

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

VT HACKNEY, INC.

and

UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO,
CLC

Case Nos. 06-CA-199799
06-CA-200380 and
06-RC-198567

VT HACKNEY INC.'S POST-HEARING BRIEF

James H. Fowles, III, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
First Base Building
2142 Boyce Street, Suite 401
Columbia, South Carolina 29201
Tel: 803.252.1300
Fax: 803.254.6517
Email: james.fowles@ogletreedeakins.com

ATTORNEYS FOR VT HACKNEY, INC.

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POST-HEARING BRIEF FOR VT HACKNEY, INC.

COMES NOW counsel for VT Hackney, Inc. (“VT Hackney,” the “Employer” or the “Company”), and consistent with Section 102.42 of the National Labor Relations Board’s (“NLRB” or the “Board”) Rules and Regulations, submits this consolidated Post-Hearing Brief.

I. STATEMENT OF THE CASE

On or about May 11, 2017, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the “Union”), filed a representation petition, Case No. 06-RC-198567. The election occurred on June 1, 2017, at which time the employees voted against the Union.¹ After the election, the Union filed eight objections and two unfair labor practice charges, Charge Nos. 06-CA-199799 and 06-CA-200380 (collectively the “Charges”). On October 30, 2017, the Regional Director for Region Six (the “Region”) issued a Consolidated Complaint for the alleged unfair labor practices (“Consolidated Complaint”), and an Order Directing Hearing on Objections, Consolidating Cases and Notice of Hearing (“Objections to the Election”).

The Consolidated Complaint and the Objections to the Election involve the same material facts and positions by the Company, Union and the Region. At the hearing, David Shepley (“Shepley”), Attorney for the General Counsel, presented evidence alleging: (1) On May 22, 2017, Charlie Stephenson unlawfully solicited grievances at a meeting with employees; (2) on or about May 20, 2017, Judy Ross interrogated former employee David Wise; and (3) former supervisor, David Bohannon (“Bohannon”), removed Union literature and a Union button from toolboxes while allowing employees to keep other paraphernalia in their toolboxes. The Objections to the

¹113 employees voted against the Union, 82 voted for the Union, and there were 14 challenged ballots.

Election reflect the same allegations made in the Consolidated Complaint, and no additional evidence was presented on the Objections to the Election.² (*See* Transcript at 187-89.)

At the Hearing on February 21, 2018, Shepley presented testimony from the following current and former employees in support of the allegations against the Company:

- David Wise (“Wise”) – Former Assembler in the Final/Finish Department;
- Brian Schutt (“Schutt”) – Electrician in the Final/Finish Department;
- Corey Trojan (“Trojan”) – Foamer in the Door Department, but was an Assembler in the Final/Finish Department; and
- Jason Sees (“Sees”) – Electrical Technician in the Final/Finish Department.

The Company presented testimony from the following individuals:

- Charlie Stephenson (“Stephenson”) – Labor Consultant;
- Ryan Baker (“Baker”) – Production Supervisor;
- Judy Ross (“Ross”) – Human Resource Manager; and
- Jim Moser (“Moser”) – Production Manager.

VT Hackney presented the following exhibits:

- Employer’s Exhibit 1: PowerPoint presented at the May 22, 2017, meeting;
- Employer’s Exhibit 2: Facility Map;
- Employer’s Exhibit 3: VT Hackney’s Solicitation and Distribution Policy; and
- Employer’s Exhibit 4: Basic Guide to the National Labor Relations Act (“Basic Guide”) with Stephenson’s Highlights.

² Objection Number Four is the mirror image, or close to the mirror image, of Consolidated Complaint Paragraph Seven. (Tr. at 187-88.) Objection Number Seven is analogous to Paragraph Nine of the Consolidated Complaint. (Tr. at 188.) Additionally, in the Objections to the Election, the Regional Director added that conduct alleged in the Consolidated Complaint Paragraph Eight could be considered as grounds for setting aside an election if the conduct occurred within the critical period.

The Union presented no witnesses or exhibits at the Hearing.

II. ISSUES

- A. Whether, on May 22, 2017, the Company, through Charlie Stephenson, unlawfully solicited grievances from employees and implied promised employees improved terms and conditions of employment.
- B. Whether, on May 20, 2017, the Company, through Judy Ross, interrogated an employee about his Union sympathies.
- C. Whether, on or about May 16, 2017, Dave Bohannon, on behalf of the Company, disparately enforced work policies by removing Union flyers and one Union pin from Company-owned toolboxes, while allegedly allowing anti-union literature/items to remain.

III. SUMMARY OF THE ARGUMENT

VT Hackney did not commit any unlawful or objectionable act(s) during the campaign leading up to the election.

Specifically, the evidence clearly demonstrates that the Company hired Stephenson to educate employees about their rights under the National Labor Relations Act (“NLRA” or the “Act”). As part of his efforts to educate employees, Stephenson held small group meetings, including a meeting on May 22, 2017. The evidence and testimony confirm that Stephenson read directly from lawful PowerPoint slides, and then read sections of the Basic Guide verbatim. Additionally, it is undisputed that Stephenson asked if anyone had “questions” at the end of the presentation. At that time, numerous employees asked questions, including Jeff Bixler, who apparently reported what amounted to allegations of sexual harassment. Only in response to this specific harassment allegation did Stephenson advise the employee that he needed to report the concern to VT Hackney’s management and/or Human Resources. Finally, the evidence pertaining to this meeting clearly demonstrates that Stephenson never solicited grievances from employees.³

³ In addition, the General Counsel and the Union failed to present any evidence that supports their claims that Stephenson impliedly promised improved terms and conditions to employees during the May 22, 2017 meeting.

Second, there has been no specific testimony or evidence presented to support the vague allegation that Ross interrogated Wise regarding his Union sympathies at any point during the campaign or election. Wise himself testified that he does not recall exactly what Ross said. The record in this matter confirms that Ross had numerous conversations with employees throughout the campaign in which she would ask how the employee was doing, given the ‘craziness’ of the campaign and, at the end of a conversation, state “we are counting on you to vote.” At no point did Ross interrogate Wise, seek information that could be used as a form of retaliation or discrimination against Wise, or imply that Ross or the Company wanted Wise to vote “no” against the Union.

The evidence proves that the 5S program was established in the Finals/Finish Department prior to the campaign. Additionally, the Company has a lawful solicitation and distribution policy, which is given to employees during new hire orientation. The testimony presented confirms that employees had numerous Union flyers lying on the tops of toolboxes, on tables, under toolboxes and in a toolbox drawer. Because loose materials present a variety of safety and productivity hazards, the Company removed the papers and pin in accordance with the solicitation and distribution policy and the 5S program. Accordingly, the Company had legitimate reasons to remove loose papers from the tops of the toolboxes and tables, while allowing employees to continue to have secured pictures, keys, drinks, and wallets in their toolboxes.

It is the Company’s position that the Consolidated Complaint and Objections to the Election must be dismissed.

IV. SUMMARY OF FACTS

A. General Background

VT Hackney, Kidron Division, located in Montgomery, Pennsylvania, manufactures insulated tractor-trailer vans and bodies.⁴ (Tr. at 103.) VT Hackney is the Company name, whereas Kidron is a brand name for the Company. (Tr. at 103.)

B. Stephenson's Meeting With Employees

Stephenson was hired by the Company as a labor consultant.⁵ (Tr. at 150.) As a labor consultant, Stephenson met with employees one-on-one on the production floor and in small groups for presentations. (Tr. at 133.) Stephenson's goal throughout the campaign was to inform and educated the employees about unions. (Tr. at 133, 149-50.) During group meetings, Stephenson used PowerPoint presentations and quoted material from the Basic Guide. (Tr. at 133.)

On or about May 22, 2017, Stephenson met with Moser and a group of employees in the Company's conference room. (Tr. at 139). Stephenson presented for approximately one to one and a half hours. (Tr. at 27, 62.) Stephenson's goal for the presentation focused on explaining how the NLRA worked and what rights employees have with and without a union. (Tr. at 79.) During the presentation, Stephenson displayed a PowerPoint presentation on a screen, verbally discussed

⁴ VT Hackney is a subsidiary of Vision Technologies Land Systems, a subsidiary of Singapore Technologies Engineering Ltd. VT Hackney, whose headquarters are in Washington, North Carolina, manufactures and sells its products under the Kidron and Hackney brands. Kidron is the market leader in multi-temp, multi-stop refrigerated truck bodies and trailers.

⁵ Stephenson started his career as a warehouse truck driver. (Tr. at 132.) After his position as a warehouse truck driver, Stephenson became an organizer/business agent for a local Teamsters Union. (*Id.*) Stephenson then became an International Organizer for the Teamsters. (*Id.*) Stephenson subsequently opened his own business, LRS Labor Relation Solutions, and became a labor consultant. (*Id.*)

each slide, and incorporated excerpts of the Basic Guide.⁶ (Tr. at 139-40; Empl. Ex. 1 and 4.) Relevant to this matter, Stephenson displayed the “Heart of the Act” slide during his presentation. (Tr. at 140-41; Empl. Ex., p. 7.) The “Heart of the Act” slide indicated that employees had a right to organize, a right to participate or not participate, a right to campaign against having a union, a right to participate in concerted activity and the right to go to their employer. (Tr. at 141.) Stephenson testified that he read the “Heart of the Act” slide, and then read from the Basic Guide. (*Id.*) The employee witnesses also testified that Stephenson went over the slide and read from something not displayed on the screen. (Tr. at 47-48, 79.) Specifically, Stephenson read the “Rights of Employees” section in the Basic Guide, which states:

The rights of employees are set forth principally in Section 7 as follows:

Section 7. Employees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment authorized in Section 8(a)(3).

(Tr. at 79, 142-43.) Stephenson then read an excerpt from page seven of the Basic Guide:

- Q: Okay. Please walk through what you did?
- A: Then, on page seven, three-quarters of the way down, the highlighted, it says, “Dues of bargaining representative and employer. Once an employer representative has been designated by a majority of the employees in an appropriate unit, the Act makes the representative the exclusive bargaining agent for all employees in the unit. As exclusive bargaining agent it has a duty to represent equally and fairly all employees in the unit without regard to the union membership or activities. Once a collective bargaining

⁶ Trojan stated that Stephenson discussed “the process, he was explaining the process to the employees, any questions they may have had for the process, to ask him, the dos and don’ts of what the Company can and can’t do, your right as an employee, things of that nature.” (Tr. at 62-63.)

representative has been designated or selected by its employees, it is illegal for an employer to bargain with individual employees, with a group of employees, or with another employee representative.

(Tr. at 143-44; Empl. Ex. 4, p. 7.) Stephenson read this to “let workers know that they don’t have to join a union that they can go to their employers with their issues.” (Tr. at 144.) Subsequently, Stephenson went back to the “Rights of Employees” section of the Basic Guide, and told the employees that they did not have to join a union to talk to VT Hackney, and that they could exercise their rights under the Act, and participate in concerted activities. (Tr. at 48, 144.) After he finished explaining the employee’s rights under Section 7 of the NLRA, Stephenson continued through the presentation.

At the end of the presentation, Stephenson showed a slide that read “Questions.”⁷ (Tr. at 84, 147.) After Stephenson displayed this slide and asked “[a]re there any questions,” numerous employees raised their hands.⁸ (*Id.*) Employees generally asked about collective bargaining,

⁷ Schutt admits that Stephenson presented the information above, and then, after Stephenson completed the PowerPoint, asked if there were any questions – to which employees began speaking:

- Q: In other words, Mr. Stephenson presented all of you all with a bunch of information, and it wasn’t until he completed all of that information that the employees started talking and asking questions, correct?
- A: That’s correct.

(Tr. at 44-45.)

⁸ Schutt admits that employees spontaneously asked questions, and that Stephenson “basically asked if there was any concerns, which would relate to a question.” (Tr. at 57.) In addition, Shepley specifically asked Schutt what Stephenson said in relation to concerns and questions:

- Q: Well, did he ask, separate from asking are there any concerns, are there any questions, or was it all just one statement?
- A: Pretty much one full statement.
- Q: And that statement, to the best of your recollection, was what; what did he say?
- A: “What are your concerns, and then we can ask questions.”

(*Id.*)

whether Stephenson would debate a Union representative, and generic questions based on the presentation. (Tr. at 49-50, 56-57, 85, 147, 176.) However, Jeff Bixler, a former welder, stood up with a list in his hands (which the Company purports was a list of topics to discuss), and asked Stephenson why his supervisor, Bohannon, was allowed to call Bixler a “vagina” and get away with it. (Tr. at 85-86, 147.) Stephenson responded by stating:

That’s not really about the presentation, but that seems to [b]e something that I needed to discuss with HR, and, you know, it was something Title VII, or discrimination, anger, something that’s going to be physically, or abruptly, it was pretty upsetting, apparently to this guy, so we felt we needed to report it.

(Tr. at 148.)

At no point did Stephenson ask the employees whether they wanted the Union.⁹ Rather, Stephenson explained to the employees that they did not need a union because employees could exercise their Section 7 rights now and bring concerns to VT Hackney without the help of a union. Additionally, there was no testimony that would indicate that Stephenson promised any of the employees in the meeting benefits.

C. Ross’ Alleged Interrogation

1. Ross’ Experience In Human Resources And Management

Ross has been employed as the Human Resource Manager at this VT Hackney facility since December 2014. (Tr. at 152.) Prior to her position at VT Hackney, Ross worked in the

In addition, Trojan admits that there were not questions during the presentation, and that there was a time period at the end for questions and answers. (Tr. at 78.)

⁹ Trojan admitted that Stephenson never asked why employees wanted the Union:

- Q: Did Mr. Stephenson say anything; did he ask you all any questions in that meeting, “Why do you want a union?”
- A: No, he didn’t ask why we want a union. He said that we don’t need a union.

(Tr. at 87-88.)

human resources field for at least six years – part of which was in a unionized facility. (Tr. at 152-54.) Further, Ross worked in management for at least ten years – excluding her twelve years in human resources.¹⁰ (Tr. at 153.) Coupled with her extensive experience, Ross attends training to update her knowledge of employment law, which includes topics such as the NLRA. (Tr. at 154.) Relevant to this matter, Ross testified that she has been trained on TIPS, and what you can and cannot say during a union campaign.¹¹ (Tr. at 154-55.)

2. Ross' Interaction With Employees Before And During The Campaign

Prior to the campaign, Ross testified that she was on the production floor for approximately two hours each day, checking in on employees.¹² (Tr. at 155.) After the petition was filed, Ross was on the production floor approximately four hours a day. (Tr. at 156.) During the critical period,¹³ Ross had general conversations with the production floor employees. (*Id.*) Specifically, Ross would ask employees how their day was going, given the ‘craziness’ of the campaign. (Tr. at 156-57.) Ross would also answer employee questions or let employees know where to find further information. (Tr. at 157.) Finally, Ross would ask employees to vote, by stating “[p]lease vote, it is important that you voice your opinion, and [that voting is] a good way to do it.” (*Id.*)

¹⁰ Therefore, Ross has a total of at least twenty-two (22) years of human resources and management experience.

¹¹ Ross testified that TIPS stands for “no threatening, no interrogation, no promises and no spying.” (Tr. at 154.) Ross also testified that “you can give [employees] facts, information facts, and on the law itself. Also, you can give your own opinions, and experience you have had in other union environments.” (Tr. at 155.)

¹² Employees work ten hour shifts Monday through Thursday.

¹³ Critical period was a term used in the Hearing. (Tr. at 156.) Critical period, as defined in the Hearing, is the period between when the petition was filed on May 11, 2017 and when the election occurred on June 1, 2017.

3. Ross' One Interaction With Wise During The Campaign

During the campaign, Ross had one conversation with Wise, a relatively new employee, in the Finals/Finish Department.¹⁴ (Tr. at 14, 158.) Consistent with her standard practice, Ross began the conversation by asking Wise how he was handling the craziness of the campaign. (Tr. at 160.) During that conversation, Ross informed Wise that Bohannon, his supervisor, thought Wise was doing a “good job” in the Finals/Finish Department. (Tr. at 14, 171.) At the end of the conversation, Ross stated: “Please vote. We are counting on you to vote. Your vote counts.” (Tr. at 159.) Ross did not ask him how he was going to vote, or encouraged him to vote in a particular way; Ross simply asked him to vote. (*Id.*)

D. Union Flyers and Pins In Company Owned Toolboxes

1. VT Hackney's Solicitation/Distribution Policy

Every new VT Hackney employee participates in new employee orientation, where they receive an employee handbook. (Tr. at 73, 118.) If, for any reason, the employee needs a replacement, Human Resources has extra copies available. The employee handbook contains a Solicitation/Distribution policy. (Tr. at 119; Empl. Ex. 3.) That policy states:

Solicitation and distribution of literature by nonemployees on company property is prohibited.

Solicitation by employees on company property is prohibited when the person soliciting or the person being solicited is on working time. Working time is the time employees are expected to be working and does not include rest, meal or authorized breaks.

Distribution of non-work literature by employees on the company property in nonworking areas during working time, as defined above, is prohibited.

¹⁴ General Counsel and the Union both assert that Ross had the conversation with Wise on Saturday, May 20, 2017. However, Ross' testimony confirms she does not work on Saturdays and did not work on Saturday, May 20, 2017. (Tr. at 161-62.)

Distribution of non-work related literature by employees on company property in working areas is prohibited.

This policy was reviewed with management and the supervisory team shortly after the Union filed the representation petition. (Tr. at 119-20.) Additionally, the policy was discussed with employees during morning meetings.¹⁵ (Tr. at 124.)

2. VT Hackney's 5S Initiative

The Company began implementing a 5S workplace initiative ("5S") in late 2016, early 2017. (Tr. at 113.) 5S helps to create and maintain efficiency and effectiveness in the workplace. (Tr. at 117.) Specifically, the five "S"es are: (1) sorting, (2) simplifying, (3) systematic cleaning, (4) standardizing, and (5) sustaining. (Tr. at 117-18.) This program helps create cleaner work areas, more organization, safer working environments, less wasted time, efficient work processes and practices, and more available space. (*Id.*)

3. Air Flow In The Finals/Finish Department

The Finals/Finish Department consists of several positions, including welders, electricians, assemblers, and brake technicians. (Tr. at 110.) The Company has placed fans in the Finals/Finish Department to circulate airflow because of the smoke caused by machines in this department. (Tr. at 113.) In addition, the bay doors are opened several times a day to bring trucks and parts in and out of the Final/Finish Department's bays. (Tr. at 128.) Further, when the temperature reaches approximately 76 to 80 degrees Fahrenheit, the Company allows the bay doors to remain open to help with air circulation. (Tr. at 126.)

¹⁵ Morning meetings are short, five minute, meetings in which a supervisor explains what tasks must be completed for the day, safety concerns, or any general topic. Baker had at least one morning meeting discussion with the Finals/Finish Department about the solicitation/distribution policy during the campaign. (Tr. at 124.)

4. Bohannon's Decision To Remove Union Flyers And A Union Pin From Company Owned Toolboxes

On or about May 15, 2017,¹⁶ Bohannon noticed flyers lying throughout the Finals/Finish Department. Specifically, the Union's witnesses admit that there were flyers, which had been placed by hourly employees, lying unsecured on the top of toolboxes, underneath the corner of other toolboxes, lying on work benches, and one flyer and one pin was magnetized to a toolbox. (Tr. at 30-31, 65, 92.) Bohannon was observed picking up the flyers, rolling them into a wad, and tossing them into the garbage.¹⁷ (Tr. at 93.) Bohannon spoke with at least three employees and explained that Union flyers could not be in the Company owned toolboxes. (Tr. at 32, 69.)

At some point during the campaign, although unclear as to when, Bohannon distributed Company flyers to employees. (Tr. at 36-37, 95.) Bohannon was questioned by several Finals/Finish Department employees as to why he was allowed to pass out flyers, while the pro-union members could not. (Tr. at 95-96.) Bohannon allegedly responded: the "Company was paying us, and not the United Steelworkers." (Tr. at 95.) However, and as elaborated below, the Company has a right to break its own rules, and the act of a Company breaking its own rules does not amount to illegal conduct or an unfair labor practice.

¹⁶ It is unclear whether the Union or General Counsel knows what day this alleged event occurred. Schutt believes it occurred on May 11, 2017, which is the day the Union filed the petition. (Tr. at 30.) Sees believes it occurred on May 15, 2017, while General Counsel believes it occurred on May 16, 2017. (Tr. at 92.) Further, Trojan and the Union allege the event occurred sometime in May 2017. (Tr. at 65; Objections Number 4.) VT Hackney will use May 15 or 16, 2017, as the date that the alleged unlawful event occurred.

¹⁷ One employee also alleges that he had a "USW" pin in his toolbox. (Tr. at 31.) It is alleged that Bohannon took the pin out of the toolbox and told employees that the pin needed to be worn on the person, and not displayed anywhere else. (Tr. at 32, 69.)

V. ARGUMENT

To prove a Section 8(a)(1) interference claim, the General Counsel and the Union must establish that the employer engaged in conduct that would reasonably tend to restrain, coerce or interfere with employees' rights under the Act. *Webasto Sunroofs, Inc.*, 342 NLRB 1220, 1223 (2004) (citing *American Freightways Co.*, 124 NLRB 146, 147 (1959)); *N.L.R.B. v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102 (6th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988). The General Counsel and the Union must prove by a preponderance of the evidence that the actions of the employer were objectively sufficient to restrain, coerce, or interfere with the employees' rights. *Cheney Construction, Inc.*, 344 NLRB 238, 239 (2005) (finding no violation of the Act because the objective facts did not prove a violation by a preponderance of the evidence).

A. **The Company Did Not Solicit Grievances During The Meetings With Stephenson**

Generally, an employer violates Section 8(a)(1) if it solicits grievances or complaints, and promises employees increased benefits and improved terms and conditions of employment in an effort to discourage Union support during a campaign. *Station Casinos, LLC*, 358 NLRB 1556, 1574 (2012); *Wiers Int'l Trucks, Inc.*, 353 NLRB 475, 488-89 (2008) (internal citations omitted). However, a violation of 8(a)(1) does not occur when the employees, on their own accord, approach management to discuss problems or when "the employer maintained a prior open door policy and there is no evidence that any promises were made to the employees." *EFCO Corp.*, 327 NLRB 372, 356 (1998). Further, the Board has held that an employer does not violate the Act when the employer merely asks for questions or comments during a meeting. *See e.g., Wal-Mart Stores, Inc.*, 348 NLRB 274, 281 (2006) ("if employees initiate the contact with management [...] then the employer is not soliciting grievances, it is merely answering questions, which is totally lawful,

so long as the answers do not convey a promise of benefits linked to union activities. [...] [M]erely being willing to listen [...] is not enough”); *Burns Int’l Security Servs., Inc.*, 261 NLRB 11 (1975).

Moreover, “the essence of a solicitation of grievances/implied promise of benefit violation is the promise of remedying the grievances, not the mere solicitation.” See *Ryder Transportation Servs.*, 341 NLRB 761, 769 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005) (emphasis added). “A solicitation of grievances by an employer during an organizational campaign is not itself unlawful. It merely raises a rebuttable inference that the employer is promising to remedy those grievances. It is that implicit promise which, if made, violates Section 8(a)(1).” *Southern Monterey Cnty. Hosp.*, 348 NLRB 327 (2006).

In *Western Refining Wholesale, Inc.*, No. 20-CA-067703, 2013 WL 1804148 (N.L.R.B. Div. of Judges Apr. 29, 2013), the Administrative Law Judge held that the company did not violate the NLRA when it explained what rights employees had under Section 7. There, the company provided a letter to its employees explaining Section 7 rights and discussed alleged harassment by union organizers. *Id.* at 22. The Administrative Law Judge held that advising employees of their Section 7 rights was not a violation of the Act. *Id.* at 23 (“Goode’s admonition to employees that they could report their violations of their rights to management is not reasonably subject to an interpretation that would unlawfully affect the exercise of Section 7 rights. I find that, here, Goode’s advice that employees report violations of their rights to management merely advises employees that Respondent would be able to protect employees from conduct that might restrain or coerce them in the exercise of their Section 7 rights.”).

The Board in *Wiers International Trucks, Inc.*, affirmed the Administrative Law Judge’s findings that the employer did not unlawfully solicit grievances by asking employees what they thought the union could do for them. *Supra* at 489. During that campaign, the president of the

company conducted three group employee meetings regarding the union. *Id.* at 479. The company alleged that the meetings were to “educate” employees. *Id.* However, the Administrative Law Judge found that the meetings were not to “educate” but were merely a chance for the president to sway employees to vote against the union. *Id.* at 480. Specifically, the president briefly discussed the mechanics of the election, but also impugned the motives of the union officials, and made comments like “any union is a thorn,” and that the union’s “sole purpose is to serve the [u]nion’s interest and not [the employees].” *Id.* The Administrative Law Judge found that the company did not solicit grievances during the meetings, but rather used the question of “what can the Union do for you” as part of the Company’s argument that the Union could not do anything positive for employees. *Id.* at 289.

Here, the meeting at issue was held simply to educate the employees about the Act. Two employees, the labor consultant, and the Plant Manager, all confirm that Stephenson’s purpose of the meeting was to educate employees about their Section 7 rights, and to explain what employees could do right now versus what they could do if a union was chosen as the bargaining representative. (Tr. at 27, 44, 62, 133, 138, 174-76.) The General Counsel’s witnesses all admit that Stephenson discussed the “Heart of the Act” slide, the Basic Guide, and the current Section 7 right for employees to go to the Company now. (Tr. at 47-48, 62-63, 79-80.)

In addition, at the end of the presentation, Stephenson asked if there were any questions, while displaying a PowerPoint slide that read “Questions.” Witnesses confirm that employees did not raise their hands to ask specific questions about the information received from the PowerPoint until the presentation had ended. Further, Stephenson only advised an employee that he needed to report the situation to management in response to an allegation of sexual harassment. Board, state, and federal law is clear that an employer (whether a supervisor or agent) is obligated to report

alleged harassment allegations; otherwise, the employer could face other charges such as Title VII harassment and negligent supervision claims. Finally, not a single shred of evidence or testimony supports the notion that Stephenson implied a promise of any benefit. Therefore, even if there is somehow a finding of a solicitation of grievances, which the Company empathically denies, there is no evidence that Stephenson implied any promise that the Company would address such grievance.

As such, the evidence supports a finding in favor of VT Hackney that the Company, through Stephenson, did not violate the Act by holding educational meetings, reviewing Section 7 rights, asking if anyone had questions, and telling Bixler that he needed to report the alleged sexual harassment to Human Resources.

B. Ross Did Not Interrogate or Threaten Wise

It is a violation of the Act if an employer interrogates an employee as to the individual's union sympathies and affiliations. *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953). Under the totality of circumstances test, the Board considers a list of factors when determining whether alleged interrogation or isolated questions of an individual was a violation of the Act:

- (1) The background, i.e., is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high [s]he was in the company hierarchy?
- (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?

(5) Truthfulness of the reply.

Toma Metals, Inc., 342 NLRB 787, 788-89 (2004); *Rossmore House Hotel*, 269 NLRB 1176 (1984) (citing *Bourne v. N.L.R.B.*, 332 F.2d 47 (2d Cir. 1964) (the Board must consider “employee’s background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation”). The Board has also found that an election will not be set aside and a remedial order will not be issued in an unfair labor practice case where the interrogation is sufficiently isolated and occurs in an atmosphere free of coercive conduct. *See, e.g., Toma Metals, Inc.*, 342 NLRB at 789 (no violation when the conversation occurred on the plant floor, and the supervisor said “what’s up with the rumor of the union I’m hearing?”); *Temp Masters, Inc.*, 344 NLRB 1188 (2005) (no violation where the employer asks whether a union representative had come to the worksite because the single question “did not ‘appear[] to be seeking information upon which to take against [the] individual employee’”); *West Tex. Equip. Co.*, 142 NLRB 1358, 1359-60 (1963) (finding that three incidents, including questions like “what do you think about this union talk” were isolated, unsubstantial and not sufficient to set aside an election).

In *Flex-n-Gate Tex., LLC*, 358 NLRB 622 (2012), the Board affirmed the Administrative Law Judge’s finding that the employer did not interrogate employees under a totality of circumstances. In *Flex-n-Gate*, the General Counsel alleged that the employer interrogated an employee when it asked the employee if he spoke with a company representative about his feelings concerning the union. 365 NLRB at 626. The Administrative Law Judge found no violation because testimony provided by the employee demonstrated that he had one conversation with his supervisor, the conversation did not occur behind closed doors (or as result of being called to the office), and the one-sentence inquiry did not appear to be a tactic to get information from the employee. *Id.* at 627. Further, neither the Administrative Law Judge, nor the Board found

evidence that the company was probing the employee for his union sentiments, and, thus, was seeking to obtain information as a basis to take action against the employee. *Id.*

Similar to *Flex-n-Gate*, a finding of interrogation by Ross based on the totality of circumstances test is simply not supported by the record evidence. First, General Counsel and the Union failed to provide any evidence or testimony indicating that Ross or the Company had a history of hostility or discrimination toward pro-Union employees. Second, Wise and Ross only had one conversation throughout the entire campaign. (Tr. at 13-14, 162.) Third, the conversation between Wise and Ross occurred in an open area, specifically in the Finals/Finish Department and during work time. (Tr. at 14, 159.) Fourth, the question “how are you feeling, given the craziness of the campaign” was not used as a tactic to probe Wise for information. Instead, as noted above, Ross asked this as an opening to a typical conversation, which naturally led into a conversation about Bohannon’s view of Wise’s performance. (Tr. at 157-59, 167 (it was “to let them know that I cared about them, and if there is anything going on, that they wanted to ask questions or concerns, they could have asked”).) Notably, Wise himself admits that he is “not real[ly] sure” as to what Ross said, just that they had a conversation that may have involved the Union, and Bohannon’s view of Wise’s performance. (Tr. at 14, 21-22.) Fifth, the statement “we are counting on you to vote” neither coerced nor intimidated Wise into voting for the Company. (Tr. at 159-60.) As stated by Ross, she wanted people to vote, no matter which way, so that the Company could know what all employees wanted, rather than a select few. (Tr. at 157, 165.) Finally, Ross did not attempt to use any information obtained to discipline or take action against Wise. Instead, Ross was attempting to have a friendly – and typical – human resources check-in with Wise to ensure he was doing okay due to the “craziness” of the campaign.

The Union and General Counsel have failed to show that the conversation between Ross and Wise was a form of interrogation, let alone one coercive enough to constitute a violation of the NLRA. Further, this action alone is not enough to overturn the election. Therefore, Paragraph Eight of the Consolidated Complaint and the Regional Director's discussion within the Objections to the election must be dismissed.

C. Bohannon Did Not Violate The Act

1. Flyers In Company Owned Toolboxes

In the context of policy enforcement, employers have the legal right to establish rules to maintain good order and discipline in the workplace. *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 798 (1954) (identifying the “undisputed right of employers to maintain discipline in their establishments”); *Metro-West Ambulance Ser. Inc.*, 360 NLRB 1029 (2014) (“The question of whether a rule or policy violates the Act requires a balancing between an employer’s right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity.”)

Because there is a distinction between oral solicitation and literature distribution, employers are entitled to ban the distribution of literature even more broadly, during working time and in working areas. *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962). The Board has consistently held that employers are allowed to forbid the distribution of literature by employees during both working time and in working areas. *See, e.g., The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017); *Beverly Enter—HI, Inc.*, 326 NLRB 355 (1998). Moreover, supervisors and managers may lawfully distribute employer’s written anti-union messages in work areas even though nonsupervisory employees are prohibited from distributing literature in the same area. *See, e.g., Internet Stevensville*, 350 NLRB 1349 (2007) (supervisors’ distribution of campaign literature to

employees is not a violation of the Act); *Beverly Enterprises – HI, Inc., supra* (finding that the employer did not engage in objectionable conduct by allowing supervisors to distribute flyers in an area where nonsupervisory employees could not).

VT Hackney's Solicitation/Distribution Policy prohibits employees from distributing non-work literature on Company property during work time. (Emp. Ex. 3.) It does not prohibit employees from distributing non-work literature during non-working time or on property not owned by the Company. (*Id.*) Further, the policy does not differentiate between distributions that involve the sale of a car from a meeting that the Union is holding in the upcoming week. (*See id.*) During the Hearing, employees stated that there were numerous copies of Union flyers in the Finals/Finish Department. (Tr. at 30-31, 65, 92.) Therefore, the employees were not simply displaying the flyers, but were, instead, attempting to distribute the flyers in the workplace during working time. This is a clear violation of the Company's Solicitation/Distribution policy, and Bohannon had a right to remove such literature and to tell the employees where and when they were allowed to distribute them. Moreover, the solicitation/distribution policy displayed in its employee handbook explained when and where flyers and other like material could be distributed at the Facility. Thus, the Company did not violate 8(a)(1) by removing flyers that were being distributed on work time and in a work area in violation of its policies.

2. 5S Program Prohibits Loose Items In The Work Place¹⁸

An Administrative Law Judge found that an employer failed to provide evidence to suggest that the removal of notebooks, pamphlets, and flyers was justified by showing that such conduct was done to maintain production and discipline. *In re Case Corp.*, No. 33-CA-12845, 2001 WL 1635475 (N.L.R.B. Div. of Judges, Dec. 14, 2001). In *Case Corp.*, employees had lockers, toolboxes, and shelves. *Id.* at 20. Up until the campaign, there had been no restrictions as to what items could be displayed on them. *Id.* The witnesses testified that they had previously kept newspapers, advertising, flyers, class notes, magazines, foods, drinks, and ChapStick in or on the company-provided storage areas. *Id.* During the campaign, employees were told that union notebooks and flyers needed to be taken off company property, and could only be placed on the person, whether in the person's hand or pocket. *Id.* at 21. The Administrative Law Judge held that an employer can restrict employees' rights to discuss self-organization, if that restriction is necessary to maintain production or discipline. *Id.* at 22. However, the employer failed to show any evidence or testimony that suggested that production or disciplinary considerations were used to justify the removal of the notebooks, pamphlets and flyers. *Id.* at 22.

Unlike the employer in *Case Corp.*, VT Hackney had clear reasons as to why it removed the loose literature and a single pin from Company-owned toolboxes and benches. As explained throughout the Hearing, the Company began implementing the 5S program before the Union filed its representation petition, which helps with the safety and efficiency of the facility. (Tr. at 74-75, 117-19.) Under this initiative, the Company does not allow loose material, of any kind, in the

¹⁸ As a general rule, employees have the right to wear a union button while at work. *Republic Aviation Corp.*, *supra*. However, the allegation, as pled, does not involve the wearing of a pin. Instead, it deals with an employee who placed Union insignia on a Company owned semi-fixed item. Therefore, the argument is not that the Company did not allow the employee to wear the pin. Instead, the argument is that the Company did not allow the employee to keep the pin, which was being used as a display, in his Company-owned toolbox.

work area. As explained by Baker, loose paper can cause fires and other safety concerns. Further, all Company paperwork is kept in binders to ensure that documents are not blown away or into hazardous areas. The General Counsel and the Union failed to establish that the Company previously allowed light, unsecured pieces of paper to be in toolboxes. Instead, testimony was provided that keys, drinks, wallets – *i.e.*, objects that are heavy enough to remain fixed and immobile – were allowed in toolboxes. (Tr. at 34, 70.) Further, there was clear testimony that “light weight” objects, such as pictures, were secured with clear tape. (Tr. at 125.) Thus, unlike the employer in *Case Corp.*, VT Hackney has presented sufficient evidence to affirm the safety and production justifications prohibiting loose materials laying in and around the Finals/Finish Department and in toolboxes.

3. Disparate Enforcement

The controlling standard for evaluating allegations of discriminatory or disparate enforcement is set forth in *Register-Guard*, 351 NLRB 1110 (2007). There, the Board held that in order to be unlawful, the employer’s conduct must discriminate along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected activities.” *Id.* at 1118. Therefore, in order to find that enforcement was illegal, the Union and the General Counsel must prove that the employer treated the distribution of non-union flyers and pins differently than union flyers and pins. *Id.* (quoting *Lucile Salter Packard Children’s Hosp. at Stanford v. N.L.R.B.*, 97 F.3d 583, 587 (D.C. Cir. 1996)).

Here, the Union and General Counsel have failed to establish any evidence to support the claim that VT Hackney disparately enforced its solicitation/distribution policy or 5S initiative. First, there is no evidence of disparate enforcement, as there has been no evidence presented that

the Company allowed other hourly employees to distribute, or maintain, flyers and or anti-union pins in and around their toolboxes. Second, there is no testimony that pro-company employees were allowed to distribute flyers in the workplace or display their anti-union pins anywhere other than on their person. Third, General Counsel and the Union failed to present any evidence that pro-company employees placed flyers in or around toolboxes that were not subsequently removed. Fourth, there has been no testimony that pro-company employees were allowed to display pins in toolboxes. Finally, there is no evidence that the Company disparately enforced the 5S initiative solely against employees who favored the Union.

The General Counsel and Union have failed to support a finding that the Company disparately enforced policies against pro-union employees. Therefore, the Administrative Law Judge cannot find that the Company violated 8(a)(1) when, based on legitimate safety and policy standards, took loose Union flyers and one Union pin out of Company-owned toolboxes.

D. Conduct As Alleged Above Is Not Enough To Overturn The Election

While conduct may be considered an unfair labor practice under the NLRA, the Board has determined that not all conduct rises to the level of misconduct sufficient to overturn an election. In *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995), the Board set out a standard for determining whether the election should be overturned. Specifically, the Board must determine whether the misconduct, taken as a whole, warrants a new election because it has a “tendency to interfere with the employees’ freedom of choice [and...] could well have affected the outcome of the election.” *Id.*; *N.L.R.B. v. Bloomfield Health Care Ctr.*, 372 F. App’x 118, 120 (2d Cir. 2010); *Research Found. of State Univ. of N.Y. at Buffalo*, 355 NLRB 950, 952 (2010). To determine whether the misconduct warrants a new election, the Board looks at the number of violations, the severity, the extent of dissemination, the size of the unit, the closeness to the election, the proximity

of the conduct to the election date, and the number of employees affected. *Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001). Moreover, the Board may decline to overturn the results of an election where it concludes that the violations and/or conduct are *de minimis*. *Portola Packaging, Inc.*, 361 NLRB No. 147 (Dec. 16, 2014) (citing *Bon Appetit Management Co.*, *supra*). Thus, 8(a)(1) violations will fall within the *de minimis* exception when the violations are “‘virtually’ impossible to conclude that they could have affected the results of the election.” *Id.* (citing *Super Thrift Markets*, 233 NLRB 409 (1977)).

In *Bon Appetit Management Co.*, the Board found that, although the employer violated 8(a)(1), the conduct did not warrant the setting aside of an election. 344 NLRB at 1043. There, the employer asked an employee how she was going to vote in the election and told her that if she voted for the Union her pay would be cut. *Id.* The Board found that such conduct was *de minimis*:

“[I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since ‘[c]onduct violative of Section 8(a)(1) is, a *fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election’.” [Emphasis in original.] The only exception to this policy is “where the misconduct is *de minimis*: ‘such that it is virtually impossible to conclude’ that the election outcome has been affected.” In determining whether misconduct could have affected the results of the election, the Board has considered the number of violations, their severity, the extent of dissemination, and the size of the unit. Other factors the Board considers include the “closeness of the election, proximity of the conduct to the election date, [and the] number of unit employees affected.” *Detroit Medical Ctr.*, 331 NLRB 878 (2000) (citations omitted). Thus, in *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977), the Board declined to set aside the election despite 8(a)(1) violations consisting of interrogations affecting 2 employees out of a unit of 106 employees.

Id. at 1044. Specifically, the Board found that that the misconduct was isolated in nature, and thus, was “virtually impossible” to conclude that this 8(a)(1) violation was enough to overturn an election. *Id.*

Here, it is clear that it is “virtually impossible” to conclude that the alleged violations, even if true (although the Company vigorously asserts they are not) would be enough to overturn the election. At the time of the vote, there were two hundred and nine employees in the petitioned for unit. The meeting wherein Stephenson spoke was attended by twenty-two employees – *i.e.*, less than 10% of the petitioned for unit – including Schutt, Michael Mitcheltree, Joseph Paulhamus, Corey Trojan, and Jason Koch. The alleged interrogation by Judy Ross included one employee, David Wise.¹⁹ Finally, the alleged Bohannon incident involved the above-mentioned individuals, plus William Wingo and Jason Sees. Therefore, a total of twenty five (25) employees could have been affected by the alleged 8(a)(1) violations. As mentioned above, the Union lost the vote by thirty-one (31) votes. Even if the Administrative Law Judge found that all three violations occurred, it is still “virtually impossible” to find that the Union could have won the election. The argument is nonsensical, in that an election, with a large margin of no votes, should be overturned because three alleged events would have affected less than twenty five (25) employees, combined.

Further, none of the allegations, as alleged, are anything more than *de minimis* claims. Specifically, only one employee, out of a group of over two hundred, alleges that a supervisor took his union pin out of his toolbox; similarly only one employee was allegedly interrogated. Likewise, the same groups of employees are involved in the Stephenson and Bohannon allegations, making it questionable as to whether such alleged conduct actually occurred and/or whether it would have affected the employees, if conducted.²⁰

¹⁹As mentioned above, the alleged interrogation by Wise was not an Objection to the Election, although the Region stated that, if true, such conduct could be grounds to overturn the election.

²⁰ Neither Schutt’s nor Trojan’s testimony throughout the Hearing was credible. Their statements were not only inconsistent with their own testimony, but also conflicted with one another and Sees.

Thus, it is clear that the alleged 8(a)(1) violations, even if true, are *de minimis* acts in that it is virtually impossible that such conduct affected the result of the election. Therefore, the Administrative Law Judge should not overturn the election results.

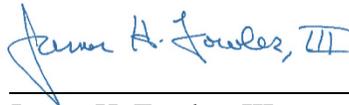
VI. CONCLUSION

Consistent with the Board authority cited herein and the record evidence from the Hearing, the Region and the Administrative Law Judge should determine that VT Hackney did not commit a single unfair labor practice or participated in objectionable conduct during the campaign.

Dated this the 13th day of April 2018.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



James H. Fowles, III

Counsel for VT Hackney, Inc.

First Base Building
2142 Boyce Street, Suite 401
Columbia, South Carolina 29201
803.252.1300 (telephone)
803.254.6517 (facsimile)
james.fowles@ogletreedeakins.com

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

VT HACKNEY, INC.

and

**UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC**

**Case Nos. 06-CA-199799
06-CA-200380 and
06-RC-198567**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing VT Hackney's Post-Hearing Brief has been served on the following on the date below by VT Hackney, Inc.:

Hon. Robert Ringler
Administrative Law Judge
819 Taylor Street, Rm 8A24
Fort Worth, TX 76102
robert.ringler@nlrb.gov

David L. Shepley, Esq.
National Labor Relations Board, Region 6
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222-411
david.shepley@nlrb.gov

Brad Manzolillo, Organizing Counsel
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and
Service Workers International Union,
AFL-CIO, CLC
60 Blvd. of the Allies
Five Gateway Center, Room 913
Pittsburgh, PA 15222
bmanzolillo@usw.org

Dated this 13th day of April 2018.



James H. Fowles, III