

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

SHAMROCK FOODS COMPANY

and

**Cases 28-CA-177035
28-CA-178621
28-CA-181714
28-CA-182541**

**BAKERY, CONFECTIONERY, TOBACCO
WORKERS' AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL
UNION NO. 232, AFL-CIO-CLC**

**GENERAL COUNSEL'S REPLY TO RESPONDENT'S
ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,

Sara S. Demirok
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Phone: (602) 416-4761
Fax: (602) 640-2178
E-mail: sara.demirok@nlrb.gov

I. INTRODUCTION

In its Answering Brief to the Exceptions of Counsel for the General Counsel's (CGC),¹ Shamrock Foods Company (Respondent) asks the Board to uphold the conclusions of Administrative Law Judge Eleanor Laws (the ALJ) that Respondent's payment of over \$200,000 to a discriminatee to waive his hard-won and highly-publicized right to reinstatement in the midst of an organizing campaign and its blaming ongoing union activity and filing of charges for its stricter enforcement of its work rules did not amount to unfair labor practices. Respondent's arguments in support of this request are not supported by the facts or the law.

II. RESPONDENT UNLAWFULLY PAID THOMAS WALLACE TO WAIVE HIS RIGHT TO REINSTATEMENT

A. Respondent Relies Casehandling Guidance and Concurring and Dissenting Opinions That Are Inapplicable and Not Controlling

In an effort to attack CGC's theory that its soliciting discriminatee Thomas Wallace (Wallace) to waive reinstatement in the midst of a contentious union organizing campaign was unlawful, Respondent argues that CGC's "position would prohibit any waiver of reinstatement in exchange for compensation." R. Br.12. Respondent further contends that this position is untenable because certain Board "authority is fatal" and "independently dispositive" to the allegation. R. Br. 12, 14. Respondent specifically relies on statements in General Counsel Memorandum 13-02, "Inclusion of Front Pay in Board Settlements" (Jan. 9, 2013),² the Board's Casehandling Manual for Compliance Proceedings, and concurring and dissenting opinions in *Al-Hilal Corp., Inc.*, 325 NLRB 318 (1998), in support of these claims. R. Br. 9-12. These

¹ Respondent's Answering Brief to General Counsel's Exceptions to the Decision of the Administrative Law Judge (July 5, 2017) will be referenced herein as "R. Br.," whereas the General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision (June 6, 2017) will be referenced as "GC Br." "JD" refers to ALJ Laws' decision, *Shamrock Foods Co.*, JD(SF)-18-17 (Apr. 25, 2017).

² General Counsel Memorandum 13-02 will be referenced hereinafter as "GC 13-02."

arguments fail because: (1) CGC's position is not nearly as sweeping as Respondent would have the Board believe, and (2) the "authority" cited by Respondent is hardly such.³

First, CGC has argued that Respondent's payment to Wallace to waive reinstatement was unlawful because it was intended to halt what, before Wallace's discharge, was a rapidly accelerating organizing campaign. Respondent's histrionic assertion that the Board's acceptance of the General Counsel's argument would prohibit any waiver of reinstatement in exchange for compensation is therefore a gross exaggeration. The vast majority of waivers of reinstatement in exchange for compensation do not occur in, and are not motivated by, such circumstances.

Moreover, the purported authority on which it relies in disputing its straw-man version of CGC's position is inapplicable and not controlling. First, Respondent cites GC 13-02 and Section 10592.8 of the Board's Casehandling Manual for Compliance Proceedings for the proposition that "parties and discriminatees are free to negotiate a wavier in return for a monetary amount." R. Br. at 9-10 (internal quotations omitted). Needless to say, these casehandling guidelines, developed by the General Counsel, are not binding on the Board or the General Counsel. See, e.g., *National Dance Institute-New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 12 fn. 26 (2016); *Children's National Medical Center*, 322 NLRB 205, 205 fn. 1 (1996). However, Respondent's conduct here was specifically targeted at discouraging protected activity. None of the purported authority cited by Respondent authorizes such unlawful conduct.

Respondent also contends that a Board majority, in *Al-Hilal Corp., Inc.*, 325 NLRB 318 (1998), ruled on the issue of whether "compensation for waiver of future employment" is

³ Respondent contends that statements made by the General Counsel during oral argument for the appeal of the District Court's imposition of a Section 10(j) injunction "confirm that [CGC's] current position is at odds with [Board] policy. R. Br. 13. However, the General Counsel simply agreed that Respondent had made an offer of reinstatement. But, as the Ninth Circuit held, the Board "retains the authority to order Wallace's reinstatement," in part, because "the Board has no statutory obligation to defer to private settlements[.]" *Overstreet v. Shamrock Foods Co.*, No. 16-15172, 2017 WL 655795, at *1 (internal quotations omitted).

appropriate. R. Br. 11. Although, in that case, the Board found that a settlement agreement between the charging party, several discriminatees, and the respondent employer could not be approved in view of the General Counsel's vigorous objections and the failure of the agreement to address many unfair labor practices, Respondent claims that a careful reading of the concurring and dissenting opinions shows that "the Board agreed that the settlement was proper and *binding*⁴ in regard to the union and three alleged discriminatees[.]" R. Br. 12 (emphasis added). However, the facts supporting the cited portions of the dissenting and concurring opinions *Al-Hilal Corp., Inc.* fundamentally distinguish that case from the instant matter. Here, unlike in *Al-Hilal Corp., Inc.*, both the General Counsel and the Charging Party specifically and vigorously object to the Respondent's agreement with Wallace. Moreover, by seeking to extinguish Wallace's right to reinstatement, a remedy intended to restore and protect the rights of Wallace *and other employees* to organize, Respondent is attempting to undermine its employees' right to organize under Section 7 of the Act. In contrast, in *Al-Hilal Corp., Inc.*, the charging party union agreed to the settlement at issue and chose to disclaim interest in representing the employer's employees, so that the agreement providing for the discriminatees' waiver of reinstatement was obviously not aimed at extinguishing an ongoing campaign. Thus, again, the purported authority cited by Respondent has no bearing.

B. The ALJ's Reliance on FRE 408 Is Misplaced

Respondent disputes CGC's argument that the ALJ improperly relied on, and incorrectly applied, the principles underling Rule 408 of the Federal Rules of Evidence (FRE 408) in determining whether it committed an unfair labor practice within the meaning of the Act because: (1) the ALJ did not apply FRE 408; (2) what claims were before the ALJ is "irrelevant"

⁴ Contrary to Respondent's assertion, the Board did not find that the settlement agreement here was binding on any party.

to the applicability of FRE 408; (3) its conduct is not at odds with the public interest; and (4) Wallace's conduct disproves the long-recognized inherent imbalance of power between employers and employees. R. Br. 14-19. The Board should reject each of these arguments.

First, Respondent contends that the ALJ did not apply FRE 408 or its underlying principles, arguing that, if the ALJ had applied FRE 408, "she would have excluded all testimony and other evidence pertaining to Wallace's settlement." R. Br. 16. However, Respondent's counsel never objected to CGC eliciting such evidence. Moreover, as discussed at length in CGC's Exceptions Brief and as seemingly acknowledged by Respondent, the ALJ, rather than directly apply the rule, stated that she was applying the principles and policies underpinning the rule in assessing whether Respondent committed an unfair labor practice, and, specifically, in finding that evidence concerning Respondent's motivation in soliciting Wallace to waive reinstatement lacked probative value. GC Br. 13-15. However, Respondent's motivation in this case is directly at issue, unlike in cases where the Board considers whether non-Board settlements are objectionable under *Independent Stave*, 287 NLRB 740 (1987), and, for that reason, and the reasons discussed at length in CGC's Brief in Support of Exceptions, the ALJ's reliance on FRE 408 should be rejected.

Second, Respondent argues that, to the extent the ALJ did apply FRE 408, the Board should reject CGC's argument that the ALJ erred in doing so because the issues purportedly resolved by the agreement (Wallace's discharge and an EEOC claim) were not the issue before the ALJ (the lawfulness of the agreement). Respondent argues that it is irrelevant that Wallace's discharge and the EEOC claim were not before the ALJ because FRE 408 is not so limited as to only apply when the same claim is at issue in the case in which the evidence is offered. R. Br. 16. However, FRE 408 on its face bars evidence to "prove or disprove the validity . . . of a

disputed claim.” Thus, “[t]o the extent that the evidence is offered for another purpose, . . . the evidence is admissible.” *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 277 (8th Cir. 1983).

Third, Respondent argues that the ALJ did not err in relying on FRE 408 because Respondent’s conduct does not conflict with the public interest. R. Br. 17-19. Specifically, Respondent argues that: (1) CGC can seek remedies other than reinstatement; (2) Wallace’s reinstatement “is not an issue of ‘public interest’”; and (3) “reinstatement is not a substantive right under the Act.” R. Br. 17. However, on all counts, Respondent ignores the fact that, in this case, Wallace’s reinstatement was inextricably linked to protecting the right of employees to continue their organizing efforts. *See Overstreet v. Shamrock Foods Co.*, CV-15-01785-PHX-DJH, 2016 WL 8505125 (D. Ariz. Feb. 1, 2017), *affd.* No. 16-15172, 2017 WL 655795 (9th Cir. Feb. 17, 2017); GC Br. 28-29. In other words, there is a strong public interest in Wallace’s reinstatement, even if there are other remedies available.

Finally, Respondent argues that its agreement could not undermine purposes of the Act, as CGC asserts, because Respondent’s transaction with Wallace shows that there was not an imbalance of bargaining power. R. Br. 19. However, Respondent’s ability to buy Wallace off despite his initial clearly-expressed desire to return to work precisely demonstrates the imbalance of power the Act is aimed at remedying. Respondent was not only able to thwart Wallace’s reinstatement and participation in protected activities; but it was also, and most importantly, able to undermine rights of Respondent’s other employees, who had been pursuing an organizing campaign. Respondent’s payment one employee, Wallace, to undermine the rights of all of its employees has upended the balance of bargaining power between Respondent and its employees, whose rights to free association have been undermined—a balance the Act is specifically intended to maintain.

C. Under the Appropriate Standard, *Wright Line*, Respondent's Conduct Was Unlawful

Respondent contends that even if *Wright Line*⁵ were applied, CGC failed to meet her burden. R. Br. 20. By not addressing the showing that Wallace engaged in union activity and that Respondent was aware of it, Respondent appears to concede both. Respondent only argues that there is no evidence of animus or an adverse action. R. Br. 21-28. First, Respondent argues that, because the General Counsel will, in appropriate circumstances, permit the payment of front pay to discriminatees desiring to waive reinstatement, its payment to Wallace in this case could not evidence animus. R. Br. 21 (citing GC 13-02). However, Respondent did not give Wallace “front pay” in the form of a Board settlement. In fact, the agreement between Wallace and Respondent did not resolve any Board matters, as Wallace never filed a charge. Moreover, as explained in CGC’s Exceptions Brief Respondent’s conduct was inherently destructive based its foreseeable effect on Respondent’s other employees.

Second, Respondent argues that the frenzied timing of the offers it made to Wallace do not show animus because it was under the District Court’s deadline to offer Wallace reinstatement. However, Respondent initially offered Wallace reinstatement, meeting the court’s deadline. It was only after Wallace indicated he wanted to return that Respondent rapidly increased its offers of payment to Wallace, pressuring him to make a quick decision, clearly in an attempt to prevent him—now the symbol of its defeat in highly-publicized litigation before the Board and a District Court—from setting foot in its warehouse. If Respondent’s desire to resolve issue were about something other than the effect of Wallace’s return on other employees and their organizing campaign, such as less immediate concerns about performance or misconduct,

⁵ 251 NLRB 1083, 1089 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

then preventing Wallace from returning for even one day could not have been so critically important as justify Respondent's rapid and increasing offers. Moreover, if the desire to resolve the issue were for some lawful reason, one would expect testimony to that effect from Respondent's witnesses, but there was none.

Respondent further contends that the amount of the offers it made does not show animus because CGC "introduced no evidence" of Wallace's earnings prior to his discharge. R. Br. 22. However, the record is replete with undisputed testimony that Wallace, as a loader, earned about \$50,000 annually. JD 12:25-26; Tr. 71:3-16; 91:5-14; 219:19-22. Respondent adds that the amount should be considered in light of the EEOC claim. However, there is no evidence that Respondent considered that claim to present any risk or to have any value. In fact, as discussed in CGC's Exception Brief, the EEOC claim was only raised by Wallace after Respondent already had \$178,000 on the table. If the EEOC claim had been factored into Respondent's monetary offers, again, one would expect testimony to that effect from Respondent's witnesses, but there was none.

Respondent also argues that statements of Natalie Wright (Wright) to Wallace do not show animus because the statements were not coercive. R. Br. 23. After signing the agreement, Wright told Wallace to leave the warehouse immediately and not to discuss the terms with anyone. Respondent argues that these directives do not show animus. However, her comments show a desire to prevent Wallace from communicating with Respondent's remaining employees or revealing to them that he had received a remedy for the unfair labor practice against him. Thus, those statements directly demonstrate animus toward the precise kind of protected activity Respondent was trying to prevent by soliciting Wallace to sign the agreement not to return.

Respondent argues extensively that the impact of Respondent's conduct on the organizing campaign does not show animus. R. Br. 24-25. In doing so, Respondent attempts to attack the credibility of lead employee organizer Steve Phipps. The ALJ made factual findings on this issue based on her credibility determinations. See JD 14:6-8. Respondent provides no basis to disturb her findings. Furthermore, CGC never argued that the actual impact on the organizing campaign was a basis for finding animus.

Respondent argues that CGC has not shown an adverse action under *Wright Line*, in large part because, according to Respondent, Wallace voluntarily waived his right to reinstatement. R. Br. 25-27. Respondent fails to cite any authority for the proposition that "voluntary" employee conduct erases the unlawful action of an employer. The Board has found otherwise in comparable contexts. For example, when an employer offers a Hobson's Choice to an employee (*i.e.* either stop engaging in protected activity or be discharged), the Board finds an adverse action. See, *e.g.*, *Titus Electric Contracting, Inc.*, 355 NLRB 1357 (2010). The important factor in determining whether an adverse action has occurred is whether the employer took action affecting the terms and conditions of employment of an employee. Here, Respondent's conduct was aimed at affecting whether Wallace was ultimately reinstated, thus showing an adverse action, and, in particular, discrimination in regard to the tenure of his employment.

Finally, with regard to whether Respondent met its burden under *Wright Line*, Respondent argues that, contrary to CGC's assertion, it provided evidence of its motivation. Specifically, Respondent points to seven lines of testimony elicited by CGC from Vice President of Operations Mark Engdahl (Engdahl). R. Br. 28. In doing so, Respondent asserts that Engdahl testified that Respondent "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 wanted

to pursue a degree in Human Resources.” R. Br. 28. However, Engdahl was never asked why Respondent offered Wallace the lump sum. Tr. 72:3-10. Rather, Engdahl responded to several questions about whether he wanted to see Wallace return to work with unresponsive answers, including a statement that Wallace told him that he was working towards a degree in human resources. *Id.* Engdahl never testified that this was the reason Respondent decided to offer Wallace the payment. *Id.* Moreover, even if Engdahl had given testimony to that effect, it would make no sense. If Respondent believed that Wallace did not want to return to work at the warehouse, why offer Wallace anything except reinstatement? Moreover, if Respondent believed that Wallace did not want to return, would Wallace’s initial acceptance of its offer of reinstatement not have disabused it of that belief? Thus, the Board should find that this unsupported and implausible *post hoc* explanation of the reason for paying Wallace not to return does not meet Respondent’s burden under *Wright Line*.

D. Wallace Did Not Waive the Right to Relief

Respondent argues that *Independent Stave* does not apply because the question of the lawfulness of Wallace’s discharge was not before the ALJ, but that, in any event, his waiver of reinstatement is “indisputably enforceable.” R. Br. 29. However, Wallace’s waiver is *unenforceable*. The Board has found similar waivers unenforceable in the compliance context. In *George Webel*, 229 NLRB 178 (1977), the Board affirmed findings that an employer’s payment to a union leader to waive reinstatement was unenforceable and did not extinguish the discriminatee’s right to backpay or reinstatement, in part, because the excessive payment “was intended to coerce [the employee] to sign the waiver of reinstatement, for the purpose of keeping this union leader out of the [workplace].” *Id.* at 180. Thus, the Board should apply *Independent Stave* in finding that Wallace did not waive the right of (of all employees) to his reinstatement.

III. ARMANDO GUTIERREZ' UNLAWFULLY BLAMED UNION ACTIVITIES AND FILING OF CHARGES FOR STRICTER RULE ENFORCEMENT

CGC excepted to the ALJ's dismissal of the allegation that Respondent, by Armando Gutierrez (Gutierrez) violated Section 8(a)(1) of the Act by blaming ongoing union activity and filing of charges for Respondent's stricter enforcement of its work rules. Respondent argues that there is not a "shred of evidence" to support the violation, asserting that Gutierrez never mentioned the filing of unfair labor practice charges or that the filing of charges was "commonly known to employees." R. Br. 33. However, as discussed in CGC's Exception Brief, another supervisor, Heather Vines-Bright, mentioned the charges and "labor relations stuff" to D'Juan Williams (Williams) just hours before Gutierrez implied the same thing. Thus, a reasonable employee would construe Gutierrez' statements as blaming the "labor relations stuff" on why he "had to be fair to everyone" by ceasing to afford Williams the same flexibility offered in the past.

IV. CONCLUSION

For the reasons explained above and throughout CGC's Brief in Support of Exceptions, the ALJ's findings and conclusions addressed therein should be reversed and the Board should order the appropriate remedies to effectively counter-balance Respondent's unlawful conduct.

Dated at Phoenix, Arizona, this 19th day of July, 2017.

Respectfully submitted,

/s/ Sara S. Demirok
Sara S. Demirok
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Phone: (602) 416-4761
Fax: (602) 640-2178
E-mail: sara.demirok@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S REPLY TO RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** 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 19th day of July, 2017, on the following:

Via E-Filing:

The Honorable Gary W. Shinnars
Executive Secretary
National Labor Relations Board
Office of the Executive Secretary
1015 Half Street SE – Room 5011
Washington, DC 20570-0001

One Copy via Email:

Nancy Inesta, Attorney at Law
Baker & Hostetler LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025
ninesta@bakerlaw.com

David A. Rosenfeld, Attorney at Law
Weinberg Roger and Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
drosenfeld@unioncounsel.net

Jay Krupin, Attorney at Law
Baker & Hostetler LLP
1050 Connecticut Avenue NW, Suite 1100
Washington, DC 20036
jkrupin@bakerlaw.com

Todd A. Dawson, Attorney at Law
Baker & Hostetler LLP
3200 PNC Center
1900 East 9th Street
Cleveland, Ohio 44114-3482
tdawson@bakerlaw.com

/s/ Dawn M. Moore

Dawn M. Moore
Administrative Assistant
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nrlrb.gov