GC also returns to the same "public interest" arguments raised in its opposition to the ALJ's reference to FRE 408. These arguments fail in regard to *Independent Stave* for the same reasons. See Section V.B.4, *supra*.

c. **Wallace's Agreement Did Not Involve Fraud, Coercion Or Duress.**

As explained above, Wallace's rejection of Shamrock's first two offers, his demand for \$350,000 plus three (3) years of paid medical insurance, his threatening statement that giving in to his demand was in Shamrock's "best interests," and his admitted understanding that he was welcome to return to work all demonstrate that Wallace was not pressured or "bullied" into signing the agreement. While Wallace claimed at trial that he felt "coerced," he testified that this alleged "pressure" was attributable to the fact that "Natalie [Wright] told me I had to sign [the settlement agreement], otherwise she's going to put me back to work." [Tr. 538:20-22 (Wallace)]. The fact that Wallace was not prepared to return to work confirms that he was not coerced by Shamrock, and waived reinstatement voluntarily.

Wallace's other admissions further undermine his claim of coercion. He admitted telling Natalie Wright that he wanted "to move on and let Shamrock move on." [Tr. 521:18-20 (Wallace)]. This was consistent with Wallace's prior statements that he did not wish to remain in the warehouse as a loader and that he was going to school to be certified in Human Resources.<sup>16</sup> [Tr. 72:7-10 (Engdahl), 234:8-13 (Wright), 494:10-15 (Wallace)]. He furthermore admitted that he understood throughout this entire process that he was always welcome to return to work at Shamrock if he chose to do so. [Tr. 532:25-533:5 (Wallace)].

In arguing that Wallace was "coerced" into voluntarily signing the settlement agreement, General Counsel relies largely upon the same facts that it cited in unsuccessfully attempting to demonstrate animus. See Section V.C.2, *supra*. These facts similarly offer no support for the GC's argument that Wallace's agreement was coercive under *Independent Stave*. In addition, General Counsel claims that a number of the provisions in Wallace's settlement agreement should be deemed unlawful. But, the GC did not allege that these provisions were violative, even in amending its complaint during the hearing. Furthermore, none of the provisions cited by General Counsel were included in Wallace's February 5 letter, and had not been presented to him at the time that he agreed to accept compensation in lieu of reinstatement. Thus, Wallace could not have felt "coerced" by these provisions when he agreed in principle to waive reinstatement.<sup>17</sup>

**d. Shamrock Has Not Breached Any Prior Settlements.**

Finally, there is no dispute that Shamrock fully complied with Wallace's settlement agreement, and there is no allegation that Shamrock failed to comply with any prior settlements. General Counsel predictably insists that the agreement should be invalidated based on two prior

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<sup>16</sup> In fact, Shamrock was reimbursing Wallace for his tuition reimbursement. [Tr. 494:10-15 (Wallace)].

<sup>17</sup> Even if General Counsel were able to pursue these now-untimely allegations at this late stage, the claims would fail. See *e.g. Hughes Christensen Co.*, 317 NLRB at 633-634 (waiver and release of claims which included provisions against reemployment, rehire or recall was lawful); *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB at 615-616 (finding the same); *Service Merchandise Co.*, 299 NLRB 1125, 1126 (1990) (settlement agreement prohibiting employee from seeking reemployment was lawful); *Suburban Yellow Taxi Co.*, 249 NLRB 265 (1980) (severance agreement waiving reemployment rights was lawful). Moreover, even if the GC could show that the provisions were unlawful, the proper remedy would be limited to rescission of these portions of Wallace's agreement.

administrative law judge decisions. As noted above, however, both of these decisions are the subject of pending exceptions, and General Counsel ignores a third decision in which the ALJ concluded that Shamrock exhibited *no* animus toward the Union's organizing attempt. See Section V.C.2.e, *supra*. Thus, like the first three (3) *Independent Stave* factors, this factor similarly supports dismissal of the GC's claim.

**E. The ALJ Correctly Held That The GC Failed to Present Any Evidence or Argument that Shamrock Blamed Unfair Labor Practice Charges For The Stricter Enforcement of Work Rules.**

The General Counsel's exception to the ALJ's dismissal of the allegation that Armando Gutierrez blamed stricter enforcement of work rules on the Union's filing of unfair labor practice charges should be rejected. (GC. Br. 33). While Shamrock denies that it more strictly enforced work rules due to any protected activity, the ALJ correctly found that the General Counsel presented "no evidence or argument" to support that Gutierrez blamed any unfair labor practice charges for the alleged violation. (ALJD 16:16-18 fn. 32).

Indeed, the General Counsel exceptions and supporting brief addressing this exception are devoid of any evidence linking the filing of unfair labor practice charges to the purported stricter enforcement of work rules and remains silent that Gutierrez ever mentioned unfair labor practice charges. (GC. Br. 31-33). Further, this proposition is inconsistent with the GC's argument that the purported stricter enforcement of the work rules was motivated by Mr. Williams' alleged participation in the union campaign (which allegedly included passing out flyers).

Tellingly, only about handful of employees (out of 350+ employees) participated in the unfair practice charges and the GC did not present any evidence to support that information regarding the unfair labor practice charges was commonly known to employees. General Counsel is asking that the Board to simply assume that Gutierrez blamed the unfair labor practices for the alleged stricter enforcement of work rules, or that Williams' reasonably believed that to be so, when General Counsel has produced no witness or evidence to support this contention. Without a shred of evidence, General Counsel's exception must be dismissed.

**VI. CONCLUSION**

As outlined above, the Complaint should be dismissed in its entirety.

Respectfully submitted,

/s/ Todd A. Dawson

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of RESPONDENT SHAMROCK FOODS COMPANY'S ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in Cases 28-CA-177035, 28-CA-178621, 28-CA-181714, and 28-CA-182541 was served by E-filing and E-mail on this 5th day of July, 2017, on the following:

***Via E-Filing:***

The Honorable Gary Shinnery  
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