ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1170 (Consolidated with Nos. 18-1178, 18-1197, 18-1199)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHAMROCK FOODS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petitions for Review of the Orders of the National Labor Relations Board,
366 NLRB No. 107 (June 22, 2018), 366 NLRB No. 117 (June 22, 2018)

DEFERRED JOINT APPENDIX – VOLUME III

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TABLE OF CONTENTS

JA Page No.

PETITION FOR REVIEW OF NLRB ORDER (28-CA-150157) .....JA 1

PETITION FOR REVIEW OF NLRB ORDER (28-CA-169970) .....JA 5

CASE 28-CA-150157.....JA 9

COMPLAINT.....JA 9

AMENDMENT TO COMPLAINT..... JA 30

TRANSCRIPT..... JA 32

GENERAL COUNSEL'S EXHIBITS .....JA 1021

Exhibit 1(a) .....JA 1021

Exhibit 1(e) .....JA 1023

Exhibit 1(g) .....JA 1025

Exhibit 2.....JA 1045

Exhibit 3.....JA 1050

Exhibit 7.....JA 1136

Exhibit 8.....JA 1179

Exhibit 9.....JA 1216

Exhibit 10.....JA 1252

Exhibit 11.....JA 1287

Exhibit 12.....JA 1327

Exhibit 13.....JA 1342

Exhibit 14.....JA 1359

Exhibit 15.....JA 1361

Exhibit 26.....JA 1447

Exhibit 29 ..... JA 1455

RESPONDENT'S EXHIBITS ..... JA 1484

Exhibit 1 ..... JA 1484

Exhibit 5 ..... JA 1538

ALJ EXHIBIT 2 ..... JA 1552

GENERAL COUNSEL'S SUBPOENA DUCES TECUM ..... JA 1570

ADMINISTRATIVE LAW JUDGE'S DECISION ..... JA 1582

SHAMROCK'S POST-HEARING BRIEF* ..... JA 1653

NLRB DECISION AND ORDER ..... JA 1705

CASE 28-CA-169970 ..... JA 1746

COMPLAINT ..... JA 1746

TRANSCRIPT ..... JA 1757

GENERAL COUNSEL'S EXHIBITS ..... JA 2645

Exhibit 2 ..... JA 2645

Exhibit 5 ..... JA 2648

Exhibit 6 ..... JA 2650

Exhibit 7 ..... JA 2653

Exhibit 8 ..... JA 2658

Exhibit 9 ..... JA 2660

Exhibit 16 ..... JA 2662

Exhibit 17 ..... JA 2664

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* Shamrock's Post-Hearing Brief is not part of the agency record as defined in 29 C.F.R. § 102.45(b).

Exhibit 18 ..... JA 2667

Exhibit 19 ..... JA 2669

Exhibit 20(c) ..... JA 2671

Exhibit 21(c) ..... JA 2689

Exhibit 22 ..... JA 2697

Exhibit 23 ..... JA 2711

RESPONDENT'S EXHIBITS ..... JA 2713

Exhibit 1 ..... JA 2713

Exhibit 2 ..... JA 2715

Exhibit 3 ..... JA 2717

Exhibit 4 ..... JA 2719

Exhibit 5 ..... JA 2721

Exhibit 14 ..... JA 2723

Exhibit 18 ..... JA 2725

Exhibit 19 ..... JA 2727

Exhibit 21 ..... JA 2729

Exhibit 22 ..... JA 2731

Exhibit 23 ..... JA 2733

Exhibit 24 ..... JA 2735

Exhibit 25 ..... JA 2738

Exhibit 26 ..... JA 2740

Exhibit 27 ..... JA 2742

Exhibit 28 ..... JA 2748

ADMINISTRATIVE LAW JUDGE'S DECISION ..... JA 2750

NLRB DECISION AND ORDER ..... JA 2776

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES,
SAN FRANCISCO BRANCH OFFICE

SHAMROCK FOODS COMPANY

and Case 28–CA–150157

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

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DECISION

Statement of the Case

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Shamrock Foods Company committed numerous unfair labor practices at its Phoenix, Arizona warehouse between January and July 2015 to discourage union or other protected activity, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. Among other things, it alleges that the Company, by and through over 10 different managers and supervisors, unlawfully interrogated, surveilled, and threatened employees, solicited employee complaints and grievances, promised and granted employees better wages and benefits, took union flyers away from employees, and discharged or disciplined two prounion employees (Thomas Wallace and Mario Lerma). It also alleges that the Company unlawfully maintained numerous overbroad rules in its employee handbook during the same period.[1]

[1] The complaint issued on July 21, 2015, and was subsequently amended on August 13 and at the hearing. See GC Exhs. 1(g), (m), (t); and Tr. 19–23, 750. The Board's jurisdiction is undisputed and well established by the admitted facts.

A hearing on the complaint allegations was held over 7 days between September 8 and September 16, 2015.[2] Thereafter, on November 25, the General Counsel and the Company filed posthearing briefs. After carefully considering those briefs and the record as a whole, for the reasons set forth below I find that the Company violated the Act substantially as alleged, committing over 20 unfair labor practices during the union campaign, including unlawfully discharging Wallace and disciplining Lerma, and unlawfully maintaining several overbroad confidentiality, blogging, solicitation/distribution, and other conduct rules in the employee handbook.[3]

I. BACKGROUND

Shamrock Foods operates food distribution warehouses in several states. In addition to the subject warehouse in Phoenix, Arizona, the Company has warehouses in California, Colorado, New Mexico, and Oregon. The Phoenix facility is the largest, with approximately 280 warehouse workers, including pickers, runners, throwers, and forklift operators, and 250 drivers.[4]

In 1998, the Teamsters Union attempted to organize the Phoenix warehousemen and drivers. The Company committed several unfair labor practices in response to the organizing campaign, including unlawfully discharging an employee. See *Shamrock Foods Co*., 337 NLRB 915 (2002), enfd. 346 F.3d 1130 (D.C. Cir. 2003). And the organizing campaign was ultimately unsuccessful.

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[2] Pursuant to the General Counsel's unopposed request, at the end of the last day of hearing on September 16, the record was held open indefinitely to allow the Regional Office additional time to investigate a new charge the Union had filed the previous day seeking a remedial bargaining order under *NLRB v. Gissel Packing Corp.*, 395 U.S. 575 (1969). Thereafter, the Respondent requested that three additional documents be included in the record. As there was no objection, the request was granted by order dated October 21, and the documents were admitted as Respondent exhibits 6, 7, and 8. The order also added certain related documents as ALJ exhibits 1–5. Finally, as the Union had recently withdrawn the *Gissel* charge, the order closed the hearing record. Thereafter, on November 25, the General Counsel moved to correct the record to include certain attached documents that had been inadvertently omitted from General Counsel exhibit 2. As the motion is consistent with the record and unopposed, it is granted. The record is therefore corrected to include the documents as General Counsel exhibits 2(b)–(f).

[3] Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[4] Although the Company often refers to its warehouse workers as "associates," they are consistently referred to here using the more traditional, statutory term "employees" to avoid any confusion.

More recently, in mid to late 2014, the Teamsters also attempted to organize the Shamrock warehouse in southern California. Around the same time, in late November, Steven Phipps, a longtime forklift operator at the Phoenix warehouse, decided to contact a different union—Bakery, Confectionery, Tobacco Workers' and Grain Millers (BCTGM) Local 232—about representing the Phoenix warehouse workers. The Union advised Phipps to keep the campaign "covert" at the beginning, and Phipps followed this plan throughout the following December, January, and February. He only spoke or met with one or a few employees at a time that he trusted and believed would sign a union card, and always offsite, never in the warehouse or parking lot.

Nevertheless, by late January 2015, word of the union campaign was spreading "like wildfire" in the warehouse. Over the next few months, more and more employees also began attending offsite meetings. Accordingly, on April 26 and 27, Phipps made a formal, public announcement in the breakroom about the campaign. (Tr. 485, 494–499, 520–521, 544–545, 612–617.)

II. The Alleged Unfair Labor Practices

A. Alleged Unlawful Statements at Company Meetings

The complaint alleges that many of the unlawful threats and other statements were made at seven large or small group meetings between late January and late April 2015 that were conducted by one of three corporate or local managers: Vice President (VP) of Operations Mark Engdahl, then-Human Resources (HR) Director Natalie Wright, or Phoenix Warehouse Manager Ivan Vaivao. All but one of the meetings (a small meeting in mid-February) were secretly recorded by Phipps or Lerma, and both the recording and a certified transcript thereof were placed in evidence by the General Counsel.

1. January 28 town hall meeting (Engdahl)

The complaint alleges that the Company made unlawful statements at two meetings on January 28. The first was a large "town hall" meeting with all of the warehouse workers that was conducted by Operations VP Engdahl that morning. Engdahl runs all of Shamrock's operations, and reports directly to Company President/CEO William (Kent) McClelland. The General Counsel alleges that Engdahl unlawfully threatened employees at the meeting that they would lose benefits if they supported a union by telling them that the "slate is wiped clean" on wages, benefits, and working conditions when collective bargaining begins (GC Exh. 1((g), par. 5(g)(1)).

Engdahl began the meeting by saying he was going to "educate" them about the southern California Teamsters' campaign and unions in general. He told them they could research "tons of stuff" for and against unions on the internet to make their own judgments; however, he was going to give them "the facts" and would "not lie" to them. He said the employees in southern California had "made good decisions" and the facility there remained "union free." He explained that a union is simply "a business" that tries to grow and get more dues by misrepresenting that they can fix all the employees' problems, and would only "cause strife between both sides." He said Shamrock wanted to deal with employees directly "as a family," and to fix problems by "working together and talking to each other . . . we talk directly with you, you talk with us, you bring up problems, we try to fix it." He therefore encouraged the employees to continue using

the Company's "open-door" policy to raise their problems. He said the Company could "always tweak things," and wanted to "work to make things better."

Engdahl also told the employees that there were various other reasons they should "think long and hard" before signing a union card. He warned them that the card is a "legally binding document" and that they were "going to pay hell trying to get it back." He also said that a company could voluntarily recognize the union if it got over 50 percent of employees to sign the cards. He then stated,

> And sometimes I've seen it in the past where companies have done that for probably not really good reasons, because what happens when a company is represented and you go into collective bargaining? The slate is wiped clean on wages, the slate is wiped clean on benefits, the slate is wiped clean on working conditions. It's all up to collective bargaining at that point in time. Right? So sometimes a company may say, "You know what, I think we're paying too much and our benefits are too rich; so I'm going to grab the union, bring them in here, sign up with them, whether my associates like it or not, and we're going to collective bargain."
>
> And guess what? At the other end of the pipeline, when you come out with a contract, all of a sudden the people have got less wages, they took away healthcare benefits, they did this, they did that. It actually saves companies money because there's no guarantees when you go into collective bargaining that you're going to come out with anything better than you got. In fact, you could come out with something worse than what you got. And they won't tell you that either. Okay. Everything is up for grabs.

Engdahl also returned to this point later, in response to a question from employee Wallace about why Shamrock's competitors are unionized. Engdahl said that, in his opinion, two of the Company's competitors (Sysco and US Foods) used the union "to keep the wages down because everybody's paid the same then . . . they don't do well with incentives." He also noted that it takes a supermajority of "70 percent plus one" to decertify or vote a union out. (GC Exh. 8(a) and (b).)[5]

Whether antiunion employer statements such as the "slate is wiped clean" in bargaining are coercive depends on the context in which they are made. As the Board stated in *BP Amoco*, 351 NLRB 614, 617 (2007):

> [E]mployer statements to employees during an organizing campaign to the effect that bargaining will start from "zero" or from "scratch" are "dangerous phrase[s],"

[5] I discredit the testimony of Natalie Wright, who as indicated above was the HR manager at the time (and is now a part-time HR specialist). Wright attended the town hall meeting with other managers, and was called to testify as an adverse witness by the General Counsel under FRE 611(c). Wright repeatedly refused to say if unions were discussed at the meeting, insisting that it was just an "educational" meeting, agreed to answer the General Counsel's question only when directed from the bench to do so, and then admitted only that unions were mentioned in a video and in reference to the California campaign (Tr. 379–381). As indicated above, the audio recording secretly made by Phipps shows that the meeting was entirely about unions.

> which carry with them "the seed of a threat that the employer will become punitively intransigent in the event the union wins the election." Contemporaneous threats or unfair labor practices may lend additional coercive meaning to the employer's remarks. Such statements are unlawful and objectionable when, in context, "they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure on what the Union can induce the employer to restore." On the other hand, such statements are permissible when they merely describe the bargaining process and/or are made in direct response to union promises. Similarly, statements that employees could lose benefits as a result of bargaining have been found lawful where they "merely [state] what could lawfully happen during the give and take of bargaining." [Citations omitted].

Here, although some of Engdahl's other statements at the meeting were untrue,[6] there is no allegation that they were unlawful.[7] Further, Engdahl did not explicitly say that Shamrock would take away existing benefits. However, by emphasizing, exclusively, what the other named and unnamed employers have intentionally done to reduce employee benefits through collective bargaining, Engdahl clearly suggested or implied that Shamrock would do the same thing. See *Pittsburgh Press Co*., 252 NLRB 500, 504 (1980); and *Madison Kipp Co*., 240 NLRB 879 (1979) (while an employer may lawfully support its antiunion statements with examples where employees at other companies suffered negative consequences following collective bargaining, it may not do so in a manner that employees would reasonably construe as a threat to deliberately pursue the same result). Moreover, Engdahl made no effort at the meeting to dispel or temper that implication by assuring employees that Shamrock would bargain over their benefits in good faith and/or that their benefits might also go up or stay the same through the give and take of bargaining. Compare, for example, *Manhattan Crowne Plaza*, 341 NLRB 619 (2004) (finding no violation where the employer acknowledged that "each set of negotiations is different"); and *Monroe Mfg. Co*., 200 NLRB 62 (1972) (same, where the employer stated, "That is not to say that anything like that will happen here. We hope that even if this union is successful [we] will continue to grow.").

The Company's posthearing brief (pp. 26–27) suggests that what Engdahl said or did not say at the January 28 town hall meeting is insignificant, as Engdahl and other managers

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[6] For example, there is no "70 percent plus one" requirement to decertify a union. In fact, there is no requirement that even 50 percent plus 1 vote against the union. The NLRB will conduct a decertification election if 30 percent or more of the unit employees sign a petition to do so, and the union will be decertified unless 50 percent plus 1 of the votes cast in the election are *in favor* of union representation, i.e., the union loses in the event of a tie vote. See *Best Motor Lines*, 82 NLRB 269 (1949); NLRB Statements of Procedure, Secs. 101.17–101.18; and the Board's website, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/decertification-election.

[7] The complaint also alleges that Engdahl "granted employees benefits" on January 28 by telling employees who complained about working conditions to make an appointment to come see him. See par. 5(g)(2). However, the General Counsel's posthearing brief does not address this allegation, and thus it appears to have been abandoned. In any event, the General Counsel failed to carry the burden of proof and persuasion.

repeatedly told employees at other meetings that their benefits could be better, worse, or the same after going through the collective-bargaining process. However, there is no record evidence that Engdahl or other managers actually said this to all of the warehouse employees at any other meeting(s) during the relevant period. Although Phoenix Warehouse Manager Vaivao made such a statement a month later, on February 24, it was at a much smaller meeting with only 8–10 employees. See Exh. 9(a), at p. 13; and Tr. 175–178, 528–530.[8] Moreover, as discussed below, Vaivao made other statements at the February 24 meeting that were unlawful. And he, Engdahl, and several other company managers and supervisors committed numerous other unfair labor practices as well.

Under all the circumstances, therefore, it is likely that employees would have reasonably understood Engdahl's remarks, not merely as a caution that their benefits could go down, but as an effective threat by a high-level manager that they would go down, if they supported a union. Accordingly, the statements were coercive and unlawful.

2. January 28 roundtable meeting (Wright)

The second meeting on January 28 was a smaller "roundtable" meeting with 15–20 employees, including Phipps. The meeting was conducted by then-HR Manager Wright immediately after the town hall meeting. It was the first of two such meetings Wright conducted that day on different shifts, and the first of any such meeting she had conducted since October 2013, the year she was hired. The General Counsel alleges that Wright unlawfully solicited complaints and grievances at the meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(h)).

Wright began by acknowledging that it had "been a while" since the Company had held roundtable meetings. She said that the Company was going to try and do it "a little bit more often" to find out "what's going on and . . . where [she] could help." She also said the Company was going to do it "a little bit differently" by having the meetings with smaller groups, as the large meetings could be "a little cumbersome, a little bit overwhelming to deal with so much and

[8] As noted by the Company, the record indicates that Vaivao and Engdahl held similar small meetings with additional employees on different shifts. However, evidence fails to establish that all of the warehouse employees attended the meetings or that Engdahl and Vaivao made the same statements at all of the meetings. Engdahl testified that he always speaks off the top of his head at the meetings (Tr. 732–735). And while Vaivao testified that he said wages could go up or down or stay the same at other small "communication" meetings in February that were conducted by Wright, he acknowledged that the meetings were not about the Union and he only made the statement if one of the employees raised the issue (Tr. 899–901, 931). See also GC Exh. 7(a), the transcript of the recording of the February 5 communication meeting (which confirms that the issue never came up and Vaivao did not make such a statement). Finally, contrary to the Company's contention (Br. 28 n. 8), the record is also insufficient to establish that the Union contumaciously failed to produce recordings from the other meetings (i.e. recordings of meetings other than those made by Phipps or Lerma that were put in evidence by the General Counsel) in response to the Company's hearing subpoena. Accordingly, the Company's request for an adverse inference that recordings of other meetings would "corroborate the noncoercive context of Shamrock's discussions with employees concerning the possible results of unionization" is denied.

trying to filter out what [the] top 10 issues were out of 250 people." Wright advised them that she had "made sure" their names would not be revealed to "management" so that they would feel more comfortable speaking up at the meeting.

Wright then asked for their "feedback" on recent changes, what they liked and disliked, and "recommendations [for] more changes." Employees voiced various complaints in response, including that there were no written guidelines or standard procedures for implementing the changes; that their tools and equipment (forklifts, pallet jacks, radios, and scanners) were old and poorly maintained; that there were too few quality controllers scheduled per shift; that they were averaging a lot less money under the new pay plan; that they had to move more heavy pallets every day without any incentives or increase in pay; and that supervisors and managers insulted, disrespected, and lied to them, and failed to respond when they raised problems using the Company's "open door" policy.

Wright's assistant took notes of the complaints, and Wright thanked the employees for their feedback and time. Wright thereafter took the complaints to upper management. (GC Exh. 15(a) and (b); Tr. 362, 383–390, 504.)

An employer's solicitation of employee grievances during a union campaign inherently includes an implied promise to remedy them and is unlawful unless the employer has a "past policy and practice" of soliciting grievances and did not "significantly alter[] its past manner and methods" of doing so. See, e.g., *Manorcare Health Services-Easton*, 356 NLRB 202 (2010); *Barberton Manor*, 252 NLRB 380 (1980); and *Carbonneau Industries*, 228 NLRB 597, 598 (1977).

Here, as indicated above, the Teamsters had recently campaigned to organize Shamrock's warehouse in southern California. And the Company was obviously aware of it and concerned about the campaign spreading to the Phoenix warehouse, which the Teamsters had also tried to organize in the past. Further, there was, in fact, a union campaign ongoing at the Phoenix warehouse at the time; it was just by a different union, BCTGM Local 232. Although the campaign was still covert at that time, and there is no direct evidence that the Company knew about it, there is strong circumstantial evidence that the Company at least suspected it was going on. As indicated above, the antiunion town hall meeting with all of the warehouse employees was held shortly after word of the campaign began spreading "like wildfire" through the warehouse. Further, the Company held the antiunion meeting at that time even though, according to Engdahl's own report, the Teamsters campaign in California had already failed.

As for the Company's past practice, there is no dispute that the Company had a history of holding roundtable meetings with employees. Phipps himself testified that the Company had held hundreds of roundtable meetings at the warehouse over the 20 years he had worked there. However, the meetings were usually held to communicate information to employees, and only sometimes to solicit their feedback.[9] Further, no such meeting had been held in the past 15 months. And, as indicated by Wright's own comments, the January 28 roundtable meeting was both intended and presented as the first in a series of more frequent, smaller meetings with

[9] Tr. 573–575. I discredit Wright's testimony to the extent it indicates that soliciting employee complaints was standard practice at the roundtable meetings (Tr. 383–388). As previously noted (fn. 5), Wright was not a credible or reliable witness.

employees to solicit their feedback.[10] Thus, the meeting represented a significant departure from past practice. Moreover, it was held immediately after the antiunion town hall meeting, where Engdahl had assured all the warehouse employees that they did not need a union because they could talk directly to the Company and it would try to fix any problems they raised. Thus, it is unlikely that the connection between the two would have been lost on employees.

Accordingly, Wright's solicitation of the employees' complaints violated Section 8(a)(1) of the Act as alleged.

3. February 5 communication meeting (Vaivao)

The February 5 meeting was even smaller than the January 28 roundtable meeting, with only about 10 employees. Although HR Manager Wright again attended and occasionally spoke, the meeting was conducted by Phoenix Warehouse Manager Vaivao.[11] The General Counsel alleges that, like Wright on January 28, Vaivao unlawfully solicited complaints and grievances at the meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(k)).

Vaivao began by saying that it was a "communication follow-up meeting" to the prior roundtable meetings. Like Wright on January 28, he also explained why the smaller meetings were being held. He said that the Company had "decided" to have the smaller meetings after the town hall meeting "to be a little bit more intimate" so that employees would be more willing to speak up and tell the Company about "some of the issues that [are] out there, some of the obstacles that [Wright] and I can remove or report . . . to make sure those are removed." He said he wanted them to give him "feedback" on "what is really bothering" the employees; what the "main concerns" and "big issues" were. He assured them that he would take notes of their complaints and get back to them about whether the matter was "fixed" or not and why. He said the Company was "commit[ted]" to removing "most of the obstacles, as much as we can."

As on January 28, employees voiced various complaints in response, including about wages and benefits, working conditions, scheduling, and the "open door" policy. Vaivao advised them that he and Wright would "make sure" the Company "heard" their concerns and "in some cases "bring [] down a solution to resolve" them. With respect to the scheduling issues in particular, he said he would "definitely look into" them and "make adjustments." (GC Exh. 7(a), (b); Tr. 523–524.)[12]

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[10] Although the Company denied in its answer that Operations Vice President Engdahl and HR Manager Wright were supervisors, it stipulated to their supervisory status at the hearing (Tr. 5–6, 20–21, 53, 65–66, 117). Their statements at the January 28 meetings are therefore nonhearsay party admissions under FRE 801(d)(2). See, e.g., *Ferguson Enterprises,* 355 NLRB 1121 n. 2 (2010).

[11] As with Engdahl and Wright, the Company denied in its answer that Vaivao was a supervisor, but stipulated to his supervisory status at the hearing.

[12] I discredit Vaivao's testimony about the February 5 meeting (Tr. 164–170, 175, 262–266). Like Wright, Vaivao was called as an adverse witness by the General Counsel during the case in chief. And like Wright's testimony about the January 28 town hall meeting, Vaivao's testimony about his role at the February 5 meeting, whether he solicited employee complaints, and whether any complaints were elicited, is clearly contradicted by the audio recording of the meeting

The only significant difference between the context and circumstances of Vaivao's solicitation of employee complaints and Wright's similar solicitation a week earlier is that Vaivao's promise to remedy the solicited complaints was more explicit. Accordingly, it was unlawful as well.

4. Mid-February union education meeting (Vaivao)

Vaivao thereafter also conducted so-called "union education" or "union prevention" meetings with small groups of employees, including one that employee Wallace attended with about eight other employees in mid-February.[13] The General Counsel alleges that Vaivao again unlawfully solicited complaints and grievances at the mid-February meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(l)).

The only evidence presented and cited by the General Counsel to support this allegation is Wallace's testimony that Vaivao "opened the floor to questions" after showing them an antiunion video, and that he "wanted to know if there [were] any issues that we wanted to bring up" after Wright explained to them how their pay and benefits compared to others in the industry (Tr. 653–654).[14] While there is nothing incredible about this testimony, it is too vague or sketchy to establish that Vaivao actually solicited complaints or grievances as at the February 5 communication meeting. Accordingly, the allegation is dismissed.

5. February 24 union education meeting (Vaivao)

Vaivao also held several small meetings on February 24, including one that Phipps attended with eight other employees. The General Counsel alleges that Vaivao committed two additional violations at that meeting: first, that he unlawfully created an impression that the employees' union activities were under surveillance by telling them that the Company had an idea who was organizing; and second, that he unlawfully asked the employees to ascertain and disclose the union activities of other employees by asking them to raise their hand to let him know if another employee had contacted them (GC Exh. 1(g), par. 5(m)(1), (2)).

Vaivao began by saying that it was another "union education" meeting so that the employees knew the "essentials." He said that employees, and even a meat plant manager, had recently come up to tell him and Brian Nicklen, the inbound manager, that they were being approached by union supporters, "so we kind of have some ideas . . . of who's out there." He also said that some had expressed concern that they might be seen talking to the union supporters on the Company's surveillance cameras. He assured the employees that the Company does not use the cameras to conduct surveillance of such activities. Vaivao also told the employees that, if they did not want to sign a union card or be approached anymore, "tell them no, you won't be a part of it [and] [r]aise your hand, say, hey, man, this guy is bugging me." He then listed various

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secretly made by Phipps.

[13] I discredit Vaivao's testimony (Tr. 155–156) that no such "union education" or "union prevention" meetings were held, as the record as a whole clearly establishes otherwise. See, e.g., GC Exhs. 9(a), (b), and 10(a), (b), the recordings and transcripts of his subsequent remarks at the February 24 and March 26 meetings, discussed infra.

[14] Unlike the other meetings at issue, there is no audio recording of the mid-February meeting (apparently because neither Phipps nor Lerma attended it).

reasons why they should be cautious or wary of supporting a union.[15] As at the mid-February educational meeting, he also showed them an antiunion video. (GC Exh. 9(a), (b); Tr. 529–530.)[16]

An employer unlawfully creates an impression of surveillance when employees would "reasonably assume" from the employer's statements that management had placed their union activities under surveillance, i.e. that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexteel Industries*, 311 NLRB 257 (1993). Thus, there is no violation where the employer's statements indicate that the information concerning the employees' union activities was voluntarily provided to the employer by their coworkers. See, e.g., *North Hills Office Services,* 346 NLRB 1009, 1103 (2006) (supervisors' statements to employees that two of their coworkers had reported that they had driven employees to a union meeting or distributed union literature during working hours did not unlawfully create an impression of surveillance in the absence of any evidence that management solicited the information); and *Bridgestone Firestone South Carolina*, 350 NLRB 526 (2007) (plant manager's letter to employees thanking "the many team members who have chosen to provide information to me regarding the recent [union organizing campaign]" did not unlawfully create the impression of surveillance). Here, Vaivao's statements indicated that he knew about the employees' union activities because employees and a manager had voluntarily informed him and Nicklen after being approached by union supporters. Accordingly, this allegation is dismissed.

On the other hand, Vaivao's additional statement during his antiunion presentation, that employees who receive unwanted solicitations should "raise [their] hand" and let management know the union supporters are "bugging" them, was clearly unlawful under Board precedent. See, e.g., *Sunbeam Corp.*, 284 NLRB 996, 997 (1988) (company president unlawfully asked employees to report the identity of union supporters by advising them to "tell these union pushers [to] . . . just go away and leave you alone, [and] [i]f they won't leave you alone, let me know about it, and we will see that something is done," as the request was broad enough to cover protected union solicitation); and *Hawkins-Hawkins Co*., 289 NLRB 1423 (1988) (plant manager unlawfully told employees that "if anyone was harassed by the union or by fellow employees" they should "contact management and they would take care of it," as the manager did not explain what he meant by "harassment"). See also *Winkle Bus Co.*, 347 NLRB 1203, 1204 (2006); *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003), enfd. 357 F.3d 692 (7th Cir. 2004); and *Tawas Industries,* 336 NLRB 318. 322 (2001), and additional cases cited there.[17] Accordingly, that allegation is sustained.

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[15] For example, like Engdahl at the January 28 antiunion town hall meeting, Vaivao told the employees that it would take "70 [percent] plus one" to vote a union out. As previously noted (fn. 6), however, this is untrue.

[16] Again, I discredit Vaivao's testimony about the meeting (Tr. 175–190), as it is contradicted by the recording and transcript of the meeting and other evidence consistent therewith.

[17] Although Vaivao testified that an employee had complained that union supporters had harassed him by throwing pens at him when he refused to sign a card (Tr. 182), Vaivao did not mention this at the meeting. Nor does the Company's posthearing brief cite any other basis to distinguish the cited Board precedent; indeed, the brief does not even address the allegation.

6. March 26 union prevention meeting (Vaivao)

Vaivao held another meeting on March 26 with a small group of employees, including Lerma. James Allen, a new HR representative at the time, was also present. The General Counsel alleges that Vaivao made several more statements at the meeting that unlawfully created the impression of surveillance; specifically, that the Company knows everything that is going on and who they are, that there was a union meeting off the property a few weeks earlier, and who attended the meetings (GC Exh. 1(g), par. 5(n)).[18]

Vaivao began by saying that it was another "union prevention" meeting. He said the Company was continuing with such meetings because employees were "getting fed up" with the union supporters. He said three employees had come up to him that week complaining about being approached to join the Union and asking him if he could make them stop. Vaivao explained that the union supporters had the right to organize. However, he said they were "disgruntled" and had "personal agendas" against the Company. He said, "We know that. We know who they are. We know they've been conducting meetings offsite." Vaivao said that the union supporters were spreading "lies" and that there was nothing to "substantiate" what they were "throwing out there." He said it was his job to "protect" employees by telling them the "truth." He then repeated that,

> [W]hoever is doing that out there, we know who they are, because they come the next day to me. They come the next day to tell me that. . . . So I know who they are. I know there's meetings out there. I know there was a meeting a . . . few weeks ago. And I know who attended.

Vaivao repeated the same point twice more later in the meeting. Thus, after Allen had finished introducing himself and addressing the employees, Vaivao said,

> I appreciate everybody showing up. . . . But we're going to continue to have all the meetings. As long as there's guys out there, I'm going to review propaganda for the union organizers. . . . I know who they are. I know exactly who they are. I know who's been asked, the guys . . . So know that I'm out there. I'm going to be vigilant. . . .I'm going to be vigilant, because I know what the truth is.

And at the very end of the meeting, after again discussing some of the reasons not to support a union,[19] he said,

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[18] Although the complaint alleges that Vaivao, Nicklen, and an unknown HR representative committed the alleged violations at the March 26 meeting, the General Counsel's posthearing brief identifies only Vaivao as the offending speaker. The complaint (par. 5(o)) also alleges that, on the same date, Vaivao, Nicklen and an unknown HR representative informed employees that it would be futile for them to select the Union as their bargaining representative by telling employees that shifts cannot be changed. However, the General Counsel's posthearing brief does not address this additional allegation, and it therefore appears to have been abandoned. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

[19] For example, Vaivao again incorrectly told the employees that it takes "70 percent plus one" to vote a union out.

> And you should feel that way. You should stand there and tell whoever it is, dude no. If you talk to me again—several guys are . . . coming up to me and say[ing] I want . . . a statement that these guys will leave me alone. . . . So that's where we're at right now. Until we have that, we have a little different conversation with them. But we know who the guys are. I want you guys to be aware of that. I want you guys to understand that.

(GC Exh. 10(a), (b).)

As discussed above, an employer's statements concerning its knowledge of employees' union activities do not unlawfully create the impression of surveillance where the statements indicate that the information was voluntarily provided to the employer by their coworkers. Here, as at the February 24 meeting, Vaivao indicated that employees who did not support the Union had voluntarily provided the information to management about who the union supporters were and who attended the meetings. Accordingly, these allegations are likewise dismissed.

7. April 29 communication meeting (Engdahl)

The Company held another small communication meeting on April 29 with about 8–10 mostly senior employees from the first shift, including Phipps. Both Vaivao and Operations VP Engdahl attended and spoke at the meeting. The General Counsel alleges that Engdahl made several unlawful statements during the meeting; specifically, that he unlawfully promised and granted benefits to employees by guaranteeing or committing to them that there would not be a layoff during the slow summer season like the previous year; created the impression of surveillance by telling employees that the Company understood who was behind the Union; threatened employees with unspecified reprisals by telling them the Union will hurt them and everybody in the future; and informed employees that it would be futile for them to support the Union by telling them that the Company does not have to agree to anything through collective bargaining (GC Exh. 1(g), par. 5(t); Tr. 19–23).

Engdahl began the meeting by handing out a document, which he said was "going out to every person in this building." He said the document was a "follow-up" on the issue of layoffs that had been discussed in previous meetings and "some other things last year that we felt we didn't handle correctly." He then stated,

> So, we're committed to the point where we put it in writing now, okay, that we will not do these things. And you can take that to the bank. So, we owed you that feedback, now we've given it to you. It's in writing. And it's probably not so important for you all. It's more of a lower on the totem pole for folks who were worried about layoffs and things like that. Well, so this will ease some of their fears.
>
> But, I wanted to start by giving this all to you all and have a little discussion with you on what's going on here with this union organizing stuff, okay. And I understand who's behind it. I understand that you don't care what anybody else thinks. I understand that you're doing it for your own personal reasons, and that's great, have at it. But, what I am going to do is straighten out some things with some facts, okay, and some truths. And I'm going to call bullshit on a lot of stuff that's being spread, because its wrong. It will hurt

> Shamrock. It will hurt all of you. It will hurt everybody in the future, okay. And I don't want that to happen.
>
> This is all my opinion. And I'm entitled to my opinion, just like you're entitled to yours, okay. I've been a Teamster for seven years. I was in the union for seven years. I understand it inside and out. I know what it's good for and what it's not good for. And it's not good for us here at Shamrock, I can tell you that, okay.

Engdahl then discussed various reasons why, in his "opinion," the Union would not be good for them. For example, he said that the Union would never negotiate a higher wage rate for them than at Sysco or U.S. Foods; that nothing would change with respect to their health insurance because it is mandated by "Obamacare" and there was only one "bucket of money" to divide up between wages, benefits, and equipment to run the warehouse; and that "nobody can say whether [a union contract] would be better or worse." He then closed by saying,

> Remember, the company pays wages, benefits, sets work conditions—not the union. The only thing the union can do is come to collective bargaining and ask. They can ask for things. The company doesn't have to agree to anything, nothing—other than what they want to. It's bargaining. Bargaining can go on forever. It can never end. It's collective bargaining. All you have to do is bargain in good faith. All right?

(GC Exh. 12(a), (b).)[20]

It is well established that an employer violates Section 8(a)(1) of the Act by promising or granting benefits during a union campaign in order to dissuade its employees from supporting the union. See, e.g., *Sisters Camelot*, 363 NLRB No. 13, slip op. at 7 (2015) ("The lawfulness of an employer's promise of benefits during a union organizational campaign depends upon the employer's motive. Thus '[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.'"); *Network Dynamics Cabling, Inc*., 351 NLRB 1423, 1424 (2007) (the Board examines "the record evidence as a whole, including any proffered legitimate reason for [granting the benefit], to determine whether "it supports an inference that [it] was motivated by an unlawful purpose"); *Real Foods Co*., 350 NLRB 309, 310 (2007) ("The granting of benefits to employees in the middle of union organizational activity 'is not *per se* unlawful where the employer can show that its actions were governed by factors other than the pending election.' The General Counsel bears the burden of proving, by a preponderance of the evidence, 'that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation.' If the General Counsel makes such a showing, the burden shifts to the employer to demonstrate a legitimate business reason for the timing of the benefit, such as by proving that the benefit was 'part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union.'"); and *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961–962 (2004) ("[A] grant of

[20] As indicated above, Vaivao also spoke at the meeting, addressing various "rumors" and statements by union supporters that he said were "not true." Again, I discredit Vaivao's and Engdahl's testimony about what they said at the meeting (Tr. 225–234, 740–741), as it is clearly contradicted by the recording and transcript.

benefits . . . during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election. To meet this burden, the employer needs to establish that the benefits conferred were part of a previously established company policy and the employer did not deviate from that policy on the advent of the union.") (Citations and footnotes omitted).

Engdahl's no-layoff commitment was clearly unlawful under these principles. First, it plainly constituted a promise or grant of a substantial benefit.[21] *Hertz Corp*., 316 NLRB 672, 688 (1995); and *Justrite Mfg. Co*., 238 NLRB 57, 61 (1978). Second, there is no dispute that the union campaign was well underway at that point and that the Company knew about it.[22] Indeed, the Company had been holding meetings with employees for the past 2 months to address and respond to the campaign. Moreover, Phipps had announced the union campaign in the breakroom just a few days earlier, on April 26 and 27, and Engdahl again specifically addressed the campaign immediately after announcing and distributing the no-layoff commitment. Third, Engdahl acknowledged at the hearing that the Company had never made such a written commitment in the past, notwithstanding that there had occasionally been other layoffs (Tr. 759).

As for general assertions of harm resulting from union organizing, while not unlawful by themselves, such assertions may become unlawful "if uttered in a context of other unfair labor practices that 'impart a coercive overtone' to the statements." *Reno Hilton Resorts Corp*., 319 NLRB 1154, 1155 (1995) (citations omitted). Thus, in *Reno Hilton* the Board found that the employer's vague assertion that the "union would not benefit you in any way and could hurt you seriously" was unlawful in light of the employer's numerous other unfair labor practices, including threats of closure, discharge, and loss of benefits, which gave the assertion "both specificity and force." Accord: *Homer D. Bronson Co.*, 349 NLRB 512, 540–541 (2007) (finding employer's statement that the union was "just going to hurt" unlawful for the same reason), enfd. 273 Fed. Appx. 32 (2d Cir. 2008).[23]

Here, Engdahl's statement to employees that supporting the Union "will hurt" them in the future was likewise made in the context of numerous other unfair labor practices. Indeed, as discussed above, Engdahl himself had previously threatened all of the employees at the January 28 town hall meeting with loss of benefits if they supported the Union. Moreover, as fully discussed infra, just a few weeks before the April 29 meeting, the Company unlawfully

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[21] Although the actual document containing the written commitment is not in evidence, Engdahl's above-quoted statements to employees at the meeting—that the Company was "committed" to no layoffs "to the point where we put it in writing," and that they could "take that to the bank" —are sufficient to establish the promise or grant of benefit. It is therefore unnecessary to pass on the General Counsel's request (GC Br. 20 n. 21) for an adverse inference based on the Company's failure to produce a copy of the document in response to paragraph 37 of the General Counsel's August 25 subpoena duces tecum (GC Exh. 2(e), attachment 1, p. 6).

[22] See *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006) (grant of benefits during union campaign is not unlawful unless employer was aware of it).

[23] See also *Downtown Toyota*, 276 NLRB 999 (1985), cited by the General Counsel, where the Board affirmed the judge's finding that the employer's statements that the union is "only going to hurt you guys" and "I'll make more money and you guys will make less" were unlawful threats of unspecified reprisal and/or of futility.

discharged one of the more active union supporters (Wallace) after he openly complained about the Company's health benefits.[24] Accordingly, as in *Reno Hilton*, the statement violated the Act.

With respect to statements about the bargaining process, the lawfulness of such statements may depend on both their content and their context. See *Airtex*, 308 NLRB 1135 n. 2 (1992). Compare also *Medieval Knights, LLC*, 350 NLRB 194, 195 (2007) (finding no objectionable conduct where the employer, which had not committed any other objectionable or unlawful conduct, stated during a hypothetical exercise that an employer does not have to agree to any specific proposals, that all negotiations were different, that the bargaining process could take weeks, months, or even more than a year, and that an employer could "stall out the negotiations" by "giving in to lesser items or addendums" "that would make them show they were bargaining in good faith but not really getting anything done"), with *Kajima Engineering*, 331 NLRB 1604, 1616 (2000) (finding a violation where the employer, which committed numerous other unfair labor practices, stated during a preelection mandatory meeting that the company "could drag their heels and make it go on forever" and just had to "show good faith efforts of negotiations for at least an hour per month").

Here, as discussed above, Engdhal made the statement ("The company doesn't have to agree to anything, nothing . . . Bargaining can go on forever. It can never end . . . All you have to do is bargain in good faith") after unlawfully telling employees that supporting the Union "will hurt" them in the future. Moreover, he had previously unlawfully threatened employees at the January 28 town hall meeting with loss of benefits if they supported the union. Thus, considered in context, Engdahl's statement would reasonably be viewed by employees, not as a mere hypothetical like in *Medieval Knights*, but as the handwriting on the wall like in *Kajima*. Accordingly, it violated the Act as well.

As for Engdahl's statement that he understood who was behind the union campaign, as previously discussed Vaivao had repeatedly stated in prior meetings in both February and March that employees had volunteered such information to management. Moreover, as indicated above, Phipps had recently announced that he was behind the campaign. Thus, even if some of the employees at the April 29 meeting had not attended Vaivao's prior meetings, it is unlikely they would reasonably assume at that point that the employer had obtained the information through surveillance. Accordingly, like the similar allegations regarding the February and March meetings, this allegation is dismissed.

B. Other Alleged Unlawful Statements or Conduct

The complaint also alleges numerous other incidents during the same period (January–July 2015) where managers or supervisors made unlawful statements to employees or engaged in other unlawful conduct. The complaint alleges that these additional violations were committed by various managers and supervisors at all levels of the Company, including President/CEO Kent

[24] Given this background of other unfair labor practices, the formal nature of the meeting, and Engdahl's high-level corporate position, it makes no difference that Engdahl couched the statement and other imparted "truths" as his "opinion." See generally *Saint Luke's Hospital,* 258 NLRB 321, 322 (1981); and *J.S. Abercrombie Co*., 83 NLRB 524, 530 (1949), affd. per curiam 180 F.2d 578 (5th Cir. 1950). Nor does the Company argue otherwise; its posthearing brief does not specifically address the allegation.

McClelland, Operations VP Engdahl, Warehouse Manager Vaivao, Safety Manager Joe Remblance, Inbound/Receiving Supervisor Dave Garcia, Outbound/Shipping Supervisor Jake Myers, Sanitation Supervisor Karen Garzon, and Floor Captains Zack White and Art Manning.

1. January 25 conversation (White)

The General Counsel alleges that, on January 25 (3 days before the January 28 town hall meeting), Floor Captain White unlawfully interrogated Phipps about the employees' union activities and created the impression of surveillance by telling him that there were rumors in the warehouse about the organizing campaign (GC Exh. 1(g), par. 5(f)). The Company disputes both that the floor captains are supervisors within the meaning of the Act and that White made any unlawful statements during his conversation with Phipps.

As indicated above, Phipps is a longtime forklift operator at the warehouse and was the person who contacted BCTGM Local 232 in November 2004. He reports to Johnny Manda or Richard Gomez, whom he considers his immediate supervisors. He and other warehouse employees also receive assignments and directions from floor captains, including White and Manning, both of whom work on the loading dock. The floor captains' job is to expedite and make the work run smoothly. They do so by assigning or reassigning employees to particular areas or routes at particular times, directing the warehouse workers to perform particular tasks, and by deciding when to send an employee home or keep them late after their shift. They issue such assignments and directions based on their own judgment of who is best able to perform the work, regardless of whether the task or assignment is consistent with that individual's job description or prepared schedule for the day, and without consulting or seeking permission from anyone. And they are held responsible by the warehouse managers, who they meet with on a weekly basis, if there is an interruption or delay in the workflow.[25]

On January 25, Phipps happened to run into White at the time clock as they were both arriving for work. As they walked together to their respective work areas, White asked Phipps if he had heard about the union organizing in California. Phipps said he had heard rumors about it. White said the Teamsters were openly handing out cards to the drivers at the gates there. He told Phipps there were rumors that there was also an organizing campaign in the Phoenix warehouse. Phipps asked what White what he knew about it, as he did not want to have the Teamsters there. White said he had heard rumors that whoever was organizing was getting really close to getting a union in. He asked Phipps if he knew anything about it. Phipps did not directly reply, but said he remembered that the Company had unlawfully fired employees for supporting the Teamsters organizing attempt in 1998; that he knew what his rights were; and that he wanted to protect himself.[26]

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[25] The foregoing findings regarding the floor captains' supervisory authority and duties are based on the credible testimony of Phipps (Tr. 485–492), Wallace (Tr. 647–648), and Lerma (764–766, 773, 779, 852) regarding their personal experiences and observations while working with White, Manning, and the other floor captains.

[26] The foregoing summary of the January 25 conversation is based on Phipps' testimony (Tr. 499, 612–617) and his May 2015 pretrial affidavit (R. Exh. 1, at 20). The Company did not call White to testify about the conversation.

Under Section 2(11) of the Act, an individual is a supervisor if he/she possesses, in the interest of the employer, at least one of the types of authority listed therein.[27] The burden is on the party asserting supervisory status to prove it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710-713 (2001).

Here, the General Counsel contends that the floor captains are supervisors because they possess the authority to assign and/or responsibly direct the warehouse employees using independent judgment.[28] As indicated above, the record supports this contention. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006) (an individual has such authority if he/she has the authority to assign employees to a place, overtime period, or significant overall duties, or direct employees to perform tasks using judgment that involves the exercise of discretion that is more than routine or clerical and not dictated or controlled by detailed instructions, and is held responsible or accountable for performance of those tasks). See also *Golden Crest Healthcare*, 348 NLRB 727, 730 (2006); and *Croft Metals, Inc.*, 348 NLRB 717 (2006).[29] Moreover, as

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[27] See 29 U.S.C. Sec. 152(11) ("The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.")

[28] The record also contains some evidence that the floor captains have the authority to effectively recommend discipline; however, the General Counsel's posthearing brief does not contend that the floor captains are supervisors on that basis.

[29] The testimony of Phipps, Wallace, and Lerma regarding the floor captains' authority to assign and responsibly direct employees using independent judgment is conclusory and lacks supporting detail in some respects, which would normally mean that it fails to satisfy the burden of proof. See *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015), and cases cited there. However, it is not fatal to the General Counsel's case under the particular circumstances here. On August 25, 2 weeks before the hearing, the General Counsel served a subpoena duces tecum on the Company requesting various documents, including documents relating to the duties of the floor captains (GC Exh. 2(e), attachment 1, pars. 1–7). The Company subsequently filed a petition to revoke these and other requests, but the petition was denied in relevant part by order dated September 4 (GC Exh. 2(a)). Nevertheless, the Company thereafter failed to timely produce any documents responsive to the requests at the hearing, either on September 8 as required by the subpoena, or on September 9. After a lengthy discussion of the matter with the parties, I concluded that the Company had failed to make a good-faith effort to timely comply with the subpoena requests as required, citing *McAllister Towing*, 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). Consistent with *McAllister* and other Board decisions, at the General Counsel's request I therefore issued a variety of evidentiary sanctions against the Company, including permitting the General Counsel to introduce secondary evidence and barring the Company from cross-examining the General Counsel's witnesses or presenting any contrary testimony or other evidence on the subjects or issues to which the subpoena requests were addressed. See also *M.D. Miller Trucking*, 361 NLRB No. 141, slip op. at 1 n. 1 and JD. at 5 (2014); *Perdue Farms, Inc.,* 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 834 (D.C. Cir. 1998); *Roofers Local 30 (Associated Builders and Contractors, Inc.),* 227 NLRB 1444, 1449 (1977); and *Bannon Mills*, 146 NLRB 611, 614 n. 4, 633–634 (1964). I also ruled that such sanctions would include appropriate adverse inferences (see, e.g., *Chipotle Services,*

noted by the General Counsel, the record also contains so-called "secondary indicia" supporting supervisory status; specifically, that the captains are paid more than the warehouse workers and regularly attend management meetings. See generally *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007). Accordingly, the General Counsel has satisfied the burden of establishing that White and Manning are supervisors.[30]

However, the record fails to establish that White unlawfully interrogated Phipps. The relevant test is whether, under all the circumstances, the questioning would have reasonably tended to restrain or coerce an employee in the exercise of union or other protected concerted activity. See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In applying this test, the Board typically considers a number of factors, including the identity of the questioner, the nature of the relationship between the supervisor and the employee, whether there is a history of employer hostility to union activity, the place and method of interrogation, the nature of the information sought, and the truthfulness of the employee's reply. See *Intertape Polymer Corp*., 360 NLRB

LLC, 363 NLRB No. 37, slip op. at 1 n. 1 (2015); and *Metro-West Ambulance Service,* 360 NLRB No. 124, slip op. at 1 and n. 13 (2014)), but reserved ruling on exactly what those inferences would be until after reviewing all the evidence and the parties' posthearing briefs. (Tr. 53–126.) Having now done so, I grant the General Counsel's request (Br. 4 n. 5) and find, for purposes of this case, that the Company's contumacious failure to produce the subpoenaed documents supports an adverse inference that they would have corroborated the testimony of Phipps, Wallace, and Lerma and provided additional evidence to establish that the floor captains have the authority to responsibly direct employees using independent judgment as required under Section 2(11) of the Act as interpreted and applied by the Board in *Oakwood Healthcare* and subsequent cases. See generally *Essex Valley Visiting Nurses Assn*., 352 NLRB 427, 441–444 (2008), reaffd. 356 NLRB No. 18 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012).

In its posthearing brief (p. 25) the Company argues that, not only should I decline to impose any adverse inference against it for failing to produce the subpoenaed documents, but I should impose an adverse inference against the General Counsel. The Company argues that such an adverse inference is warranted because the General Counsel failed to call or question White or Manning themselves regarding their supervisory authority. To paraphrase the D.C. Circuit, the Company's argument "is not only meritless, it reflects real chutzpah." *Fallbrook Hospital Corp., v. NLRB*, 785 F.3d 729, 733 (D.C. Cir. 2015). There is no record basis to assume that White and Manning would have testified favorably to the General Counsel. See generally *Torbitt & Castleman, Inc.*, 320 NLRB 907 n. 6 (1996), enfd. 123 F.3d 899, 907 (6th Cir. 1997); and *International Automated Machines*, 285 NLRB 1122 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988) (an adverse inference against a party for failing to call a witness is inappropriate unless it may reasonably be assumed that the witness would have testified favorably to that party). Moreover, without the subpoenaed documents, the General Counsel would not have been able to fully cross-examine or impeach them regarding their testimony. Finally, the sole authority cited by the Company for applying an adverse inference against the General Counsel—the judge's decision in *Desert Pines Golf Club*, 334 NLRB 265, 268 (2001) —has no precedential weight as the Board expressly disavowed the judge's discussion of the issue (see n. 1).

[30] The General Counsel also alleges and asserts that the floor captains are agents of the Company under 2(13) of the Act. However, the General Counsel's posthearing brief fails to specify the evidentiary basis for such a finding, and it is unnecessary to reach the issue given my finding that they are supervisors.

No. 114, slip op. at 1 (2014), enfd in relevant part 801 F.3d 224 (4th Cir. 2015); and *Fresh & Easy Neighborhood Market, Inc.,* 356 NLRB 546, 556 (2011), enfd. in relevant part 468 Fed. Appx. 1, 3 (D.C. Cir. 2012), and cases cited there.

Here, there are some factors supporting the General Counsel's contention that White's remarks and questions were coercive. White and Phipps had never had such conversations previously,[31] the union campaign at the warehouse was still covert, and there is no evidence that Phipps' role had been revealed to management at that point. Further, Phipps avoided directly answering White's questions, specifically mentioning the Company's previous unfair labor practices during the 1998 union campaign.[32]

However, White was a low level supervisor, the conversation arose casually, after a chance encounter at the time clock, and nothing in the record indicates that White's demeanor or tone or was hostile or threatening in any way. Further, Phipps knew that word of the union campaign had been spreading "like wildfire" through the warehouse, notwithstanding his attempts to keep it covert, and White's remarks and questions did not seek or invite any additional or specific information such as the identity of the union supporters. Finally, over 16 years had passed since the 1998 Teamsters campaign, and the Company had not at that point committed any further unfair labor practices in response to the current BCTGM campaign. On balance, therefore, it is unlikely that White's remarks and questions would have reasonably tended to restrain or coerce an employee in exercising the right to engage in union activity. Cf. *Hancock*, 337 NLRB 1223, 1224 (2002) (reaching same conclusion under similar circumstances). Accordingly, the allegation is dismissed.

The record likewise fails to establish that White unlawfully created the impression of surveillance. An employer's general statements about hearing "rumors" of a union campaign do not create an impression of surveillance absent evidence that the employer could only have learned of the rumor through surveillance. See *South Shore Hospital*, 229 NLRB 363 (1977), and cases cited there.[33] There is no such evidence here. Accordingly, this allegation is dismissed as well.

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[31] I credit Phipps' uncontroverted testimony in this regard (Tr. 499). Phipps also denied ever speaking to Manning specifically about the union campaign (Tr. 613–615) and Manning confirmed this (Tr. 970).

[32] At the hearing, Phipps testified that he was also concerned about White's questioning because White reported to Shipping Supervisor Myers, who was known to be very antiunion (Tr. 499).

[33] *Flexsteel Industries*, 311 NLRB 257 (1993), cited by the General Counsel, is inapposite. In that case, the Board distinguished *South Shore Hospital* and found a violation because the employer's personnel manager twice stated to an employee that he had heard rumors about that employee's union activity, and the statements were accompanied by unlawful interrogations and implicit threats. As indicated above, White's reference to "rumors" concerned the union campaign generally rather than Phipps' own union activities, and his accompanying questions did not constitute unlawful interrogation.

2. January 28 conversation (Myers)

The General Counsel also alleges that, on January 28, shortly after the town hall meeting, Outbound/Shipping Supervisor Myers unlawfully interrogated Wallace about his union sympathies (GC Exh. 1(g), par. 5(i).)

Wallace is a warehouse loader who had worked at the Phoenix facility for a little over 6 years, since May 2008. He had not been aware of the union campaign prior to the January 28 town hall meeting, but signed a union card later that evening at a local Denny's restaurant. Myers is an admitted supervisor and directly supervised Wallace.[34]

The subject conversation occurred about 30 minutes after the town hall meeting ended. Wallace was working at the loading dock door, when Myers walked up to him and asked what he thought about the union. Wallace replied that he had talked to his dad, a neighbor, and a Sysco Driver and they said that union workers have better benefits, but he was going to do his own research. Myers nodded his head in agreement and walked off.[35]

Unlike White's previous conversation with Phipps, the balance of relevant factors supports the allegation that this conversation was coercive and unlawful. Myers was Wallace's immediate supervisor, he purposefully approached Wallace at his work station and questioned him directly about his personal views of the union, and he did so shortly after a formal meeting with all of the warehouse employees where a high-level corporate official expressed opposition to the union and unlawfully threatened employees with reduced benefits if they supported it. Further, Wallace, who was not an open union supporter, gave Myers a noncommittal response. Cf. *Intertape Polymer Corp*., above (finding a violation under similar circumstances).

3. January 28 incident at Denny's (Manning)

The General Counsel also alleges that, later that evening, Floor Captain Manning engaged in surveillance of the employees' union activities at the local Denny's restaurant (GC Exh. 1(g), par. 5(j)).

As discussed above, the union campaign was still covert at the end of January. Phipps was meeting with small groups of employees at that time, but only organizing-committee members and employees they were sure supported the Union were invited. One such meeting was held at a local Denny's restaurant about a quarter mile from the warehouse on the evening of January 28. Phipps and two union representatives arrived at around 5:30 p.m., and about five to six warehouse employees showed up between 6:30 and 7 p.m. They all sat a table in the very back that was not visible from the lobby.

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[34] As with Engdahl, Wright, and Vaivao, the Company denied in its answer that Myers was a supervisor, but stipulated to his supervisory status at the hearing.

[35] I credit Wallace's testimony about the conversation (Tr. 646–650). Myers admitted that he stopped and talked to employees while making his daily rounds on the dock after the meeting. Although he testified that he only asked employees if they had any questions about the meeting, he could not recall his conversation with Wallace; indeed, he could not recall whether he even spoke to Wallace. (Tr. 863–864, 867.)

Phipps stayed until about 7:30 p.m. As he was going out the door, he ran into Manning, who, as found above, is a company supervisor. Manning was standing on the handicapped ramp outside the front of the restaurant talking to an employee who had just signed a card. Phipps was surprised to see Manning there, as directions had been given not to invite captains to the meetings.[36] And there is no credible evidence that anyone had done so, or that Manning was at Denny's for any reason other than to gather information about the meeting.[37]

It is unlawful for a manager or supervisor to go to an offsite location such as a restaurant without an invitation or any other legitimate justification to observe employees' union activities during nonworking time. See, e.g., *Ivy Steel & Wire, Inc*., 346 NLRB 404 (2006); *North Hills Office Services*, 344 NLRB 1083, 1095 (2005); and *Munsingwear, Inc*., 149 NLRB 839, 846 (1964) and cases cited there. As indicated above, the record evidence indicates that that is precisely what Manning did.[38] Accordingly, his conduct violated the Act as alleged.

4. April 27 conversation (Manning)

The General Counsel also alleges that, a few months later, on April 27, Manning unlawfully created the impression of surveillance by telling Phipps that the Company knew he had recently announced the union campaign in the breakroom, and that he had better watch his back because the Company was watching him.[39]

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[36] The foregoing findings are based on the credible testimony of Phipps (Tr. 518–520, 597) and Wallace (Tr. 651–652), who as mentioned above was one of the employees who attended and signed a card at the meeting.

[37] I discredit Manning's testimony that he was "asked by a couple employees . . . would [he] go to the meeting" and that all he knew was that it had "something to do with work" (Tr. 967–968). First, Manning never identified who those employees were. Second, while Manning had met with Phipps offsite to discuss work issues in the past, he admitted that unions were never discussed at those meetings and that Phipps himself did not tell him about the January 28 organizing meeting (Tr. 973). Third, Lerma, who was on the organizing committee and also attended the January 28 meeting, credibly testified that he likewise did not invite Manning (Tr. 834). Fourth, there is no evidence that Manning had ever expressed support for a union; indeed, the record indicates he was strongly opposed to a union. See Manning's testimony, Tr. 969 ("[the employee I spoke to outside Denny's] asked me, 'Are you in the union or out?" And I said, 'Hell, no.'"). Finally, as indicated above, word of the organizing campaign was spreading "like wildfire" at that time. And Manning admitted that he himself had been hearing "a lot of talk on the docks about meetings and this and that" (Tr. 972). In sum, based on the record as a whole, I find that it is more likely that Manning overheard discussion on the docks that there would be a union organizing meeting at Denny's that evening, and that, in light of the Company's antiunion town hall meeting that morning, he went to Denny's to see what he could see.

[38] *Music Express East, Inc*., 340 NLRB 1063, 1076 (2003), cited by the Company, is therefore plainly distinguishable on its facts.

[39] The complaint alleges that Manning's statements violated Section 8(a)(1) of the Act because the first statement constituted surveillance and the second statement constituted a threat of unspecified reprisal (GC Exh. 1(g), par. 5(s)). However, at the end of the hearing, the General Counsel clarified that Manning's first statement to Phipps was being alleged as unlawful on the theory that it created the impression of surveillance (Tr. 971). And the General Counsel's

As discussed above, Phipps publicly announced the union campaign in the breakroom on April 26 and 27. On the latter date, both Warehouse Manager Vaivao and another manager were present in the breakroom during at least part of the announcement. A while later, after Phipps had returned to work on his forklift, Manning came by in a cart and asked Phipps if it was true, what he announced in the breakroom. Phipps replied that he could not talk about it during work. Manning said, "just watch yourself, because they [are] watching both of us, so watch your back." Manning then turned around and left.[40]

As indicated by the Company, Manning's initial query reflecting awareness of Phipps' announcement could not by itself reasonably create an impression of surveillance given that Phipps made the announcement openly in the company breakroom, managers were present at the time, and there is no contention that they should not have been. See *Sunshine Piping, Inc*., 350 NLRB 1186 (2007), and cases cited there. However, as indicated by the General Counsel, Manning's follow-up statement warning Phipps to "watch yourself" and "watch your back" because the Company was watching, clearly did create the impression of surveillance. Accordingly, it was coercive and unlawful. See *Woodcrest Health Care Center*, 360 NLRB No. 58, slip op. at 1–2 (2014), enfd. in relevant part 784 F.3d 902, 917–918 (3d Cir. 2015).

5. April 29 incident (Remblance)

The General Counsel also alleges that, on April 29, a few days after Phipps announced the union campaign in the breakroom, Safety Manager Remblance unlawfully surveilled and interrogated Phipps and another employee while they were on break (GC Exh. 1(g), par. 5(u)).

The incident occurred at about 1 p.m., a normal breaktime for Phipps and other employees. Phipps and another senior employee on the first shift were talking in one of the aisles, which was not unusual as employees could take a break wherever they wanted. Remblance, who was about 60–70 yards away walking towards his office, noticed them and

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posthearing brief argues that both statements were unlawful on this theory, apparently abandoning the theory that the second statement was a threat of reprisal. While such shifting theories are certainly not to be encouraged, given that the complaint allegation here involves a single, short conversation, which was fully litigated and would likely have been litigated just the same regardless of the theory, I find that the Company has not been deprived of due process. See *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015) (finding that supervisor's statements to an employee violated Section 8(a)(1) on the ground that they were coercive, regardless of whether they constituted an unlawful interrogation as alleged in the complaint).

[40] I credit Phipps' testimony about the conversation (Tr. 545–546, 555, 619). Manning testified that he could not remember whether he had such a conversation with Phipps, but denied that he ever told Phipps to watch his back (Tr. 970). The Company argues that this testimony reflects well on Manning's credibility; specifically, that Manning's "acknowledge[ment]" that he could not remember the conversation shows that he was a "credible and forthright witness" (Br. 28). However, the Company offers no plausible explanation for Manning's failure to remember whether he had a conversation with Phipps about his union campaign announcement less than 5 months earlier, and no such explanation is readily apparent. Further, as noted above, Manning's testimony on other matters was inconsistent and clearly contrary to the record as a whole.

came over.[41] He asked each of them if they were on break. They both said yes. Remblance asked what they were talking about. Although they had been talking about Phipps' involvement in the union campaign, they just told Remblance they were talking about work. Remblance then tried to make small talk, but they made it clear they were not interested. So Remblance started to walk away. However, before he left, he turned and asked Phipps how much time he had left on his break. Phipps looked at his phone and said a couple more minutes. Remblance told him to be sure to get back to work when his break was over.[42]

Phipps acknowledged in his pretrial affidavit (R. Exh. 1, p. 42–43), that Remblance had come up and joined conversations between him and other employees in the past. However, the circumstances indicate that that was not Remblance sole or primary reason for coming over; rather, he came over to find out if they were on break and what they were talking about. Further, it is undisputed that, as safety manager, Remblance was not in Phipps' direct supervisory chain and had never monitored his break time in the past. And there is no apparent reason in the record why Remblance would have done so in this instance other than Phipps' recent announcement about the union campaign in the breakroom. Indeed, as discussed below, the evidence indicates that other company managers and supervisors likewise took a number of other, unlawful actions to monitor and interfere with the union campaign. Accordingly, a preponderance of the evidence supports the allegation that Remblance's conduct constituted unlawful surveillance. Cf. *Hawthorn Co*., 166 NLRB 251 (1967), enfd. in relevant part 404 F.2d 1205 (8th Cir. 1969) (foreman engaged in unlawful surveillance by adopting a practice during the union campaign of sitting at employee tables in the cafeteria instead of the foremen's table during coffee breaks, assertedly to ensure they did not go over their break time).[43]

The related interrogation allegation presents a somewhat closer question. Although Remblance asked what they were talking about, he did not specifically refer to the union campaign. Further, Phipps was an open union supporter at that point. However, considering the timing—just 2 days after Phipps' announcement, and a few hours after the antiunion communication meeting where Operations VP Engdahl made several unlawful statements to Phipps and other first-shift senior employees—and the unlawful context discussed above, it is likely that Remblance's question would have reasonably tended to chill employees in the exercise of their union activity. Accordingly, a preponderance of the evidence supports this allegation as well. Cf. *Classic Sofa, Inc*., 346 NLRB 219, 235 (2006) (given the employer's various antiunion statements, the company president unlawfully created an impression of surveillance and interrogated an employee a week before the union election by noting that two other employees had been talking a lot and asking if she knew what they were talking about).

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[41] Like several of the other named managers, the Company denied in its answer that Remblance was a statutory supervisor, but stipulated to his supervisory status at the hearing.

[42] I credit Phipps' testimony about the incident (Tr. 551–553, 620). Although his testimony is not corroborated (the other employee did not testify), it is also not controverted (Remblance, who no longer works for the Company, likewise did not testify). Further, it is consistent with his pretrial affidavit (R. Exh. 1, p. 42–43), and the Company does not cite any reason why it should not be credited.

[43] *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006), cited by the Company, is distinguishable as the Board found that the supervisor there did not engage in any "out-of-the-ordinary" type of conduct.

6. May 1 incident (Garcia)

The General Counsel also alleges that a few days later, on May 1, Inbound/Receiving Supervisor Garcia unlawfully engaged in surveillance and created the impression of surveillance by searching Lerma's forklift for union authorization cards and subsequently telling Lerma that he knew that Lerma had passed out a card in the breakroom and that he had searched Lerma's forklift to find union cards (GC Exh. 1(g), par. 5(v)(1), (2)).[44]

Lerma is a second-shift forklift operator and member of the union organizing committee. He signed a union card on January 2, and began gathering signatures from other employees in February. Garcia is currently his direct supervisor. Garcia has worked at the warehouse for 27 years, and has known Lerma for about 6 years. He became the outbound supervisor around mid-2013 and the second-shift inbound supervisor in February 2015, and has seen Lerma basically every day he worked since.[45]

The May 1 incident occurred during a lunch break while Lerma was in the receiving office. He had parked his forklift just outside the breakroom, and could see it through the large office window. The forklift had an ID number on it (C18) and was typically assigned to him every day. He had also left his clipboard on top of the forklift, which he had purchased himself and had various documents clipped to it, including his pay sheets, drop notes, and work-hour calculations for the week. A copy of the day's schedule, which was prepared by the first-shift inbound supervisor and showed where all the employees were assigned, was also in a cubbyhole on the forklift.

At some point, Lerma glanced out the window and noticed that Garcia was leaning over the forklift with Lerma's clipboard in his hands and was leafing through the documents. Lerma immediately went out and confronted Garcia, asking him what he was looking for. Garcia said he was looking for the schedule and walked away. However, Lerma did not believe him because the schedule was in plain view sticking out of the cubbyhole and was not on the clipboard. Further, while Garcia had authority to adjust the schedule and move employees around, he could access the schedule on his office computer and had never asked to see Lerma's copy of the schedule before. Accordingly, when Lerma later saw Garcia again in the deli aisle, he asked Garcia "to be straight" with him and tell him the real reason he was going through his "stuff." Garcia admitted at that point that he was looking for union cards. He said he had gotten a call from transportation that Lerma was putting up flyers and had handed a union card to the transportation clerk in the breakroom.[46]

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[44] The complaint (par. 5(v)(3)) additionally alleges that Garcia unlawfully solicited employee complaints and promised employees increased benefits on May 1. However, the General Counsel's posthearing brief does not address this allegation, and it appears to have been abandoned. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

[45] Tr. 763, 784, 956–958. The Company stipulated at the hearing that Garcia is a statutory supervisor.

[46] I credit Lerma's testimony about the incident (Tr. 807–814, 836–838, 851– 856). See also GC Exh. 28(a), (b) (pictures of where his forklift was parked). Although Garcia testified to the contrary in virtually every detail, he was not a credible witness. For example, notwithstanding that the forklift drivers are usually assigned the same forklift every day and that he had directly

There is no contention or evidence that Lerma had violated a lawful company rule or policy by distributing a union card in the breakroom. Nor is there any contention or evidence that the Company had a non-discriminatory policy and practice of searching forklifts or clipboards for nonwork related items. Accordingly, Garcia's foregoing conduct was clearly coercive and violated the Act as alleged. See, e.g., *Intermedics, Inc*., 262 NLRB 1407, 1415 (1982), enfd. 715 F.2d 1022 (5th Cir. 1983); and *Clark Equipment*, 278 NLRB 498, 503–504 (1986). Compare *Bellagio, LLC*, 362 NLRB No. 175 (2015) (no violation found where the employer had legitimate cause, based on the employee's violation of company policy regarding protection of client credit card data, to review her work email account to determine whether she also had committed other similar violations); and *Stanley M. Feil, Inc*., 250 NLRB 1154 (1980) (no violation found where the employer had a pre-existing legitimate rule and practice of searching purses and bags when employees exited the facility during lunch break).

7. May 5 meeting with Lerma (Engdahl and Vaivao)

The General Counsel also alleges that, several days later, on May 5, Operations VP Engdahl and Warehouse Manager Vaivao called Lerma up to the office and made various statements to him that unlawfully created the impression of surveillance of his union activities, promulgated an overbroad and discriminatory rule prohibiting him and other union supporters from heckling or insulting employees, and threatened him with unspecified reprisals for doing so (GC Exh. 1(g), par. 5(w)).[47]

The subject meeting, which Lerma secretly recorded, occurred at the beginning of his shift. Upon arriving at the warehouse, a supervisor informed Lerma that Vaivao wanted to see him upstairs in his office. When Lerma got there, Vaivao told him that Engdahl wanted to talk to him, and walked him across the hall to Engdahl's office.[48] After completing a phone call, Engdahl introduced himself to Lerma and explained why he had been called up. He said,

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supervised Lerma on the warehouse floor for the previous 3 months, he denied that he had any idea it was Lerma's forklift and clipboard he was looking through (Tr. 947). He also denied that he carries his own copy of the schedule, notwithstanding that he distributes the schedule to the employees, regularly "tweaks" it by shuffling employees around two to three times every shift, and his office computer is far away on the opposite side of the warehouse (Tr. 947–949). Indeed, during cross-examination on another point, Garcia let slip that he had "just distributed the schedule" prior to looking through Lerma's clipboard (Tr. 963). Moreover, given the Company's hostility to the union campaign, other unlawful conduct discussed herein, and subsequent actions against Lerma (see the next section below), it is not difficult to believe that Garcia would have been looking for union cards on Lerma's forklift or clipboard. Nor is it too difficult to believe, given that Garcia had known Lerma for so many years and had apparently not been a supervisor for the vast majority of his 27-year career, that he would have admitted privately to Lerma that that was the real reason he was looking through Lerma's clipboard when Lerma continued to question him about it.

[47] The complaint also separately alleges (par. 6) that the Company unlawfully disciplined Lerma at the May 5 meeting. This allegation is addressed in section C.2 below.

[48] See Tr. 742 (Engdahl's warehouse office is located directly across from Vaivao's office).

> I wanted to talk to you today because there's been let's just say some rumblings coming off the floor. Okay. And I'm doing this more as a heads-up to you, okay, as wanting you to kind of take note and stay out of trouble. Okay.
>
> The words that have come off the floor are that there's some hecklings going on, some insulting going on, and some potential slowdown on certain folks who are not sharing a similar point of view. Okay. So I . . . want you to be aware of that. It has come to our attention, okay. And I want you to understand our position would be that that won't be tolerated. Okay. And you could get in some serious trouble for that. We want to try to avoid that. Okay.
>
> So I'm . . .speaking as generically as I can, but I'm sure you understand what I'm trying to say and . . . you know, we . . .want to avoid problems that we don't need to have. That's all I'm saying. Okay. And I'm trying to speak as nicely as I can and, you know, at least get the message across, right.

Lerma replied that he was just doing his own research like Engdahl had told him to do in the town hall meeting, because what the Company was saying and what other guys were saying about unions conflicted, and a lot of people asked his opinion. Lerma complained that he felt like he was being pulled aside by management and "put in hot water" for "spreading rumors" whenever he tried to express his opinion, even if it was on break or outside the Company.

Engdahl said Lerma was entitled to express his opinion, and hoped he did not "scare the shit out" out of Lerma by "bringing him up" to his office. He then offered to "help clarify," saying,

> It's okay to express your opinion, okay, but the part that wouldn't be okay is if it was done in such a way where somebody could perceive it as intimidation, or something like that, right? It's kind of how you do it, if that makes sense, right? Maybe—just think about that when you are expressing your opinion as to how you're doing it and what not, because maybe—you know, I'm not saying this is the case, but maybe if that feedback is coming around somehow they are being—you know, . . . feel threatened or intimidated. That's all I'm saying. I don't know.

Vaivao then spoke, explaining why he had previously "followed up" and "talked" with Lerma about expressing his opinions. He said he had done so because employees had told him that Lerma was the one who told them things about the Company's new pay plan, and the employees were concerned about it and brought it up to him. And employees were now telling the Company again that Lerma was "the local voice out there . . . telling [his] opinion in front . . . of the guys." Vaivao said,

> So that's what we're hearing . . . all right. We're hearing that, hey, Lerma was doing this. All right. . . . Like Mark [Engdahl] said, we just got to make sure that we're not doing those type of things up there. We're not . . . heckling guys out there. We're not slowly . . . not bringing fork[lifts] down for guys, for certain individuals. All right. . . . If that's the situation, like Mark said, you would be—you would find yourself in some deeper trouble.

Lerma asked Vaivao who his sources were. However, Vaivao declined to say. Engdahl assured Lerma that he was "not getting in trouble right now"; that they were "just talking" to

him. Lerma replied that, nevertheless, to "protect himself," in the future he would just do his work, "stay quiet, don't say shit," and go home. Engdahl said "okay" and reiterated that Lerma was not "getting in trouble." Engdahl said that he was "trying to avoid anybody getting in trouble"; that he "could not afford to lose anybody" and did not "want to have to bring in new people"; that Lerma did a good job and the Company had "a ton of investment" in him by training him over the years; and that the Company would have been "doing [Lerma] a disservice not to at least tell [him] what [they] were hearing so that [he was] aware of it." Lerma said "okay, that works," and the meeting ended. (GC Exh. 13(a), (b); Tr. 320–323, 820.)[49]

The General Counsel contends that Engdahl's foregoing statements created the impression of surveillance because he failed to disclose how he acquired information about Lerma's union activities (GC Br. 40). However, both Engdahl and Vaivao indicated that the Company learned about his activities from other employees who had complained about them. Although they did not identify the employees by name, Board precedent did not require them to do so. See the discussion and cases cited in section A.5 above regarding the February 24 union education meeting. Accordingly, this allegation is dismissed.

As indicated above, the General Counsel also contends that Engdahl's statements effectively promulgated a rule prohibiting Lerma and other union supporters from heckling or insulting other employees. The General Counsel asserts that this rule was unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In that case, the Board held that a work rule is unlawful, even if it does not expressly restrict union activity, if (1) employees would reasonably construe it to prohibit union activity, (2) the rule was promulgated in response to union activity, or (3) it has been applied to restrict union activity. The General Counsel argues that the no-heckling or insulting rule was unlawful under the first and second prongs of this test, i.e. because it was promulgated in response to union activity, and/or because such terms as "heckling" and "insulting" are ambiguous and employees would reasonably interpret them to encompass protected union activities. (GC Br. 62 n. 43).

The General Counsel's arguments are well supported. There is no real dispute that Engdahl adopted or announced a rule prohibiting "heckling" or "insulting" coworkers at the May 5 meeting. As indicated above, Engdahl clearly stated that such conduct "won't be tolerated." Further, he did not cite or refer Lerma to any existing rule prohibiting such conduct, and the Company does not contend that there was any such rule.[50]

There is also no real dispute that Engdahl promulgated the rule in response to union activity. Although Engdahl and Vaivao scrupulously avoided specifically mentioning the union

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[49] I discredit the testimony of Engdahl (Tr. 742–749) and Vaivao (Tr. 237–249) to the extent it conflicts with the recording and transcript of the meeting. For example, I discredit Vaivao's testimony that Engdahl specifically told Lerma that employees had complained that he had thrown pens at them when they declined to sign a union card.

[50] As discussed in section D.11 below, the Company maintains a rule against "harassment." However, Engdahl did not mention this no-harassment rule at the May 5 meeting, the reported complaints about union supporters were not treated as harassment complaints under that rule (Tr. 144–145, 749, 929–930), and the Company's posthearing brief does not contend it was identical to or fully consistent with Engdahl's rule.

campaign during the meeting, there is no dispute that they were referring to Lerma's prounion opinions and activities, and that everyone in the room understood this.

In these circumstances, the burden was on the Company to demonstrate that the new rule was actually motivated by legitimate workplace concerns apart from the union campaign. *Care One at Madison Avenue*, 361 NLRB No. 159, slip op. at 3 (2014). The Company failed to do so. Although Engdahl and Vaivao offered hearsay testimony that employees complained to them about Lerma and other union supporters throwing pens at them after they declined to sign a card, their testimony was never corroborated.[51] Lerma credibly testified that he did not engage in such conduct (Tr. 815–816, 847), and none of the complaining employees were called to contradict him. Nor was any documentation of the complaints presented. Indeed, Engdahl and Vaivao admitted that none of the complaints were ever investigated or documented (Tr. 749, 929–930). Accordingly, the rule was clearly unlawful under the second prong of the *Lutheran Heritage* test. See *Care One*, above, at n. 6, and cases cited there.

As for the first prong of the *Lutheran Heritage* test, like employer statements generally, both the content and the context of the rule must be considered. Here, as indicated above, the rule prohibited "heckling" and "insulting" coworkers. On its face, such language is at least arguably lawful, i.e. it is not so "imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions or interactions protected by Section 7 [of the Act]" (*2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011)). See *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 3 n. 10 (2014) (finding lawful an employer rule that prohibited "abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious").

However, Engdahl went further by "clarify[ing]" that such conduct included expressing an opinion in such a way "where somebody could perceive it as intimidation" or "feel threatened or intimidated." It is well established that rules restricting union or other protected activity based on the subjective reactions of others are unlawful. See *Consolidated Diesel Co.,* 332 NLRB 1019, 1020 (2000), and cases cited there. As the court stated in enforcing the Board's decision in that case, "There would be nothing left of Section 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings with the potential for expulsion." 263 F.3d 345, 354 (4th Cir. 2001).[52]

Further, Engdahl announced the rule at a time when employees were, in fact, reportedly complaining about being approached by union supporters. As discussed above, Vaivao had reported this to Lerma and other employees at the March 26 union prevention meeting. See sec. II.A.6, above. Moreover, just days before the May 5 meeting, Lerma's immediate supervisor, Garcia, unlawfully searched his forklift for union cards simply because he had been seen handing a card to an employee in the breakroom. In these circumstances, employees would reasonably conclude that the rule was intended to restrict such protected activities. See *Care One*, above,

[51] As noted above, neither Engdahl nor Vaivao specifically mentioned any pen throwing to Lerma at the meeting. Thus, I reject the Company's argument (Br. 18) that Lerma's failure to specifically deny such conduct at the May 5 meeting itself supports Engdahl's hearsay testimony about the complaints.

[52] Although I would reach the same conclusion regardless, Lerma's response to Engdahl (that, to "protect himself," in the future he would just do his work, "stay quiet, don't say shit," and go home) certainly appears to confirm this reasoning.

slip op. at 4; and *Boulder City Hospital, Inc*., 355 NLRB 1247 (2010). See also *Auto Workers v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008).

Finally, as indicated above, Engdahl warned Lerma that he "could get in some serious trouble" if he violated the rule. Vaivao similarly told Lerma that he "would find [him]self in deeper trouble" if he violated the rule. And, in his subsequent concluding remarks, Engdahl made clear that, by "trouble," they meant Lerma could be terminated. Thus, the evidence likewise supports the allegation that Engdahl and Vaivao unlawfully threatened Lerma with reprisals if he violated the rule. See generally *Waste Management of Palm Beach*, 329 NLRB 198, 200 (1999); and *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993).

8. May 8 letter to employees (McClelland)

The General Counsel alleges that a few days later, on May 8, Company President/CEO McClelland committed similar violations in a letter to all warehouse employees. The General Counsel alleges that the letter unlawfully promulgated an overbroad and discriminatory rule that requested employees to report, and threatened to legally prosecute, anyone who violated it (GC Exh. 1(g), par. 5(x)).

The letter stated in relevant part as follows:

> To All Associates:
>
> It has come to my attention that some associates have recently been subjected to threatening, violent, or unlawfully coercive behavior by other associates. This is a very serious matter and one that I take personally.
>
> Let me be clear: such behavior is *not* consistent with the Shamrock Foods Company culture and values that are central to us. Shamrock has been in business since 1922, and has *never* tolerated associates behaving towards each other in a manner which is violent, threatening, or unlawfully coercive. Shamrock Foods Company has always celebrated and encouraged the diversity of its associates and will continue to do so. Associates should not be physically afraid of coming to work. We will not allow associates to behave in a manner which violates the law through threats of violence, or unlawful bullying. Simply put, this type of behavior is unacceptable and I will make every effort to stop it at our workplace.
>
> To that end, if you have been the victim of such behavior, in any way, shape, or form, however minor, please promptly report it. Shamrock will fairly and thoroughly investigate all allegations. If the complaint has merit, Shamrock will take appropriate action against anyone threatening associates and refer the matter to law enforcement for prosecution to the fullest extent of the law if that is the right course of action. Each associate is expected to perform their work in a cooperative manner with management/supervision, fellow associates, customers, and vendors. [GC Ex. 14.]

The General Counsel contends that McClelland's foregoing letter promulgated a new rule prohibiting unlawful coercive behavior or bullying. The General Counsel argues that, like

Engdahl's rule, this new rule was unlawful under both the first and second prongs of the *Lutheran Heritage* test because it was promulgated in response to union activity and because employees would reasonably construe it to apply to protected union activity.

Again, the General Counsel's arguments are well supported. The letter clearly stated that unlawful coercive behavior and bullying "was "unacceptable" and would not be tolerated or allowed. Further, like Engdahl, McClelland did not cite or refer employees to any existing rule prohibiting such conduct, and the Company does not contend that there was any such rule.[53]

It is likewise clear that the letter was sent in response to union activity. Although McClelland did not specifically mention the union campaign, as discussed above neither did Engdahl and Vaivao, yet there is no dispute that they were referring to union activity at their May 5 meeting with Lerma. Further, McClelland sent the letter to all the warehouse employees just 3 days later after that meeting. And there is no record evidence of any conduct other than the prounion activity Engdahl and Vaivo discussed with Lerma and other employees at that and other meetings that might have prompted the letter.

Moreover, McClelland's testimony regarding how he came to send the letter is entirely unbelievable. McClelland testified that he had no idea what the reported coercive behavior or bullying was related to. He testified that HR told him that employees had complained of feeling threatened, but he did not recall who in HR told him, did not know any details about what happened, did not know why they felt threatened, and did not think it mattered why they felt threatened. However, he acknowledged that he does not regularly send such letters to employees, and in fact could not specifically recall the last time he had done so. He also admitted that he "chose" to send this one because he felt that it was "imperative" to do so. (Tr. 353–356.) It is inherently unlikely in these circumstances that he would not have asked or been told, at least in general terms, what the alleged threatening behavior was about, before sending the letter.[54]

As discussed above, therefore, it was incumbent on the Company to show that McClelland's new rule was actually motivated by legitimate workplace concerns apart from the union campaign. As with Engdahl's rule, the Company failed to do so. Accordingly, the rule was clearly unlawful under the second prong of the *Lutheran Heritage* test.

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[53] Again, the Company does not contend that McClelland's rule prohibiting unlawful coercion or bullying was identical or consistent with the Company's existing no-harassment rule.

[54] Thus, I find that, in truth, McClelland did ask and/or was told. See *NLRB v. Howell Chevrolet Co*., 204 F.2d 79, 86–87 (9th Cir. 1953), affd. 346 U.S. 482 (1953) (where a tribunal discredits a witness, it may find, "not only that the witness' testimony is not true, but that the truth is the opposite of his story"); and *O'Reilly Auto Parts v. NLRB*, 779 F.3d 576, 585 (D.C. Cir. 2015) (where a witness' testimony is discredited, the "next logical step" is to find that "the truth was the opposite of what he recounted under oath"). The General Counsel also cites the Company's June 8, 2015 position statement (GC Exh. 29, p. 15), which it submitted during the Region's investigation of the allegations, as support for finding that the letter was sent in response to union activity. However, the General Counsel offered the Company's position statement into evidence solely in support of the allegations involving Wallace, and it was therefore received solely for that purpose (Tr. 857). Accordingly, I have not relied on it here.

Regarding the first prong of the test, no case has been cited or found since *Lutheran Heritage* involving a rule that prohibited "unlawful bullying." Like "heckling" and "insulting," this language is at least arguably lawful on its face, particularly where, as here, it is used in the context of discussing "threatening, violent, or unlawfully coercive behavior." See generally *First Transit*, above. However, the circumstances surrounding issuance of the rule must also be considered. And, as discussed above, McClelland announced the rule just days after three of his supervisors or managers had unlawfully discouraged a primary union supporter from continuing to engage in lawful union solicitation by searching his equipment for union cards and warning him that the way he expressed his prounion opinions would be scrutinized under a subjective standard. In these circumstances, an employee would reasonably conclude that, like Engdahl's rule, McClelland's no-unlawful bullying rule would be applied to restrict protected activities. See *Care One*, and *Boulder City*, above.

Finally, given the foregoing, McClelland's letter also violated the Act as alleged by requesting employees to "promptly report" to the Company if they were "the victim of such behavior, in any way, shape, or form, however minor," and by threatening to "refer the matter to law enforcement for prosecution to the fullest extent of the law" if the Company decided the complaint had merit. See *Winkle Bus Co*., 347 NLRB 1203, 1024 (2006); *Ryder Truck Rental*, 341 NLRB 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005); and *Tawas Industries*, 336 NLRB 318, 322 (2001).

9. May and June breakroom incidents (Garzon)

The General Counsel also alleges that Sanitation Supervisor Garzon committed a number of unfair labor practices in May and June. Garzon had been the sanitation supervisor at the warehouse for about 2 years, and supervised around 20 employees.[55] The General Counsel alleges that she unlawfully took union flyers away from and interrogated two of those employees in the breakroom, and also unlawfully removed union literature from the breakroom information counter (GC Exh. 1(g), pars. (y), (aa)).[56]

Phipps began handing out union flyers at the warehouse near the end of May. On May 25, he was in the upstairs breakroom doing so when he noticed that Garzon was standing at a table where he had placed flyers in front of two of the sanitation employees. As he watched, Garzon reached down and took both of the flyers off the table. Phipps immediately walked over and confronted her, saying she could not do that; it was a violation of their rights unless they gave her permission to take the flyers. Garzon did not respond, but looked at the employees and

[55] As with all of the other managers and supervisors identified in the original complaint, the Company denied in its answer that Garzon was a supervisor, but stipulated to her supervisory status at the hearing.

[56] The complaint alleges that Garzon also unlawfully removed union flyers from the breakroom on July 8. However, there is no specific record evidence of this and the General Counsel's posthearing brief appears to have abandoned the allegation. The complaint additionally alleges that the Company maintains an overbroad no-solicitation/distribution rule generally. This allegation is addressed in section D.12 below.

said, "Well, you guys don't want these, do you?" Both of the employees shook their heads no, and she walked off with them.[57]

Phipps also left union flyers on an "information counter" that the Company maintains in the breakroom. The counter is used by the Company for displaying or distributing health and fitness information. Employees also occasionally place business cards and notices advertising items for sale on the counter, but Garzon immediately removes them.[58] On at least three occasions, Garzon likewise removed the union flyers that Phipps had placed on the counter (Tr. 878). On one of those occasions in June, Phipps actually videotaped her doing so with his cell phone camera. The video shows Garzon entering the breakroom, walking directly to the counter, picking up the union flyers, and immediately walking out with them (GC Exh. 24).

It is well established that an employer may not prohibit distribution of union literature by employees during nonwork time in nonwork areas absent a showing of special circumstances that make prohibiting the distribution of literature necessary to maintain production or discipline. See *Our Way, Inc*., 268 NLRB 394 (1983); and *Stoddard-Quirk Mfg*., 138 NLRB 615 (1962). The Company made no such showing here; indeed, it does not even contend that there are any special circumstances justifying a rule against distributing union flyers to employees in the breakroom. Moreover, as indicated by the General Counsel, it is unlawful under extant law for an employer to confiscate union literature even if it could lawfully prohibit distribution of it. See *Manorcare Health Services-Easton*, 356 NLRB at 206; and *Hanson Aggregates Central, Inc*., 337 NLRB 870, 875–876 (2002). Thus, for either or both of these reasons, Garzon clearly violated the Act by taking the flyers from the two employees in the breakroom.

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[57] I credit Phipps' testimony about this incident (Tr. 554–558, 625–626, 630). It was corroborated in substantial part by Garzon herself, who admitted that she picked up both of the flyers; that Phipps approached and said she was not supposed to do that; that she asked the employees if they wanted them back and they said no; and that she then walked off and threw the flyers away (Tr. 872–877, 883–884). Although Garzon testified that she initially took one of the flyers only because it was in English and the employee asked her to translate it in Spanish for her, I discredit that testimony. According to Garzon, she already had her own copy of the flyer (Tr. 873). Thus, there was no need to take the employee's copy to translate it. Further, as indicated above, Garzon also took the other employee's flyer. Finally, Garzon admitted that she refused to translate the flyer for the employee because it was a union flyer (Tr. 874).

[58] Tr. 558, 634–636, 881–883. Phipps testified that other "things" are also frequently put on the counter, such as drinks, chips, water bottles, milk crates, and even hula hoops (Tr. 634–635). However, he did not say who put them there or why. Further, although he said he had a picture of the counter with one or more of these items on it, no such picture was offered into evidence. Nor did any other witness corroborate his testimony. Accordingly, I find that the General Counsel failed to establish that employees regularly placed items on the counter that were not immediately removed by Garzon or the sanitation employees.

Phipps also testified that he had never noticed Garzon pick things up in the breakroom before (Tr. 636). However, it seems unlikely that Garzon, who had also been a cleaner for 10 years before she became the sanitation supervisor, would not have done so. In any event, the General Counsel's posthearing brief does not cite or rely on Phipps' testimony in this respect as support for the allegations.

Considering all the circumstances, particularly the fact that she was their direct supervisor, Garzon also clearly violated the Act as alleged by asking the two employees if they wanted the union flyers back. See *GC Murphy Co*., 213 NLRB 175, 176–177 (1974) (store managers unlawfully interrogated employees by asking what they planned to do with the literature a union agent had given them and to turn it over to the company); and *St. Francis Medical Center*, 340 NLRB 1370, 1382 (2003) (hospital security guard unlawfully interrogated employees by asking them if they were going to read the union flyer they had received or going to keep it, and to give it to him).

However, the evidence fails to establish that Garzon likewise violated the Act by removing the flyers from the company information counter. It is well established that an employer may lawfully reserve breakroom bulletin boards for company information only (*Walmart Stores, Inc.,* 340 NLRB 703, 709–710 (2003)), and no case has been cited or found indicating that an employer may not likewise reserve a breakroom counter. Although an employer may not disparately enforce such a policy by permitting employees to display some information but not union information (ibid.), contrary to the General Counsel's contention, there is no direct or substantial evidence that the Company did so.[59] As indicated above, the counter was maintained by the Company solely to display information on health and fitness, and other information placed there by employees was routinely removed.[60] Accordingly, this allegation is dismissed.

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[59] In arguing to the contrary, the General Counsel's posthearing brief cites: (1) Phipps' videotape of Garzon removing the union flyers; and (2) Lerma's testimony that the employees sell Girl Scout cookies and fundraise for their children's sports teams on the work floor (Tr. 780). I agree that Phipps' videotape is strong evidence that Garzon went into the breakroom solely to remove the union flyers. Based on the videotape and the record as a whole, I therefore discredit Garzon's testimony (Tr. 884–888) that she did not go there on that occasion to look for or remove the flyers, and that she was just checking the entire breakroom as usual to make sure it was clean. I also agree that Lerma's testimony indicates that the Company might not have strictly enforced its no-solicitation/distribution rule in certain respects on the work floor (Lerma did not say whether any managers or supervisors were present or aware of the employee solicitation on the work floor). However, neither is sufficient to satisfy the General Counsel's burden to establish that removing the union flyers from the company information counter was contrary to past practice or otherwise discriminatory. See *Wal-Mart Stores*, above. Compare *Intertape Polymer Corp*., 360 NLRB No. 114 (2014) (finding violation where evidence established that literature, such as newspapers, magazines, etc., had previously remained untouched in the breakroom until at least the end of the workday, but during the union campaign supervisors monitored the breakroom much more closely and began removing all literature, including union literature, shortly after employees finished their breaks), enfd. on point 801 F.3d 224, 232–233 (4th Cir. 2015).

[60] There is no reference to use of the breakroom counter in the company no-solicitation/ distribution rule, or any other documentary evidence in the record of the Company's restriction on its use. However, it is not necessary that such a restriction be in writing. See *Walmart Stores*, above. And the General Counsel's posthearing brief does not contend otherwise.

10. May 29 wage increase

The General Counsel also alleges that, about May 29, the Company unlawfully gave a wage increase to some of the warehouse employees to dissuade them from supporting or voting for the Union (GC Exh. 1(g), par. 5(z)).

The Company granted or announced wage increases for four groups or classifications of warehouse workers in May: will call ($2/hour, retroactive to beginning of pay period), returns ($2/hour), sanitation ($1/hour), and throwers ($1/hour, likewise retroactive). Such wage increases for warehouse employees were rare; increases normally ranged between 3–5 percent. And the Company had never granted a retroactive wage increase in the previous 20 years.[61]

As previously discussed in section A.7 above, an employer violates Section 8(a)(1) of the Act by promising or granting a benefit during a union campaign in order to dissuade its employees from supporting the union. The evidence strongly supports an inference that this was the Company's motive for granting or announcing the May wage increases. As discussed above, HR Director Wright and Warehouse Manager Vaivao had unlawfully solicited employee complaints regarding their wages at the roundtable and communication meetings on January 28 and February 5. Moreover, at the recent communication meeting on April 29, Operations VP Engdahl had specifically reminded employees, after making various unlawful promises and threats, that it was "the company" that pays wages, "not the union." See sec. A.2, 3, and 7 above. Granting a substantial number of the warehouse employees extraordinary and unprecedented retroactive wage increases just a few weeks later not only proved, but emphasized the point. It also, of course, suggested "a fist inside the velvet glove," and thereby fit well with the Company's other unlawful antiunion conduct.[62]

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[61] The foregoing findings are based on the credible and corroborative testimony of Phipps (Tr. 559–561 and Lerma (Tr. 781, 843). Both are in a different classification or position (forklift operator), and their testimony about most or all of the wage increases was hearsay, based only on what they had been told by the employees who received them. Nevertheless, I have given this secondary evidence substantial weight in light of the Company's failure to make a good-faith effort to timely comply with the General Counsel's subpoena request for the relevant payroll records (GC Exh. 2(e), attachment 1, par. 52). See fn. 29 above, and cases cited there. See also Tr. 911–927 (further discussing the evidentiary sanctions with respect to the wage-increase allegation), and Company counsel's on-the-record statements, Tr. 94 [day 2] ("[A] lot of these we could . . . probably just stipulate to . . . I don't think there's a question that there was a pay raise granted on a particular date"); Tr. 563–564 [day 5] ("without . . . having spoken to the client yet, I believe the General Counsel is correct. . . . I don't believe there is a dispute over whether there was an increase"); Tr. 564–565 [day 5] ("I'm not aware of the dispute on [the date of the increase] . . . and to the best of my knowledge, I think those amounts are correct, but I would have to double-check"); and Tr. 916 [day 7] ("there are documents that say . . . this is the wage increase and stuff").

[62] See *NLRB v. Exchange Parts Co*., 375 U.S. 405, 460 (1964) ("The danger in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."). The General Counsel's posthearing brief does not request an adverse inference of an unlawful motive based on the Company's failure to produce documents responsive to paragraphs 52–54 of the subpoena duces

Nevertheless, the Company argues that the allegation must fail for two reasons. First, it argues that the wage increase cannot be found unlawful because no election petition was pending, and the Company therefore had no knowledge at the time which employees the Union had targeted in its organizing effort. The argument is without merit. See *NLRB v. Curwood, Inc.*, 397 F.3d 548, 553–557 (7th Cir. 2005) (affirming Board's finding that the employer's pre-petition announcement of benefits was unlawful where the employer was admittedly aware of the union campaign at the time), and cases cited there.[63] As in *Curwood*, there is no dispute here that the Company knew about the union organizing campaign among the warehouse workers at the time it granted the wage increases. Nor is there any evidence or contention that the Company had reason to believe that the campaign excluded warehouse workers in the will call, returns, sanitation, and thrower positions.

Second, the Company argues that no violation can be found because the Union's campaign was not active at the time that the wage increases were granted. This argument is likewise without merit. There is no evidence that the union campaign was not still active during and after May 2015. On the contrary, as discussed earlier, Phipps began openly distributing union flyers at the warehouse at the end of May. And both he and Lerma continued to do so in June. (Tr. 554, 565, 630, 787–788, 846.) Thus, there was no reasonable basis for the Company to conclude that the union campaign was dormant at the time of the wage increases. Cf. *Sigo Corp.*, 146 NLRB 1484, 1486 (1964) (reaching contrary conclusion where the union had withdrawn its petition without explanation and there was no evidence of any organizational activity thereafter).

In arguing otherwise, the Company relies solely on a pretrial affidavit that Phipps gave to the NLRB Regional Office on May 21 during its investigation of the Union's unfair labor practice charges. The Company asserts that Phipps' affidavit admitted that the union campaign was essentially dormant at that time. However, the affidavit contained no such admission. Indeed, it stated that a union meeting had been held just 2 days earlier, on May 19. Although the affidavit stated that fewer employees attended the meeting, that only four additional cards had been signed in the previous 30 days, and that the campaign was "pretty much stalled," it explained that this was "due to the [Company's] constant efforts to interrogate employees about if we are for or against the union and the fact that supervisors are constantly surveilling us." (R. Exh. 1, pp. 52–53.)

In any event, there is no record evidence or contention that the Company was provided a copy of Phipps' affidavit before it granted the wage increases. The NLRB's policy and practice is not to provide a respondent with such a pretrial affidavit unless and until the witness has testified for the General Counsel or the charging party at the hearing. See Sec. 102.118(b)(c) and (d) of the Board's Rules; and *H.B. Zachry Co.*, 310 NLRB 1037 (1993).

Accordingly, the wage increases violated the Act as alleged.

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tecum. In any event, given the substantial record evidence of the Company's unlawful motive discussed above, it is unnecessary to draw or rely on such an adverse inference.

[63] See also *Hampton Inn*, 348 NLRB at 17 (the rule regarding a promise or grant of benefits during an organizing campaign applies even if no representation petition has yet been filed).

C. Alleged Unlawful Discharge and Discipline

1. Thomas Wallace

The General Counsel alleges that the Company violated Section 8(a)(1) and (3) of the Act by discharging Wallace on April 6 because he complained at a March 31 company meeting about the Company's health benefits and/or because he supported the Union, and to discourage other employees from engaging in such activities. The General Counsel also alleges that the Company violated Section 8(a)(1) of the Act by presenting a separation agreement to Wallace at the time of his discharge that included certain overbroad provisions.[64] (GC Exh. 1(g), par. 5(a), (p) – (r), and GC Exh. 1(m), par. 6(b); Tr. 699–700.)

a. The discharge

As discussed in section B.2 above, Wallace is a warehouse loader who had worked at the Phoenix facility for over 6 years and signed a union card at the Denny's meeting on January 28. There is no evidence that Wallace passed out union flyers or otherwise openly campaigned for the Union at the facility.[65] However, as indicated in section A.1 above, he was the first employee to speak up when Engdahl opened the floor to questions at the January 28 town hall meeting, asking why Shamrock's competitors were unionized (GC Exh. 8(a), at 12–13.)

Wallace also asked a few questions at a mandatory "state of the company" meeting with all of the warehouse workers and managers on March 31. The meeting was conducted by Robert Beake, the Company's senior vice-president for HR. Beake had served in that position for 14 years, and reported directly to both President/CEO Kent McClelland and his father, Norman McClelland, the chairman of the board.

Like the January 28 town hall meeting, the meeting was secretly recorded by Phipps. Beake began by saying that neither of the McClellands could be present at the meeting, but that he would play a recorded message from each, one from Kent "in the beginning" and one from Norman "at the end." He then played the message from Kent. It summarized the Company's "tremendous growth" and "wonderful results" during the previous year, thanked the employees for their contribution, and listed the topics for the meeting (the company's stock and retirement programs, changes in HR, and other "things that affect [employees] directly and personally").

Beake then discussed these points in more detail. He noted that, although the Company was still privately held and family owned, it had around $3 billion in sales the previous year, and an annualized growth of over 8 percent over the previous 30 years, which was "incredibly impressive" for the industry. He also said that the Company expected "some incredible numbers" in 2015, including $300 million in sales from just one of the Company's newer food

[64] Although the complaint alleges that the provisions were also discriminatory, the General Counsel's posthearing brief argues only that they were overbroad, and thus appears to have abandoned the theory. In any event, the General Counsel failed to carry the burden of proof and persuasion.

[65] Phipps testified that Wallace brought the Union three signed cards and was outspoken about the benefits of the Union (Tr. 606). However, this testimony was not corroborated and the General Counsel's posthearing brief does not mention or rely on it.

service operations in California. He said that all of the profits are put back into the Company to continue its growth. However, he noted that a substantial number of employees were stockholders and had benefited from the large increase in the Company's stock price. He also discussed various employee benefits offered by the Company. He noted, for example, that the Company continued to contribute half of the employee deductible under the Company's wellness and healthcare plans, and also continued to offer a 401(k) match and profit sharing.

Beake then introduced Vince Daniels, the Company's new vice president for HR. Daniels had been hired 6 months earlier, in August 2014, and reported to Beake. Daniels briefly summarized various changes in HR and employee services, including a new internet based portal for employees to access 24/7.

Beake then "close[d]" by playing a recorded message from Norman McClelland. The message reiterated how much the Company was progressing and gaining in market share. It also again thanked the employees for their part, saying that the Company "value[d]" them and wanted to treat them "like family."

When the message was finished, Beake repeated that it "close[d] out what [the Company] wanted to convey" to the employees at the meeting. However, he added that there was "a little bit of time . . . to take some questions if [they had] any." An employee then asked a few questions about the healthcare plan; specifically, about getting a medical discount card and whether the deductible had gone up.

After these two initial questions had been answered, Beake asked if there were any other questions. Wallace at that point raised his hand and said, "Yeah. Is there any way we can get our old insurance back?" This question was immediately greeted with a burst of laughter and applause among the employees. When it subsided, Wallace continued, "You know, 300 million dollars. I mean it's through the roof. Is that even being considered or anything?"

Beake responded that the $300 million was sales revenue and not profits, and that the Company's profit margin was only pennies on the dollar. He acknowledged that the healthcare plan had some drawbacks as well as benefits, but said the Company tried to do the best it could for the employees by changing to the high deductible plan and covering half of the deductible for them.

Wallace then followed up with a second question: "Is there any way you could contribute the full 3,000 or the full contribution? Because some companies do that. I was just wondering." Beake replied that "most companies don't contribute *anything* to the deductible." The Company does, he continued, and "obviously it pleases a lot," but "[i]t doesn't please all." He noted that the Company spent over $23 million on healthcare in 2014, and said it would continue to look at the plan to try to manage its costs.

Another employee then asked a question about the next open enrollment for the long-term and wellness programs. Wallace, however, did not remain to hear the answer. He was near the back of the room, next to the rear door (one of three exits), and decided to leave at that point and return to his work station. When he got there, he saw his supervisor, Myers, who had left even earlier, about halfway through the meeting. Wallace told Myers he left because the packed room was so hot and stuffy, and Myers said he had left for the same reason. Wallace also told Myers

about the applause in response to his question to Beake, and said he hoped he would not get in trouble for it. Myers assured him he would not.

Back at the meeting, Beake continued to take questions for a few more minutes. After the last one was answered, he announced, "We're out of time," and thanked everyone. The employees then returned to their work stations.[66]

Wallace continued working the remainder of the day and again on April 1, 3, and 5 without any problem. On April 6, however, after he had finished lunch, the shift manager told him to "grab [his] stuff" and escorted him to HR. When he arrived, Warehouse Manager Vaivao and Allen, the new HR representative, were there.[67] Wallace asked Vaivao what was going on. Vaivao replied,

> We have a situation here. Senior staff was offended that you asked about the healthcare . . . [S]enior staff thought you were rude and disrespectful and you're being terminated.

Wallace asked how he could be fired for asking questions when the employees had been invited to do so. Vaivao replied,

> Senior staff came together and . . . [the] decision came from Norm and Kent [McClelland] . . . that you're not going to be happy with the benefits that we give you so you can find a company with better benefits.[68]

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[66] The foregoing summary is based primarily on the recording and transcript of the meeting (GC Exh. 11(a), (b)), and the credible testimony of Wallace (Tr. 657–659) and Phipps (Tr. 536–537). Wallace testified that he also saw two other employees leave early. However, this testimony was not corroborated and the General Counsel's posthearing brief does not mention or rely on it. As for Myers, he admitted that he left early (Tr. 864–865). Although he testified that he did so because "about that time of year . . . I just get a cold and I started coughing really bad," he did not deny telling Wallace that he had left early for the same reason he did.

[67] Allen subsequently resigned in June 2015 (Tr. 370–371), and did not testify.

[68] I credit Wallace's testimony about the meeting with Vaivao and Allen (Tr. 659–662, 665–666, 678, 696–697), which was detailed and consistent both with what he subsequently told Phipps (Tr. 541–543, 609) and with the sworn statement he gave to the NLRB 2 weeks after the meeting (R. Exh. 5, pp. 9–10). Although Kent McClelland denied any involvement in the discharge decision (Tr. 351–352), and Vaivao denied saying or suggesting otherwise on April 6 (Tr. 150–154, 906), I discredit that testimony. First, there is no reason to believe Beake would not have spoken to one or both of the McClellands about the meeting. As indicated above, Beake reported directly to them on a regular basis, and there was plenty of time to report to them about the state-of-the-company meeting between March 31 and April 6. Indeed, Beake did not deny reporting to the McClellands about the meeting, and the Company has offered no other explanation for the week-long delay before discharging Wallace. Moreover, as discussed infra, HR Vice President Daniels' testimony that he alone made the discharge decision without talking to anyone is wholly unbelievable. Second, as noted above (fns. 12, 13, 16, 20, 49), Vaivao was a particularly unreliable witness. And his testimony about the March 31 meeting that led to Wallace's termination was no better. For example, he testified that Wallace was the only one who left the meeting early (Tr. 193). However, as indicated above, there is no dispute that

Allen then presented Wallace with a "Separation Agreement and Release and Waiver." The agreement stated that he was being terminated effective that day, and set forth the total amount of "separation benefits" he would receive, in addition to any unpaid wages, "*provided*" he signed the agreement. It also contained various other terms and conditions, including, as discussed below, several confidentiality provisions. (GC Exh. 26.) Wallace signed that he received the agreement, but refused to sign that he accepted it.

The parties agree that the proper test for evaluating whether Wallace's discharge was unlawful is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that test, the General Counsel must prove by a preponderance of the evidence that the employee's union or other protected activity was a substantial or motivating factor in the adverse action. The General Counsel can make a sufficient initial showing in this regard by demonstrating that (1) the employee engaged in the union or protected activity and the employer knew it, or the employer believed or suspected that the employee engaged in or was likely to engage in such activity, and (2) the employer had animus against such activity. If the General Counsel makes the required initial showing, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's actual or suspected union or protected activity. See *Corliss Resources*, 362 NLRB No. 21, slip op. at 13 (2015); *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007); *Signature Flight Support*, 333 NLRB 1250 (2001), affd. 31 Fed. Appx. 931 (11th Cir. 2002); and *Multi-Ad Services*, 331 NLRB 1226, 1240 (2000), enfd. 255 F.3d 363 (7th Cir. 2001), and cases cited there.

Here, as indicated above, the General Counsel alleges that the Company unlawfully discharged Wallace (1) for complaining about the healthcare plan, and/or (2) because it knew or suspected that he supported the union campaign. With respect to the first, the General Counsel has clearly satisfied the initial *Wright Line* burden. It is well established that an employee engages in protected concerted activity by complaining at a group meeting about employment terms common to all employees. *Worldmark by Wyndam*, 356 NLRB 765 (2011). And the applause from Wallace's coworkers in response to his initial question to Beake certainly supports applying that general principle here. Further, Vaivao specifically stated at the termination meeting that Wallace was being fired for complaining to Beake about the Company's healthcare plan at the meeting.[69]

Myers, Wallace's direct supervisor, left the meeting about halfway through. Vaivao also testified that Wallace was "agitated" when he asked his questions, and that he "got up and stormed out" after Beake answered them (Ibid.). However, neither is reflected in the recording of the meeting: Wallace asked his questions in a normal/conversational tone, and there is no sound of any disturbance after Beake answered them. Further, as indicated above, Wallace was right next to the rear exit, and Beake himself testified that he did not even notice Wallace leaving (Tr. 444, 446). Finally, although Daniels testified that Wallace made a dismissive wave forward with his hand as he walked out of the meeting (Tr. 714), there was no mention of this in the Company's position statement during the NLRB's investigation (GC Exh. 29, p. 22, par. 5), no other witness testified at the hearing that they saw Wallace make such a gesture (not even Vaivao), and Wallace himself credibly denied doing so (Tr. 657).

[69] As noted above, I have credited Wallace's testimony about what Vaivao said at the termination meeting. Although Phipps acknowledged that he had not been disciplined when he

The General Counsel has also satisfied the initial *Wright Line* burden with respect to the second. As indicated above, Wallace was a union supporter. And it is certainly a reasonable inference that the Company knew or suspected this given the nature of Wallace's questions at the January 28 and March 31 meetings and Vaivao's statements at the March 26 union prevention meeting that the Company knew "exactly" which "disgruntled" employees supported the Union and attended union meetings.[70] Further, the Company's strong animus toward union supporters is well established by the Company's numerous unfair labor practices and the record as a whole. See *Metro-West Ambulance Service,* 360 NLRB No. 124, slip op. at 1 (2014); and *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014), and cases cited there (employer's contemporaneous 8(a)(1) violations demonstrate its union animus).[71]

Moreover, as discussed below, there is an abundance of other, circumstantial evidence that the discharge was unlawfully motivated. See, e.g., *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935–939 (D.C. Cir. 2011); and *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966) (unlawful motive for discharge may be established by circumstantial evidence).

Shifting reasons for discharge. In the June 8 position statement it filed during the NLRB investigation of the allegations, the Company stated that Wallace was discharged for "belligerently interrupting a senior Company official multiple times" and because he "abruptly left the meeting without permission" (GC Exh. 29, p. 22, par. 5). At the hearing, however, HR Vice President Daniels, who claimed that he alone made the decision, testified that Wallace was terminated because he made a "dismissive waving gesture forward" with his hand after Beake answered his questions and because he walked out of the meeting (714–715). And Daniels later testified that Wallace was terminated solely for leaving the meeting (Tr. 718). See also the Company's posthearing brief at 43 ("Wallace was discharged because he stormed out of [the] March 31 mandatory meeting").[72]

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complained in an arguably rude and disrespectful manner at previous company meetings about how the Company treated employees, those meetings were conducted before the union campaign and/or by lower level managers or supervisors. See Tr. 543–544, 601, 609–611, 630–631; and R. Exh. 1, p. 36.

[70] See sec. A.6, above. Engdahl admitted that Wallace's question about Shamrock's unionized competitors at the January 28 town hall meeting "stuck" with him, as it was "pretty insightful" and had never been asked at any of the numerous similar meetings he had conducted in the past (Tr. 894, 897–898).

[71] See also *EF International Language School, Inc.,* 363 NLRB No. 20, slip op. at 1 n. 2 (2015) (General Counsel is not required to show animus toward the alleged discriminatee's union or protected activity in particular in order to satisfy the initial burden under *Wright Line*).

[72] The Company did not produce a termination report or any other documents regarding the discharge, as requested in paragraphs 28–33 of the General Counsel's subpoena duces tecum (Tr. 542). When asked for an explanation on the second day of hearing for failing to produce a termination report, company counsel stated, "Your Honor, we did look into that. There is no—currently, they don't give written termination of assistant people. We did—that one we did look into, and it just doesn't exist." Counsel also stated that there were no emails or other communications about the discharge because Daniels had "compartmentalized" the decision. (Tr. 84–85.) However, subsequent testimony established that the Company does regularly prepare termination reports; that there was a termination report for Wallace; and that it was circulated by

Such shifting reasons support an inference of unlawful motive. See, e.g., *Lucky Cab*, above; *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999); *Black Entertainment Television*, 324 NLRB 1161 (1997); and *Zurn Industries,* 255 NLRB 632, 635 (1981), affd. 680 F.2d 683, 694 (9th Cir. 1982), cert. denied 462 U.S. 1131 (1983).

False reasons for discharge. As indicated above, Wallace did not interrupt Beake, belligerently or otherwise, not even once. Nor did he make any dismissive gestures when he left the meeting. See fn. 68, supra. Even the one consistent reason offered to the NLRB during the investigation and hearing—that Wallace engaged in insubordination by leaving the mandatory meeting early—is at best a distortion or exaggeration of the facts. As discussed above, Beake twice stated to the employees that the meeting would "end" or "close" with the recorded message from Norman McClelland. And he repeated this yet again when the recording had finished, stating that it "close[d] out what [the Company] wanted to convey" to the employees. Thus, while Beake thereafter offered to answer any questions, the offer was clearly a mere courtesy.

Such false or exaggerated reasons are likewise evidence of unlawful motive. See, e.g., *Lucky Cab*, above; *Key Food*, 336 NLRB 111, 114 (2001); *Yenkin-Majestic Paint Co.*, 321 NLRB 387, 396 (1996), enfd. mem. 124 F.3d 202 (6th Cir. 1997); *Radisson Muehleback Hotel*, 273 NLRB 1464, 1475–1476 (1985); *William L. Meyers, Inc.*, 266 NLRB 342, 346 (1983), enfd. mem. 735 F.2d 1371 (9th Cir. 1984); and *Ramada Inn*, 201 NLRB 431, 434-435 (1973). See also *Shattuck Denn Mining Corp*., above.

Lack of consultation or investigation. As previously noted, Daniels testified that he decided to fire Wallace on his own, without consulting *anyone*—not his immediate superior Beake (who he meets with daily and is the person Wallace allegedly disrespected), Vaivao (who manages the Phoenix warehouse), or Myers (who supervised Wallace). Nor did he speak to Wallace himself. (Tr. 711–712, 720–721).

However, there are two problems with this testimony. First, it is inherently unbelievable. As indicated above, Daniels had been hired as HR vice president only 6 months earlier. Further, he admitted on cross-examination that he focuses on "strategic matters" and is "not in the bowels of the ship"; that he had "never" been involved in terminating a warehouse employee before; and that he was unfamiliar with the Company's policies, personnel handbook, or progressive disciplinary system.[73] Moreover, it is inconsistent with other evidence. As indicated above, Vaivao told Wallace that the McClellands had made the decision. Further, Daniels testified that

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email (Tr. 403–410). For this and the other reasons previously discussed, I ruled during the hearing that the General Counsel was entitled to various evidentiary sanctions, including, on request, appropriate adverse inferences. See fn. 29, above. However, the General Counsel's posthearing brief does not request an adverse inference that the discharge was unlawfully motivated based on the Company's subpoena noncompliance. And given all of the other direct and circumstantial evidence of unlawful motive discussed above, it is unnecessary to adopt or rely on an adverse inference.

[73] Tr. 716–718. The handbook states: "Discipline will be administered utilizing the following guidelines, but discipline may start at any level within this process: Step 1–Counseling; Step 2–Verbal Warning; Step 3–Written Warning; Step 4–Final Warning/3-Day Suspension; Step 5–Termination" (GC Exh. 3, p. 64). Daniels admitted that he did not consult the handbook or the disciplinary guidelines in deciding to immediately terminate Wallace (Tr. 717–718).

he told Allen to fire Wallace the very next day after the March 31 meeting, i.e. on April 1 (Tr. 720). However, Allen and Vaivao did not do so until April 6, allowing Wallace to continue working on April 1, 3, and 5. And, as noted above, no explanation has been offered for the delay.[74]

Second, even if Daniels did, in fact, make the decision in the confined and constricted manner he described, this in itself is strong evidence of unlawful motive. As indicated above, while Daniels may have had the authority to terminate warehouse employees, he did not have any experience, knowledge, or responsibility regarding such disciplinary decisions at Shamrock. Further, it takes little imagination to think of one or two common reasons why Wallace might have had an urgent need to leave the meeting. Thus, if Daniels was truly concerned about Wallace leaving the meeting during the open question period, it would have been natural (and consistent with the Company's desire to treat employees "like family") to inquire why Wallace had left before terminating him. Yet, Daniels never did so. Accordingly, it is a reasonable inference that this was not the real reason for discharging him, but a pretext to conceal the Company's unlawful motive. See, e.g., *Golden State Foods Corp*., 340 NLRB 382, 385 (2003) (respondent did not seek an explanation from employee before suspending him); *Casa San Miguel, Inc*., 320 NLRB 534, 571 (1995) (respondent failed to consult with employees' supervisor or even speak to the employees involved before disciplining them); and *Williams Services,* 302 NLRB 492, 502 (1991) (respondent failed to consult with the site manager or any of the employee's immediate supervisors before terminating her).[75]

Finally, the Company has failed to satisfy its burden of showing that it would have taken the same action anyway, regardless of Wallace's protected conduct. Indeed, given that the Company's proffered reason or reasons for discharging Wallace were pretextual, the Company has failed by definition to make such a showing. See, e.g., *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 639 (2011), enfd. sub. nom. *Mathew Enterprise v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012); and *Golden State Foods*, above. Accordingly, the discharge of Wallace violated Section 8(a)(1) and (3) of the Act, as alleged.[76]

b. The separation agreement

The General Counsel contends that the following three provisions of the separation agreement were overbroad and unlawful under the first prong of the test in *Lutheran Heritage*,

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[74] I therefore discredit Daniels' testimony. Rather, I find, consistent with Vaivao's statements at the April 6 termination meeting (which as previously noted constitute nonhearsay admissions), that Beake and/or other managers met with or otherwise reported to the McClellands between March 31 and April 6 what transpired at the meeting, and that the McClellands directed that Wallace be discharged.

[75] As discussed above, Myers, Wallace's supervisor, also left the meeting early, and there is no evidence that he was disciplined, much less discharged, for doing so. However, the General Counsel's posthearing brief does not rely on this disparate treatment as evidence of the Company's unlawful motive.

[76] In light of the foregoing findings, it is unnecessary to address the General Counsel's alternative argument (Br. 55–56) that the discharge was unlawful under the standards set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) for evaluating when an employee's outburst during protected activity costs the employee the protection of the Act.

supra, i.e. because employees would reasonably construe them to prohibit union or protected activity:[77]

> 10. You agree that, except as may be required by law, you will not directly or indirectly, use or disclose, or allow the use or disclosure, to any person, business, firm, corporation, partnership or other entity any confidential, or proprietary information concerning any of the Released Parties, its business, its suppliers or its customers. All information, whether written or otherwise, regarding the Released Parties' businesses, including but not limited to financial, personnel or corporate information and information regarding customers, customer lists, costs, prices, earnings, systems, operating procedures, prospective and executed contracts and other business arrangements and sources of supply are presumed to be confidential information of the Released Parties for purposes of this Agreement . . . .
>
> * * *
>
> 12. You have executed a Confidentiality Agreement and you acknowledge that the terms of such agreement remain in effect notwithstanding the termination of your employment. . . . You may not use/disclose any of the Company's Confidential Information for any reason following your termination and during the transition period.
>
> 13. You agree not to make any disparaging remarks or take any action now, or at any time in the future, which could be detrimental to the Released Parties. . . . [GC Exh. 26, p. 3–4.]

The General Counsel's position is well supported. The prohibitions in paragraphs 10 and 12 on disclosing "confidential information," including any "personnel or corporate information," following termination of employment would reasonably be interpreted as prohibiting the discussion of the Company's wages, hours, and working conditions with a union or other third person or entity. See *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 n. 1, and JD. at 7 (2015) (employer's confidentiality agreement provided that "information about physicians, other employees, and the internal affairs of [the company] are considered confidential"); and *DirectTV U.S.*, 359 NLRB No. 54, slip op. at 3 (2013), reaffd. 362 NLRB No. 48, slip op. at 1 n. 1 (2015) ("confidentiality" provision in employer's handbook instructed employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" and to "[n]ever give out information about . . . employees," and expressly included "employee records" as one category of "company information" that must be held confidential). See also *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014).

Paragraph 13's broad prohibition, without any accompanying explanation or illustrative examples, on making "any disparaging remarks or tak[ing] any action now, or at any time in the future, which could be detrimental" to the Company would likewise reasonably be interpreted to prohibit or restrict union or protected activity. See *Lily Transportation Corp.*, 362 NLRB No. 54

[77] See discussion in sec. A.7 above.

(2015), slip op. at 1 and JD at 8 (employer's handbook rule stated that company would "use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving [the company or its] employees and associates on the internet and may take corrective action up to and including discharge of offending employees"); *First Transit,* 360 NLRB No. 72, slip op. at 1 n. 5 (employer's "disloyalty" rule prohibited employees from participating "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company"); and *Hills & Dales General Hospital*, 360 NLRB No. 70 (2014) (employer's rules prohibited employees from "engaging in . . . negativity" or "mak[ing] negative comments about our fellow team members, including coworkers and managers," and required employees to "represent [the company] in the community in a positive and professional manner").

Contrary to the Company's contention, it makes no difference that the foregoing provisions were contained in a separation agreement and that Wallace refused to sign it. Cf. *Metro Networks*, 336 NLRB 63, 67 n. 20 (2001) (finding that the employer violated Section 8(a)(4) and (1) of the Act by offering unlawfully discharged employees severance agreements that included overbroad nonassistance and nondisclosure provisions, notwithstanding that employees refused to sign it).

The General Counsel also challenges paragraph 9 of the separation agreement, which states:

> 9. Because the information in this Separation Agreement is confidential, it is agreed that you will not disclose the terms of this Separation Agreement to anyone, except that you may disclose the terms of this Separation Agreement to your family, your attorney, your accountant, a state unemployment office, and to the extent required by a valid court order or by law.

The General Counsel argues that this provision is likewise unlawful under *Lutheran Heritage* because it "essentially prohibit[s] [Wallace] from discussing his discharge, a clear violation of the Act" (Br. 57).

However, the provision cannot reasonably be construed in this manner. The separation agreement and its terms say nothing about the underlying circumstances or reasons for the discharge. Therefore, nothing in paragraph 9 prohibits disclosing those circumstances or reasons. Accordingly, as the General Counsel has cited no other basis or authority for invalidating the provision, the allegation is dismissed.

2. Mario Lerma

As discussed in section B. 7 above, on May 5 Operations VP Engdahl and Warehouse Manager Vaivao met with Lerma to discuss "rumblings coming off the floor" about him "heckling," "insulting," and engaging in "potential slowdown[s]" against coworkers who did not support the union campaign. During the course of that meeting, Engdahl and Vaivao made unlawful statements that created an overbroad rule that employees would reasonably construe as prohibiting or restricting protected union activity, and threatened Lerma with reprisals if he

violated that rule. The General Counsel alleges that Engdahl and Vaivao also unlawfully disciplined Lerma at the May 5 meeting because of his protected union activities, and to discourage him and other employees from engaging in such activities (GC Exh. 1(m), par. 6(a), (c)).[78]

The record supports the allegation. First, although the Company denies it, a preponderance of the evidence establishes that Lerma was, in fact, disciplined at the meeting. Indeed, Vaivao acknowledged at the hearing that the meeting was in the nature of a "counseling" (Tr. 245), which as noted above (fn. 73) is the first step in the Company's progressive disciplinary process. This is consistent with Vaivao's statement at the meeting that Lerma could get in "deeper trouble" if employees continued to complain about him, a statement which both confirmed that Lerma was already in trouble, and warned that he would be in even more trouble in the future. Further, although Engdahl subsequently assured Lerma that he was "not getting in trouble" at that time, he immediately cast a shadow over that assurance with a veiled warning that Lerma would be terminated, the very last step in the progressive disciplinary process, the next time. Cf. *Altercare of Wadsworth*, 355 NLRB 565 (2010) (finding that the employer's verbal warnings to several employees constituted discipline, even though they were not memorialized in the employees' personnel file, as such warnings were specifically included in the employer's progressive disciplinary system and the warnings were administered to the employees by high level officials).

Second, the evidence also establishes that the discipline was unlawful. Again, the parties agree that the proper analysis is set forth in *Wright Line.*[79] Applying that analysis, the General Counsel clearly satisfied the initial burden. As discussed in section B.6 above, Lerma was a prominent union supporter, the Company obviously knew it, and the Company's animus is amply demonstrated by its numerous other violations, including Supervisor Garcia's unlawful search for union cards on Lerma's clipboard just a few days before the May 5 meeting. Moreover, as previously discussed, Engdahl and Vaivao admitted that they did not even investigate the alleged complaints about Lerma's "heckling," "insulting," and "potential slowdown[s]." As discussed above with respect to Wallace's discharge, this admission is strong circumstantial evidence that Lerma's alleged misconduct was not the real reason for disciplining him, but a pretext to conceal the Company's true motive: to discourage Lerma from continuing to solicit support for the union. It also effectively prevents the Company from satisfying its rebuttal burden of establishing that it would have disciplined Lerma anyway, even if he had not engaged in the alleged misconduct. Accordingly, the discipline violated Section 8(a)(3) of the Act as alleged.

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[78] The complaint and amended complaint allege that, like Wallace, Lerma was also disciplined because he engaged in other protected concerted activities, in violation of Section 8(a)(1) of the Act. However, the General Counsel's posthearing brief argues only that Lerma was disciplined because of his union activities, in violation of Section 8(a)(3). Accordingly, the independent 8(a)(1) discipline allegation appears to have been abandoned. In any event, the General Counsel failed to carry the burden of proof and persuasion.

[79] No party asserts that the discipline should be evaluated under the *Burnup & Sims* analysis applicable where an employer disciplines an employee for misconduct during the course of protected activity. See *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964).

D. Alleged Unlawful Employee Handbook Rules

The General Counsel alleges that the Company has maintained numerous rules in its Associate Handbook during the same period that are unlawfully overbroad under the first prong of the *Lutheran Heritage* test, i.e. because employees would reasonably construe them to prohibit or restrict protected activity (GC Exh. 1(g), pars. 5(b)–(e); Tr. 750–752). [80]

1. Company confidential information

The handbook contains numerous sections, including one entitled "Protecting the Company's Confidential Information." It states in relevant part as follows:

> The Company's confidential information is a valuable asset and includes: information, knowledge, or data concerning costs, commission reports or payments, purchasing, profits, markets, sales, discounts, margins, customer histories or preferences, relationships with vendors, organization structures, associates, customers, surveys, customer lists, lists of prospective customers, customer account records, marketing plans or efforts, sales records, training and service materials, Company manuals and policies, computer programs, software and disks, order guides, financial statements and projections, business plans, budgets, supplier lists, contracts, calendars and/or day-timers that contain customer contact and other customer information, compensation schedules, proposals and quotes for business, notes regarding customers and prospective customers and pricing information.
>
> This information is the property of the Company and may be protected by patent, trademark, copyright and trade secret laws. All confidential information must be used for Company business purposes only. Every associate, agent, and contractor must safeguard it. THIS RESPONSIBILITY INCLUDES NOT DISCLOSING THE COMPANY CONFIDENTIAL INFORMATION, INCLUDING INFORMATION REGARDING THE COMPANY'S PRODUCTS OR BUSINESS, OVER THE INTERNET, INCLUDING THROUGH SOCIAL MEDIA. . . .
>
> (i) Non-Disclosure/Assignment Agreement. When you joined the Company, you signed an agreement to protect and hold confidential the Company's proprietary information. This agreement remains in effect for as long as you work for the Company and after you leave the Company. Under this agreement you may not disclose the Company's confidential information to anyone or use it to benefit anyone other than the Company without the prior written consent of an authorized Company officer. . . . [GC Ex. 3, pp. 8–9.]

[80] See discussion in sec. A.7 above. Although the complaint alleges that the rules are also discriminatory, the General Counsel's posthearing brief argues only that they are overbroad, and thus appears to abandon that allegation. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

Like the confidentiality provisions in the Company's separation agreement, the broad provisions of the foregoing rule, which designate as confidential any "information, knowledge, or data" concerning "associates" (i.e. employees), "Company manuals and policies," and "compensation schedules," would reasonably be interpreted to prohibit employees from discussing wages, hours, and working conditions with a union or other third person or entity. Accordingly, the provisions violate Section 8(a)(1) of the Act as alleged. See cases cited in sec. C.1.b above.

2. Government information requests

The handbook also includes a section entitled "Handling the Confidential Information of Others." It contains seven subsections, including one entitled "Requests by Regulatory Authorities," which states:

> The Company and its associates must cooperate with appropriate government inquiries and investigations. In this context, however, it is important to protect the legal rights of the Company with respect to its confidential information. All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department. No financial information may be disclosed without the prior approval of the Company's President or Chief Financial Officer. [GC Exh. 3, p. 11]

The General Counsel argues that this provision would reasonably be interpreted to require employees to refer NLRB requests for documents or investigative interviews to the Company, thereby interfering with the investigation of unfair labor practice charges.

Reading the provision in isolation, the General Counsel's argument is well supported by Board precedent. See *DirectTV*, above, 359 NLRB No. 54, slip op. at 3 (employer's handbook stated that, "[i]f law enforcement wants to interview or obtain information regarding a [company] employee . . . the employee should contact the security department . . . who will handle contact with law enforcement agencies and any needed coordination with [company] departments"). See also *Management Consulting, Inc*., 349 NLRB 249 (2007), and cases cited there (employer statements that discourage employees from providing information and hinder the Board's investigation of unfair labor practice charges violate Section 8(a)(1) of the Act).

However, in evaluating whether a challenged rule is unlawful, the Board does not read particular phrases in isolation. *Lutheran Heritage*, 343 NLRB at 646. Here, as indicated above, the subject provision is actually a subsection of a broader section. The introductory paragraph of that section indicates that it deals only with confidential information provided to the Company by "third party" companies and individuals that the Company has, or may eventually have, "business relationships" with. Thus, the Company argues that, read in context, the subject provision would not reasonably be interpreted to encompass government requests for information about its own employees or their wages, hours, and working conditions.

The Company's argument is a reasonable one. Further, the General Counsel, who has the burden of proof and persuasion, offers no rebuttal to it, instead simply ignoring the context of the provision. See GC's Br. at 68. Accordingly, this allegation is dismissed. See generally

Professional Medical Transport, Inc., 362 NLRB No. 19, slip op. at 13 (2015); and *Desert Toyota*, 346 NLRB 110, 115 (2005).

3. Media information requests

Another subsection under the same section is entitled "Company Spokespeople." It states:

> The Company has an established Spokesperson who handles all requests for information from the Media. Ms. Sandra Kelly at the Dairy is the person who has been designated to provide overall Company information or to respond to any public events or issues for which we might receive press calls or inquiries. If you believe that an event or situation may result in the press seeking additional information, please contact Ms. Kelly at the Dairy to advise her of the nature of the situation so that she may be prepared for any calls. Only the Company's CEO may authorize another associate to speak on behalf of the Company. [GC Exh. 3, p. 11].

The General Counsel argues that this provision would reasonably be interpreted to require employees to disclose to the Company whenever they have plans to publicize matters related to their terms and conditions of employment or a union organizing campaign, thereby unlawfully interfering with their right to freely do so and discouraging them from engaging in such protected activity. Again, however, the General Counsel fails to acknowledge or address the fact that the provision is set forth in a section that is limited to confidential information provided to the Company by "third party" companies and individuals that the Company has, or may eventually have, "business relationships" with. Accordingly, this allegation is dismissed as well.

4. Company electronic and telephonic communications systems

The handbook also includes a section entitled "Electronic and Telephonic Communications." The introductory paragraphs of the section state in relevant part:

> All electronic and telephonic communications systems and all communications and information transmitted by, received from, or stored in these systems are the property of Shamrock and as such are to be used solely for job-related purposes. The use of any software and business equipment, including, but not limited to, facsimiles, computers, the Company's E-mail system, the Internet, and copy machines for private purposes is strictly prohibited. . . .
>
> Moreover, improper use of the E-mail system (e.g., spreading offensive jokes or remarks), including the Internet, will not be tolerated. [GC Exh. 3, p. 59]

The General Counsel contends that the first paragraph is unlawful because it prohibits employees from using the Company's email and other electronic and telephone systems for union or other protected activities even during nonworking time, citing *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) (holding that employers must allow employees to use their company email accounts for protected communications during nonworking time absent special circumstances making a ban necessary to maintain production or discipline). The General

Counsel contends that the second provision is unlawfully overbroad because employees would reasonably construe the ban on "improper" use of such systems to include protected conduct.

However, the Board in *Purple Communications* made clear that such usage restrictions are only unlawful if employees actually have access to the employer's systems. See slip op. at 1, 3, and 5. See also *UPMC*, 362 NLRB No. 191, slip op. at 3 (2015). As indicated by the Company, the record here fails to establish that the warehouse employees have such access. Former HR Manager Wright specifically testified that they do not have access to the email system (Tr. 375), and no evidence was presented to rebut her testimony or to establish that the employees have access to other electronic and telephone systems.[81] Accordingly, this allegation is also dismissed.

5. Monitoring use

The same section includes a subsection entitled "Monitoring Use." It states in relevant part:

> To ensure that the use of electronic and telephonic communications systems and business equipment is consistent with Shamrock legitimate business interests, authorized representatives of Shamrock may monitor the use of such equipment from time to time. This includes monitoring internet usage of any kind. This may also include listening to stored voicemail messages. In some functions, telephone monitoring is used to assist in associate training and the development of quality customer service: The associate will be notified if telephone monitoring is applicable to their area.
>
> In addition, Shamrock reserves the right to use software and blog-search tools to monitor comments or discussions about company representatives, customers, vendors, other associates, the company and its business and products, or competitors that associates or non-associates post anywhere on the Internet, including in blogs and other types of openly accessible personal journals, diaries, and personal and business discussion forums.
>
> *Shamrock cautions that associates should have no expectation of privacy while using company equipment and facilities for any purpose.* [GC Exh. 3, p. 59.]

The General Counsel contends that the second paragraph above is unlawful because it creates the impression that the Company will engage in surveillance of employees' protected activities on the internet. The General Counsel acknowledges that the Board in *Purple Communications* stated that an employer could monitor its computers and email systems for legitimate management reasons, and could also notify its employees that it would do so. However, the General Counsel argues that the second paragraph is nevertheless unlawful because it is not limited to monitoring the Company's computers and email system, but includes comments or discussions employees post using their personal computers or email accounts.

[81] Arguably, the fact that the email provision is contained in the employee handbook is itself circumstantial evidence that employees have email access. However, the General Counsel's posthearing brief does not make this argument. Indeed, it does not even address the access issue.

However, as indicated above, the introductory paragraphs of the section indicate that the subsection only applies to company computer and email systems. This is also apparent from the first and third paragraphs of the subsection itself. Again, the General Counsel's posthearing brief fails to acknowledge or address this factual context.[82] Accordingly, this allegation is dismissed as well.

6. Instant messaging

The same section also includes a subsection entitled "E-mail," which states:

> Associates are prohibited from using any Instant Messaging applications except those provided specially by Shamrock for Associate's business use. External E-mail messages may carry one or more attachments. An attachment may be any kind of computer file, such as a word processing document, spreadsheet, software program, or graphic image. [GC Exh. 3, p. 60.]

The General Counsel contends that this provision is unlawful for the same reasons the previous two provisions above are unlawful, i.e. because it prohibits employees from using company computer systems to send instant messages about union or other protected activity even during nonworking time, and because it is not limited to company computer systems, and thus employees would reasonably conclude that the rule also prohibits them from doing so on their personal computer systems or devices.

Both arguments again fail for the same reasons discussed above. There is no evidence that the employees have access to company computer systems to send instant messages, and the introductory paragraphs of the section in which the subsection appears indicate that the subsection only applies to instant messaging on company computer systems. Accordingly, this allegation is likewise dismissed.

7. World Wide Web

The same section also includes a subsection entitled "World Wide Web," which states in relevant part:

> As a general rule, associates may not forward, distribute, or incorporate into another work, material retrieved from a Web site or other external system. Very limited or "fair use" may be permitted in certain circumstances. Any associate desiring to reproduce or store the contents of a screen or Web site should contact their Supervisor to ascertain whether the intended use is permissible.
>
> Use of the World Wide Web includes all restrictions, which apply generally to the use of the Company's E-mail and other electronic and telephonic equipment, as noted above. In addition, the following rules apply with respect to Internet usage:

[82] Like the complaint, the General Counsel's posthearing brief sets forth only the second paragraph of the subsection. It omits the first and third paragraphs without any signal, notation, or explanation.

* * *

2. No Downloading of Non-Business Related Data: The Company allows the download of files from the Internet. However, downloading files should be limited to those that relate directly to Shamrock business.

* * *

4. No Participation in Web-Based Surveys without Authorization: When using the Internet, the user implicitly involves Shamrock in his/her expression. Therefore, users should not participate in Web or E-mail based surveys or interviews without authorization. [GC Exh. 3, p. 60.]

The General Counsel contends that this provision is unlawful for similar reasons, i.e. because (1) it would reasonably be read by employees to (a) prohibit them downloading, forwarding or distributing to coworkers information from the internet or other external source about a union, the Company, or the employees and their terms and conditions of employment; and (b) require them to obtain the Company's authorization to participate in surveys from unions about their concerns or interest in union representation; (2) "there is no language in the provision indicating that it was intended to apply only to use of the [Company's] computer system and equipment"; and (3) even if the provision is limited to the Company's computer systems and equipment, the Company has failed to show special circumstances for the restrictions as required by the Board's decision in *Purple Communications*, above (GC Br. 74–75).

All of these arguments again fail for the same reasons discussed above. Both the context and the content of the provision indicate that it applies only to company computers and equipment,[83] and there is no evidence the employees have access to them. Accordingly, this allegation is also dismissed.

8. Blogging

The same section also includes a subsection entitled "Blogging," which states:

The following rules and guidelines apply to blogging, whether blogging is done for Shamrock on company time, on a personal Web site during non-work time, or outside the workplace. The rules and guidelines apply to all associates.

[1.] Shamrock discourages associates from discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications. Nonofficial company communications include Internet chat rooms, associates' personal blogs and similar forms of online journals or diaries, personal newsletters on the Internet, and blogs on Web sites not affiliated with, sponsored, or maintained by Shamrock.

[83] Again, the General Counsel's posthearing brief omits and entirely ignores the first sentence of the second paragraph of the provision referencing "the Company's E-mail and other electronic and telephonic equipment."

[2.] Associates have a duty to protect associates' home addresses, social security numbers, birth date, driver's license number, and other personal information and the confidentiality of Shamrock trade secrets, marketing lists, customer account information, strategic business plans, competitor intelligence, financial information, business contracts, and other proprietary and nonpublic company information that associates can access.

[3.] Associates cannot use blogs to harass, threaten, libel, or slander, malign, defame or disparage, or discriminate against co-workers, managers, customers, clients, vendors or suppliers, and organizations associated or doing business with Shamrock, or any members of the public, including Web site visitors who post comments about blog contents.

[4.] Associates who maintain blogs on their own or another Web site and choose to identify themselves as associates of Shamrock are strongly encouraged to state explicitly, clearly, and in a prominent place on the site that views expressed in their blogs are associates' own and not those of Shamrock or of any person or organization affiliated or doing business with Shamrock.

[5.] Shamrock respects associates' right to express personal opinions in personal blogs and does not retaliate or discriminate against associates who use their blogs for political, organizing, or other lawful purposes.

[6.] Associates cannot use Shamrock's logo or trademarks or the name, logo, or trademarks of any business partner, supplier, vendor, affiliate, or subsidiary on any personal blogs or other online sites unless their use is sponsored or otherwise sanctioned, approved, or maintained by Shamrock.

[7.] Associates cannot post on personal blogs Shamrock's copyrighted information or company-issued documents bearing Shamrock's name, trademark, or logo.

[8.] Associates cannot post on personal blogs photographs of company events, other associates or company representatives engaged in Shamrock's business, or company products, unless associates have received Shamrock's explicit permission.

[9.] Associates cannot advertise or sell company products or services via personal blogs.

[10 .] Shamrock discourages associates from linking to Shamrock's external or internal Web site from personal blogs.

[11.] Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the NLRA. [GC Exh. 3, pp. 61–62.]

The General Counsel contends that the foregoing provision is unlawful because (1) it explicitly states that it applies outside the workplace; and (2) paragraphs 1–3, 6–8, and 10 would reasonably be read by employees to prohibit or limit their right to engage in protected union or other concerted activities (GC Br. 78–80).

As indicated by the General Counsel, unlike the other subsections discussed above, this subsection clearly indicates that it is *not* limited to company computers and equipment. Thus, the subject paragraphs must be evaluated to determine whether they would reasonably be construed to prohibit or restrict employees from using their personal computers or other devices to engage in union or other protected communications or discussions on the internet.

Paragraph 1. The broad language of this paragraph, discouraging employees from publicly discussing on the internet "any work-related matters, whether confidential or not," would reasonably be interpreted by employees to encompass online discussions relating to employee terms and conditions of employment. Accordingly, it is overbroad. See *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014), affd. ___ Fed. Appx. ___, 2015 WL 6161477 (2d Cir. Oct. 21, 2015).[84]

Paragraph 2. This paragraph, which requires employees to "protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information," would reasonably be construed to prohibit or restrict employees from disclosing their coworkers' contact information and wages, hours, and working conditions as part of a union organizing or public campaign to improve their terms and conditions of employment. Accordingly, like the similar confidentiality provisions in the Wallace separation agreement and handbook section on company confidential information, it is overbroad. See secs. C.1.b, and D.1, above, and cases cited there. See also *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 2 (2015) ("confidentiality" provision in employer's handbook prohibited employees from disclosing "to anyone outside the company, indirectly or directly," including "participation in internet chat rooms or message boards," "any information about the company which has not been shared by the company with the general public," including but not limited to "organizational charts, salary structures, [and] policy and procedures manuals"); and *Lily Transportation*, 362 NLRB No. 54, slip op. at 1 nn. 2, 3 and JD. at 6–7 (provisions in employer handbook prohibited employees from disclosing "employee information maintained in confidential personnel files" and from posting on the internet "information or comments about [the company or its] . . . employees or employees' work that have not been approved by [the company]").

Paragraph 3. This paragraph, which prohibits employees from using blogs to, among other things, "malign" or "disparage" coworkers or managers, would reasonably be interpreted by employees to include protected union or other concerted activity. Thus, like the similar provision in the Wallace separation agreement, it is overbroad. See sec. C.1.b, above, and cases cited there. See also *UPMC*, 362 NLRB No. 191, slip op. at 2 n. 5 and JD. at 24–25 (employer's acceptable-use policy prohibited employees, without prior written consent, from using company computers, even on nonworking time, to establish or participate in websites or social networks

[84] The Company does not contend that this paragraph (or paragraph 10) is lawful because it uses the word "discourages," rather than "prohibits." In any event, Board precedent indicates to the contrary. See *Boeing Co.*, 362 NLRB No. 195 (2015), and cases cited there.

that "disparage or misrepresent," or make "false or misleading statements regarding" the company).

Paragraphs 6 & 7. These provisions, which prohibit or require approval for employees to use Shamrock's logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites, are also overbroad. See *id.*, slip op. at 2 n. 5 and JD. at 25, and cases cited there.

Paragraph 8. This provision, which requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products, would reasonably be interpreted to encompass photos documenting unsafe or hazardous working conditions and equipment or other evidence relevant to employment-related disputes. Accordingly, it is likewise overbroad. See *Whole Foods Market, Inc.,* 363 NLRB No. 87 (2015) (employer's rule prohibited all recording, including using cameras to record images, without prior approval of the company or consent of all parties); and *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 3–4 (employer's rule banned use of cameras, camera phones, audio-visual and other recording equipment on company property without authorization), and cases cited there. See also the cases cited above with respect to paragraphs 1–3.

Paragraph 10. This provision, which discourages employees from linking to Shamrock's external website from personal blogs, would restrict employees' ability to identify or direct others to the Company's website in discussing company policies or terms and conditions of employment. Accordingly, it is overbroad as well. Cf. *UPMC*, above.

Finally, the Company does not contend that any of the foregoing paragraphs are saved by the general qualifiers or disclaimers set forth in paragraphs 5 and 11 regarding employees' "right to express personal opinions" about "organizing" and other "rights under Section 7 of the NLRA." Indeed, neither the General Counsel nor the Company even mention these provisions in their posthearing briefs. In any event, Board precedent indicates that they are insufficient to do so. See *Solarcity Corp*., 363 NLRB No. 83, slip op. at 6 (2015), and cases cited there. Accordingly, all seven paragraphs violate the Act as alleged.

9. Guideline to prohibited activities

The same section also includes a subsection entitled "Guideline to Prohibited Activities." It states in relevant part:

> The following behaviors are examples of previously stated or additional actions to activities that are prohibited and considered improper use of the Internet, E-mail or voicemail systems provided by Shamrock. These examples are provided as guidelines only and are not all-inclusive:
>
> [1.] Sending or posting confidential material, trade secrets, or proprietary information outside of the organization.
>
> * * *
>
> [13.] Refusing to cooperate with security investigations.

> [14.] Sending or posting chain letters, solicitations, or advertisements not related to business purposes or activities.
>
> * * *
>
> [16.] Sending or posting messages that disparage another organization.
>
> * * *
>
> Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the NLRA. [GC Exh. 3, p. 62].

The General Counsel contends that this subsection is unlawfully overbroad for essentially the same reasons as the previous subsection discussed above. However, unlike that subsection, this subsection indicates that it applies only to Company computers and equipment. And, as previously discussed, there is no evidence the employees have access them. Accordingly, this allegation is dismissed.[85]

10. Reporting violations

The same section also includes a subsection entitled "Reporting Violations," which states:

> Shamrock requests and urges associates to use official company communications to report violations of Shamrock's blogging rules and guidelines, customers' or associates' complaints about blog content, or perceived misconduct or possible unlawful activity related to blogging, including security breaches, misappropriation or theft of proprietary business information, and trademark infringement. Associates can report actual or perceived violations to supervisors, other managers, or to Human Resources.
>
> As a condition of employment and continued employment, associates are required to sign an Electronic and Telephonic Communications Acknowledgement Form. Applicants are required to sign this form on acceptance of an employment offer by Shamrock.

As discussed above, the Company's blogging rule is unlawfully overbroad, i.e., it would reasonably be read to prohibit or restrict protected union or other concerted activities. Thus, as indicated by the General Counsel, this provision effectively solicits employees to report such protected activities to the Company. Accordingly, it is unlawful. See *Montgomery Ward*, 269 NLRB 598, 600 (1984) (employer's no-distribution rule directed employees to report conduct that it unlawfully prohibited). See also *Bill's Electric, Inc*., 350 NLRB 292, 306 (2007); and *Dillon Cos.*, 340 NLRB 1260, 1267 (2003).

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[85] As with the previous subsection, the Company does not contend that this subsection is saved by the last sentence purporting to preserve employees' "rights under Section 7 of the NLRA."

11. Guidelines to appropriate conduct

The handbook also contains a section entitled "Guidelines to Appropriate Conduct." It states in relevant part as follows:

> *Listed below are some of the rules and regulations of Shamrock. This list should not be viewed as all-inclusive. It is intended only to illustrate the types of behavior and conduct that Shamrock considers inappropriate and grounds for disciplinary action up to and including termination of employment without prior warning, at the sole discretion of the company, including, but not limited to, the following*:
>
> * * *
>
> [2.] Theft and/or deliberate damage or destruction of property not belonging to the associate, including the misuse or unauthorized use of any products, property, tools, equipment of any person or the unauthorized use of any company-owned equipment.
>
> * * *
>
> [6.] Any act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work, including sexual or other harassment, wasting the associate's time, harming or placing the associate in harm's way, immoral or indecent conduct or conduct that creates a disturbance in the workplace.
>
> Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the National Labor Relations Act. [GC Exh. 3, pp. 83–84.]

The General Counsel alleges that paragraph 2 above is unlawfully overbroad because employees "would reasonably understand it to encompass their use of [the Company's] email system or their engaging in conduct that [the Company] considered 'misuse' of that system," including protected communications on nonworking time (Br. 84). However, as discussed above, the employees do not have access to the Company's email system. Accordingly, this allegation is dismissed.

Unlike paragraph 2, paragraph 6 is not limited to use of the Company's computers or other equipment. Further, as indicated by the General Counsel, its broad prohibition on "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace" would reasonably be understood to encompass protected union or other concerted activities.[86] See *Ryder Transportation Services*, 341 NLRB 761 (2004) ("It is well settled that the Act allows employees to engage in persistent union solicitation even when it

[86] The General Counsel's posthearing brief also argues that the term "harassment" would reasonably be interpreted by employees to include protected conduct. However, *Lutheran Heritage* itself held to the contrary, 343 NLRB at 648–649, and the General Counsel cites no legal or factual basis for distinguishing that case.

annoys or disturbs the employees who are being solicited."), enfd. 401 F.3d 815 (7th Cir. 2005). See also the discussion and cases cited in section B.7 above. Finally, as with other provisions, the Company does not contend that this provision is saved by the last sentence of the section purporting to preserve employees' "rights under Section 7 of the [NLRA]." Accordingly, the provision is unlawful.

12. No solicitation or distribution

The handbook also includes a section entitled "No Solicitation, No Distribution," which states:

> Shamrock believes that the work time of our associates should be devoted to their work-related activities, and that it is neither safe nor productive for our associates to be distracted by individuals engaged in non-work related activities during work time or in work areas. Thus, the conducting of non-company business related activities is prohibited during the working time by either the associate doing the soliciting or the associate being solicited or at any time in customer or public areas. Associates may not solicit other associates under any circumstances for any non-company related activities.
>
> The distribution of non-company literature, such as leaflets, letters or other written materials by an associate is not permitted during the working time of either the associate doing the distributing or the associate to whom the non-company literature is being distributed, or any time in working areas or in customer and public areas.
>
> It is important that we keep our associates informed on all matters that involve them. Company bulletin boards/email is our primary means for posting notices and other materials related to our associates and our business. In order to avoid any confusion over what may or may not be posted on Shamrock bulletin boards, and to avoid obscuring important business-related materials with items which are of a personal nature, Shamrock bulletin boards are to be used solely for the posting of Shamrock business-related notices and materials. If you would like to post any Shamrock business-related materials, please see your Department Manager, the General Branch Manager or the Human Resources Representative. Only these Individuals are authorized to approve and post information on Shamrock bulletin boards. [GC Exh. 3, p. 65.]

The first and second paragraphs of this section explicitly ban soliciting or distributing in customer or public areas at any time. Thus, as indicated by the General Counsel, they would reasonably be construed to prohibit off-duty employees from engaging in union solicitation or distribution in such areas, including in parking lots and other public nonworking areas between shifts. Accordingly, they are unlawful. See *Times Publishing Co*., 231 NLRB 207 (1977), enfd. in relevant part and remanded on other grounds 576 F.2d 1107 (5th Cir. 1978) (employer's rule prohibited solicitation and distribution in public areas at any time); and *Bankers Club, Inc*., 218 NLRB 22, 27 (1975) (employer's rule banned solicitation or distribution in customer areas at any time), cited with approval in *Purple Communications*, 362 NLRB No. 126, slip op. at 13. See

also *Golub Corp*., 338 NLRB 515 (2002); and *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999), and cases cited there.

The General Counsel contends that the first paragraph is also overbroad because it bans, not just soliciting, but also "the conducting of non-company business related activities" during working time. The General Counsel argues that this language "would reasonably be read to prohibit employees from discussing their working conditions or . . . the state of an organizing campaign during working time, even though there is no restriction on other types of discussions at the facility." (Br. 86.) However, there are two problems with this argument. First, both the title of the section and the remainder of the paragraph indicate that the term "non-company business" refers to soliciting. Second, the General Counsel cites no record evidence that the Company actually permits discussions about personal matters other than working conditions and union organizing during working time. Cf. *Hertz Corp*., 316 NLRB 672, 687 (1995) (record evidence established that the employer had not enforced any restrictions on what employees could say to each other in working areas during working time). The argument therefore fails.

The General Counsel also alleges that the third paragraph is unlawful because it requires employees to seek approval before posting any information at the facility, including in nonworking areas, citing *Brunswick Corp*., 282 NLRB 794, 795 (1987). However, *Brunswick* involved a no-solicitation rule, not a no-posting rule. Unlike with solicitation/distribution, the law permits an employer to prohibit employees from posting materials anytime and anywhere in the facility as long as the employer does not apply the ban in a discriminatory manner. *Flamingo Hilton*, 330 NLRB 287, 293 (1999). See also *St. Francis Medical Center*, 347 NLRB 368, 370 (2006) ("The comparison between solicitation/distribution and posting is a comparison of 'apples to oranges'."). The General Counsel does not contend or cite any record evidence that the Company has applied its no-posting rule in a discriminatory manner. Accordingly, this allegation is dismissed.

13. Cell phone use

Finally, the General Counsel also alleges that the Company has unlawfully promulgated and maintained an overbroad cell phone rule (Tr. 750, 844). The rule is set forth in a January 2, 2015 memorandum that the Company posted entitled "Head/Ear & Cell Phone Use." The memo states:

> In an effort to improve the workplace safety environment, ensure the safety of our associates and to maintain compliance with State, Federal and regulatory agencies, the use of all musical devices to include, but not limited to cell phones and head/ear phone use within the warehouse is being discontinued effective January 4, 2015.
>
> Beyond the impact of the individual noise level, personal music devices create a potential hazard. They impair a worker's ability to hear surrounding sounds and compromise the user's general alertness and concentration; therefore they may be considered a hazard within the workplace. This is especially true if working around moving equipment or in circumstances where a worker must be able to hear warning sounds.

> An EMERGENCY phone line is in place should a family member need to be contacted while at work and the message will be relayed to you. This line is for emergency use ONLY. [GC Exh. 27].

The General Counsel argues that the foregoing memo sets forth a "a sweeping prohibition on the use of cell phones," which would reasonably be interpreted "to ban the use of cell phones for any purpose whatsoever, including recording working conditions for any number of reasons protected under the Act." The General Counsel contends that it is therefore unlawful, citing *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 4 (employer's rule banned use of cameras or any other type of audio visual recording equipment unless authorized for business purposes). (Br. 87.)

As indicated by the Company, however, the rule on its face does not ban employees from carrying cell phones or using them to take pictures or videos. Rather, it is clear from both the rule and the accompanying explanation/justification in the memo that the ban is limited to the use of cell phones for listening to music or making or receiving calls.[87] Accordingly, this allegation is dismissed.

CONCLUSIONS OF LAW

1. The Respondent Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Threatening employees at a January 28, 2015 town hall meeting that they would lose benefits if they supported a union.

b. Soliciting employees' complaints and grievances and promising to remedy them at a January 28 roundtable meeting if employees refrained from supporting a union.

c. Soliciting employees' complaints and grievances and promising to remedy them at a February 5 communication meeting if employees refrained from supporting a union.

d. Telling employees at a February 24 union education meeting to report to management if union supporters solicited them to sign a union card.

e. Promising or granting benefits to employees on April 29 by committing, both at a communication meeting and in writing, that employees would not be laid off, to discourage support for a union.

f. Threatening employees at the April 29 communication meeting with unspecified reprisals if they supported a union.

g. Informing employees at the April 29 communication meeting that it would be futile for them to support a union.

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[87] Again, the General Counsel's posthearing brief omits and entirely ignores the second and third paragraphs of the memo.

2. The Company also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Interrogating an employee on January 28, 2015 about whether he supported a union.

b. Surveilling employees' union activities on January 28.

c. Creating the impression of surveilling an employee's union activities on April 27.

d. Surveilling employees' union activities on April 29.

e. Interrogating employees about their union activities on April 29.

f. Surveilling and creating the impression of surveilling an employee's union activities on May 1.

g. Orally promulgating a discriminatory and overbroad rule at a May 5 meeting with an employee that prohibited union supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated," and threatening the employee with reprisals if he violated the above rule.

h. Promulgating a discriminatory and overbroad rule in a May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior," requesting employees to report to management if the rule was violated, and threatening to refer violations of the rule to law enforcement for prosecution.

i. Taking union flyers away from employees on May 25.

j. Interrogating employees on May 25 about whether they supported the union.

k. Granting wage increases to employees on May 29 to discourage support for the union.

3. The Company also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

a. Maintaining an overbroad rule in its Associate Handbook on "Protecting the Company's Confidential Information" since at least October 15, 2014 that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

b. Maintaining an overbroad rule in the handbook on "Blogging" since the same date that:

1. Discourages employees from publicly discussing on the internet "any work-related matters, whether confidential or not."

2. Requires employees to "protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information."

3. Prohibits employees from using blogs to "malign" or "disparage" coworkers or managers.

4. Prohibits or requires company approval for employees to use the company logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites.

5. Requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products.

6. Discourages employees from linking to the Company's external website from personal blogs.

c. Maintaining an overbroad rule in the handbook on "Reporting Violations" since the same date that solicits employees to report any of the above prohibited blogging activities to the Company.

d. Maintaining an overbroad rule in the handbook on "Guidelines to Appropriate Conduct" since the same date that prohibits "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

e. Maintaining an overbroad rule in the handbook on "No Solicitation, No Distribution" since the same date that bans soliciting or distributing in customer or public areas at any time.

f. Offering a "Separation Agreement and Release and Waiver" to an employee on April 6, 2015 that prohibited disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

4. The Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act by discharging Thomas Wallace on April 6, 2015 because of his protected concerted and union activities and to discourage employees from engaging in such activities.

5. The Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by disciplining Mario Lerma on May 5, 2015 because of his protected union activities and to discourage employees from engaging in such activities.

6. The Company did not otherwise violate the Act as alleged in the complaint.

REMEDY

The appropriate remedy for the foregoing violations is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, in the event Wallace has not already been reinstated, the Company will be required to offer him immediate and full reinstatement to his former position.[88] In addition, the Company will be required to make him whole for any loss of earnings and other benefits as a result of his unlawful termination. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB 6 (2010).

As set forth in *Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Company will also be required to compensate Wallace for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.[89]

In addition, the Company will be required to remove from its files any reference to the unlawful termination of Wallace and discipline of Lerma, and to notify them in writing that this has been done and that the termination or discipline will not be used against them in any way.

The Company will also be required to rescind, in writing, the discriminatory and overbroad rule it orally promulgated at the May 5 meeting with Lerma, the discriminatory and overbroad rule set forth in its May 8 letter to all employees, and the overbroad separation agreement it offered to Wallace on April 6. The Company will likewise be required to rescind the overbroad handbook rules, and furnish all current employees with inserts for their current employee handbooks that (1) advise that the unlawful rule has been rescinded, or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rule, or (2) provide a lawfully worded rule.

In addition, the Company will be required to post a notice to employees, in both English and Spanish, stating that it will not continue to engage in the same or any like or related unlawful conduct and that it will affirmatively remedy its unlawful conduct as ordered.

Given the severity and scope of the Company's unfair labor practices, and the fact that many of them were committed by high-level officials and/or at large and small mandatory meetings, the notice must also be read aloud to the employees. Specifically, President/CEO Kent McClelland or Operations VP Engdahl, or, if the Company chooses, a Board agent in their

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[88] See, e.g., *Kellogg Company*, 362 NLRB No. 86, slip op. at 8 (2015). On February 1, 2016, the U.S. District Court in Arizona (Humetewa, J.) granted the General Counsel's request for a temporary injunction under Section 10(j) of the Act requiring the Company to offer Wallace reinstatement pending a final decision by the Board. *Overstreet v. Shamrock Foods Co*., CV-15-01785-PHX-DJH.

[89] The General Counsel also requests search-for-work expenses, i.e. that the Company be required to reimburse Wallace for all expenses he incurred searching for interim work. This remedy is denied as it would involve a change in Board law. See *Katch Kan USA LLC*, 362 NLRB No. 162, slip op. at 1 n. 2 (2015).

presence, must read the remedial notice aloud to all warehouse employees at one or more mandatory meetings scheduled during working time to ensure the widest possible attendance. A Spanish-language interpreter must be present as well to translate the reading for employees who are not fluent in both English and Spanish. See *OS Transport LLC*, 358 NLRB 1048, 1049 (2012), reaffd. 362 NLRB No. 34 (2015); and *Homer D. Bronson*, 349 NLRB at 515, and cases cited there.

According, based on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[90]

ORDER

The Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or disciplining employees because of their protected concerted or union activities and to discourage employees from engaging in such activities.

(b) Threatening employees that they would lose benefits if they supported a union.

(c) Soliciting employees' complaints and grievances and promising to remedy them if employees refrained from supporting a union.

(d) Promising or granting benefits to employees by committing that they would not be laid off to discourage support for a union.

(e) Granting wage increases to employees to discourage support for the union.

(f) Telling employees to report to management if union supporters solicited them to sign a union card.

(g) Threatening employees with unspecified reprisals if they support a union.

(h) Informing employees that it would be futile for them to support a union.

(i) Interrogating employees about whether they support a union.

(j) Surveilling employees' union activities.

(k) Creating the impression of surveilling employees' union activities.

(l) Taking union flyers away from employees.

[90] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(m) Promulgating discriminatory or overbroad rules, either orally or in writing, that restrict employees' right to engaged in protected union activities.

(n) Requesting employees to report to management if the discriminatory or overbroad rules are violated.

(o) Threatening employees with discharge or other unspecified reprisals, and to refer the matter to law enforcement for prosecution, if they violate the discriminatory or overbroad rules.

(p) Maintaining overbroad rules in the Associate Handbook that prohibit, restrict, or discourage employees from engaging in protected union and other concerted activities.

(q) Offering a "Separation Agreement and Release and Waiver" to employees that includes provisions prohibiting employees from engaging in protected union and other concerted activities following termination of employment.

(r) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Thomas Wallace full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Wallace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Compensate Wallace for any adverse tax consequences of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of the Board's Order, remove from the Company's files any reference to the unlawful April 6, 2015 termination of Wallace, and within 3 days thereafter notify him in writing that this has been done and that the termination will not be used against him in any way.

(f) Within 14 days from the date of the Board's Order, remove from the Company's files any reference to the unlawful May 5, 2015 discipline of Mario Lerma, and within 3 days

thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(g) Within 14 days of the Board's Order, rescind, in writing, the discriminatory and overbroad rule it orally promulgated at the May 5 meeting with Lerma that prohibited union supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated."

(h) Within 14 days of the Board's Order, rescind, in writing, the discriminatory and overbroad rule set forth in the May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior."

(i) Within 14 days of the Board's Order, rescind, in writing, the "Separation Agreement and Release and Waiver" that prohibits employees from disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

(j) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Protecting the Company's Confidential Information" that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

(k) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Blogging" that: (1) discourages employees from publicly discussing on the internet "any work-related matters, whether confidential or not"; (2) requires employees to "protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information"; prohibits employees from using blogs to "malign" or "disparage" coworkers or managers; (4) prohibits or requires company approval for employees to use the company logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites; (5) requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products; and (6) discourages employees from linking to the Company's external website from personal blogs.

(l) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Reporting Violations" that solicits employees to report any of the above prohibited blogging activities to the Company.

(m) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Guidelines to Appropriate Conduct" that prohibits "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

(n) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "No Solicitation, No Distribution" that bans soliciting or distributing in customer or public areas at any time.

(o) Furnish all current employees with inserts for their current employee handbooks that (1) advise that the above unlawful rules have been rescinded, or (2) provide lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules.

(p) Within 14 days after service by the Region, post at its warehouse in Phoenix, Arizona copies of the attached notice marked "Appendix"[91] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2014.

(q) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the warehouse employees by the Respondent's President/CEO Kent McClelland or Operations Vice President Mark Engdahl, or, if the Company chooses, a Board agent in their presence, with translation available for Spanish-speaking employees.

(r) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 11, 2016

Jeffrey D. Wedekind
Administrative Law Judge

[91] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge, discipline or otherwise discriminate against any of you for supporting Bakery, Confectionary, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC, or any other union.

WE WILL NOT threaten you with loss of benefits if you support a union.

WE WILL NOT solicit your complaints and grievances and promise to remedy them if you refrain from supporting a union.

WE WILL NOT promise or grant benefits to discourage you from supporting a union.

WE WILL NOT grant wage increases to discourage you from supporting a union.

WE WILL NOT ask or tell you to report if union supporters solicit you to sign a union card.

WE WILL NOT threaten you with unspecified reprisals if you support a union.

WE WILL NOT inform you that it would be futile for you to support a union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT watch or monitor you in order to find out about your union activities, or create the impression that we are doing so.

WE WILL NOT take union flyers away from you.

WE WILL NOT impose discriminatory or overbroad rules, either orally or in writing, that restrict your right to engage in protected union activities, request that you report if such rules are

violated, or threaten to discharge or take unspecified reprisals against you, or to refer the matter to law enforcement for prosecution, if you violate the rules.

WE WILL NOT maintain overbroad rules in the Associate Handbook that prohibit, restrict, or discourage you from engaging in protected union and other concerted activities.

WE WILL NOT offer you a "Separation Agreement and Release and Waiver" that prohibits you from engaging in protected union and other concerted activities following termination of your employment.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the Board's Order, offer Thomas Wallace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wallace whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Wallace for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating Wallace's backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the Board's Order, remove from our files any reference to the unlawful April 6, 2015 discharge of Wallace, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the Board's Order, remove from our files any reference to the unlawful May 5, 2015 discipline of Mario Lerma, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, within 14 days from the Board's Order, rescind the "Separation Agreement and Release and Waiver" we offered to Wallace that prohibits disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

WE WILL, within 14 days from the Board's Order, rescind, in writing, the discriminatory and overbroad rule we orally promulgated at our May 5 meeting with Lerma that prohibited union supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated."

WE WILL, within 14 days from the Board's Order, rescind, in writing, the discriminatory and overbroad rule set forth in our May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Protecting the Company's Confidential Information" that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Blogging" that: (1) discourages you from publicly discussing on the internet "any work-related matters, whether confidential or not"; (2) requires you to "protect" your coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information"; prohibits you from using blogs to "malign" or "disparage" coworkers or managers; (4) prohibits or requires company approval for you to use the company logo or trademarks, or post copyrighted information in documents containing the company name, trademark, or logo, on any personal blogs or other online sites; (5) requires company permission for you to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products; and (6) discourages you from linking to the Company's external website from personal blogs.

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Reporting Violations" that solicits you to report any of the above prohibited blogging activities to the Company.

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Guidelines to Appropriate Conduct" that prohibits you from engaging in "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "No Solicitation, No Distribution" that prohibits you from soliciting or distributing in customer or public areas at any time.

WE WILL furnish you with inserts for your current associate handbooks that (1) advise that the above unlawful rules have been rescinded, or (2) provide lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to you revised associate handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules.

SHAMROCK FOODS COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-150157 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.

Shamrock's Post-Hearing Brief is not record material as defined in 29 C.F.R. § 102.45(b), but it was cited in Shamrock's filings to this Court and thus is included.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

SHAMROCK FOODS COMPANY

and

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

Case No. 28-CA-150157

POST-HEARING BRIEF OF RESPONDENT SHAMROCK FOODS COMPANY

November 25, 2015

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND FACTS 1

III. THE VARIOUS EMPLOYMENT RULES AND POLICIES CHALLENGED BY THE GENERAL COUNSEL ARE LAWFUL AND CONSISTENT WITH THE GENERAL COUNSEL'S PUBLISHED GUIDANCE. 2

A. The General Counsel's Allegations Regarding The Shamrock Associate Handbook Rely On Unreasonable Readings Of Isolated Terms. 4

1. The Policy Protecting the Company's Confidential Information. 4

2. The Non-Disclosure Policy. 7

3. The Policy Concerning Requests By Regulatory Authorities. 8

4. The Policy Concerning Requests For Public Statements On Shamrock's Behalf. 9

5. Policies Concerning Internet And Email Use. 10

6. The Guidelines To Appropriate Conduct. 11

7. The Solicitation And Distribution Policy. 13

B. Shamrock's Offer Of A Severance Agreement To Thomas Wallace Does Not Constitute Promulgation of An Unlawful Work Rule. 15

C. The General Counsel's Claim That Shamrock Unlawfully Prohibited Retaliatory Slowdowns Is Unsupportable. 17

D. Kent McClelland's May 8 Letter Was A Lawful Prohibition Against Threatening Conduct. 18

E. Shamrock's Policy Prohibiting Musical Devices On The Warehouse Floor Is A Lawful Safety Measure. 19

IV. THE GENERAL COUNSEL'S ALLEGATIONS OF UNLAWFUL CONDUCT ARE UNSUPPORTED AND BASED ON MISCHARACTERIZATION. 21

A. The General Counsel's Anticipated Request For Adverse Inferences In Addition To Sanctions Is Improper And Unsupportable. 21

B. The Allegations Concerning Manning And White Should Be Dismissed Based On The General Counsel's Failure To Establish Supervisory Status. 23

C. The General Counsel's Allegations Concerning Threats And Other Purportedly Unlawful Remarks By Shamrock Representatives Are Based On Legally Permissible Statements. 27

D. The General Counsel's Interrogation Allegations Are Factually Incorrect And Legally Unsupportable. 29

E. The General Counsel's Allegations Concerning Solicitation Of Grievances Fail Based On Shamrock's Substantial and Undisputed History Of Soliciting Employee Feedback. 33

F. The General Counsel's Claim That Shamrock "Confiscated" Union Literature Is Based On Nothing More Than Routine Cleaning Of Shamrock's Break Rooms. 34

G. The General Counsel's Allegations Of Implied And Actual Surveillance Are Meritless. 35

H. The May 2015 Wage Increases Were Unrelated To The Union's Organizing Activity. 40

V. GENERAL COUNSEL IS UNABLE TO ESTABLISH THE ELEMENTS NECESSARY TO SUPPORT ITS CLAIMS OF UNLAWFUL DISCIPLINE. 42

A. Allegations Concerning Unlawful Discipline Are Subject To The *Wright Line* Burden-Shifting Approach. 42

B. The General Counsel Cannot Establish That Shamrock Had Knowledge Of Wallace's Alleged Union Activities. 43

1. The General Counsel Counsel Cannot Establish That Lerma Was Subject To An Adverse Employment Action. 44

VI. THE BOARD'S REQUESTED RELIEF IS NOT APPROPRIATE. 45

VII. CONCLUSION 47

I. INTRODUCTION

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

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

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

II. BACKGROUND FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(GCX 3 at 9).

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

3. The Policy Concerning Requests By Regulatory Authorities.

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

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

(GCX 3 at 11).

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

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

(GCX 3 at 9).

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

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

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

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

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

(GCX 3 at 11).

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

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

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

5. Policies Concerning Internet And Email Use.

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

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

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

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

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

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

(GCX 3 at 63).

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

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

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

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

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

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

> We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here. Under both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment triggering liability under state or federal law.

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

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

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

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

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

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

(GCX 3 at 65).

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

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

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

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

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

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

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

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

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

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

A. If I signed – yes. If I signed –

. . . .

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

A. No, sir.

Q. And so you didn't get the money –

A. No, sir.

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

A. No.

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

A. Right.

Q. And then it was off the table?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

A copy was sent by E-Filing to:

The Honorable Jeffrey D. Wedekind
Administrative Law Judge
National Labor Relations Board Division of Judges, San Francisco Division
901 Market Street, Suite 300
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Copies were sent by electronic mail to:

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End of Non-Record Material

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Shamrock Foods Company *and* Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL–CIO–CLC. Case 28–CA–150157

June 22, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On February 11, 2016, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel and Charging Party each filed cross-exceptions and supporting briefs, and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The Respondent operates a food distribution warehouse and employs approximately 280 employees at its Phoenix, Arizona, facility. In late 2014, the Bakery, Confectionary, Tobacco Workers' and Grain Millers International Union, Local 232 (Charging Party or Union) attempted to organize the Respondent's warehouse employees. The General Counsel alleges in this case that, during the organizing drive, the Respondent committed numerous unfair labor practices from January to July 2015.[3]

We agree with the judge, for the reasons stated in his decision, and as further discussed here, that the Respondent violated Section 8(a)(1) of the Act by: (1) threatening employees;[4] (2) soliciting employee complaints and grievances;[5] (3) instructing employees to ascertain and disclose the union activities of others; (4) informing employees that supporting the Union would be futile; (5) promising employees a benefit in order to discourage union support;[6] (6) surveilling employees and creating the impression of surveillance;[7] (7) promulgating an un-

[1] The Respondent and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that the General Counsel abandoned complaint pars. 5(g)(2), which alleged an unlawful grant of benefits; 5(o), which alleged an unlawful statement of futility; 5(v)(3), which alleged an unlawful solicitation of grievances; and a portion of par. 5(aa), which alleged an unlawful removal of union literature on July 8; or to the judge's dismissal of complaint par. 5(s)(1), which alleged that the Respondent violated Sec. 8(a)(1) when Floor Supervisor Manning informed employee Steven Phipps that the Respondent knew he had recently announced the union organizing campaign in the break room.

The Respondent has excepted to the judge's imposition of sanctions against it for failing to comply with a subpoena duces tecum served by the General Counsel. The authority to impose sanctions, "including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party," is a matter committed in the first instance to the judge's discretion. *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396–397 (2004), enfd. 156 F.Appx. 386 (2d Cir. 2005). We find that that the sanctions imposed by the judge were proportionate to the Respondent's contumacious noncompliance with the General Counsel's subpoena request and that the judge did not abuse his discretion. Cf. *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (reversing judge's dismissal of the complaint as sanction for party's noncompliance with subpoena as disproportionate), enfd. in part 577 F.3d 70 (2d Cir. 2009). We further find that the judge did not abuse his discretion in declining to draw an adverse inference against the Charging Party for its failure to produce supposed recordings of other meetings with employees because they were not in the Charging Party's possession or control. See *North Hills Office Services*, 344 NLRB 1083, 1084 fn. 13 (2005) (finding adverse inference inappropriate when requested documents were not under party's control and likely did not exist).

[2] We affirm the judge's dismissal of the complaint allegations not otherwise discussed in this Decision.

[3] All subsequent dates are in 2015, unless otherwise indicated.

[4] We agree with the judge that, under all the circumstances, employees would have reasonably understood Vice President of Operations Mark Engdahl's January 28 remark that the "slate is wiped clean" on wages, benefits, and working conditions when collective bargaining begins as a coercive threat. We also agree with the judge that, on April 29, Engdahl threatened employees with unspecified reprisals by his statement that the Union "will hurt all of you," because the other unlawful statements expressed during the April 29 meeting imparted a "coercive overtone" to the threat of harm. See *Reno Hilton*, 319 NLRB 1154, 1155 (1995).

[5] Because we agree that on January 28, Human Resources Manager Natalie Wright unlawfully solicited employee complaints and grievances and that Warehouse Manager Ivan Vaivao also unlawfully solicited employee complaints and grievances on February 5, we find it unnecessary to pass on the Charging Party's exception to the judge's dismissal of the allegation that Vaivao committed the same violation during a different mid-February meeting. Finding this additional violation would be cumulative and would not affect the remedy.

[6] We note that, in providing the employees with a written guarantee that there would not be a summer layoff as in the previous year, the Respondent failed to show that it had a legitimate business reason for the timing of its announcement, just two days after employee Steven Phipps formally announced the union organizing campaign.

[7] We agree with the judge that, on January 28, Floor Captain Art Manning unlawfully engaged in surveillance of employees' union activity by standing outside a local Denny's restaurant where a union organizing meeting was taking place and, on April 27, created the im-

lawful rule in response to union activity, instructing employees to report employees who violated that rule, and threatening employees with legal prosecution if they violated that rule;[8] (8) interrogating employees;[9] (9) confiscating and prohibiting the distribution of union literature; and (10) granting a wage increase in order to discourage union support.

We also adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by disciplining employee Lerma,[10] and violated Section 8(a)(1) by discharging employee Wallace.[11] And we agree with the judge that

pression of surveillance by telling employee Phipps to "just watch yourself, because they [are] watching both of us, so watch your back" after hearing that Phipps had formally announced the union organizing campaign in the break room the day before. We also agree that Supervisor Dave Garcia surveilled employee Mario Lerma on May 1 by searching his forklift for union authorization cards and that Garcia's statement to Lerma on the same date that he knew that Lerma had passed out a union authorization card in the break room created the impression of surveillance.

We find it unnecessary to pass on the allegations that the Respondent created the impression of surveillance by Warehouse Manager Vaivao's statement on March 26 and Vice President Engdahl's statement on April 29 because finding these additional violations would be cumulative and would not affect the remedy. For the same reason, Members Pearce and McFerran also find it unnecessary to pass on the allegation that Safety Manager Joe Remblance surveilled employees on April 29. However, Member Kaplan would reverse the judge's finding that Safety Manager Remblance surveilled employees on April 29. In his view, it was not unusual for Remblance to join a conversation with employees, the Union was never mentioned during the conversation with Remblance, and Remblance merely asked if they were on break at the time. Nothing about this ordinary interaction indicated that the employees' union activities were being monitored.

[8] On May 8, President/CEO Kent McClelland distributed a letter to employees in which he prohibited "unlawfully coercive" behavior or bullying. We agree with the judge that, by this letter, the Respondent unlawfully promulgated a rule in response to employees' union activity. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (rule that does not explicitly restrict Sec.7 activity unlawful if promulgated in response to union activity). We therefore find it unnecessary to pass on whether the rule would be unlawful if it was not promulgated in response to union activity.

Member Kaplan notes that, although the May 8 letter asserted it was sent because "some [employees] have recently been subjected to threatening, violent, or unlawfully coercive behavior by other [employees]," the Respondent failed to substantiate the claim. In different circumstances, he would find a letter reminding employees of a preexisting rule against violent, threatening, or coercive behavior lawful.

[9] We agree with the judge that, on January 28, Supervisor Jake Myers unlawfully interrogated employee Thomas Wallace and, on May 25, Supervisor Karen Garzon unlawfully interrogated two employees.

Members Pearce and McFerran agree with the judge that, on April 29, Safety Manager Remblance also unlawfully interrogated employee Phipps and another employee. While Phipps and his coworker were on break and conversing, Remblance walked 60 to 70 yards out of his way to interrupt their discussion, and ask what they were discussing. Although the employees had been talking about the union campaign, they replied that they were discussing work. Remblance then asked Phipps how much time he had left on his break and reminded him to get back to work after his break. As found by the judge, the only apparent reason for Remblance's action and inquiry was Phipps' recent announcement about the union campaign. Indeed, based on the timing of the question - just 2 days after Phipps announced the union campaign, and a few hours after the Respondent's anti-union meeting – we agree with the judge that Phipps clearly understood Remblance's question as an unlawful interrogation about his union activities.

However, Member Kaplan would reverse the judge and dismiss this allegation of interrogation. He again notes that the circumstances of the April 29 conversation were not unusual. Consistent with past actions, Remblance joined a conversation with two employees in an open area of the warehouse and simply inquired as to what the employees were talking about. At no point did he ask about the union organizing campaign or the employees' views of the Union.

[10] We agree with the judge that the Respondent unlawfully threatened Lerma with unspecified reprisals if he heckled or insulted other employees and that the conversation on May 5 was, in fact, a "counseling," the first level of discipline under the Respondent's progressive discipline policy. This finding is supported by Vice President Engdahl's warning that Lerma "could get in some serious trouble for that" and by Warehouse Manager Vaivao's remark that he "would find [him]self in deeper trouble" if he engaged in such conduct again.

However, we reverse the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating an overbroad work rule when Engdahl told Lerma that heckling or insulting other employees would not be tolerated. As the Board has repeatedly stated, before assessing whether the oral promulgation of an alleged rule is unlawful, it is appropriate to determine whether the statement at issue is in fact the promulgation of a rule. See *Teachers AFT New Mexico*, 360 NLRB 438, 438 fn. 3 (2014); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 777 (2006); see also *Food Services of America, Inc.*, 360 NLRB 1012, 1016 fn. 11 (2014) (dismissing oral rule promulgation allegation where statement was made to a single employee and not of general applicability), vacated pursuant to settlement by 365 NLRB No. 85 (2017). Here, Engdahl's statement was made to a single employee and the prohibition on heckling and insulting was "never repeated to any other employee as a general requirement" by the Respondent. *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 243 and fn. 5 (2014). Thus, we find that the Respondent did not orally promulgate an unlawful work rule. Accordingly, we dismiss this allegation.

[11] We agree with the judge, for the reasons he states, that the General Counsel sustained his initial burden of proving that Wallace's protected concerted activity in complaining about the employees' healthcare plan at an employer town hall meeting was a motivating factor in his discharge, and that the Respondent violated Sec. 8(a)(1) by discharging him for this activity. However, Member Kaplan does not rely on *Worldmark by Wyndham*, 356 NLRB 765 (2011), in affirming the judge's finding that Wallace's conduct at an employee meeting with management was concerted and would consider reviewing the holding the *Worldmark by Wyndham* in an appropriate future case.

We find it unnecessary to pass on the judge's finding that the discharge additionally violated Sec. 8(a)(3), as such a finding would not materially affect the remedy. Contrary to his colleagues, Member Pearce would affirm the judge's finding that the Respondent additionally violated Sec. 8(a)(3) by discharging Wallace. As found by the judge, the Respondent knew or suspected that Wallace supported the Union based on his questions at the January 28 and March 31 meetings and Warehouse Manager Vaivao's statement at the March 26 meeting that the Respondent knew which employees supported the Union. Further, the General Counsel amply demonstrated the Respondent's animus through its numerous unfair labor practices, shifting and false reasons for the discharge, and lack of consultation or investigation before terminating Wallace. And because the Respondent's reasons for discharging Wallace were pretextual, the Respondent failed by definition to satisfy its rebuttal burden.

paragraphs 10, 12, and 13 of the separation agreement presented to Wallace at the time of his discharge violated Section 8(a)(1).[12]

Finally, we shall sever and retain for further consideration the numerous complaint allegations that the Respondent violated Section 8(a)(1) by maintaining various rules in its Associate Handbook.[13]

AMENDED CONCLUSIONS OF LAW

1. Delete the judge's Conclusions of Law 2(d) and 3(a) to (e) and re-letter/re-number the remaining paragraphs accordingly.

2. Substitute the following as re-lettered Conclusion of Law 2(f):

"(f) Threatening an employee with discipline or other unspecified reprisals if he heckled or insulted other employees, or solicited employees in a manner which could be perceived as intimidation."

3. Substitute the following as Conclusion of Law 4:

"4. The Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by discharging Thomas Wallace on April 6, 2015 because of his protected concerted activities and to discourage employees from engaging in such activities."

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[14] Specifically, we amend the judge's remedy in the following respects.

We shall modify the judge's recommended tax compensation and Social Security reporting remedy in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Additionally, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate Thomas Wallace for his search-for-work

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[12] In finding certain paragraphs of the separation agreement to be unlawful, the judge relied on cases involving overbroad work rules. We find those cases to be inapposite because the separation agreement is not a generally applicable work rule.

Nonetheless, we agree with the judge that pars. 10, 12 and 13 are unlawful. The Board has found that an employer may condition a settlement on an employee's waiver of Sec. 7 rights if the waiver is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver. *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 2 (2016). Pars. 10, 12, and 13 cannot be narrowly tailored to the facts giving rise to Wallace's discharge because the Respondent discharged Wallace for an unlawful reason, his protected activity. This is in contrast to *S. Freedman & Sons* where, in exchange for signing a settlement agreement, an employee who received a traffic ticket and caused an accident in a company vehicle was only suspended instead of terminated. Moreover, pars. 10, 12, and 13 broadly required Wallace to waive certain Sec. 7 rights that would have prevented him from providing assistance to his former coworkers; disclosing information to the Board, including any "personnel or corporate information"; and making disparaging remarks or taking actions now, or at any time in the future, which could be "detrimental" to the Respondent—none of which is narrowly tailored to the facts giving rise to Wallace's discharge.

Member Kaplan would not find pars. 10, 12, or 13 unlawful. Initially, he notes that the General Counsel only alleged that the Respondent unlawfully maintained the contested paragraphs as over-broad work rules, and he concurs with his colleagues that these paragraphs of the separation agreement are not generally applicable work rules. In his view, inasmuch as Wallace was the only employee involved, was not required to sign the separation agreement, and did not do so, the mere proffer to him of the agreement containing the contested paragraphs did not violate Sec. 8(a)(1).

Members Pearce and Kaplan also agree with the judge's dismissal of the allegation that par. 9 of the separation agreement is unlawful. Member Pearce agrees with the judge that this paragraph does not prohibit Wallace from discussing his discharge. Member Kaplan would adopt the judge's dismissal of the allegation for par. 9 for the same reasons he would dismiss the allegations regarding pars. 10, 12, and 13. However, even if the language at issue in par. 9 were contained in a signed and enforceable separation agreement, he would agree with Member Pearce that the language would not prevent an employee from discussing his or her discharge.

Consistent with her dissenting position in *S. Freedman & Sons*, Member McFerran would find unlawful paragraph 9 of the separation agreement, which prevents Wallace from disclosing the terms of the separation agreement to his former coworkers or the Board. She believes that par. 9 has an impermissible chilling effect on the Sec. 7 rights of all employees by barring Wallace from providing information to the Board concerning the Respondent's unlawful interference with employees' statutory rights. See *Metro Networks*, 336 NLRB 63, 67 (2001). For instance, par. 9 would prohibit Wallace from revealing that he cannot, because of the settlement agreement, disclose to the Board his knowledge of any of the Respondent's business practices, including "personnel or corporate information," which could be instrumental in a Board investigation to uncover unlawful conduct. This is particularly notable because par. 9 would prevent Wallace from even disclosing the existence of other unlawful provisions in the settlement agreement itself, namely pars. 10, 12, and 13. In addition, under par. 9, Wallace would not be able to discuss the terms of his separation with his former coworkers who could find themselves in a similar predicament. Accordingly, in light of these considerations, Member McFerran would find that par. 9 of the separation agreement is also unlawful.

[13] The rules are as follows: (1) Protecting the Company's Confidential Information; (2) Requests by Regulatory Authorities; (3) Company Spokespeople; (4) Electronic and Telephonic Communications; (5) Monitoring Use; (6) E-mail; (7) World Wide Web; (8) Blogging; (9) Guideline to Prohibited Activities; (10) Reporting Violations; (11) Discipline for Violations (which the judge did not mention); (12) Guidelines to Appropriate Conduct; (13) No Solicitation, No Distribution; and (14) Head/Ear & Cell Phone Use.

[14] We take administrative notice of a settlement agreement between Thomas Wallace and the Respondent in Case 28–CA–177035, now pending on exceptions before the Board. Any issues regarding the effect of that settlement, if any, on the Respondent's reinstatement and backpay obligations, and the Respondent's defenses to any reinstatement or backpay obligation, may appropriately be addressed in compliance.

and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Further, due to the numerous unfair labor practices committed by the Respondent in this case and the resulting length of the notice, we find it appropriate to require a notice-mailing remedy so that employees may have the necessary time and opportunity to read and understand the violations and their rights. We shall therefore also order the Respondent, at its own expense, to mail a copy of the attached notice marked "Appendix" in English and Spanish to all current employees and former employees employed at its Phoenix, Arizona, facility at any time since January 28, 2015.

Finally, we shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), and to conform to the violations found herein and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

(b) Issuing counselings or otherwise disciplining employees because of their support for and activities on behalf of the Bakery, Confectionary, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL–CIO–CLC (Union) or any other labor organization.

(c) Threatening employees with a loss of existing benefits if they select the Union as their bargaining representative.

(d) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting the Union.

(e) Promising or granting benefits to employees by committing not to lay off employees during the summer in order to discourage employees from supporting the Union.

(f) Granting a wage increase to employees in order to discourage employees from supporting the Union.

(g) Instructing employees to report the identity of employees engaged in solicitation to management.

(h) Threatening employees with unspecified reprisals if they select the Union as their bargaining representative.

(i) Threatening employees that selecting a union representative would be futile.

(j) Coercively interrogating employees about their union sympathies and/or support.

(k) Placing employees under surveillance while they engage in union or other protected concerted activities.

(l) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(m) Confiscating and prohibiting the distribution of union literature.

(n) Threatening employees with discharge or other unspecified reprisals if they engage in activities on behalf of the Union.

(o) Promulgating and maintaining a rule in response to employees' union activity prohibiting employees from engaging in unlawfully coercive behavior or bullying.

(p) Instructing employees to report the identity of employees who violated the unlawful rule prohibiting employees from engaging in unlawfully coercive behavior or bullying.

(q) Threatening employees with legal prosecution if they violated the unlawful rule prohibiting employees from engaging in unlawfully coercive behavior or bullying.

(r) Maintaining a Separation Agreement prohibiting employees from disclosing confidential information including any "personnel or corporate information" and from making disparaging remarks or taking actions which could be "detrimental" to the Respondent.

(s) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Thomas Wallace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Thomas Wallace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Thomas Wallace for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is

fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Thomas Wallace, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful counseling of Mario Lerma, and within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

(g) Rescind the rule promulgated on May 8 prohibiting unlawfully coercive behavior and bullying.

(h) Rescind the provisions in the Separation Agreement that prohibit employees from disclosing confidential information including any "personnel or corporate information," and making disparaging remarks or taking actions which could be "detrimental" to the Respondent.

(i) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix," in English and Spanish.[15] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 28, 2015.

(j) Within 14 days after service by the Region, mail copies of the attached notice marked "Appendix" in English and Spanish, at its own expense, to all employees who were employed by the Respondent at its Phoenix, Arizona facility at any time since January 28, 2015. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(k) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance of employees, at which time the attached notice marked "Appendix" is to be read to employees at its Phoenix, Arizona facility by President/CEO Kent McClelland or Operations Vice President Mark Engdahl, in the presence of a Board agent, or, at the Respondent's option, by a Board agent in the presence of President McClelland or Operations Vice President Engdahl, with translation available for Spanish-speaking employees.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations that the Respondent unlawfully maintained rules titled: (1) Protecting the Company's Confidential Information; (2) Requests by Regulatory Authorities; (3) Company Spokespeople; (4) Electronic and Telephonic Communications; (5) Monitoring Use; (6) E-mail; (7) World Wide Web; (8) Blogging; (9) Guideline to Prohibited Activities; (10) Reporting Violations; (11) Discipline for Violations; (12) Guidelines to Appropriate Conduct; (13) No Solicitation, No Distribution; and (14) Head/Ear & Cell Phone Use, are severed from this case and retained for future resolution.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 22, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT issue counseling or otherwise discipline you because of your support for and activities on behalf of the Bakery, Confectionary, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL–CIO–CLC (Union) or any other labor organization.

WE WILL NOT threaten you with a loss of existing benefits if you select the Union as your bargaining representative.

WE WILL NOT solicit grievances from you and impliedly promise to remedy them in order to discourage you from supporting the Union.

WE WILL NOT promise or grant benefits to you, such as a promise to not lay off employees during the summer, in order to discourage you from supporting the Union.

WE WILL NOT grant a wage increase to you in order to discourage you from supporting the Union.

WE WILL NOT instruct you to report the identity of employees engaged in solicitation to management.

WE WILL NOT threaten you with unspecified reprisals if you select the Union as your bargaining representative.

WE WILL NOT threaten you that selecting a union representative would be futile.

WE WILL NOT coercively interrogate you about your union sympathies and/or support.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT confiscate and prohibit the distribution of union literature.

WE WILL NOT threaten you with discharge or other unspecified reprisals if you engage in activities on behalf of the Union.

WE WILL NOT promulgate and maintain a rule in response to your union activity prohibiting employees from engaging in unlawfully coercive behavior or bullying.

WE WILL NOT instruct you to report the identity of employees who violate the unlawful rule prohibiting employees from engaging in unlawfully coercive behavior or bullying.

WE WILL NOT threaten you with legal prosecution if you violate the unlawful rule prohibiting employees from engaging in unlawfully coercive behavior or bullying.

WE WILL NOT maintain a Separation Agreement prohibiting you from disclosing confidential information including any "personnel or corporate information" and from making disparaging remarks or taking actions which could be "detrimental" to us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Thomas Wallace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Wallace whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Thomas Wallace for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Thomas Wallace, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful counseling of Mario Lerma, and WE WILL, within 3

days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL rescind the rule promulgated on May 8 prohibiting unlawfully coercive behavior and bullying.

WE WILL rescind the provisions in the Separation Agreement that prohibit employees from disclosing confidential information including any "personnel or corporate information," and making disparaging remarks or taking actions which could be "detrimental" to the Respondent.

SHAMROCK FOODS COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-150157 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Sara S. Demirok, Esq., and *Elise F. Oviedo, Esq.,* for the General Counsel.

Todd A. Dawson, Esq., and *Nancy Inesta, Esq. (Baker & Hostetler, LLP),* for the Respondent Company.

Alan G. Crowley, Esq., and *David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld),* for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Shamrock Foods Company committed numerous unfair labor practices at its Phoenix, Arizona warehouse between January and July 2015 to discourage union or other protected activity, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. Among other things, it alleges that the Company, by and through over 10 different managers and supervisors, unlawfully interrogated, surveilled, and threatened employees, solicited employee complaints and grievances, promised and granted employees better wages and benefits, took union flyers away from employees, and discharged or disciplined two prounion employees (Thomas Wallace and Mario Lerma). It also alleges that the Company unlawfully maintained numerous overbroad rules in its employee handbook during the same period.[1]

A hearing on the complaint allegations was held over 7 days between September 8 and 16, 2015.[2] Thereafter, on November 25, the General Counsel and the Company filed posthearing briefs. After carefully considering those briefs and the record as a whole, for the reasons set forth below I find that the Company violated the Act substantially as alleged, committing over 20 unfair labor practices during the union campaign, including unlawfully discharging Wallace and disciplining Lerma, and unlawfully maintaining several overbroad confidentiality, blogging, solicitation/distribution, and other conduct rules in the employee handbook.[3]

I. BACKGROUND

Shamrock Foods operates food distribution warehouses in several states. In addition to the subject warehouse in Phoenix, Arizona, the Company has warehouses in California, Colorado, New Mexico, and Oregon. The Phoenix facility is the largest, with approximately 280 warehouse workers, including pickers, runners, throwers, and forklift operators, and 250 drivers.[4]

In 1998, the Teamsters Union attempted to organize the Phoenix warehousemen and drivers. The Company committed several unfair labor practices in response to the organizing campaign, including unlawfully discharging an employee. See *Shamrock Foods Co.,* 337 NLRB 915 (2002), enfd. 346 F.3d 1130 (D.C. Cir. 2003). And the organizing campaign was ultimately unsuccessful.

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[1] The complaint issued on July 21, 2015, and was subsequently amended on August 13 and at the hearing. See GC Exhs. 1(g), (m), (t); and Tr. 19–23, 750. The Board's jurisdiction is undisputed and well established by the admitted facts.

[2] Pursuant to the General Counsel's unopposed request, at the end of the last day of hearing on September 16, the record was held open indefinitely to allow the Regional Office additional time to investigate a new charge the Union had filed the previous day seeking a remedial bargaining order under *NLRB v. Gissel Packing Corp.*, 395 U.S. 575 (1969). Thereafter, the Respondent requested that three additional documents be included in the record. As there was no objection, the request was granted by order dated October 21, and the documents were admitted as Respondent exhibits 6, 7, and 8. The order also added certain related documents as ALJ exhibits 1–5. Finally, as the Union had recently withdrawn the *Gissel* charge, the order closed the hearing record. Thereafter, on November 25, the General Counsel moved to correct the record to include certain attached documents that had been inadvertently omitted from GC Exh. 2. As the motion is consistent with the record and unopposed, it is granted. The record is therefore corrected to include the documents as GC Exhs. 2(b)–(f).

[3] Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[4] Although the Company often refers to its warehouse workers as "associates," they are consistently referred to here using the more traditional, statutory term "employees" to avoid any confusion.

More recently, in mid to late 2014, the Teamsters also attempted to organize the Shamrock warehouse in southern California. Around the same time, in late November, Steven Phipps, a longtime forklift operator at the Phoenix warehouse, decided to contact a different union—Bakery, Confectionery, Tobacco Workers' and Grain Millers (BCTGM) Local 232—about representing the Phoenix warehouse workers. The Union advised Phipps to keep the campaign "covert" at the beginning, and Phipps followed this plan throughout the following December, January, and February. He only spoke or met with one or a few employees at a time that he trusted and believed would sign a union card, and always offsite, never in the warehouse or parking lot.

Nevertheless, by late January 2015, word of the union campaign was spreading "like wildfire" in the warehouse. Over the next few months, more and more employees also began attending offsite meetings. Accordingly, on April 26 and 27, Phipps made a formal, public announcement in the breakroom about the campaign. (Tr. 485, 494–499, 520–521, 544–545, 612–617.)

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Alleged Unlawful Statements at Company Meetings

The complaint alleges that many of the unlawful threats and other statements were made at seven large or small group meetings between late January and late April 2015 that were conducted by one of three corporate or local managers: Vice President (VP) of Operations Mark Engdahl, then-Human Resources (HR) Director Natalie Wright, or Phoenix Warehouse Manager Ivan Vaivao. All but one of the meetings (a small meeting in mid-February) were secretly recorded by Phipps or Lerma, and both the recording and a certified transcript thereof were placed in evidence by the General Counsel.

1. January 28 town hall meeting (Engdahl)

The complaint alleges that the Company made unlawful statements at two meetings on January 28. The first was a large "town hall" meeting with all of the warehouse workers that was conducted by Operations VP Engdahl that morning. Engdahl runs all of Shamrock's operations, and reports directly to Company President/CEO William (Kent) McClelland. The General Counsel alleges that Engdahl unlawfully threatened employees at the meeting that they would lose benefits if they supported a union by telling them that the "slate is wiped clean" on wages, benefits, and working conditions when collective bargaining begins (GC Exh. 1((g), par. 5(g)(1)).

Engdahl began the meeting by saying he was going to "educate" them about the southern California Teamsters' campaign and unions in general. He told them they could research "tons of stuff" for and against unions on the internet to make their own judgments; however, he was going to give them "the facts" and would "not lie" to them. He said the employees in southern California had "made good decisions" and the facility there remained "union free." He explained that a union is simply "a business" that tries to grow and get more dues by misrepresenting that they can fix all the employees' problems, and would only "cause strife between both sides." He said Shamrock wanted to deal with employees directly "as a family," and to fix problems by "working together and talking to each other . . . we talk directly with you, you talk with us, you bring up problems, we try to fix it." He therefore encouraged the employees to continue using the Company's "open-door" policy to raise their problems. He said the Company could "always tweak things," and wanted to "work to make things better."

Engdahl also told the employees that there were various other reasons they should "think long and hard" before signing a union card. He warned them that the card is a "legally binding document" and that they were "going to pay hell trying to get it back." He also said that a company could voluntarily recognize the union if it got over 50 percent of employees to sign the cards. He then stated,

> And sometimes I've seen it in the past where companies have done that for probably not really good reasons, because what happens when a company is represented and you go into collective bargaining? The slate is wiped clean on wages, the slate is wiped clean on benefits, the slate is wiped clean on working conditions. It's all up to collective bargaining at that point in time. Right? So sometimes a company may say, "You know what, I think we're paying too much and our benefits are too rich; so I'm going to grab the union, bring them in here, sign up with them, whether my associates like it or not, and we're going to collective bargain."
>
> And guess what? At the other end of the pipeline, when you come out with a contract, all of a sudden the people have got less wages, they took away healthcare benefits, they did this, they did that. It actually saves companies money because there's no guarantees when you go into collective bargaining that you're going to come out with anything better than you got. In fact, you could come out with something worse than what you got. And they won't tell you that either. Okay. Everything is up for grabs.

Engdahl also returned to this point later, in response to a question from employee Wallace about why Shamrock's competitors are unionized. Engdahl said that, in his opinion, two of the Company's competitors (Sysco and US Foods) used the union "to keep the wages down because everybody's paid the same then . . . they don't do well with incentives." He also noted that it takes a supermajority of "70 percent plus one" to decertify or vote a union out. (GC Exh. 8(a) and (b).)[5]

Whether antiunion employer statements such as the "slate is wiped clean" in bargaining are coercive depends on the context in which they are made. As the Board stated in BP Amoco, 351 NLRB 614, 617 (2007):

> [E]mployer statements to employees during an organizing

[5] I discredit the testimony of Natalie Wright, who as indicated above was the HR manager at the time (and is now a part-time HR specialist). Wright attended the town hall meeting with other managers, and was called to testify as an adverse witness by the General Counsel under FRE 611(c). Wright repeatedly refused to say if unions were discussed at the meeting, insisting that it was just an "educational" meeting, agreed to answer the General Counsel's question only when directed from the bench to do so, and then admitted only that unions were mentioned in a video and in reference to the California campaign (Tr. 379–381). As indicated above, the audio recording secretly made by Phipps shows that the meeting was entirely about unions.

> campaign to the effect that bargaining will start from "zero" or from "scratch" are "dangerous phrase[s]," which carry with them "the seed of a threat that the employer will become punitively intransigent in the event the union wins the election." Contemporaneous threats or unfair labor practices may lend additional coercive meaning to the employer's remarks. Such statements are unlawful and objectionable when, in context, "they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure on what the Union can induce the employer to restore." On the other hand, such statements are permissible when they merely describe the bargaining process and/or are made in direct response to union promises. Similarly, statements that employees could lose benefits as a result of bargaining have been found lawful where they "merely [state] what could lawfully happen during the give and take of bargaining." [Citations omitted].

Here, although some of Engdahl's other statements at the meeting were untrue,[6] there is no allegation that they were unlawful.[7] Further, Engdahl did not explicitly say that Shamrock would take away existing benefits. However, by emphasizing, exclusively, what the other named and unnamed employers have intentionally done to reduce employee benefits through collective bargaining, Engdahl clearly suggested or implied that Shamrock would do the same thing. See *Pittsburgh Press Co*., 252 NLRB 500, 504 (1980); and *Madison Kipp Co.,* 240 NLRB 879 (1979) (while an employer may lawfully support its anti-union statements with examples where employees at other companies suffered negative consequences following collective bargaining, it may not do so in a manner that employees would reasonably construe as a threat to deliberately pursue the same result). Moreover, Engdahl made no effort at the meeting to dispel or temper that implication by assuring employees that Shamrock would bargain over their benefits in good faith and/or that their benefits might also go up or stay the same through the give and take of bargaining. Compare, for example, *Manhattan Crowne Plaza*, 341 NLRB 619 (2004) (finding no violation where the employer acknowledged that "each set of negotiations is different"); and *Monroe Mfg. Co*., 200 NLRB 62 (1972) (same, where the employer stated, "That is not to say that anything like that will happen here. We hope that even if this union is successful [we] will continue to grow.").

The Company's posthearing brief (pp. 26–27) suggests that what Engdahl said or did not say at the January 28 town hall meeting is insignificant, as Engdahl and other managers repeatedly told employees at other meetings that their benefits could be better, worse, or the same after going through the collective-bargaining process. However, there is no record evidence that Engdahl or other managers actually said this to all of the warehouse employees at any other meeting(s) during the relevant period. Although Phoenix Warehouse Manager Vaivao made such a statement a month later, on February 24, it was at a much smaller meeting with only 8–10 employees. See Exh. 9(a), at p. 13; and Tr. 175–178, 528–530.[8] Moreover, as discussed below, Vaivao made other statements at the February 24 meeting that were unlawful. And he, Engdahl, and several other company managers and supervisors committed numerous other unfair labor practices as well.

Under all the circumstances, therefore, it is likely that employees would have reasonably understood Engdahl's remarks, not merely as a caution that their benefits could go down, but as an effective threat by a high-level manager that they would go down, if they supported a union. Accordingly, the statements were coercive and unlawful.

2. January 28 roundtable meeting (Wright)

The second meeting on January 28 was a smaller "roundtable" meeting with 15–20 employees, including Phipps. The meeting was conducted by then-HR Manager Wright immediately after the town hall meeting. It was the first of two such meetings Wright conducted that day on different shifts, and the first of any such meeting she had conducted since October 2013, the year she was hired. The General Counsel alleges that Wright unlawfully solicited complaints and grievances at the meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(h)).

[6] For example, there is no "70 percent plus one" requirement to decertify a union. In fact, there is no requirement that even 50 percent plus 1 vote against the union. The NLRB will conduct a decertification election if 30 percent or more of the unit employees sign a petition to do so, and the union will be decertified unless 50 percent plus 1 of the votes cast in the election are *in favor* of union representation, i.e., the union loses in the event of a tie vote. See *Best Motor Lines*, 82 NLRB 269 (1949); NLRB Statements of Procedure, Secs. 101.17–101.18; and the Board's website, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am- represented-union/decertification-election.

[7] The complaint also alleges that Engdahl "granted employees benefits" on January 28 by telling employees who complained about working conditions to make an appointment to come see him. See par. 5(g)(2). However, the General Counsel's posthearing brief does not address this allegation, and thus it appears to have been abandoned. In any event, the General Counsel failed to carry the burden of proof and persuasion.

[8] As noted by the Company, the record indicates that Vaivao and Engdahl held similar small meetings with additional employees on different shifts. However, evidence fails to establish that all of the warehouse employees attended the meetings or that Engdahl and Vaivao made the same statements at all of the meetings. Engdahl testified that he always speaks off the top of his head at the meetings (Tr. 732–735). And while Vaivao testified that he said wages could go up or down or stay the same at other small "communication" meetings in February that were conducted by Wright, he acknowledged that the meetings were not about the Union and he only made the statement if one of the employees raised the issue (Tr. 899–901, 931). See also GC Exh. 7(a), the transcript of the recording of the February 5 communication meeting (which confirms that the issue never came up and Vaivao did not make such a statement). Finally, contrary to the Company's contention (Br. 28 n. 8), the record is also insufficient to establish that the Union contumaciously failed to produce recordings from the other meetings (i.e. recordings of meetings other than those made by Phipps or Lerma that were put in evidence by the General Counsel) in response to the Company's hearing subpoena. Accordingly, the Company's request for an adverse inference that recordings of other meetings would "corroborate the noncoercive context of Shamrock's discussions with employees concerning the possible results of unionization" is denied.

Wright began by acknowledging that it had "been a while" since the Company had held roundtable meetings. She said that the Company was going to try and do it "a little bit more often" to find out "what's going on and . . . where [she] could help." She also said the Company was going to do it "a little bit differently" by having the meetings with smaller groups, as the large meetings could be "a little cumbersome, a little bit overwhelming to deal with so much and trying to filter out what [the] top 10 issues were out of 250 people." Wright advised them that she had "made sure" their names would not be revealed to "management" so that they would feel more comfortable speaking up at the meeting.

Wright then asked for their "feedback" on recent changes, what they liked and disliked, and "recommendations [for] more changes." Employees voiced various complaints in response, including that there were no written guidelines or standard procedures for implementing the changes; that their tools and equipment (forklifts, pallet jacks, radios, and scanners) were old and poorly maintained; that there were too few quality controllers scheduled per shift; that they were averaging a lot less money under the new pay plan; that they had to move more heavy pallets every day without any incentives or increase in pay; and that supervisors and managers insulted, disrespected, and lied to them, and failed to respond when they raised problems using the Company's "open door" policy.

Wright's assistant took notes of the complaints, and Wright thanked the employees for their feedback and time. Wright thereafter took the complaints to upper management. (GC Exh. 15(a) and (b); Tr. 362, 383–390, 504.)

An employer's solicitation of employee grievances during a union campaign inherently includes an implied promise to remedy them and is unlawful unless the employer has a "past policy and practice" of soliciting grievances and did not "significantly alter[] its past manner and methods" of doing so. See, e.g., *Manorcare Health Services-Easton*, 356 NLRB 202 (2010); *Barberton Manor*, 252 NLRB 380 (1980); and *Carbonneau Industries*, 228 NLRB 597, 598 (1977).

Here, as indicated above, the Teamsters had recently campaigned to organize Shamrock's warehouse in southern California. And the Company was obviously aware of it and concerned about the campaign spreading to the Phoenix warehouse, which the Teamsters had also tried to organize in the past. Further, there was, in fact, a union campaign ongoing at the Phoenix warehouse at the time; it was just by a different union, BCTGM Local 232. Although the campaign was still covert at that time, and there is no direct evidence that the Company knew about it, there is strong circumstantial evidence that the Company at least suspected it was going on. As indicated above, the antiunion town hall meeting with all of the warehouse employees was held shortly after word of the campaign began spreading "like wildfire" through the warehouse. Further, the Company held the antiunion meeting at that time even though, according to Engdahl's own report, the Teamsters campaign in California had already failed.

As for the Company's past practice, there is no dispute that the Company had a history of holding roundtable meetings with employees. Phipps himself testified that the Company had held hundreds of roundtable meetings at the warehouse over the 20 years he had worked there. However, the meetings were usually held to communicate information to employees, and only sometimes to solicit their feedback.[9] Further, no such meeting had been held in the past 15 months. And, as indicated by Wright's own comments, the January 28 roundtable meeting was both intended and presented as the first in a series of more frequent, smaller meetings with employees to solicit their feedback.[10] Thus, the meeting represented a significant departure from past practice. Moreover, it was held immediately after the antiunion town hall meeting, where Engdahl had assured all the warehouse employees that they did not need a union because they could talk directly to the Company and it would try to fix any problems they raised. Thus, it is unlikely that the connection between the two would have been lost on employees.

Accordingly, Wright's solicitation of the employees' complaints violated Section 8(a)(1) of the Act as alleged.

3. February 5 communication meeting (Vaivao)

The February 5 meeting was even smaller than the January 28 roundtable meeting, with only about 10 employees. Although HR Manager Wright again attended and occasionally spoke, the meeting was conducted by Phoenix Warehouse Manager Vaivao.[11] The General Counsel alleges that, like Wright on January 28, Vaivao unlawfully solicited complaints and grievances at the meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(k)).

Vaivao began by saying that it was a "communication follow-up meeting" to the prior roundtable meetings. Like Wright on January 28, he also explained why the smaller meetings were being held. He said that the Company had "decided" to have the smaller meetings after the town hall meeting "to be a little bit more intimate" so that employees would be more willing to speak up and tell the Company about "some of the issues that [are] out there, some of the obstacles that [Wright] and I can remove or report . . . to make sure those are removed." He said he wanted them to give him "feedback" on "what is really bothering" the employees; what the "main concerns" and "big issues" were. He assured them that he would take notes of their complaints and get back to them about whether the matter was "fixed" or not and why. He said the Company was "commit[ted]" to removing "most of the obstacles, as much as we can."

As on January 28, employees voiced various complaints in response, including about wages and benefits, working conditions, scheduling, and the "open door" policy. Vaivao advised

[9] Tr. 573–575. I discredit Wright's testimony to the extent it indicates that soliciting employee complaints was standard practice at the roundtable meetings (Tr. 383–388). As previously noted (fn. 5), Wright was not a credible or reliable witness.

[10] Although the Company denied in its answer that Operations Vice President Engdahl and HR Manager Wright were supervisors, it stipulated to their supervisory status at the hearing (Tr. 5–6, 20–21, 53, 65–66, 117). Their statements at the January 28 meetings are therefore nonhearsay party admissions under FRE 801(d)(2). See, e.g., *Ferguson Enterprises,* 355 NLRB 1121 n. 2 (2010).

[11] As with Engdahl and Wright, the Company denied in its answer that Vaivao was a supervisor, but stipulated to his supervisory status at the hearing.

them that he and Wright would "make sure" the Company "heard" their concerns and "in some cases "bring [] down a solution to resolve" them. With respect to the scheduling issues in particular, he said he would "definitely look into" them and "make adjustments." (GC Exh. 7(a), (b); Tr. 523–524.)[12]

The only significant difference between the context and circumstances of Vaivao's solicitation of employee complaints and Wright's similar solicitation a week earlier is that Vaivao's promise to remedy the solicited complaints was more explicit. Accordingly, it was unlawful as well.

4. Mid-February union education meeting (Vaivao)

Vaivao thereafter also conducted so-called "union education" or "union prevention" meetings with small groups of employees, including one that employee Wallace attended with about eight other employees in mid-February.[13] The General Counsel alleges that Vaivao again unlawfully solicited complaints and grievances at the mid-February meeting and promised to remedy them if the employees refrained from union activity (GC Exh. 1(g), par. 5(l)).

The only evidence presented and cited by the General Counsel to support this allegation is Wallace's testimony that Vaivao "opened the floor to questions" after showing them an antiunion video, and that he "wanted to know if there [were] any issues that we wanted to bring up" after Wright explained to them how their pay and benefits compared to others in the industry (Tr. 653–654).[14] While there is nothing incredible about this testimony, it is too vague or sketchy to establish that Vaivao actually solicited complaints or grievances as at the February 5 communication meeting. Accordingly, the allegation is dismissed.

5. February 24 union education meeting (Vaivao)

Vaivao also held several small meetings on February 24, including one that Phipps attended with eight other employees. The General Counsel alleges that Vaivao committed two additional violations at that meeting: first, that he unlawfully created an impression that the employees' union activities were under surveillance by telling them that the Company had an idea who was organizing; and second, that he unlawfully asked the employees to ascertain and disclose the union activities of other employees by asking them to raise their hand to let him know if another employee had contacted them (GC Exh. 1(g), par. 5(m)(1), (2)).

Vaivao began by saying that it was another "union education" meeting so that the employees knew the "essentials." He said that employees, and even a meat plant manager, had recently come up to tell him and Brian Nicklen, the inbound manager, that they were being approached by union supporters, "so we kind of have some ideas . . . of who's out there." He also said that some had expressed concern that they might be seen talking to the union supporters on the Company's surveillance cameras. He assured the employees that the Company does not use the cameras to conduct surveillance of such activities. Vaivao also told the employees that, if they did not want to sign a union card or be approached anymore, "tell them no, you won't be a part of it [and] [r]aise your hand, say, hey, man, this guy is bugging me." He then listed various reasons why they should be cautious or wary of supporting a union.[15] As at the mid-February educational meeting, he also showed them an antiunion video. (GC Exh. 9(a), (b); Tr. 529–530.)[16]

An employer unlawfully creates an impression of surveillance when employees would "reasonably assume" from the employer's statements that management had placed their union activities under surveillance, i.e. that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexteel Industries*, 311 NLRB 257 (1993). Thus, there is no violation where the employer's statements indicate that the information concerning the employees' union activities was voluntarily provided to the employer by their coworkers. See, e.g., *North Hills Office Services*, 346 NLRB 1099, 1103 (2006) (supervisors' statements to employees that two of their coworkers had reported that they had driven employees to a union meeting or distributed union literature during working hours did not unlawfully create an impression of surveillance in the absence of any evidence that management solicited the information); and Bridgestone Firestone South Carolina, 350 NLRB 526 (2007) (plant manager's letter to employees thanking "the many team members who have chosen to provide information to me regarding the recent [union organizing campaign]" did not unlawfully create the impression of surveillance). Here, Vaivao's statements indicated that he knew about the employees' union activities because employees and a manager had voluntarily informed him and Nicklen after being approached by union supporters. Accordingly, this allegation is dismissed.

On the other hand, Vaivao's additional statement during his antiunion presentation, that employees who receive unwanted solicitations should "raise [their] hand" and let management know the union supporters are "bugging" them, was clearly unlawful under Board precedent. See, e.g., *Sunbeam Corp.*, 287 NLRB 996, 997 (1988) (company president unlawfully asked employees to report the identity of union supporters by advising them to "tell these union pushers [to] . . . just go away

[12] I discredit Vaivao's testimony about the February 5 meeting (Tr. 164–170, 175, 262–266). Like Wright, Vaivao was called as an adverse witness by the General Counsel during the case in chief. And like Wright's testimony about the January 28 town hall meeting, Vaivao's testimony about his role at the February 5 meeting, whether he solicited employee complaints, and whether any complaints were elicited, is clearly contradicted by the audio recording of the meeting secretly made by Phipps.

[13] I discredit Vaivao's testimony (Tr. 155–156) that no such "union education" or "union prevention" meetings were held, as the record as a whole clearly establishes otherwise. See, e.g., GC Exhs. 9(a), (b), and 10(a), (b), the recordings and transcripts of his subsequent remarks at the February 24 and March 26 meetings, discussed infra.

[14] Unlike the other meetings at issue, there is no audio recording of the mid-February meeting (apparently because neither Phipps nor Lerma attended it).

[15] For example, like Engdahl at the January 28 antiunion town hall meeting, Vaivao told the employees that it would take "70 [percent] plus one" to vote a union out. As previously noted (fn. 6), however, this is untrue.

[16] Again, I discredit Vaivao's testimony about the meeting (Tr. 175–190), as it is contradicted by the recording and transcript of the meeting and other evidence consistent therewith.

and leave you alone, [and] [i]f they won't leave you alone, let me know about it, and we will see that something is done," as the request was broad enough to cover protected union solicitation); and Hawkins-Hawkins Co., 289 NLRB 1423 (1988) (plant manager unlawfully told employees that "if anyone was harassed by the union or by fellow employees" they should "contact management and they would take care of it," as the manager did not explain what he meant by "harassment"). See also *Winkle Bus Co*., 347 NLRB 1203, 1204 (2006); *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003), enfd. 357 F.3d 692 (7th Cir. 2004); and *Tawas Industries*, 336 NLRB 318, 322 (2001), and additional cases cited there. [17] Accordingly, that allegation is sustained.

6. March 26 union prevention meeting (Vaivao)

Vaivao held another meeting on March 26 with a small group of employees, including Lerma. James Allen, a new HR representative at the time, was also present. The General Counsel alleges that Vaivao made several more statements at the meeting that unlawfully created the impression of surveillance; specifically, that the Company knows everything that is going on and who they are, that there was a union meeting off the property a few weeks earlier, and who attended the meetings (GC Exh. 1(g), par. 5(n)).[18]

Vaivao began by saying that it was another "union prevention" meeting. He said the Company was continuing with such meetings because employees were "getting fed up" with the union supporters. He said three employees had come up to him that week complaining about being approached to join the Union and asking him if he could make them stop. Vaivao explained that the union supporters had the right to organize. However, he said they were "disgruntled" and had "personal agendas" against the Company. He said, "We know that. We know who they are. We know they've been conducting meetings offsite." Vaivao said that the union supporters were spreading "lies" and that there was nothing to "substantiate" what they were "throwing out there." He said it was his job to "protect" employees by telling them the "truth." He then repeated that,

> [W]hoever is doing that out there, we know who they are, because they come the next day to me. They come the next day to tell me that. . . . So I know who they are. I know there's meetings out there. I know there was a meeting a . . . few weeks ago. And I know who attended.

Vaivao repeated the same point twice more later in the meeting. Thus, after Allen had finished introducing himself and addressing the employees, Vaivao said,

> I appreciate everybody showing up. . . . But we're going to continue to have all the meetings. As long as there's guys out there, I'm going to review propaganda for the union organizers. . . . I know who they are. I know exactly who they are. I know who's been asked, the guys . . . So know that I'm out there. I'm going to be vigilant. . . .I'm going to be vigilant, because I know what the truth is.

And at the very end of the meeting, after again discussing some of the reasons not to support a union,[19] he said,

> And you should feel that way. You should stand there and tell whoever it is, dude no. If you talk to me again—several guys are . . . coming up to me and say[ing] I want . . . a statement that these guys will leave me alone. . . . So that's where we're at right now. Until we have that, we have a little different conversation with them. But we know who the guys are. I want you guys to be aware of that. I want you guys to understand that.

(GC Exh. 10(a), (b).)

As discussed above, an employer's statements concerning its knowledge of employees' union activities do not unlawfully create the impression of surveillance where the statements indicate that the information was voluntarily provided to the employer by their coworkers. Here, as at the February 24 meeting, Vaivao indicated that employees who did not support the Union had voluntarily provided the information to management about who the union supporters were and who attended the meetings. Accordingly, these allegations are likewise dismissed.

7. April 29 communication meeting (Engdahl)

The Company held another small communication meeting on April 29 with about 8–10 mostly senior employees from the first shift, including Phipps. Both Vaivao and Operations VP Engdahl attended and spoke at the meeting. The General Counsel alleges that Engdahl made several unlawful statements during the meeting; specifically, that he unlawfully promised and granted benefits to employees by guaranteeing or committing to them that there would not be a layoff during the slow summer season like the previous year; created the impression of surveillance by telling employees that the Company understood who was behind the Union; threatened employees with unspecified reprisals by telling them the Union will hurt them and everybody in the future; and informed employees that it would be futile for them to support the Union by telling them that the

[17] Although Vaivao testified that an employee had complained that union supporters had harassed him by throwing pens at him when he refused to sign a card (Tr. 182), Vaivao did not mention this at the meeting. Nor does the Company's posthearing brief cite any other basis to distinguish the cited Board precedent; indeed, the brief does not even address the allegation.

[18] Although the complaint alleges that Vaivao, Nicklen, and an unknown HR representative committed the alleged violations at the March 26 meeting, the General Counsel's posthearing brief identifies only Vaivao as the offending speaker. The complaint (par. 5(o)) also alleges that, on the same date, Vaivao, Nicklen and an unknown HR representative informed employees that it would be futile for them to select the Union as their bargaining representative by telling employees that shifts cannot be changed. However, the General Counsel's posthearing brief does not address this additional allegation, and it therefore appears to have been abandoned. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

[19] For example, Vaivao again incorrectly told the employees that it takes "70 percent plus one" to vote a union out.

Company does not have to agree to anything through collective bargaining (GC Exh. 1(g), par. 5(t); Tr. 19–23).

Engdahl began the meeting by handing out a document, which he said was "going out to every person in this building." He said the document was a "follow-up" on the issue of layoffs that had been discussed in previous meetings and "some other things last year that we felt we didn't handle correctly." He then stated,

> So, we're committed to the point where we put it in writing now, okay, that we will not do these things. And you can take that to the bank. So, we owed you that feedback, now we've given it to you. It's in writing. And it's probably not so important for you all. It's more of a lower on the totem pole for folks who were worried about layoffs and things like that. Well, so this will ease some of their fears.
>
> But, I wanted to start by giving this all to you all and have a little discussion with you on what's going on here with this union organizing stuff, okay. And I understand who's behind it. I understand that you don't care what anybody else thinks. I understand that you're doing it for your own personal reasons, and that's great, have at it. But, what I am going to do is straighten out some things with some facts, okay, and some truths. And I'm going to call bullshit on a lot of stuff that's being spread, because its wrong. It will hurt Shamrock. It will hurt all of you. It will hurt everybody in the future, okay. And I don't want that to happen.

This is all my opinion. And I'm entitled to my opinion, just like you're entitled to yours, okay. I've been a Teamster for seven years. I was in the union for seven years. I understand it inside and out. I know what it's good for and what it's not good for. And it's not good for us here at Shamrock, I can tell you that, okay.

Engdahl then discussed various reasons why, in his "opinion," the Union would not be good for them. For example, he said that the Union would never negotiate a higher wage rate for them than at Sysco or U.S. Foods; that nothing would change with respect to their health insurance because it is mandated by "Obamacare" and there was only one "bucket of money" to divide up between wages, benefits, and equipment to run the warehouse; and that "nobody can say whether [a union contract] would be better or worse." He then closed by saying,

> Remember, the company pays wages, benefits, sets work conditions—not the union. The only thing the union can do is come to collective bargaining and ask. They can ask for things. The company doesn't have to agree to anything, nothing—other than what they want to. It's bargaining. Bargaining can go on forever. It can never end. It's collective bargaining. All you have to do is bargain in good faith. All right?

(GC Exh. 12(a), (b).)[20]

It is well established that an employer violates Section 8(a)(1) of the Act by promising or granting benefits during a union campaign in order to dissuade its employees from supporting the union. See, e.g., *Sisters Camelot*, 363 NLRB No. 13, slip op. at 7 (2015) ("The lawfulness of an employer's promise of benefits during a union organizational campaign depends upon the employer's motive. Thus '[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.'"); *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (the Board examines "the record evidence as a whole, including any proffered legitimate reason for [granting the benefit], to determine whether "it supports an inference that [it] was motivated by an unlawful purpose"); *Real Foods Co*., 350 NLRB 309, 310 (2007) ("The granting of benefits to employees in the middle of union organizational activity 'is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election.' The General Counsel bears the burden of proving, by a preponderance of the evidence, 'that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation.' If the General Counsel makes such a showing, the burden shifts to the employer to demonstrate a legitimate business reason for the timing of the benefit, such as by proving that the benefit was 'part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union.'"); and *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961–962 (2004) ("[A] grant of benefits . . . during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election. To meet this burden, the employer needs to establish that the benefits conferred were part of a previously established company policy and the employer did not deviate from that policy on the advent of the union.") (Citations and footnotes omitted).

Engdahl's no-layoff commitment was clearly unlawful under these principles. First, it plainly constituted a promise or grant of a substantial benefit.[21] *Hertz Corp*., 316 NLRB 672, 688 (1995); and *Justrite Mfg. Co*., 238 NLRB 57, 61 (1978). Second, there is no dispute that the union campaign was well underway at that point and that the Company knew about it.[22] Indeed, the Company had been holding meetings with employ-

[20] As indicated above, Vaivao also spoke at the meeting, addressing various "rumors" and statements by union supporters that he said were "not true." Again, I discredit Vaivao's and Engdahl's testimony about what they said at the meeting (Tr. 225–234, 740–741), as it is clearly contradicted by the recording and transcript.

[21] Although the actual document containing the written commitment is not in evidence, Engdahl's above-quoted statements to employees at the meeting—that the Company was "committed" to no layoffs "to the point where we put it in writing," and that they could "take that to the bank"—are sufficient to establish the promise or grant of benefit. It is therefore unnecessary to pass on the General Counsel's request (GC Br. 20 n. 21) for an adverse inference based on the Company's failure to produce a copy of the document in response to paragraph 37 of the General Counsel's August 25 subpoena duces tecum (GC Exh. 2(e), attachment 1, p. 6).

[22] See *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006) (grant of benefits during union campaign is not unlawful unless employer was aware of it).

ees for the past 2 months to address and respond to the campaign. Moreover, Phipps had announced the union campaign in the breakroom just a few days earlier, on April 26 and 27, and Engdahl again specifically addressed the campaign immediately after announcing and distributing the no-layoff commitment. Third, Engdahl acknowledged at the hearing that the Company had never made such a written commitment in the past, notwithstanding that there had occasionally been other layoffs (Tr. 759).

As for general assertions of harm resulting from union organizing, while not unlawful by themselves, such assertions may become unlawful "if uttered in a context of other unfair labor practices that 'impart a coercive overtone' to the statements." *Reno Hilton*, 319 NLRB 1154, 1155 (1995) (citations omitted). Thus, in Reno Hilton the Board found that the employer's vague assertion that the "union would not benefit you in any way and could hurt you seriously" was unlawful in light of the employer's numerous other unfair labor practices, including threats of closure, discharge, and loss of benefits, which gave the assertion "both specificity and force." Accord: *Homer D. Bronson Co.*, 349 NLRB 512, 540–541 (2007) (finding employer's statement that the union was "just going to hurt" unlawful for the same reason), enfd. 273 Fed. Appx. 32 (2d Cir. 2008).[23]

Here, Engdahl's statement to employees that supporting the Union "will hurt" them in the future was likewise made in the context of numerous other unfair labor practices. Indeed, as discussed above, Engdahl himself had previously threatened all of the employees at the January 28 town hall meeting with loss of benefits if they supported the Union. Moreover, as fully discussed infra, just a few weeks before the April 29 meeting, the Company unlawfully discharged one of the more active union supporters (Wallace) after he openly complained about the Company's health benefits.[24] Accordingly, as in Reno Hilton, the statement violated the Act.

With respect to statements about the bargaining process, the lawfulness of such statements may depend on both their content and their context. See *Airtex*, 308 NLRB 1135 fn. 2 (1992). Compare also *Medieval Knights*, LLC, 350 NLRB 194, 195 (2007) (finding no objectionable conduct where the employer, which had not committed any other objectionable or unlawful conduct, stated during a hypothetical exercise that an employer does not have to agree to any specific proposals, that all negotiations were different, that the bargaining process could take weeks, months, or even more than a year, and that an employer could "stall out the negotiations" by "giving in to lesser items or addendums" "that would make them show they were bargaining in good faith but not really getting anything done"), with *Kajima Engineering*, 331 NLRB 1604, 1616 (2000) (finding a violation where the employer, which committed numerous other unfair labor practices, stated during a preelection mandatory meeting that the company "could drag their heels and make it go on forever" and just had to "show good faith efforts of negotiations for at least an hour per month").

Here, as discussed above, Engdhal made the statement ("The company doesn't have to agree to anything, nothing . . . Bargaining can go on forever. It can never end . . . All you have to do is bargain in good faith") after unlawfully telling employees that supporting the Union "will hurt" them in the future. Moreover, he had previously unlawfully threatened employees at the January 28 town hall meeting with loss of benefits if they supported the union. Thus, considered in context, Engdahl's statement would reasonably be viewed by employees, not as a mere hypothetical like in Medieval Knights, but as the handwriting on the wall like in Kajima. Accordingly, it violated the Act as well.

As for Engdahl's statement that he understood who was behind the union campaign, as previously discussed Vaivao had repeatedly stated in prior meetings in both February and March that employees had volunteered such information to management. Moreover, as indicated above, Phipps had recently announced that he was behind the campaign. Thus, even if some of the employees at the April 29 meeting had not attended Vaivao's prior meetings, it is unlikely they would reasonably assume at that point that the employer had obtained the information through surveillance. Accordingly, like the similar allegations regarding the February and March meetings, this allegation is dismissed.

B. Other Alleged Unlawful Statements or Conduct

The complaint also alleges numerous other incidents during the same period (January–July 2015) where managers or supervisors made unlawful statements to employees or engaged in other unlawful conduct. The complaint alleges that these additional violations were committed by various managers and supervisors at all levels of the Company, including President/CEO Kent McClelland, Operations VP Engdahl, Warehouse Manager Vaivao, Safety Manager Joe Remblance, Inbound/Receiving Supervisor Dave Garcia, Outbound/Shipping Supervisor Jake Myers, Sanitation Supervisor Karen Garzon, and Floor Captains Zack White and Art Manning.

1. January 25 conversation (White)

The General Counsel alleges that, on January 25 (3 days before the January 28 town hall meeting), Floor Captain White unlawfully interrogated Phipps about the employees' union activities and created the impression of surveillance by telling him that there were rumors in the warehouse about the organizing campaign (GC Exh. 1(g), par. 5(f)). The Company disputes both that the floor captains are supervisors within the meaning of the Act and that White made any unlawful statements during his conversation with Phipps.

As indicated above, Phipps is a longtime forklift operator at the warehouse and was the person who contacted BCTGM

[23] See also *Downtown Toyota*, 276 NLRB 999 (1985), cited by the General Counsel, where the Board affirmed the judge's finding that the employer's statements that the union is "only going to hurt you guys" and "I'll make more money and you guys will make less" were unlawful threats of unspecified reprisal and/or of futility.

[24] Given this background of other unfair labor practices, the formal nature of the meeting, and Engdahl's high-level corporate position, it makes no difference that Engdahl couched the statement and other imparted "truths" as his "opinion." See generally *Saint Luke's Hospital,* 258 NLRB 321, 322 (1981); and *J.S. Abercrombie Co*., 83 NLRB 524, 530 (1949), affd. per curiam 180 F.2d 578 (5th Cir. 1950). Nor does the Company argue otherwise; its posthearing brief does not specifically address the allegation.

Local 232 in November 2014. He reports to Johnny Manda or Richard Gomez, whom he considers his immediate supervisors. He and other warehouse employees also receive assignments and directions from floor captains, including White and Manning, both of whom work on the loading dock. The floor captains' job is to expedite and make the work run smoothly. They do so by assigning or reassigning employees to particular areas or routes at particular times, directing the warehouse workers to perform particular tasks, and by deciding when to send an employee home or keep them late after their shift. They issue such assignments and directions based on their own judgment of who is best able to perform the work, regardless of whether the task or assignment is consistent with that individual's job description or prepared schedule for the day, and without consulting or seeking permission from anyone. And they are held responsible by the warehouse managers, who they meet with on a weekly basis, if there is an interruption or delay in the workflow.[25]

On January 25, Phipps happened to run into White at the time clock as they were both arriving for work. As they walked together to their respective work areas, White asked Phipps if he had heard about the union organizing in California. Phipps said he had heard rumors about it. White said the Teamsters were openly handing out cards to the drivers at the gates there. He told Phipps there were rumors that there was also an organizing campaign in the Phoenix warehouse. Phipps asked what White what he knew about it, as he did not want to have the Teamsters there. White said he had heard rumors that whoever was organizing was getting really close to getting a union in. He asked Phipps if he knew anything about it. Phipps did not directly reply, but said he remembered that the Company had unlawfully fired employees for supporting the Teamsters organizing attempt in 1998; that he knew what his rights were; and that he wanted to protect himself.[26]

Under Section 2(11) of the Act, an individual is a supervisor if he/she possesses, in the interest of the employer, at least one of the types of authority listed therein.[27] The burden is on the party asserting supervisory status to prove it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–713 (2001).

Here, the General Counsel contends that the floor captains are supervisors because they possess the authority to assign and/or responsibly direct the warehouse employees using independent judgment.[28] As indicated above, the record supports this contention. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006) (an individual has such authority if he/she has the authority to assign employees to a place, overtime period, or significant overall duties, or direct employees to perform tasks using judgment that involves the exercise of discretion that is more than routine or clerical and not dictated or controlled by detailed instructions, and is held responsible or accountable for performance of those tasks). See also *Golden Crest Healthcare*, 348 NLRB 727, 730 (2006); and *Croft Metals, Inc.*, 348 NLRB 717 (2006).[29] Moreover, as noted by the

[25] The foregoing findings regarding the floor captains' supervisory authority and duties are based on the credible testimony of Phipps (Tr. 485–492), Wallace (Tr. 647–648), and Lerma (764–766, 773, 779, 852) regarding their personal experiences and observations while working with White, Manning, and the other floor captains.

[26] The foregoing summary of the January 25 conversation is based on Phipps' testimony (Tr. 499, 612–617) and his May 2015 pretrial affidavit (R. Exh. 1, at 20). The Company did not call White to testify about the conversation.

[27] See 29 U.S.C. Sec. 152(11) ("The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.")

[28] The record also contains some evidence that the floor captains have the authority to effectively recommend discipline; however, the General Counsel's posthearing brief does not contend that the floor captains are supervisors on that basis.

[29] The testimony of Phipps, Wallace, and Lerma regarding the floor captains' authority to assign and responsibly direct employees using independent judgment is conclusory and lacks supporting detail in some respects, which would normally mean that it fails to satisfy the burden of proof. See *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015), and cases cited there. However, it is not fatal to the General Counsel's case under the particular circumstances here. On August 25, 2 weeks before the hearing, the General Counsel served a subpoena duces tecum on the Company requesting various documents, including documents relating to the duties of the floor captains (GC Exh. 2(e), attachment 1, pars. 1–7). The Company subsequently filed a petition to revoke these and other requests, but the petition was denied in relevant part by order dated September 4 (GC Exh. 2(a)). Nevertheless, the Company thereafter failed to timely produce any documents responsive to the requests at the hearing, either on September 8 as required by the subpoena, or on September 9. After a lengthy discussion of the matter with the parties, I concluded that the Company had failed to make a good-faith effort to timely comply with the subpoena requests as required, citing *McAllister Towing*, 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). Consistent with *McAllister* and other Board decisions, at the General Counsel's request I therefore issued a variety of evidentiary sanctions against the Company, including permitting the General Counsel to introduce secondary evidence and barring the Company from cross-examining the General Counsel's witnesses or presenting any contrary testimony or other evidence on the subjects or issues to which the subpoena requests were addressed. See also *M.D. Miller Trucking*, 361 NLRB No. 141, slip op. at 1 fn. 1 and JD. at 5 (2014); *Perdue Farms, Inc.,* 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 834 (D.C. Cir. 1998); *Roofers Local 30 (Associated Builders and Contractors, Inc.),* 227 NLRB 1444, 1449 (1977); and *Bannon Mills*, 146 NLRB 611, 614 n. 4, 633–634 (1964). I also ruled that such sanctions would include appropriate adverse inferences (see, e.g., *Chipotle Services, LLC*, 363 NLRB No. 37, slip op. at 1 n. 1 (2015); and *Metro-West Ambulance Service,* 360 NLRB No. 124, slip op. at 1 and fn. 13 (2014)), but reserved ruling on exactly what those inferences would be until after reviewing all the evidence and the parties' posthearing briefs. (Tr. 53–126.) Having now done so, I grant the General Counsel's request (Br. 4 n. 5) and find, for purposes of this case, that the Company's contumacious failure to produce the subpoenaed documents supports an adverse inference that they would have corroborated the testimony of Phipps, Wallace, and Lerma and provided additional evidence to establish that the floor captains have the authority to responsibly direct employees using independent judgment as required under Section 2(11) of the Act as interpreted and applied by the Board in *Oakwood Healthcare and subsequent cases.* See generally *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 441–444 (2008), reaffd. 356 NLRB No. 18 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012).

General Counsel, the record also contains so-called "secondary indicia" supporting supervisory status; specifically, that the captains are paid more than the warehouse workers and regularly attend management meetings. See generally *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007). Accordingly, the General Counsel has satisfied the burden of establishing that White and Manning are supervisors.[30]

However, the record fails to establish that White unlawfully interrogated Phipps. The relevant test is whether, under all the circumstances, the questioning would have reasonably tended to restrain or coerce an employee in the exercise of union or other protected concerted activity. See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In applying this test, the Board typically considers a number of factors, including the identity of the questioner, the nature of the relationship between the supervisor and the employee, whether there is a history of employer hostility to union activity, the place and method of interrogation, the nature of the information sought, and the truthfulness of the employee's reply. See *Intertape Polymer Corp.,* 360 NLRB No. 114, slip op. at 1 (2014), enfd in relevant part 801 F.3d 224 (4th Cir. 2015); and *Fresh & Easy Neighborhood Market, Inc*., 356 NLRB 546, 556 (2011), enfd. in relevant part 468 Fed. Appx. 1, 3 (D.C. Cir. 2012), and cases cited there.

Here, there are some factors supporting the General Counsel's contention that White's remarks and questions were coercive. White and Phipps had never had such conversations previously,[31] the union campaign at the warehouse was still covert, and there is no evidence that Phipps' role had been revealed to management at that point. Further, Phipps avoided directly answering White's questions, specifically mentioning the Company's previous unfair labor practices during the 1998 union campaign.[32]

However, White was a low level supervisor, the conversation arose casually, after a chance encounter at the time clock, and nothing in the record indicates that White's demeanor or tone or was hostile or threatening in any way. Further, Phipps knew that word of the union campaign had been spreading "like wildfire" through the warehouse, notwithstanding his attempts to keep it covert, and White's remarks and questions did not seek or invite any additional or specific information such as the identity of the union supporters. Finally, over 16 years had passed since the 1998 Teamsters campaign, and the Company had not at that point committed any further unfair labor practices in response to the current BCTGM campaign. On balance, therefore, it is unlikely that White's remarks and questions would have reasonably tended to restrain or coerce an employee in exercising the right to engage in union activity. Cf. *Hancock*, 337 NLRB 1223, 1224 (2002) (reaching same conclusion under similar circumstances). Accordingly, the allegation is dismissed.

The record likewise fails to establish that White unlawfully created the impression of surveillance. An employer's general statements about hearing "rumors" of a union campaign do not create an impression of surveillance absent evidence that the employer could only have learned of the rumor through surveillance. See *South Shore Hospital*, 229 NLRB 363 (1977), and cases cited there.[33] There is no such evidence here. Accordingly, this allegation is dismissed as well.

2. January 28 conversation (Myers)

The General Counsel also alleges that, on January 28, shortly after the town hall meeting, Outbound/Shipping Supervisor Myers unlawfully interrogated Wallace about his union sympathies (GC Exh. 1(g), par. 5(i).)

Wallace is a warehouse loader who had worked at the Phoenix facility for a little over 6 years, since May 2008. He had not been aware of the union campaign prior to the January 28 town hall meeting, but signed a union card later that evening at a local Denny's restaurant. Myers is an admitted supervisor and directly supervised Wallace.[34]

The subject conversation occurred about 30 minutes after the

In its posthearing brief (p. 25) the Company argues that, not only should I decline to impose any adverse inference against it for failing to produce the subpoenaed documents, but I should impose an adverse inference against the General Counsel. The Company argues that such an adverse inference is warranted because the General Counsel failed to call or question White or Manning themselves regarding their supervisory authority. To paraphrase the D.C. Circuit, the Company's argument "is not only meritless, it reflects real chutzpah." *Fallbrook Hospital Corp., v. NLRB*, 785 F.3d 729, 733 (D.C. Cir. 2015). There is no record basis to assume that White and Manning would have testified favorably to the General Counsel. See generally *Torbitt & Castleman, Inc.*, 320 NLRB 907 n. 6 (1996), enfd. 123 F.3d 899, 907 (6th Cir. 1997); and *International Automated Machines*, 285 NLRB 1122 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988) (an adverse inference against a party for failing to call a witness is inappropriate unless it may reasonably be assumed that the witness would have testified favorably to that party). Moreover, without the subpoenaed documents, the General Counsel would not have been able to fully cross-examine or impeach them regarding their testimony. Finally, the sole authority cited by the Company for applying an adverse inference against the General Counsel—the judge's decision in *Desert Pines Golf Club*, 334 NLRB 265, 268 (2001)—has no precedential weight as the Board expressly disavowed the judge's discussion of the issue (see fn. 1).

[30] The General Counsel also alleges and asserts that the floor captains are agents of the Company under 2(13) of the Act. However, the General Counsel's posthearing brief fails to specify the evidentiary basis for such a finding, and it is unnecessary to reach the issue given my finding that they are supervisors.

[31] I credit Phipps' uncontroverted testimony in this regard (Tr. 499). Phipps also denied ever speaking to Manning specifically about the union campaign (Tr. 613–615) and Manning confirmed this (Tr. 970).

[32] At the hearing, Phipps testified that he was also concerned about White's questioning because White reported to Shipping Supervisor Myers, who was known to be very antiunion (Tr. 499).

[33] *Flexsteel Industries*, 311 NLRB 257 (1993), cited by the General Counsel, is inapposite. In that case, the Board distinguished *South Shore Hospital* and found a violation because the employer's personnel manager twice stated to an employee that he had heard rumors about that employee's union activity, and the statements were accompanied by unlawful interrogations and implicit threats. As indicated above, White's reference to "rumors" concerned the union campaign generally rather than Phipps' own union activities, and his accompanying questions did not constitute unlawful interrogation.

[34] As with Engdahl, Wright, and Vaivao, the Company denied in its answer that Myers was a supervisor, but stipulated to his supervisory status at the hearing.

town hall meeting ended. Wallace was working at the loading dock door, when Myers walked up to him and asked what he thought about the union. Wallace replied that he had talked to his dad, a neighbor, and a Sysco

Driver and they said that union workers have better benefits, but he was going to do his own research. Myers nodded his head in agreement and walked off.[35]

Unlike White's previous conversation with Phipps, the balance of relevant factors supports the allegation that this conversation was coercive and unlawful. Myers was Wallace's immediate supervisor, he purposefully approached Wallace at his work station and questioned him directly about his personal views of the union, and he did so shortly after a formal meeting with all of the warehouse employees where a high-level corporate official expressed opposition to the union and unlawfully threatened employees with reduced benefits if they supported it. Further, Wallace, who was not an open union supporter, gave Myers a noncommittal response. Cf. *Intertape Polymer Corp*., above (finding a violation under similar circumstances).

3. January 28 incident at Denny's (Manning)

The General Counsel also alleges that, later that evening, Floor Captain Manning engaged in surveillance of the employees' union activities at the local Denny's restaurant (GC Exh. 1(g), par. 5(j)).

As discussed above, the union campaign was still covert at the end of January. Phipps was meeting with small groups of employees at that time, but only organizing-committee members and employees they were sure supported the Union were invited. One such meeting was held at a local Denny's restaurant about a quarter mile from the warehouse on the evening of January 28. Phipps and two union representatives arrived at around 5:30 p.m., and about five to six warehouse employees showed up between 6:30 and 7 p.m. They all sat a table in the very back that was not visible from the lobby.

Phipps stayed until about 7:30 p.m. As he was going out the door, he ran into Manning, who, as found above, is a company supervisor. Manning was standing on the handicapped ramp outside the front of the restaurant talking to an employee who had just signed a card. Phipps was surprised to see Manning there, as directions had been given not to invite captains to the meetings.[36] And there is no credible evidence that anyone had done so, or that Manning was at Denny's for any reason other than to gather information about the meeting.[37]

It is unlawful for a manager or supervisor to go to an offsite location such as a restaurant without an invitation or any other legitimate justification to observe employees' union activities during nonworking time. See, e.g., *Ivy Steel & Wire, Inc*., 346 NLRB 404 (2006); *North Hills Office Services,* 344 NLRB 1083, 1095 (2005); and *Munsingwear, Inc.,* 149 NLRB 839, 846 (1964), and cases cited there. As indicated above, the record evidence indicates that that is precisely what Manning did.[38] Accordingly, his conduct violated the Act as alleged.

4. April 27 conversation (Manning)

The General Counsel also alleges that, a few months later, on April 27, Manning unlawfully created the impression of surveillance by telling Phipps that the Company knew he had recently announced the union campaign in the breakroom, and that he had better watch his back because the Company was watching him.[39]

As discussed above, Phipps publicly announced the union campaign in the breakroom on April 26 and 27. On the latter date, both Warehouse Manager Vaivao and another manager were present in the breakroom during at least part of the announcement. A while later, after Phipps had returned to work on his forklift, Manning came by in a cart and asked Phipps if it was true, what he announced in the breakroom. Phipps replied

[35] I credit Wallace's testimony about the conversation (Tr. 646–650). Myers admitted that he stopped and talked to employees while making his daily rounds on the dock after the meeting. Although he testified that he only asked employees if they had any questions about the meeting, he could not recall his conversation with Wallace; indeed, he could not recall whether he even spoke to Wallace. (Tr. 863–864, 867.)

[36] The foregoing findings are based on the credible testimony of Phipps (Tr. 518–520, 597) and Wallace (Tr. 651–652), who as mentioned above was one of the employees who attended and signed a card at the meeting.

[37] I discredit Manning's testimony that he was "asked by a couple employees . . . would [he] go to the meeting" and that all he knew was that it had "something to do with work" (Tr. 967–968). First, Manning never identified who those employees were. Second, while Manning had met with Phipps offsite to discuss work issues in the past, he admitted that unions were never discussed at those meetings and that Phipps himself did not tell him about the January 28 organizing meeting (Tr. 973). Third, Lerma, who was on the organizing committee and also attended the January 28 meeting, credibly testified that he likewise did not invite Manning (Tr. 834). Fourth, there is no evidence that Manning had ever expressed support for a union; indeed, the record indicates he was strongly opposed to a union. See Manning's testimony, Tr. 969 ("[the employee I spoke to outside Denny's] asked me, 'Are you in the union or out?" And I said, 'Hell, no.'"). Finally, as indicated above, word of the organizing campaign was spreading "like wildfire" at that time. And Manning admitted that he himself had been hearing "a lot of talk on the docks about meetings and this and that" (Tr. 972). In sum, based on the record as a whole, I find that it is more likely that Manning overheard discussion on the docks that there would be a union organizing meeting at Denny's that evening, and that, in light of the Company's antiunion town hall meeting that morning, he went to Denny's to see what he could see.

[38] *Music Express East, Inc*., 340 NLRB 1063, 1076 (2003), cited by the Company, is therefore plainly distinguishable on its facts.

[39] The complaint alleges that Manning's statements violated Section 8(a)(1) of the Act because the first statement constituted surveillance and the second statement constituted a threat of unspecified reprisal (GC Exh. 1(g), par. 5(s)). However, at the end of the hearing, the General Counsel clarified that Manning's first statement to Phipps was being alleged as unlawful on the theory that it created the impression of surveillance (Tr. 971). And the General Counsel's posthearing brief argues that both statements were unlawful on this theory, apparently abandoning the theory that the second statement was a threat of reprisal. While such shifting theories are certainly not to be encouraged, given that the complaint allegation here involves a single, short conversation, which was fully litigated and would likely have been litigated just the same regardless of the theory, I find that the Company has not been deprived of due process. See *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015) (finding that supervisor's statements to an employee violated Section 8(a)(1) on the ground that they were coercive, regardless of whether they constituted an unlawful interrogation as alleged in the complaint).

that he could not talk about it during work. Manning said, "just watch yourself, because they [are] watching both of us, so watch your back." Manning then turned around and left.[40]

As indicated by the Company, Manning's initial query reflecting awareness of Phipps' announcement could not by itself reasonably create an impression of surveillance given that Phipps made the announcement openly in the company breakroom, managers were present at the time, and there is no contention that they should not have been. See Sunshine Piping, Inc., 350 NLRB 1186 (2007), and cases cited there. However, as indicated by the General Counsel, Manning's follow-up statement warning Phipps to "watch yourself" and "watch your back" because the Company was watching, clearly did create the impression of surveillance. Accordingly, it was coercive and unlawful. See Woodcrest Health Care Center, 360 NLRB No. 58, slip op. at 1–2 (2014), enfd. in relevant part 784 F.3d 902, 917–918 (3d Cir. 2015).

5. April 29 incident (Remblance)

The General Counsel also alleges that, on April 29, a few days after Phipps announced the union campaign in the breakroom, Safety Manager Remblance unlawfully surveilled and interrogated Phipps and another employee while they were on break (GC Exh. 1(g), par. 5(u)).

The incident occurred at about 1 p.m., a normal breaktime for Phipps and other employees. Phipps and another senior employee on the first shift were talking in one of the aisles, which was not unusual as employees could take a break wherever they wanted. Remblance, who was about 60–70 yards away walking towards his office, noticed them and came over.[41] He asked each of them if they were on break. They both said yes. Remblance asked what they were talking about. Although they had been talking about Phipps' involvement in the union campaign, they just told Remblance they were talking about work. Remblance then tried to make small talk, but they made it clear they were not interested. So Remblance started to walk away. However, before he left, he turned and asked Phipps how much time he had left on his break. Phipps looked at his phone and said a couple more minutes. Remblance told him to be sure to get back to work when his break was over.[42]

Phipps acknowledged in his pretrial affidavit (R. Exh. 1, p. 42–43), that Remblance had come up and joined conversations between him and other employees in the past. However, the circumstances indicate that that was not Remblance sole or primary reason for coming over; rather, he came over to find out if they were on break and what they were talking about. Further, it is undisputed that, as safety manager, Remblance was not in Phipps' direct supervisory chain and had never monitored his break time in the past. And there is no apparent reason in the record why Remblance would have done so in this instance other than Phipps' recent announcement about the union campaign in the breakroom. Indeed, as discussed below, the evidence indicates that other company managers and supervisors likewise took a number of other, unlawful actions to monitor and interfere with the union campaign. Accordingly, a preponderance of the evidence supports the allegation that Remblance's conduct constituted unlawful surveillance. Cf. *Hawthorn Co*., 166 NLRB 251 (1967), enfd. in relevant part 404 F.2d 1205 (8th Cir. 1969) (foreman engaged in unlawful surveillance by adopting a practice during the union campaign of sitting at employee tables in the cafeteria instead of the foremen's table during coffee breaks, assertedly to ensure they did not go over their break time).[43]

The related interrogation allegation presents a somewhat closer question. Although Remblance asked what they were talking about, he did not specifically refer to the union campaign. Further, Phipps was an open union supporter at that point. However, considering the timing—just 2 days after Phipps' announcement, and a few hours after the antiunion communication meeting where Operations VP Engdahl made several unlawful statements to Phipps and other first-shift senior employees—and the unlawful context discussed above, it is likely that Remblance's question would have reasonably tended to chill employees in the exercise of their union activity. Accordingly, a preponderance of the evidence supports this allegation as well. Cf. *Classic Sofa, Inc.,* 346 NLRB 219, 235 (2006) (given the employer's various antiunion statements, the company president unlawfully created an impression of surveillance and interrogated an employee a week before the union election by noting that two other employees had been talking a lot and asking if she knew what they were talking about).

6. May 1 incident (Garcia)

The General Counsel also alleges that a few days later, on May 1, Inbound/Receiving Supervisor Garcia unlawfully engaged in surveillance and created the impression of surveillance by searching Lerma's forklift for union authorization cards and subsequently telling Lerma that he knew that Lerma had passed out a card in the breakroom and that he had searched Lerma's forklift to find union cards (GC Exh. 1(g), par. 5(v)(1), (2)).[44]

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[40] I credit Phipps' testimony about the conversation (Tr. 545–546, 555, 619). Manning testified that he could not remember whether he had such a conversation with Phipps, but denied that he ever told Phipps to watch his back (Tr. 970). The Company argues that this testimony reflects well on Manning's credibility; specifically, that Manning's "acknowledge[ment]" that he could not remember the conversation shows that he was a "credible and forthright witness" (Br. 28). However, the Company offers no plausible explanation for Manning's failure to remember whether he had a conversation with Phipps about his union campaign announcement less than 5 months earlier, and no such explanation is readily apparent. Further, as noted above, Manning's testimony on other matters was inconsistent and clearly contrary to the record as a whole.

[41] Like several of the other named managers, the Company denied in its answer that Remblance was a statutory supervisor, but stipulated to his supervisory status at the hearing.

[42] I credit Phipps' testimony about the incident (Tr. 551–553, 620). Although his testimony is not corroborated (the other employee did not testify), it is also not controverted (Remblance, who no longer works for the Company, likewise did not testify). Further, it is consistent with his pretrial affidavit (R. Exh. 1, p. 42–43), and the Company does not cite any reason why it should not be credited.

[43] *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006), cited by the Company, is distinguishable as the Board found that the supervisor there did not engage in any "out-of-the- ordinary" type of conduct.

[44] The complaint (par. 5(v)(3)) additionally alleges that Garcia unlawfully solicited employee complaints and promised employees in-

Lerma is a second-shift forklift operator and member of the union organizing committee. He signed a union card on January 2, and began gathering signatures from other employees in February. Garcia is currently his direct supervisor. Garcia has worked at the warehouse for 27 years, and has known Lerma for about 6 years. He became the outbound supervisor around mid-2013 and the second-shift inbound supervisor in February 2015, and has seen Lerma basically every day he worked since.[45]

The May 1 incident occurred during a lunch break while Lerma was in the receiving office. He had parked his forklift just outside the breakroom, and could see it through the large office window. The forklift had an ID number on it (C18) and was typically assigned to him every day. He had also left his clipboard on top of the forklift, which he had purchased himself and had various documents clipped to it, including his pay sheets, drop notes, and work-hour calculations for the week. A copy of the day's schedule, which was prepared by the first-shift inbound supervisor and showed where all the employees were assigned, was also in a cubbyhole on the forklift.

At some point, Lerma glanced out the window and noticed that Garcia was leaning over the forklift with Lerma's clipboard in his hands and was leafing through the documents. Lerma immediately went out and confronted Garcia, asking him what he was looking for. Garcia said he was looking for the schedule and walked away. However, Lerma did not believe him because the schedule was in plain view sticking out of the cubbyhole and was not on the clipboard. Further, while Garcia had authority to adjust the schedule and move employees around, he could access the schedule on his office computer and had never asked to see Lerma's copy of the schedule before. Accordingly, when Lerma later saw Garcia again in the deli aisle, he asked Garcia "to be straight" with him and tell him the real reason he was going through his "stuff." Garcia admitted at that point that he was looking for union cards. He said he had gotten a call from transportation that Lerma was putting up flyers and had handed a union card to the transportation clerk in the breakroom.[46]

There is no contention or evidence that Lerma had violated a lawful company rule or policy by distributing a union card in the breakroom. Nor is there any contention or evidence that the Company had a non-discriminatory policy and practice of searching forklifts or clipboards for nonwork related items. Accordingly, Garcia's foregoing conduct was clearly coercive and violated the Act as alleged. See, e.g., *Intermedics, Inc*., 262 NLRB 1407, 1415 (1982), enfd. 715 F.2d 1022 (5th Cir. 1983); and *Clark Equipment*, 278 NLRB 498, 503–504 (1986). Compare *Bellagio, LLC,* 362 NLRB No. 175 (2015) (no violation found where the employer had legitimate cause, based on the employee's violation of company policy regarding protection of client credit card data, to review her work email account to determine whether she also had committed other similar violations); and *Stanley M. Feil, Inc*., 250 NLRB 1154 (1980) (no violation found where the employer had a pre-existing legitimate rule and practice of searching purses and bags when employees exited the facility during lunch break).

7. May 5 meeting with Lerma (Engdahl and Vaivao)

The General Counsel also alleges that, several days later, on May 5, Operations VP Engdahl and Warehouse Manager Vaivao called Lerma up to the office and made various statements to him that unlawfully created the impression of surveillance of his union activities, promulgated an overbroad and discriminatory rule prohibiting him and other union supporters from heckling or insulting employees, and threatened him with unspecified reprisals for doing so (GC Exh. 1(g), par. 5(w)).[47]

The subject meeting, which Lerma secretly recorded, occurred at the beginning of his shift. Upon arriving at the warehouse, a supervisor informed Lerma that Vaivao wanted to see him upstairs in his office. When Lerma got there, Vaivao told him that Engdahl wanted to talk to him, and walked him across the hall to Engdahl's office.[48] After completing a phone call, Engdahl introduced himself to Lerma and explained why he had been called up. He said,

> I wanted to talk to you today because there's been let's just say some rumblings coming off the floor. Okay. And I'm doing this more as a heads-up to you, okay, as wanting you to kind of take note and stay out of trouble. Okay.
>
> The words that have come off the floor are that there's some hecklings going on, some insulting going on, and some potential slowdown on certain folks who are not

creased benefits on May 1. However, the General Counsel's posthearing brief does not address this allegation, and it appears to have been abandoned. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

[45] Tr. 763, 784, 956–958. The Company stipulated at the hearing that Garcia is a statutory supervisor.

[46] I credit Lerma's testimony about the incident (Tr. 807–814, 836–838, 851–856). See also GC Exh. 28(a), (b) (pictures of where his forklift was parked). Although Garcia testified to the contrary in virtually every detail, he was not a credible witness. For example, notwithstanding that the forklift drivers are usually assigned the same forklift every day and that he had directly supervised Lerma on the warehouse floor for the previous 3 months, he denied that he had any idea it was Lerma's forklift and clipboard he was looking through (Tr. 947). He also denied that he carries his own copy of the schedule, notwithstanding that he distributes the schedule to the employees, regularly "tweaks" it by shuffling employees around two to three times every shift,

and his office computer is far away on the opposite side of the warehouse (Tr. 947–949). Indeed, during cross-examination on another point, Garcia let slip that he had "just distributed the schedule" prior to looking through Lerma's clipboard (Tr. 963). Moreover, given the Company's hostility to the union campaign, other unlawful conduct discussed herein, and subsequent actions against Lerma (see the next section below), it is not difficult to believe that Garcia would have been looking for union cards on Lerma's forklift or clipboard. Nor is it too difficult to believe, given that Garcia had known Lerma for so many years and had apparently not been a supervisor for the vast majority of his 27-year career, that he would have admitted privately to Lerma that that was the real reason he was looking through Lerma's clipboard when Lerma continued to question him about it.

[47] The complaint also separately alleges (par. 6) that the Company unlawfully disciplined Lerma at the May 5 meeting. This allegation is addressed in section C.2 below.

[48] See Tr. 742 (Engdahl's warehouse office is located directly across from Vaivao's office).

> sharing a similar point of view. Okay. So I . . . want you to be aware of that. It has come to our attention, okay. And I want you to understand our position would be that that won't be tolerated. Okay. And you could get in some serious trouble for that. We want to try to avoid that. Okay.
>
> So I'm . . .speaking as generically as I can, but I'm sure you understand what I'm trying to say and . . . you know, we . . .want to avoid problems that we don't need to have. That's all I'm saying. Okay. And I'm trying to speak as nicely as I can and, you know, at least get the message across, right.

Lerma replied that he was just doing his own research like Engdahl had told him to do in the town hall meeting, because what the Company was saying and what other guys were saying about unions conflicted, and a lot of people asked his opinion. Lerma complained that he felt like he was being pulled aside by management and "put in hot water" for "spreading rumors" whenever he tried to express his opinion, even if it was on break or outside the Company.

Engdahl said Lerma was entitled to express his opinion, and hoped he did not "scare the shit out" out of Lerma by "bringing him up" to his office. He then offered to "help clarify," saying,

> It's okay to express your opinion, okay, but the part that wouldn't be okay is if it was done in such a way where somebody could perceive it as intimidation, or something like that, right? It's kind of how you do it, if that makes sense, right? Maybe—just think about that when you are expressing your opinion as to how you're doing it and what not, because maybe—you know, I'm not saying this is the case, but maybe if that feedback is coming around somehow they are being—you know, . . . feel threatened or intimidated. That's all I'm saying. I don't know.

Vaivao then spoke, explaining why he had previously "followed up" and "talked" with Lerma about expressing his opinions. He said he had done so because employees had told him that Lerma was the one who told them things about the Company's new pay plan, and the employees were concerned about it and brought it up to him. And employees were now telling the Company again that Lerma was "the local voice out there . . . telling [his] opinion in front . . . of the guys." Vaivao said,

> So that's what we're hearing . . . all right. We're hearing that, hey, Lerma was doing this. All right. . . . Like Mark [Engdahl] said, we just got to make sure that we're not doing those type of things up there. We're not . . . heckling guys out there. We're not slowly . . . not bringing fork[lifts] down for guys, for certain individuals. All right. . . . If that's the situation, like Mark said, you would be—you would find yourself in some deeper trouble.

Lerma asked Vaivao who his sources were. However, Vaivao declined to say. Engdahl assured Lerma that he was "not getting in trouble right now"; that they were "just talking" to him. Lerma replied that, nevertheless, to "protect himself," in the future he would just do his work, "stay quiet, don't say shit," and go home. Engdahl said "okay" and reiterated that Lerma was not "getting in trouble." Engdahl said that he was "trying to avoid anybody getting in trouble"; that he "could not afford to lose anybody" and did not "want to have to bring in new people"; that Lerma did a good job and the Company had "a ton of investment" in him by training him over the years; and that the Company would have been "doing [Lerma] a disservice not to at least tell [him] what [they] were hearing so that [he was] aware of it." Lerma said "okay, that works," and the meeting ended. (GC Exh. 13(a), (b); Tr. 320–323, 820.)[49]

The General Counsel contends that Engdahl's foregoing statements created the impression of surveillance because he failed to disclose how he acquired information about Lerma's union activities (GC Br. 40). However, both Engdahl and Vaivao indicated that the Company learned about his activities from other employees who had complained about them. Although they did not identify the employees by name, Board precedent did not require them to do so. See the discussion and cases cited in section A.5 above regarding the February 24 union education meeting. Accordingly, this allegation is dismissed.

As indicated above, the General Counsel also contends that Engdahl's statements effectively promulgated a rule prohibiting Lerma and other union supporters from heckling or insulting other employees. The General Counsel asserts that this rule was unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In that case, the Board held that a work rule is unlawful, even if it does not expressly restrict union activity, if (1) employees would reasonably construe it to prohibit union activity, (2) the rule was promulgated in response to union activity, or (3) it has been applied to restrict union activity. The General Counsel argues that the no-heckling or insulting rule was unlawful under the first and second prongs of this test, i.e. because it was promulgated in response to union activity, and/or because such terms as "heckling" and "insulting" are ambiguous and employees would reasonably interpret them to encompass protected union activities. (GC Br. 62 fn. 43).

The General Counsel's arguments are well supported. There is no real dispute that Engdahl adopted or announced a rule prohibiting "heckling" or "insulting" coworkers at the May 5 meeting. As indicated above, Engdahl clearly stated that such conduct "won't be tolerated." Further, he did not cite or refer Lerma to any existing rule prohibiting such conduct, and the Company does not contend that there was any such rule.[50]

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[49] I discredit the testimony of Engdahl (Tr. 742–749) and Vaivao (Tr. 237–249) to the extent it conflicts with the recording and transcript of the meeting. For example, I discredit Vaivao's testimony that Engdahl specifically told Lerma that employees had complained that he had thrown pens at them when they declined to sign a union card.

[50] As discussed in section D.11 below, the Company maintains a rule against "harassment." However, Engdahl did not mention this no-harassment rule at the May 5 meeting, the reported complaints about union supporters were not treated as harassment complaints under that rule (Tr. 144–145, 749, 929–930), and the Company's posthearing brief does not contend it was identical to or fully consistent with Engdahl's rule.

There is also no real dispute that Engdahl promulgated the rule in response to union activity. Although Engdahl and Vaivao scrupulously avoided specifically mentioning the union campaign during the meeting, there is no dispute that they were referring to Lerma's prounion opinions and activities, and that everyone in the room understood this.

In these circumstances, the burden was on the Company to demonstrate that the new rule was actually motivated by legitimate workplace concerns apart from the union campaign. *Care One at Madison Avenue*, 361 NLRB No. 159, slip op. at 3 (2014). The Company failed to do so. Although Engdahl and Vaivao offered hearsay testimony that employees complained to them about Lerma and other union supporters throwing pens at them after they declined to sign a card, their testimony was never corroborated.[51] Lerma credibly testified that he did not engage in such conduct (Tr. 815–816, 847), and none of the complaining employees were called to contradict him. Nor was any documentation of the complaints presented. Indeed, Engdahl and Vaivao admitted that none of the complaints were ever investigated or documented (Tr. 749, 929–930). Accordingly, the rule was clearly unlawful under the second prong of the Lutheran Heritage test. See Care One, above, at n. 6, and cases cited there.

As for the first prong of the Lutheran Heritage test, like employer statements generally, both the content and the context of the rule must be considered. Here, as indicated above, the rule prohibited "heckling" and "insulting" coworkers. On its face, such language is at least arguably lawful, i.e. it is not so "imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions or interactions protected by Section 7 [of the Act]" (*2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011)). See *First Transit, Inc.,* 360 NLRB No. 72, slip op. at 3 n. 10 (2014) (finding lawful an employer rule that prohibited "abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious").

However, Engdahl went further by "clarify[ing]" that such conduct included expressing an opinion in such a way "where somebody could perceive it as intimidation" or "feel threatened or intimidated." It is well established that rules restricting union or other protected activity based on the subjective reactions of others are unlawful. See *Consolidated Diesel Co*., 332 NLRB 1019, 1020 (2000), and cases cited there. As the court stated in enforcing the Board's decision in that case, "There would be nothing left of Section 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings with the potential for expulsion." 263 F.3d 345, 354 (4th Cir. 2001).[52]

Further, Engdahl announced the rule at a time when employees were, in fact, reportedly complaining about being approached by union supporters. As discussed above, Vaivao had reported this to Lerma and other employees at the March 26 union prevention meeting. See sec. II.A.6, above. Moreover, just days before the May 5 meeting, Lerma's immediate supervisor, Garcia, unlawfully searched his forklift for union cards simply because he had been seen handing a card to an employee in the breakroom. In these circumstances, employees would reasonably conclude that the rule was intended to restrict such protected activities. See *Care One*, above, slip op. at 4; and *Boulder City Hospital, Inc*., 355 NLRB 1247 (2010). See also *Auto Workers v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008).

Finally, as indicated above, Engdahl warned Lerma that he "could get in some serious trouble" if he violated the rule. Vaivao similarly told Lerma that he "would find [him]self in deeper trouble" if he violated the rule. And, in his subsequent concluding remarks, Engdahl made clear that, by "trouble," they meant Lerma could be terminated. Thus, the evidence likewise supports the allegation that Engdahl and Vaivao unlawfully threatened Lerma with reprisals if he violated the rule. See generally Waste Management of Palm Beach, 329 NLRB 198, 200 (1999); and Lancaster Fairfield Community Hospital, 311 NLRB 401, 403 (1993).

8. May 8 letter to employees (McClelland)

The General Counsel alleges that a few days later, on May 8, Company President/CEO McClelland committed similar violations in a letter to all warehouse employees. The General Counsel alleges that the letter unlawfully promulgated an overbroad and discriminatory rule that requested employees to report, and threatened to legally prosecute, anyone who violated it (GC Exh. 1(g), par. 5(x)).

The letter stated in relevant part as follows:

> To All Associates:
>
> It has come to my attention that some associates have recently been subjected to threatening, violent, or unlawfully coercive behavior by other associates. This is a very serious matter and one that I take personally.
>
> Let me be clear: such behavior is not consistent with the Shamrock Foods Company culture and values that are central to us. Shamrock has been in business since 1922, and has never tolerated associates behaving towards each other in a manner which is violent, threatening, or unlawfully coercive. Shamrock Foods Company has always celebrated and encouraged the diversity of its associates and will continue to do so. Associates should not be physically afraid of coming to work. We will not allow associates to behave in a manner which violates the law through threats of violence, or unlawful bullying. Simply put, this type of behavior is unacceptable and I will make every effort to stop it at our workplace.
>
> To that end, if you have been the victim of such behavior, in any way, shape, or form, however minor, please promptly report it. Shamrock will fairly and thoroughly investigate all al-

[51] As noted above, neither Engdahl nor Vaivao specifically mentioned any pen throwing to Lerma at the meeting. Thus, I reject the Company's argument (Br. 18) that Lerma's failure to specifically deny such conduct at the May 5 meeting itself supports Engdahl's hearsay testimony about the complaints.

[52] Although I would reach the same conclusion regardless, Lerma's response to Engdahl (that, to "protect himself," in the future he would just do his work, "stay quiet, don't say shit," and go home) certainly appears to confirm this reasoning.

> legations. If the complaint has merit, Shamrock will take appropriate action against anyone threatening associates and refer the matter to law enforcement for prosecution to the fullest extent of the law if that is the right course of action. Each associate is expected to perform their work in a cooperative manner with management/supervision, fellow associates, customers, and vendors. [GC Exh. 14.]

The General Counsel contends that McClelland's foregoing letter promulgated a new rule prohibiting unlawful coercive behavior or bullying. The General Counsel argues that, like Engdahl's rule, this new rule was unlawful under both the first and second prongs of the Lutheran Heritage test because it was promulgated in response to union activity and because employees would reasonably construe it to apply to protected union activity.

Again, the General Counsel's arguments are well supported. The letter clearly stated that unlawful coercive behavior and bullying "was "unacceptable" and would not be tolerated or allowed. Further, like Engdahl, McClelland did not cite or refer employees to any existing rule prohibiting such conduct, and the Company does not contend that there was any such rule.[53]

It is likewise clear that the letter was sent in response to union activity. Although McClelland did not specifically mention the union campaign, as discussed above neither did Engdahl and Vaivao, yet there is no dispute that they were referring to union activity at their May 5 meeting with Lerma. Further, McClelland sent the letter to all the warehouse employees just 3 days later after that meeting. And there is no record evidence of any conduct other than the prounion activity Engdahl and Vaivo discussed with Lerma and other employees at that and other meetings that might have prompted the letter.

Moreover, McClelland's testimony regarding how he came to send the letter is entirely unbelievable. McClelland testified that he had no idea what the reported coercive behavior or bullying was related to. He testified that HR told him that employees had complained of feeling threatened, but he did not recall who in HR told him, did not know any details about what happened, did not know why they felt threatened, and did not think it mattered why they felt threatened. However, he acknowledged that he does not regularly send such letters to employees, and in fact could not specifically recall the last time he had done so. He also admitted that he "chose" to send this one because he felt that it was "imperative" to do so. (Tr. 353–356.) It is inherently unlikely in these circumstances that he would not have asked or been told, at least in general terms, what the alleged threatening behavior was about, before sending the letter.[54]

As discussed above, therefore, it was incumbent on the Company to show that McClelland's new rule was actually motivated by legitimate workplace concerns apart from the union campaign. As with Engdahl's rule, the Company failed to do so. Accordingly, the rule was clearly unlawful under the second prong of the Lutheran Heritage test.

Regarding the first prong of the test, no case has been cited or found since Lutheran Heritage involving a rule that prohibited "unlawful bullying." Like "heckling" and "insulting," this language is at least arguably lawful on its face, particularly where, as here, it is used in the context of discussing "threatening, violent, or unlawfully coercive behavior." See generally First Transit, above. However, the circumstances surrounding issuance of the rule must also be considered. And, as discussed above, McClelland announced the rule just days after three of his supervisors or managers had unlawfully discouraged a primary union supporter from continuing to engage in lawful union solicitation by searching his equipment for union cards and warning him that the way he expressed his prounion opinions would be scrutinized under a subjective standard. In these circumstances, an employee would reasonably conclude that, like Engdahl's rule, McClelland's no-unlawful bullying rule would be applied to restrict protected activities. See Care One, and Boulder City, above.

Finally, given the foregoing, McClelland's letter also violated the Act as alleged by requesting employees to "promptly report" to the Company if they were "the victim of such behavior, in any way, shape, or form, however minor," and by threatening to "refer the matter to law enforcement for prosecution to the fullest extent of the law" if the Company decided the complaint had merit. See *Winkle Bus Co.*, 347 NLRB 1203, 1204 (2006); *Ryder Truck Rental*, 341 NLRB 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005); and *Tawas Industries*, 336 NLRB 318, 322 (2001).

9. May and June breakroom incidents (Garzon)

The General Counsel also alleges that Sanitation Supervisor Garzon committed a number of unfair labor practices in May and June. Garzon had been the sanitation supervisor at the warehouse for about 2 years, and supervised around 20 employees.[55] The General Counsel alleges that she unlawfully took union flyers away from and interrogated two of those employees in the breakroom, and also unlawfully removed union literature from the breakroom information counter (GC Exh. 1(g), pars. (y), (aa)).[56]

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[53] Again, the Company does not contend that McClelland's rule prohibiting unlawful coercion or bullying was identical or consistent with the Company's existing no-harassment rule.

[54] Thus, I find that, in truth, McClelland did ask and/or was told. See *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79, 86–87 (9th Cir. 1953), affd. 346 U.S. 482 (1953) (where a tribunal discredits a witness, it may find, "not only that the witness' testimony is not true, but that the truth is the opposite of his story"); and *O'Reilly Auto Parts v. NLRB*, 779 F.3d 576, 585 (D.C. Cir. 2015) (where a witness' testimony is discredited, the "next logical step" is to find that "the truth was the opposite of what he recounted under oath"). The General Counsel also cites the Company's June 8, 2015 position statement (GC Exh. 29, p. 15), which it submitted during the Region's investigation of the allegations, as support for finding that the letter was sent in response to union activity. However, the General Counsel offered the Company's position statement into evidence solely in support of the allegations involving Wallace, and it was therefore received solely for that purpose (Tr. 857). Accordingly, I have not relied on it here.

[55] As with all of the other managers and supervisors identified in the original complaint, the Company denied in its answer that Garzon was a supervisor, but stipulated to her supervisory status at the hearing.

[56] The complaint alleges that Garzon also unlawfully removed union flyers from the breakroom on July 8. However, there is no specific record evidence of this and the General Counsel's posthearing brief

Phipps began handing out union flyers at the warehouse near the end of May. On May 25, he was in the upstairs breakroom doing so when he noticed that Garzon was standing at a table where he had placed flyers in front of two of the sanitation employees. As he watched, Garzon reached down and took both of the flyers off the table. Phipps immediately walked over and confronted her, saying she could not do that; it was a violation of their rights unless they gave her permission to take the flyers. Garzon did not respond, but looked at the employees and said, "Well, you guys don't want these, do you?" Both of the employees shook their heads no, and she walked off with them.[57]

Phipps also left union flyers on an "information counter" that the Company maintains in the breakroom. The counter is used by the Company for displaying or distributing health and

fitness information. Employees also occasionally place business cards and notices advertising items for sale on the counter, but Garzon immediately removes them.[58] On at least three occasions, Garzon likewise removed the union flyers that Phipps had placed on the counter (Tr. 878). On one of those occasions in June, Phipps actually videotaped her doing so with his cell phone camera. The video shows Garzon entering the breakroom, walking directly to the counter, picking up the union flyers, and immediately walking out with them (GC Exh. 24).

It is well established that an employer may not prohibit distribution of union literature by employees during nonwork time in nonwork areas absent a showing of special circumstances that make prohibiting the distribution of literature necessary to maintain production or discipline. See *Our Way, Inc.,* 268 NLRB 394 (1983); and *Stoddard-Quirk Mfg.,* 138 NLRB 615 (1962). The Company made no such showing here; indeed, it does not even contend that there are any special circumstances justifying a rule against distributing union flyers to employees in the breakroom. Moreover, as indicated by the General Counsel, it is unlawful under extant law for an employer to confiscate union literature even if it could lawfully prohibit distribution of it. See *Manorcare Health Services-Easton*, 356 NLRB at 206; and *Hanson Aggregates Central, Inc.*, 337 NLRB 870, 875–876 (2002). Thus, for either or both of these reasons, Garzon clearly violated the Act by taking the flyers from the two employees in the breakroom.

Considering all the circumstances, particularly the fact that she was their direct supervisor, Garzon also clearly violated the Act as alleged by asking the two employees if they wanted the union flyers back. See *GC Murphy Co.*, 213 NLRB 175, 176–177 (1974) (store managers unlawfully interrogated employees by asking what they planned to do with the literature a union agent had given them and to turn it over to the company); and *St. Francis Medical Center,* 340 NLRB 1370, 1382 (2003) (hospital security guard unlawfully interrogated employees by asking them if they were going to read the union flyer they had received or going to keep it, and to give it to him).

However, the evidence fails to establish that Garzon likewise violated the Act by removing the flyers from the company information counter. It is well established that an employer may lawfully reserve breakroom bulletin boards for company information only (*Walmart Stores, Inc.*, 340 NLRB 703, 709–710 (2003)), and no case has been cited or found indicating that an employer may not likewise reserve a breakroom counter. Although an employer may not disparately enforce such a policy by permitting employees to display some information but not union information (ibid.), contrary to the General Counsel's contention, there is no direct or substantial evidence that the Company did so.[59] As indicated above, the counter was main-

appears to have abandoned the allegation. The complaint additionally alleges that the Company maintains an overbroad no-solicitation/distribution rule generally. This allegation is addressed in section D.12 below.

[57] I credit Phipps' testimony about this incident (Tr. 554–558, 625–626, 630). It was corroborated in substantial part by Garzon herself, who admitted that she picked up both of the flyers; that Phipps approached and said she was not supposed to do that; that she asked the employees if they wanted them back and they said no; and that she then walked off and threw the flyers away (Tr. 872–877, 883–884). Although Garzon testified that she initially took one of the flyers only because it was in English and the employee asked her to translate it in Spanish for her, I discredit that testimony. According to Garzon, she already had her own copy of the flyer (Tr. 873). Thus, there was no need to take the employee's copy to translate it. Further, as indicated above, Garzon also took the other employee's flyer. Finally, Garzon admitted that she refused to translate the flyer for the employee because it was a union flyer (Tr. 874).

[58] Tr. 558, 634–636, 881–883. Phipps testified that other "things" are also frequently put on the counter, such as drinks, chips, water bottles, milk crates, and even hula hoops (Tr. 634–635). However, he did not say who put them there or why. Further, although he said he had a picture of the counter with one or more of these items on it, no such picture was offered into evidence. Nor did any other witness corroborate his testimony. Accordingly, I find that the General Counsel failed to establish that employees regularly placed items on the counter that were not immediately removed by Garzon or the sanitation employees.

Phipps also testified that he had never noticed Garzon pick things up in the breakroom before (Tr. 636). However, it seems unlikely that Garzon, who had also been a cleaner for 10 years before she became the sanitation supervisor, would not have done so. In any event, the General Counsel's posthearing brief does not cite or rely on Phipps' testimony in this respect as support for the allegations.

[59] In arguing to the contrary, the General Counsel's posthearing brief cites: (1) Phipps' videotape of Garzon removing the union flyers; and (2) Lerma's testimony that the employees sell Girl Scout cookies and fundraise for their children's sports teams on the work floor (Tr. 780). I agree that Phipps' videotape is strong evidence that Garzon went into the breakroom solely to remove the union flyers. Based on the videotape and the record as a whole, I therefore discredit Garzon's testimony (Tr. 884–888) that she did not go there on that occasion to look for or remove the flyers, and that she was just checking the entire breakroom as usual to make sure it was clean. I also agree that Lerma's testimony indicates that the Company might not have strictly enforced its no-solicitation/distribution rule in certain respects on the work floor (Lerma did not say whether any managers or supervisors were present or aware of the employee solicitation on the work floor). However, neither is sufficient to satisfy the General Counsel's burden to establish that removing the union flyers from the company information counter was contrary to past practice or otherwise discriminatory. See *Wal-Mart Stores*, above. Compare *Intertape Polymer Corp*., 360 NLRB No. 114 (2014) (finding violation where evidence established that literature, such as newspapers, magazines, etc., had previously remained untouched in the breakroom until at least the end of the workday, but

tained by the Company solely to display information on health and fitness, and other information placed there by employees was routinely removed.[60] Accordingly, this allegation is dismissed.

10. May 29 wage increase

The General Counsel also alleges that, about May 29, the Company unlawfully gave a wage increase to some of the warehouse employees to dissuade them from supporting or voting for the Union (GC Exh. 1(g), par. 5(z)).

The Company granted or announced wage increases for four groups or classifications of warehouse workers in May: will call ($2/hour, retroactive to beginning of pay period), returns ($2/hour), sanitation ($1/hour), and throwers ($1/hour, likewise retroactive). Such wage increases for warehouse employees were rare; increases normally ranged between 3–5 percent. And the Company had never granted a retroactive wage increase in the previous 20 years.[61]

As previously discussed in section A.7 above, an employer violates Section 8(a)(1) of the Act by promising or granting a benefit during a union campaign in order to dissuade its employees from supporting the union. The evidence strongly supports an inference that this was the Company's motive for granting or announcing the May wage increases. As discussed above, HR Director Wright and Warehouse Manager Vaivao had unlawfully solicited employee complaints regarding their wages at the roundtable and communication meetings on January 28 and February 5. Moreover, at the recent communication meeting on April 29, Operations VP Engdahl had specifically reminded employees, after making various unlawful promises and threats, that it was "the company" that pays wages, "not the union." See sec. A.2, 3, and 7 above. Granting a substantial number of the warehouse employees extraordinary and unprecedented retroactive wage increases just a few weeks later not only proved, but emphasized the point. It also, of course, suggested "a fist inside the velvet glove," and thereby fit well with the Company's other unlawful antiunion conduct.[62]

Nevertheless, the Company argues that the allegation must fail for two reasons. First, it argues that the wage increase cannot be found unlawful because no election petition was pending, and the Company therefore had no knowledge at the time which employees the Union had targeted in its organizing effort. The argument is without merit. See *NLRB v. Curwood*, Inc., 397 F.3d 548, 553–557 (7th Cir. 2005) (affirming Board's finding that the employer's pre-petition announcement of benefits was unlawful where the employer was admittedly aware of the union campaign at the time), and cases cited there.[63] As in Curwood, there is no dispute here that the Company knew about the union organizing campaign among the warehouse workers at the time it granted the wage increases. Nor is there any evidence or contention that the Company had reason to believe that the campaign excluded warehouse workers in the will call, returns, sanitation, and thrower positions.

Second, the Company argues that no violation can be found because the Union's campaign was not active at the time that the wage increases were granted. This argument is likewise without merit. There is no evidence that the union campaign was not still active during and after May 2015. On the contrary, as discussed earlier, Phipps began openly distributing union flyers at the warehouse at the end of May. And both he and Lerma continued to do so in June. (Tr. 554, 565, 630, 787–788, 846.) Thus, there was no reasonable basis for the Company to conclude that the union campaign was dormant at the time of the wage increases. Cf. *Sigo Corp.*, 146 NLRB 1484, 1486 (1964) (reaching contrary conclusion where the union had withdrawn its petition without explanation and there was no evidence of any organizational activity thereafter).

In arguing otherwise, the Company relies solely on a pretrial affidavit that Phipps gave to the NLRB Regional Office on May 21 during its investigation of the Union's unfair labor practice charges. The Company asserts that Phipps' affidavit admitted that the union campaign was essentially dormant at that time. However, the affidavit contained no such admission. Indeed, it stated that a union meeting had been held just 2 days

during the union campaign supervisors monitored the breakroom much more closely and began removing all literature, including union literature, shortly after employees finished their breaks), enfd. on point 801 F.3d 224, 232–233 (4th Cir. 2015).

[60] There is no reference to use of the breakroom counter in the company no-solicitation/ distribution rule, or any other documentary evidence in the record of the Company's restriction on its use. However, it is not necessary that such a restriction be in writing. See *Walmart Stores*, above. And the General Counsel's posthearing brief does not contend otherwise.

[61] The foregoing findings are based on the credible and corroborative testimony of Phipps (Tr. 559–561 and Lerma (Tr. 781, 843). Both are in a different classification or position (forklift operator), and their testimony about most or all of the wage increases was hearsay, based only on what they had been told by the employees who received them. Nevertheless, I have given this secondary evidence substantial weight in light of the Company's failure to make a good-faith effort to timely comply with the General Counsel's subpoena request for the relevant payroll records (GC Exh. 2(e), attachment 1, par. 52). See fn. 29 above, and cases cited there. See also Tr. 911–927 (further discussing the evidentiary sanctions with respect to the wage-increase allegation), and Company counsel's on-the-record statements, Tr. 94 [day 2] ("[A] lot of these we could . . . probably just stipulate to . . . I don't think there's a question that there was a pay raise granted on a particular date"); Tr. 563–564 [day 5] ("without . . . having spoken to the client yet, I believe the General Counsel is correct. . . . I don't believe there is a dispute over whether there was an increase"); Tr. 564–565 [day 5] ("I'm not aware of the dispute on [the date of the increase] . . . and to the best of my knowledge, I think those amounts are correct, but I would have to double-check"); and Tr. 916 [day 7] ("there are documents that say . . . this is the wage increase and stuff").

[62] See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 460 (1964) ("The danger in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."). The General Counsel's posthearing brief does not request an adverse inference of an unlawful motive based on the Company's failure to produce documents responsive to paragraphs 52–54 of the subpoena duces tecum. In any event, given the substantial record evidence of the Company's unlawful motive discussed above, it is unnecessary to draw or rely on such an adverse inference.

[63] See also *Hampton Inn*, 348 NLRB at 17 (the rule regarding a promise or grant of benefits during an organizing campaign applies even if no representation petition has yet been filed).

earlier, on May 19. Although the affidavit stated that fewer employees attended the meeting, that only four additional cards had been signed in the previous 30 days, and that the campaign was "pretty much stalled," it explained that this was "due to the [Company's] constant efforts to interrogate employees about if we are for or against the union and the fact that supervisors are constantly surveilling us." (R. Exh. 1, pp. 52–53.)

In any event, there is no record evidence or contention that the Company was provided a copy of Phipps' affidavit before it granted the wage increases. The NLRB's policy and practice is not to provide a respondent with such a pretrial affidavit unless and until the witness has testified for the General Counsel or the charging party at the hearing. See Sec. 102.118(b)(c) and (d) of the Board's Rules; and *H.B. Zachry Co.,* 310 NLRB 1037 (1993).

Accordingly, the wage increases violated the Act as alleged.

C. Alleged Unlawful Discharge and Discipline

1. Thomas Wallace

The General Counsel alleges that the Company violated Section 8(a)(1) and (3) of the Act by discharging Wallace on April 6 because he complained at a March 31 company meeting about the Company's health benefits and/or because he supported the Union, and to discourage other employees from engaging in such activities. The General Counsel also alleges that the Company violated Section 8(a)(1) of the Act by presenting a separation agreement to Wallace at the time of his discharge that included certain overbroad provisions.[64] (GC Exh. 1(g), par. 5(a), (p) – (r), and GC Exh. 1(m), par. 6(b); Tr. 699–700.)

a. The discharge

As discussed in section B.2 above, Wallace is a warehouse loader who had worked at the Phoenix facility for over 6 years and signed a union card at the Denny's meeting on January 28. There is no evidence that Wallace passed out union flyers or otherwise openly campaigned for the Union at the facility.[65] However, as indicated in section A.1 above, he was the first employee to speak up when Engdahl opened the floor to questions at the January 28 town hall meeting, asking why Shamrock's competitors were unionized (GC Exh. 8(a), at 12–13.)

Wallace also asked a few questions at a mandatory "state of the company" meeting with all of the warehouse workers and managers on March 31. The meeting was conducted by Robert Beake, the Company's senior vice-president for HR. Beake had served in that position for 14 years, and reported directly to both President/CEO Kent McClelland and his father, Norman McClelland, the chairman of the board.

Like the January 28 town hall meeting, the meeting was secretly recorded by Phipps. Beake began by saying that neither of the McClellands could be present at the meeting, but that he would play a recorded message from each, one from Kent "in the beginning" and one from Norman "at the end." He then played the message from Kent. It summarized the Company's "tremendous growth" and "wonderful results" during the previous year, thanked the employees for their contribution, and listed the topics for the meeting (the company's stock and retirement programs, changes in HR, and other "things that affect [employees] directly and personally").

Beake then discussed these points in more detail. He noted that, although the Company was still privately held and family owned, it had around $3 billion in sales the previous year, and an annualized growth of over 8 percent over the previous 30 years, which was "incredibly impressive" for the industry. He also said that the Company expected "some incredible numbers" in 2015, including $300 million in sales from just one of the Company's newer food service operations in California. He said that all of the profits are put back into the Company to continue its growth. However, he noted that a substantial number of employees were stockholders and had benefited from the large increase in the Company's stock price. He also discussed various employee benefits offered by the Company. He noted, for example, that the Company continued to contribute half of the employee deductible under the Company's wellness and healthcare plans, and also continued to offer a 401(k) match and profit sharing.

Beake then introduced Vince Daniels, the Company's new vice president for HR. Daniels had been hired 6 months earlier, in August 2014, and reported to Beake. Daniels briefly summarized various changes in HR and employee services, including a new internet based portal for employees to access 24/7.

Beake then "close[d]" by playing a recorded message from Norman McClelland. The message reiterated how much the Company was progressing and gaining in market share. It also again thanked the employees for their part, saying that the Company "value[d]" them and wanted to treat them "like family."

When the message was finished, Beake repeated that it "close[d] out what [the Company] wanted to convey" to the employees at the meeting. However, he added that there was "a little bit of time . . . to take some questions if [they had] any." An employee then asked a few questions about the healthcare plan; specifically, about getting a medical discount card and whether the deductible had gone up.

After these two initial questions had been answered, Beake asked if there were any other questions. Wallace at that point raised his hand and said, "Yeah. Is there any way we can get our old insurance back?" This question was immediately greeted with a burst of laughter and applause among the employees. When it subsided, Wallace continued, "You know, 300 million dollars. I mean it's through the roof. Is that even being considered or anything?"

Beake responded that the $300 million was sales revenue and not profits, and that the Company's profit margin was only pennies on the dollar. He acknowledged that the healthcare plan had some drawbacks as well as benefits, but said the Company tried to do the best it could for the employees by changing to the high deductible plan and covering half of the

[64] Although the complaint alleges that the provisions were also discriminatory, the General Counsel's posthearing brief argues only that they were overbroad, and thus appears to have abandoned the theory. In any event, the General Counsel failed to carry the burden of proof and persuasion.

[65] Phipps testified that Wallace brought the Union three signed cards and was outspoken about the benefits of the Union (Tr. 606). However, this testimony was not corroborated and the General Counsel's posthearing brief does not mention or rely on it.

deductible for them.

Wallace then followed up with a second question: "Is there any way you could contribute the full 3,000 or the full contribution? Because some companies do that. I was just wondering." Beake replied that "most companies don't contribute anything to the deductible." The Company does, he continued, and "obviously it pleases a lot," but "[i]t doesn't please all." He noted that the Company spent over $23 million on healthcare in 2014, and said it would continue to look at the plan to try to manage its costs.

Another employee then asked a question about the next open enrollment for the long-term and wellness programs. Wallace, however, did not remain to hear the answer. He was near the back of the room, next to the rear door (one of three exits), and decided to leave at that point and return to his work station. When he got there, he saw his supervisor, Myers, who had left even earlier, about halfway through the meeting. Wallace told Myers he left because the packed room was so hot and stuffy, and Myers said he had left for the same reason. Wallace also told Myers about the applause in response to his question to Beake, and said he hoped he would not get in trouble for it. Myers assured him he would not.

Back at the meeting, Beake continued to take questions for a few more minutes. After the last one was answered, he announced, "We're out of time," and thanked everyone. The employees then returned to their work stations.[66]

Wallace continued working the remainder of the day and again on April 1, 3, and 5 without any problem. On April 6, however, after he had finished lunch, the shift manager told him to "grab [his] stuff" and escorted him to HR. When he arrived, Warehouse Manager Vaivao and Allen, the new HR representative, were there.[67] Wallace asked Vaivao what was going on. Vaivao replied,

> We have a situation here. Senior staff was offended that you asked about the healthcare . . . [S]enior staff thought you were rude and disrespectful and you're being terminated.

Wallace asked how he could be fired for asking questions when the employees had been invited to do so. Vaivao replied,

> Senior staff came together and . . . [the] decision came from Norm and Kent [McClelland] . . . that you're not going to be happy with the benefits that we give you so you can find a company with better benefits.[68]

Allen then presented Wallace with a "Separation Agreement and Release and Waiver." The agreement stated that he was being terminated effective that day, and set forth the total amount of "separation benefits" he would receive, in addition to any unpaid wages, "provided" he signed the agreement. It also contained various other terms and conditions, including, as discussed below, several confidentiality provisions. (GC Exh. 26.) Wallace signed that he received the agreement, but refused to sign that he accepted it.

The parties agree that the proper test for evaluating whether Wallace's discharge was unlawful is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that test, the General Counsel must prove by a preponderance of the evidence that the employee's union or other protected activity was a substantial or motivating factor in the adverse action. The General Counsel can make a sufficient initial showing in this regard by demonstrating that (1) the employee engaged in the union or protected activity and the employer knew it, or the employer believed or suspected that the employee engaged in or was likely to engage in such activity, and (2) the employer had animus against such activity. If the General Counsel makes the required initial showing, the burden shifts to the employer to

[66] The foregoing summary is based primarily on the recording and transcript of the meeting (GC Exh. 11(a), (b)), and the credible testimony of Wallace (Tr. 657–659) and Phipps (Tr. 536– 537). Wallace testified that he also saw two other employees leave early. However, this testimony was not corroborated and the General Counsel's posthearing brief does not mention or rely on it. As for Myers, he admitted that he left early (Tr. 864–865). Although he testified that he did so because "about that time of year . . . I just get a cold and I started coughing really bad," he did not deny telling Wallace that he had left early for the same reason he did.

[67] Allen subsequently resigned in June 2015 (Tr. 370–371), and did not testify.

[68] I credit Wallace's testimony about the meeting with Vaivao and Allen (Tr. 659–662, 665–666, 678, 696–697), which was detailed and consistent both with what he subsequently told Phipps (Tr. 541–543, 609) and with the sworn statement he gave to the NLRB 2 weeks after the meeting (R. Exh. 5, pp. 9–10). Although Kent McClelland denied any involvement in the discharge decision (Tr. 351–352), and Vaivao denied saying or suggesting otherwise on April 6 (Tr. 150–154, 906), I discredit that testimony. First, there is no reason to believe Beake would not have spoken to one or both of the McClellands about the meeting. As indicated above, Beake reported directly to them on a regular basis, and there was plenty of time to report to them about the state-of-the-company meeting between March 31 and April 6. Indeed, Beake did not deny reporting to the McClellands about the meeting, and the Company has offered no other explanation for the week-long delay before discharging Wallace. Moreover, as discussed infra, HR Vice President Daniels' testimony that he alone made the discharge decision without talking to anyone is wholly unbelievable. Second, as noted above (fns. 12, 13, 16, 20, 49), Vaivao was a particularly unreliable witness. And his testimony about the March 31 meeting that led to Wallace's termination was no better. For example, he testified that Wallace was the only one who left the meeting early (Tr. 193). However, as indicated above, there is no dispute that Myers, Wallace's direct supervisor, left the meeting about halfway through. Vaivao also testified that Wallace was "agitated" when he asked his questions, and that he "got up and stormed out" after Beake answered them (Ibid.). However, neither is reflected in the recording of the meeting: Wallace asked his questions in a normal/conversational tone, and there is no sound of any disturbance after Beake answered them. Further, as indicated above, Wallace was right next to the rear exit, and Beake himself testified that he did not even notice Wallace leaving (Tr. 444, 446). Finally, although Daniels testified that Wallace made a dismissive wave forward with his hand as he walked out of the meeting (Tr. 714), there was no mention of this in the Company's position statement during the NLRB's investigation (GC Exh. 29, p. 22, par. 5), no other witness testified at the hearing that they saw Wallace make such a gesture (not even Vaivao), and Wallace himself credibly denied doing so (Tr. 657).

establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's actual or suspected union or protected activity. See Corliss Resources, 362 NLRB No. 21, slip op. at 13 (2015); *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007); *Signature Flight Support*, 333 NLRB 1250 (2001), affd. 31 Fed. Appx. 931 (11th Cir. 2002); and *Multi-Ad Services*, 331 NLRB 1226, 1240 (2000), enfd. 255 F.3d 363 (7th Cir. 2001), and cases cited there.

Here, as indicated above, the General Counsel alleges that the Company unlawfully discharged Wallace (1) for complaining about the healthcare plan, and/or (2) because it knew or suspected that he supported the union campaign. With respect to the first, the General Counsel has clearly satisfied the initial Wright Line burden. It is well established that an employee engages in protected concerted activity by complaining at a group meeting about employment terms common to all employees. *Worldmark by Wyndam*, 356 NLRB 765 (2011). And the applause from Wallace's coworkers in response to his initial question to Beake certainly supports applying that general principle here. Further, Vaivao specifically stated at the termination meeting that Wallace was being fired for complaining to Beake about the Company's healthcare plan at the meeting.[69]

The General Counsel has also satisfied the initial Wright Line burden with respect to the second. As indicated above, Wallace was a union supporter. And it is certainly a reasonable inference that the Company knew or suspected this given the nature of Wallace's questions at the January 28 and March 31 meetings and Vaivao's statements at the March 26 union prevention meeting that the Company knew "exactly" which "disgruntled" employees supported the Union and attended union meetings.[70] Further, the Company's strong animus toward union supporters is well established by the Company's numerous unfair labor practices and the record as a whole. See *Metro-West Ambulance Service*, 360 NLRB No. 124, slip op. at 1 (2014); and *Lucky Cab Co*., 360 NLRB No. 43, slip op. at 6 (2014), and cases cited there (employer's contemporaneous 8(a)(1) violations demonstrate its union animus).[71]

Moreover, as discussed below, there is an abundance of other, circumstantial evidence that the discharge was unlawfully motivated. See, e.g., *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935–939 (D.C. Cir. 2011); and *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (unlawful motive for discharge may be established by circumstantial evidence).

Shifting reasons for discharge. In the June 8 position statement it filed during the NLRB investigation of the allegations, the Company stated that Wallace was discharged for "belligerently interrupting a senior Company official multiple times" and because he "abruptly left the meeting without permission" (GC Exh. 29, p. 22, par. 5). At the hearing, however, HR Vice President Daniels, who claimed that he alone made the decision, testified that Wallace was terminated because he made a "dismissive waving gesture forward" with his hand after Beake answered his questions and because he walked out of the meeting (714–715). And Daniels later testified that Wallace was terminated solely for leaving the meeting (Tr. 718). See also the Company's posthearing brief at 43 ("Wallace was discharged because he stormed out of [the] March 31 mandatory meeting").[72]

Such shifting reasons support an inference of unlawful motive. See, e.g., *Lucky Cab,* above; *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999); *Black Entertainment Television*, 324 NLRB 1161 (1997); and *Zurn Industries,* 255 NLRB 632, 635 (1981), affd. 680 F.2d 683, 694 (9th Cir. 1982), cert. denied 462 U.S. 1131 (1983).

False reasons for discharge. As indicated above, Wallace did not interrupt Beake, belligerently or otherwise, not even once. Nor did he make any dismissive gestures when he left the meeting. See fn. 68, supra. Even the one consistent reason offered to the NLRB during the investigation and hearing—that Wallace engaged in insubordination by leaving the mandatory meeting early—is at best a distortion or exaggeration of the facts. As discussed above, Beake twice stated to the employees that the meeting would "end" or "close" with the recorded message from Norman McClelland. And he repeated this yet again when the recording had finished, stating that it "close[d] out what [the Company] wanted to convey" to the employees. Thus, while Beake thereafter offered to answer any questions, the offer was clearly a mere courtesy.

[69] As noted above, I have credited Wallace's testimony about what Vaivao said at the termination meeting. Although Phipps acknowledged that he had not been disciplined when he complained in an arguably rude and disrespectful manner at previous company meetings about how the Company treated employees, those meetings were conducted before the union campaign and/or by lower level managers or supervisors. See Tr. 543–544, 601, 609–611, 630–631; and . Exh. 1, p. 36.

[70] See sec. A.6, above. Engdahl admitted that Wallace's question about Shamrock's unionized competitors at the January 28 town hall meeting "stuck" with him, as it was "pretty insightful" and had never been asked at any of the numerous similar meetings he had conducted in the past (Tr. 894, 897–898).

[71] See also *EF International Language School, Inc.,* 363 NLRB No. 20, slip op. at 1 n. 2 (2015) (General Counsel is not required to show animus toward the alleged discriminatee's union or protected activity in particular in order to satisfy the initial burden under *Wright Line).*

[72] The Company did not produce a termination report or any other documents regarding the discharge, as requested in paragraphs 28–33 of the General Counsel's subpoena duces tecum (Tr. 542). When asked for an explanation on the second day of hearing for failing to produce a termination report, company counsel stated, "Your Honor, we did look into that. There is no—currently, they don't give written termination of assistant people. We did—that one we did look into, and it just doesn't exist." Counsel also stated that there were no emails or other communications about the discharge because Daniels had "compartmentalized" the decision. (Tr. 84–85.) However, subsequent testimony established that the Company does regularly prepare termination reports; that there was a termination report for Wallace; and that it was circulated by email (Tr. 403–410). For this and the other reasons previously discussed, I ruled during the hearing that the General Counsel was entitled to various evidentiary sanctions, including, on request, appropriate adverse inferences. See fn. 29, above. However, the General Counsel's posthearing brief does not request an adverse inference that the discharge was unlawfully motivated based on the Company's subpoena noncompliance. And given all of the other direct and circumstantial evidence of unlawful motive discussed above, it is unnecessary to adopt or rely on an adverse inference.

Such false or exaggerated reasons are likewise evidence of unlawful motive. See, e.g., Lucky Cab, above; *Key Food*, 336 NLRB 111, 114 (2001); *Yenkin-Majestic Paint Co.*, 321 NLRB 387, 396 (1996), enfd. mem. 124 F.3d 202 (6th Cir. 1997); Radisson Muehleback Hotel, 273 NLRB 1464, 1475–1476 (1985); *William L. Meyers, Inc.*, 266 NLRB 342, 346 (1983), enfd. mem. 735 F.2d 1371 (9th Cir. 1984); and *Ramada Inn*, 201 NLRB 431, 434-435 (1973). See also *Shattuck Denn Mining Corp*., above.

Lack of consultation or investigation. As previously noted, Daniels testified that he decided to fire Wallace on his own, without consulting anyone—not his immediate superior Beake (who he meets with daily and is the person Wallace allegedly disrespected), Vaivao (who manages the Phoenix warehouse), or Myers (who supervised Wallace). Nor did he speak to Wallace himself. (Tr. 711–712, 720–721).

However, there are two problems with this testimony. First, it is inherently unbelievable. As indicated above, Daniels had been hired as HR vice president only 6 months earlier. Further, he admitted on cross-examination that he focuses on "strategic matters" and is "not in the bowels of the ship"; that he had "never" been involved in terminating a warehouse employee before; and that he was unfamiliar with the Company's policies, personnel handbook, or progressive disciplinary system.[73] Moreover, it is inconsistent with other evidence. As indicated above, Vaivao told Wallace that the McClellands had made the decision. Further, Daniels testified that he told Allen to fire Wallace the very next day after the March 31 meeting, i.e. on April 1 (Tr. 720). However, Allen and Vaivao did not do so until April 6, allowing Wallace to continue working on April 1, 3, and 5. And, as noted above, no explanation has been offered for the delay.[74]

Second, even if Daniels did, in fact, make the decision in the confined and constricted manner he described, this in itself is strong evidence of unlawful motive. As indicated above, while Daniels may have had the authority to terminate warehouse employees, he did not have any experience, knowledge, or responsibility regarding such disciplinary decisions at Shamrock. Further, it takes little imagination to think of one or two common reasons why Wallace might have had an urgent need to leave the meeting. Thus, if Daniels was truly concerned about Wallace leaving the meeting during the open question period, it would have been natural (and consistent with the Company's desire to treat employees "like family") to inquire why Wallace had left before terminating him. Yet, Daniels never did so. Accordingly, it is a reasonable inference that this was not the real reason for discharging him, but a pretext to conceal the Company's unlawful motive. See, e.g., *Golden State Foods Corp*., 340 NLRB 382, 385 (2003) (respondent did not seek an explanation from employee before suspending him); *Casa San Miguel, Inc.,* 320 NLRB 534, 571 (1995) (respondent failed to consult with employees' supervisor or even speak to the employees involved before disciplining them); and *Williams Services*, 302 NLRB 492, 502 (1991) (respondent failed to consult with the site manager or any of the employee's immediate supervisors before terminating her).[75]

Finally, the Company has failed to satisfy its burden of showing that it would have taken the same action anyway, regardless of Wallace's protected conduct. Indeed, given that the Company's proffered reason or reasons for discharging Wallace were pretextual, the Company has failed by definition to make such a showing. See, e.g., *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 639 (2011), enfd. sub. nom. *Mathew Enterprise v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012); and *Golden State Foods*, above. Accordingly, the discharge of Wallace violated Section 8(a)(1) and (3) of the Act, as alleged.[76]

b. The separation agreement

The General Counsel contends that the following three provisions of the separation agreement were overbroad and unlawful under the first prong of the test in Lutheran Heritage, supra, i.e. because employees would reasonably construe them to prohibit union or protected activity:[77]

> 10. You agree that, except as may be required by law, you will not directly or indirectly, use or disclose, or allow the use or disclosure, to any person, business, firm, corporation, partnership or other entity any confidential, or proprietary information concerning any of the Released Parties, its business, its suppliers or its customers. All information, whether written or otherwise, regarding the Released Parties' businesses, including but not limited to financial, personnel or corporate information and information regarding customers, customer lists, costs, prices, earnings, systems, operating procedures, prospective and executed contracts and other business arrangements and sources of supply are presumed to be confidential information of the Released Parties for purposes of this Agreement . . . .
>
> * * *
>
> 12. You have executed a Confidentiality Agreement and you

[73] Tr. 716–718. The handbook states: "Discipline will be administered utilizing the following guidelines, but discipline may start at any level within this process: Step 1–Counseling; Step 2– Verbal Warning; Step 3–Written Warning; Step 4–Final Warning/3-Day Suspension; Step 5–Termination" (GC Exh. 3, p. 64). Daniels admitted that he did not consult the handbook or the disciplinary guidelines in deciding to immediately terminate Wallace (Tr. 717–718).

[74] I therefore discredit Daniels' testimony. Rather, I find, consistent with Vaivao's statements at the April 6 termination meeting (which as previously noted constitute nonhearsay admissions), that Beake and/or other managers met with or otherwise reported to the McClellands between March 31 and April 6 what transpired at the meeting, and that the McClellands directed that Wallace be discharged.

[75] As discussed above, Myers, Wallace's supervisor, also left the meeting early, and there is no evidence that he was disciplined, much less discharged, for doing so. However, the General Counsel's posthearing brief does not rely on this disparate treatment as evidence of the Company's unlawful motive.

[76] In light of the foregoing findings, it is unnecessary to address the General Counsel's alternative argument (Br. 55–56) that the discharge was unlawful under the standards set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) for evaluating when an employee's outburst during protected activity costs the employee the protection of the Act.

[77] See discussion in sec. A.7 above.

> acknowledge that the terms of such agreement remain in effect notwithstanding the termination of your employment. . . . You may not use/disclose any of the Company's Confidential Information for any reason following your termination and during the transition period.
>
> 13. You agree not to make any disparaging remarks or take any action now, or at any time in the future, which could be detrimental to the Released Parties. . . . [GC Exh. 26, p. 3–4.]

The General Counsel's position is well supported. The prohibitions in paragraphs 10 and 12 on disclosing "confidential information," including any "personnel or corporate information," following termination of employment would reasonably be interpreted as prohibiting the discussion of the Company's wages, hours, and working conditions with a union or other third person or entity. See *Rocky Mountain Eye Center*, P.C., 363 NLRB No. 34, slip op. at 1 n. 1, and JD. at 7 (2015) (employer's confidentiality agreement provided that "information about physicians, other employees, and the internal affairs of [the company] are considered confidential"); and *DirectTV U.S.*, 359 NLRB No. 54, slip op. at 3 (2013), reaffd. 362 NLRB No. 48, slip op. at 1 n. 1 (2015) ("confidentiality" provision in employer's handbook instructed employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" and to "[n]ever give out information about . . . employees," and expressly included "employee records" as one category of "company information" that must be held confidential). See also *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014).

Paragraph 13's broad prohibition, without any accompanying explanation or illustrative examples, on making "any disparaging remarks or tak[ing] any action now, or at any time in the future, which could be detrimental" to the Company would likewise reasonably be interpreted to prohibit or restrict union or protected activity. See *Lily Transportation Corp.,* 362 NLRB No. 54 (2015), slip op. at 1 and JD at 8 (employer's handbook rule stated that company would "use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving [the company or its] employees and associates on the internet and may take corrective action up to and including discharge of offending employees"); *First Transit*, 360 NLRB No. 72, slip op. at 1 fn. 5 (employer's "disloyalty" rule prohibited employees from participating "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company"); and *Hills & Dales General Hospital*, 360 NLRB No. 70 (2014) (employer's rules prohibited employees from "engaging in . . . negativity" or "mak[ing] negative comments about our fellow team members, including coworkers and managers," and required employees to "represent [the company] in the community in a positive and professional manner").

Contrary to the Company's contention, it makes no difference that the foregoing provisions were contained in a separation agreement and that Wallace refused to sign it. Cf. *Metro Networks*, 336 NLRB 63, 67 fn. 20 (2001) (finding that the employer violated Section 8(a)(4) and (1) of the Act by offering unlawfully discharged employees severance agreements that included overbroad nonassistance and nondisclosure provisions, notwithstanding that employees refused to sign it).

The General Counsel also challenges paragraph 9 of the separation agreement, which states:

> 9. Because the information in this Separation Agreement is confidential, it is agreed that you will not disclose the terms of this Separation Agreement to anyone, except that you may disclose the terms of this Separation Agreement to your family, your attorney, your accountant, a state unemployment office, and to the extent required by a valid court order or by law.

The General Counsel argues that this provision is likewise unlawful under Lutheran Heritage because it "essentially prohibit[s] [Wallace] from discussing his discharge, a clear violation of the Act" (Br. 57).

However, the provision cannot reasonably be construed in this manner. The separation agreement and its terms say nothing about the underlying circumstances or reasons for the discharge. Therefore, nothing in paragraph 9 prohibits disclosing those circumstances or reasons. Accordingly, as the General Counsel has cited no other basis or authority for invalidating the provision, the allegation is dismissed.

2. Mario Lerma

As discussed in section B. 7 above, on May 5 Operations VP Engdahl and Warehouse Manager Vaivao met with Lerma to discuss "rumblings coming off the floor" about him "heckling," "insulting," and engaging in "potential slowdown[s]" against coworkers who did not support the union campaign. During the course of that meeting, Engdahl and Vaivao made unlawful statements that created an overbroad rule that employees would reasonably construe as prohibiting or restricting protected union activity, and threatened Lerma with reprisals if he violated that rule. The General Counsel alleges that Engdahl and Vaivao also unlawfully disciplined Lerma at the May 5 meeting because of his protected union activities, and to discourage him and other employees from engaging in such activities (GC Exh. 1(m), par. 6(a), (c)).[78]

The record supports the allegation. First, although the Company denies it, a preponderance of the evidence establishes that Lerma was, in fact, disciplined at the meeting. Indeed, Vaivao acknowledged at the hearing that the meeting was in the nature of a "counseling" (Tr. 245), which as noted above (fn. 73) is the first step in the Company's progressive disciplinary process.

[78] The complaint and amended complaint allege that, like Wallace, Lerma was also disciplined because he engaged in other protected concerted activities, in violation of Section 8(a)(1) of the Act. However, the General Counsel's posthearing brief argues only that Lerma was disciplined because of his union activities, in violation of Section 8(a)(3). Accordingly, the independent 8(a)(1) discipline allegation appears to have been abandoned. In any event, the General Counsel failed to carry the burden of proof and persuasion.

This is consistent with Vaivao's statement at the meeting that Lerma could get in "deeper trouble" if employees continued to complain about him, a statement which both confirmed that Lerma was already in trouble, and warned that he would be in even more trouble in the future. Further, although Engdahl subsequently assured Lerma that he was "not getting in trouble" at that time, he immediately cast a shadow over that assurance with a veiled warning that Lerma would be terminated, the very last step in the progressive disciplinary process, the next time. Cf. Altercare of Wadsworth, 355 NLRB 565 (2010) (finding that the employer's verbal warnings to several employees constituted discipline, even though they were not memorialized in the employees' personnel file, as such warnings were specifically included in the employer's progressive disciplinary system and the warnings were administered to the employees by high level officials).

Second, the evidence also establishes that the discipline was unlawful. Again, the parties agree that the proper analysis is set forth in Wright Line.[79] Applying that analysis, the General Counsel clearly satisfied the initial burden. As discussed in section B.6 above, Lerma was a prominent union supporter, the Company obviously knew it, and the Company's animus is amply demonstrated by its numerous other violations, including Supervisor Garcia's unlawful search for union cards on Lerma's clipboard just a few days before the May 5 meeting. Moreover, as previously discussed, Engdahl and Vaivao admitted that they did not even investigate the alleged complaints about Lerma's "heckling," "insulting," and "potential slowdown[s]." As discussed above with respect to Wallace's discharge, this admission is strong circumstantial evidence that Lerma's alleged misconduct was not the real reason for disciplining him, but a pretext to conceal the Company's true motive: to discourage Lerma from continuing to solicit support for the union. It also effectively prevents the Company from satisfying its rebuttal burden of establishing that it would have disciplined Lerma anyway, even if he had not engaged in the alleged misconduct. Accordingly, the discipline violated Section 8(a)(3) of the Act as alleged.

D. Alleged Unlawful Employee Handbook Rules

The General Counsel alleges that the Company has maintained numerous rules in its Associate Handbook during the same period that are unlawfully overbroad under the first prong of the Lutheran Heritage test, i.e. because employees would reasonably construe them to prohibit or restrict protected activity (GC Exh. 1(g), pars. 5(b)–(e); Tr. 750–752).[80]

1. Company confidential information

The handbook contains numerous sections, including one entitled "Protecting the Company's Confidential Information." It states in relevant part as follows:

> The Company's confidential information is a valuable asset and includes: information, knowledge, or data concerning costs, commission reports or payments, purchasing, profits, markets, sales, discounts, margins, customer histories or preferences, relationships with vendors, organization structures, associates, customers, surveys, customer lists, lists of prospective customers, customer account records, marketing plans or efforts, sales records, training and service materials, Company manuals and policies, computer programs, software and disks, order guides, financial statements and projections, business plans, budgets, supplier lists, contracts, calendars and/or daytimers that contain customer contact and other customer information, compensation schedules, proposals and quotes for business, notes regarding customers and prospective customers and pricing information.
>
> This information is the property of the Company and may be protected by patent, trademark, copyright and trade secret laws. All confidential information must be used for Company business purposes only. Every associate, agent, and contractor must safeguard it. THIS RESPONSIBILITY INCLUDES NOT DISCLOSING THE COMPANY CONFIDENTIAL INFORMATION, INCLUDING INFORMATION REGARDING THE COMPANY'S PRODUCTS OR BUSINESS, OVER THE INTERNET, INCLUDING THROUGH SOCIAL MEDIA. . . .
>
> (i) Non-Disclosure/Assignment Agreement. When you joined the Company, you signed an agreement to protect and hold confidential the Company's proprietary information. This agreement remains in effect for as long as you work for the Company and after you leave the Company. Under this agreement you may not disclose the Company's confidential information to anyone or use it to benefit anyone other than the Company without the prior written consent of an authorized Company officer. . . . [GC Ex. 3, pp. 8–9.]

Like the confidentiality provisions in the Company's separation agreement, the broad provisions of the foregoing rule, which designate as confidential any "information, knowledge, or data" concerning "associates" (i.e. employees), "Company manuals and policies," and "compensation schedules," would reasonably be interpreted to prohibit employees from discussing wages, hours, and working conditions with a union or other third person or entity. Accordingly, the provisions violate Section 8(a)(1) of the Act as alleged. See cases cited in sec. C.1.b above.

2. Government information requests

The handbook also includes a section entitled "Handling the Confidential Information of Others." It contains seven subsections, including one entitled "Requests by Regulatory Authorities," which states:

> The Company and its associates must cooperate with appropriate government inquiries and investigations. In this context, however, it is important to protect the legal rights of the

[79] No party asserts that the discipline should be evaluated under the *Burnup & Sims* analysis applicable where an employer disciplines an employee for misconduct during the course of protected activity. See *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964).

[80] See discussion in sec. A.7 above. Although the complaint alleges that the rules are also discriminatory, the General Counsel's posthearing brief argues only that they are overbroad, and thus appears to abandon that allegation. In any event, the General Counsel has failed to carry the burden of proof and persuasion.

> Company with respect to its confidential information. All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department. No financial information may be disclosed without the prior approval of the Company's President or Chief Financial Officer. [GC Exh. 3, p. 11]

The General Counsel argues that this provision would reasonably be interpreted to require employees to refer NLRB requests for documents or investigative interviews to the Company, thereby interfering with the investigation of unfair labor practice charges.

Reading the provision in isolation, the General Counsel's argument is well supported by Board precedent. See *DirectTV,* above, 359 NLRB No. 54, slip op. at 3 (employer's handbook stated that, "[i]f law enforcement wants to interview or obtain information regarding a [company] employee . . . the employee should contact the security department . . . who will handle contact with law enforcement agencies and any needed coordination with [company] departments"). See also *Management Consulting, Inc*., 349 NLRB 249 (2007), and cases cited there (employer statements that discourage employees from providing information and hinder the Board's investigation of unfair labor practice charges violate Section 8(a)(1) of the Act).

However, in evaluating whether a challenged rule is unlawful, the Board does not read particular phrases in isolation. *Lutheran Heritage*, 343 NLRB at 646. Here, as indicated above, the subject provision is actually a subsection of a broader section. The introductory paragraph of that section indicates that it deals only with confidential information provided to the Company by "third party" companies and individuals that the Company has, or may eventually have, "business relationships" with. Thus, the Company argues that, read in context, the subject provision would not reasonably be interpreted to encompass government requests for information about its own employees or their wages, hours, and working conditions.

The Company's argument is a reasonable one. Further, the General Counsel, who has the burden of proof and persuasion, offers no rebuttal to it, instead simply ignoring the context of the provision. See GC's Br. at 68. Accordingly, this allegation is dismissed. See generally *Professional Medical Transport, Inc.*, 362 NLRB No. 19, slip op. at 13 (2015); and *Desert Toyota*, 346 NLRB 110, 115 (2005).

3. Media information requests

Another subsection under the same section is entitled "Company Spokespeople." It states:

> The Company has an established Spokesperson who handles all requests for information from the Media. Ms. Sandra Kelly at the Dairy is the person who has been designated to provide overall Company information or to respond to any public events or issues for which we might receive press calls or inquiries. If you believe that an event or situation may result in the press seeking additional information, please contact Ms. Kelly at the Dairy to advise her of the nature of the situation so that she may be prepared for any calls. Only the Company's CEO may authorize another associate to speak on behalf of the Company. [GC Exh. 3, p. 11].

The General Counsel argues that this provision would reasonably be interpreted to require employees to disclose to the Company whenever they have plans to publicize matters related to their terms and conditions of employment or a union organizing campaign, thereby unlawfully interfering with their right to freely do so and discouraging them from engaging in such protected activity. Again, however, the General Counsel fails to acknowledge or address the fact that the provision is set forth in a section that is limited to confidential information provided to the Company by "third party" companies and individuals that the Company has, or may eventually have, "business relationships" with. Accordingly, this allegation is dismissed as well.

4. Company electronic and telephonic communications systems

The handbook also includes a section entitled "Electronic and Telephonic Communications." The introductory paragraphs of the section state in relevant part:

> All electronic and telephonic communications systems and all communications and information transmitted by, received from, or stored in these systems are the property of Shamrock and as such are to be used solely for job-related purposes. The use of any software and business equipment, including, but not limited to, facsimiles, computers, the Company's E-mail system, the Internet, and copy machines for private purposes is strictly prohibited. . . .

Moreover, improper use of the E-mail system (e.g., spreading offensive jokes or remarks), including the Internet, will not be tolerated. [GC Exh. 3, p. 59.]

The General Counsel contends that the first paragraph is unlawful because it prohibits employees from using the Company's email and other electronic and telephone systems for union or other protected activities even during nonworking time, citing *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) (holding that employers must allow employees to use their company email accounts for protected communications during nonworking time absent special circumstances making a ban necessary to maintain production or discipline). The General Counsel contends that the second provision is unlawfully overbroad because employees would reasonably construe the ban on "improper" use of such systems to include protected conduct.

However, the Board in Purple Communications made clear that such usage restrictions are only unlawful if employees actually have access to the employer's systems. See slip op. at 1, 3, and 5. See also *UPMC*, 362 NLRB No. 191, slip op. at 3 (2015). As indicated by the Company, the record here fails to establish that the warehouse employees have such access. Former HR Manager Wright specifically testified that they do not have access to the email system (Tr. 375), and no evidence was presented to rebut her testimony or to establish that the employees have access to other electronic and telephone systems.[81] Accordingly, this allegation is also dismissed.

[81] Arguably, the fact that the email provision is contained in the employee handbook is itself circumstantial evidence that employees have email access. However, the General Counsel's posthearing brief does

5. Monitoring use

The same section includes a subsection entitled "Monitoring Use." It states in relevant part:

> To ensure that the use of electronic and telephonic communications systems and business equipment is consistent with Shamrock legitimate business interests, authorized representatives of Shamrock may monitor the use of such equipment from time to time. This includes monitoring internet usage of any kind. This may also include listening to stored voicemail messages. In some functions, telephone monitoring is used to assist in associate training and the development of quality customer service: The associate will be notified if telephone monitoring is applicable to their area.
>
> In addition, Shamrock reserves the right to use software and blog-search tools to monitor comments or discussions about company representatives, customers, vendors, other associates, the company and its business and products, or competitors that associates or non-associates post anywhere on the Internet, including in blogs and other types of openly accessible personal journals, diaries, and personal and business discussion forums.
> *Shamrock cautions that associates should have no expectation of privacy while using company equipment and facilities for any purpose. [GC Exh. 3, p. 59.]*

The General Counsel contends that the second paragraph above is unlawful because it creates the impression that the Company will engage in surveillance of employees' protected activities on the internet. The General Counsel acknowledges that the Board in Purple Communications stated that an employer could monitor its computers and email systems for legitimate management reasons, and could also notify its employees that it would do so. However, the General Counsel argues that the second paragraph is nevertheless unlawful because it is not limited to monitoring the Company's computers and email system, but includes comments or discussions employees post using their personal computers or email accounts.

However, as indicated above, the introductory paragraphs of the section indicate that the subsection only applies to company computer and email systems. This is also apparent from the first and third paragraphs of the subsection itself. Again, the General Counsel's posthearing brief fails to acknowledge or address this factual context.[82] Accordingly, this allegation is dismissed as well.

6. Instant messaging

The same section also includes a subsection entitled "E-mail," which states:

> Associates are prohibited from using any Instant Messaging applications except those provided specially by Shamrock for Associate's business use. External E-mail messages may carry one or more attachments. An attachment may be any kind of computer file, such as a word processing document, spreadsheet, software program, or graphic image. [GC Exh. 3, p. 60.]

The General Counsel contends that this provision is unlawful for the same reasons the previous two provisions above are unlawful, i.e. because it prohibits employees from using company computer systems to send instant messages about union or other protected activity even during nonworking time, and because it is not limited to company computer systems, and thus employees would reasonably conclude that the rule also prohibits them from doing so on their personal computer systems or devices.

Both arguments again fail for the same reasons discussed above. There is no evidence that the employees have access to company computer systems to send instant messages, and the introductory paragraphs of the section in which the subsection appears indicate that the subsection only applies to instant messaging on company computer systems. Accordingly, this allegation is likewise dismissed.

7. World Wide Web

The same section also includes a subsection entitled "World Wide Web," which states in relevant part:

> As a general rule, associates may not forward, distribute, or incorporate into another work, material retrieved from a Web site or other external system. Very limited or "fair use" may be permitted in certain circumstances. Any associate desiring to reproduce or store the contents of a screen or Web site should contact their Supervisor to ascertain whether the intended use is permissible.
>
> Use of the World Wide Web includes all restrictions, which apply generally to the use of the Company's E-mail and other electronic and telephonic equipment, as noted above. In addition, the following rules apply with respect to Internet usage:
>
> * * *
>
> 2. No Downloading of Non-Business Related Data: The Company allows the download of files from the Internet. However, downloading files should be limited to those that relate directly to Shamrock business.
>
> * * *
>
> 4. No Participation in Web-Based Surveys without Authorization: When using the Internet, the user implicitly involves Shamrock in his/her expression. Therefore, users should not participate in Web or E-mail based surveys or interviews without authorization. [GC Exh. 3, p. 60.]

The General Counsel contends that this provision is unlawful for similar reasons, i.e. because (1) it would reasonably be read by employees to (a) prohibit them downloading, forwarding or distributing to coworkers information from the internet or other external source about a union, the Company, or the employees and their terms and conditions of employment; and (b) require

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not make this argument. Indeed, it does not even address the access issue.

[82] Like the complaint, the General Counsel's posthearing brief sets forth only the second paragraph of the subsection. It omits the first and third paragraphs without any signal, notation, or explanation.

them to obtain the Company's authorization to participate in surveys from unions about their concerns or interest in union representation; (2) "there is no language in the provision indicating that it was intended to apply only to use of the [Company's] computer system and equipment"; and (3) even if the provision is limited to the Company's computer systems and equipment, the Company has failed to show special circumstances for the restrictions as required by the Board's decision in Purple Communications, above (GC Br. 74–75).

All of these arguments again fail for the same reasons discussed above. Both the context and the content of the provision indicate that it applies only to company computers and equipment,[83] and there is no evidence the employees have access to them. Accordingly, this allegation is also dismissed.

8. Blogging

The same section also includes a subsection entitled "Blogging," which states:

> The following rules and guidelines apply to blogging, whether blogging is done for Shamrock on company time, on a personal Web site during non-work time, or outside the workplace. The rules and guidelines apply to all associates.
>
> [1.] Shamrock discourages associates from discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications. Nonofficial company communications include Internet chat rooms, associates' personal blogs and similar forms of online journals or diaries, personal newsletters on the Internet, and blogs on Web sites not affiliated with, sponsored, or maintained by Shamrock.
>
> [2.] Associates have a duty to protect associates' home addresses, social security numbers, birth date, driver's license number, and other personal information and the confidentiality of Shamrock trade secrets, marketing lists, customer account information, strategic business plans, competitor intelligence, financial information, business contracts, and other proprietary and nonpublic company information that associates can access.
>
> [3.] Associates cannot use blogs to harass, threaten, libel, or slander, malign, defame or disparage, or discriminate against co-workers, managers, customers, clients, vendors or suppliers, and organizations associated or doing business with Shamrock, or any members of the public, including Web site visitors who post comments about blog contents.
>
> [4.] Associates who maintain blogs on their own or another Web site and choose to identify themselves as associates of Shamrock are strongly encouraged to state explicitly, clearly, and in a prominent place on the site that views expressed in their blogs are associates' own and not those of Shamrock or of any person or organization affiliated or doing business with Shamrock.
>
> [5.] Shamrock respects associates' right to express personal opinions in personal blogs and does not retaliate or discriminate against associates who use their blogs for political, organizing, or other lawful purposes.
>
> [6.] Associates cannot use Shamrock's logo or trademarks or the name, logo, or trademarks of any business partner, supplier, vendor, affiliate, or subsidiary on any personal blogs or other online sites unless their use is sponsored or otherwise sanctioned, approved, or maintained by Shamrock.
>
> [7.] Associates cannot post on personal blogs Shamrock's copyrighted information or company-issued documents bearing Shamrock's name, trademark, or logo.
>
> [8.] Associates cannot post on personal blogs photographs of company events, other associates or company representatives engaged in Shamrock's business, or company products, unless associates have received Shamrock's explicit permission.
>
> [9.] Associates cannot advertise or sell company products or services via personal blogs.
>
> [10 .] Shamrock discourages associates from linking to Shamrock's external or internal Web site from personal blogs.
>
> [11.] Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the NLRA. [GC Exh. 3, pp. 61–62.]

The General Counsel contends that the foregoing provision is unlawful because (1) it explicitly states that it applies outside the workplace; and (2) paragraphs 1–3, 6–8, and 10 would reasonably be read by employees to prohibit or limit their right to engage in protected union or other concerted activities (GC Br. 78–80).

As indicated by the General Counsel, unlike the other subsections discussed above, this subsection clearly indicates that it is not limited to company computers and equipment. Thus, the subject paragraphs must be evaluated to determine whether they would reasonably be construed to prohibit or restrict employees from using their personal computers or other devices to engage in union or other protected communications or discussions on the internet.

Paragraph 1. The broad language of this paragraph, discouraging employees from publicly discussing on the internet "any work-related matters, whether confidential or not," would reasonably be interpreted by employees to encompass online discussions relating to employee terms and conditions of employment. Accordingly, it is overbroad. See *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014), affd. ___ Fed. Appx. ___, 2015 WL 6161477 (2d Cir. Oct. 21, 2015).[84]

Paragraph 2. This paragraph, which requires employees to

[83] Again, the General Counsel's posthearing brief omits and entirely ignores the first sentence of the second paragraph of the provision referencing "the Company's E-mail and other electronic and telephonic equipment."

[84] The Company does not contend that this paragraph (or paragraph 10) is lawful because it uses the word "discourages," rather than "prohibits." In any event, Board precedent indicates to the contrary. See *Boeing Co.*, 362 NLRB No. 195 (2015), and cases cited there.

"protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information," would reasonably be construed to prohibit or restrict employees from disclosing their coworkers' contact information and wages, hours, and working conditions as part of a union organizing or public campaign to improve their terms and conditions of employment. Accordingly, like the similar confidentiality provisions in the Wallace separation agreement and handbook section on company confidential information, it is overbroad. See secs. C.1.b, and D.1, above, and cases cited there. See also *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 2 (2015) ("confidentiality" provision in employer's handbook prohibited employees from disclosing "to anyone outside the company, indirectly or directly," including "participation in internet chat rooms or message boards," "any information about the company which has not been shared by the company with the general public," including but not limited to "organizational charts, salary structures, [and] policy and procedures manuals"); and *Lily Transportation*, 362 NLRB No. 54, slip op. at 1 nn. 2, 3 and JD. at 6–7 (provisions in employer handbook prohibited employees from disclosing "employee information maintained in confidential personnel files" and from posting on the internet "information or comments about [the company or its] . . . employees or employees' work that have not been approved by [the company]").

Paragraph 3. This paragraph, which prohibits employees from using blogs to, among other things, "malign" or "disparage" coworkers or managers, would reasonably be interpreted by employees to include protected union or other concerted activity. Thus, like the similar provision in the Wallace separation agreement, it is overbroad. See sec. C.1.b, above, and cases cited there. See also *UPMC*, 362 NLRB No. 191, slip op. at 2 n. 5 and JD. at 24–25 (employer's acceptable-use policy prohibited employees, without prior written consent, from using company computers, even on nonworking time, to establish or participate in websites or social networks that "disparage or misrepresent," or make "false or misleading statements regarding" the company).

Paragraphs 6 & 7. These provisions, which prohibit or require approval for employees to use Shamrock's logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites, are also overbroad. See id., slip op. at 2 n. 5 and JD. at 25, and cases cited there.

Paragraph 8. This provision, which requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products, would reasonably be interpreted to encompass photos documenting unsafe or hazardous working conditions and equipment or other evidence relevant to employment-related disputes. Accordingly, it is likewise overbroad. See *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015) (employer's rule prohibited all recording, including using cameras to record images, without prior approval of the company or consent of all parties); and *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 3–4 (employer's rule banned use of cameras, camera phones, audio-visual and other recording equipment on company property without authorization), and cases cited there. See also the cases cited above with respect to paragraphs 1–3.

Paragraph 10. This provision, which discourages employees from linking to Shamrock's external website from personal blogs, would restrict employees' ability to identify or direct others to the Company's website in discussing company policies or terms and conditions of employment. Accordingly, it is overbroad as well. Cf. *UPMC*, above.

Finally, the Company does not contend that any of the foregoing paragraphs are saved by the general qualifiers or disclaimers set forth in paragraphs 5 and 11 regarding employees' "right to express personal opinions" about "organizing" and other "rights under Section 7 of the NLRA." Indeed, neither the General Counsel nor the Company even mention these provisions in their posthearing briefs. In any event, Board precedent indicates that they are insufficient to do so. See *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 6 (2015), and cases cited there. Accordingly, all seven paragraphs violate the Act as alleged.

9. Guideline to prohibited activities

The same section also includes a subsection entitled "Guideline to Prohibited Activities." It states in relevant part:

> The following behaviors are examples of previously stated or additional actions to activities that are prohibited and considered improper use of the Internet, E-mail or voicemail systems provided by Shamrock. These examples are provided as guidelines only and are not all-inclusive:
>
> [1.] Sending or posting confidential material, trade secrets, or proprietary information outside of the organization.
>
> * * *
>
> [13.] Refusing to cooperate with security investigations.
>
> [14.] Sending or posting chain letters, solicitations, or advertisements not related to business purposes or activities.
>
> * * *
>
> [16.] Sending or posting messages that disparage another organization.
>
> * * *
>
> Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the NLRA. [GC Exh. 3, p. 62].

The General Counsel contends that this subsection is unlawfully overbroad for essentially the same reasons as the previous subsection discussed above. However, unlike that subsection, this subsection indicates that it applies only to Company computers and equipment. And, as previously discussed, there is no evidence the employees have access them. Accordingly, this

allegation is dismissed.[85]

10. Reporting violations

The same section also includes a subsection entitled "Reporting Violations," which states:

> Shamrock requests and urges associates to use official company communications to report violations of Shamrock's blogging rules and guidelines, customers' or associates' complaints about blog content, or perceived misconduct or possible unlawful activity related to blogging, including security breaches, misappropriation or theft of proprietary business information, and trademark infringement. Associates can report actual or perceived violations to supervisors, other managers, or to Human Resources.
>
> As a condition of employment and continued employment, associates are required to sign an Electronic and Telephonic Communications Acknowledgement Form. Applicants are required to sign this form on acceptance of an employment offer by Shamrock.

As discussed above, the Company's blogging rule is unlawfully overbroad, i.e., it would reasonably be read to prohibit or restrict protected union or other concerted activities. Thus, as indicated by the General Counsel, this provision effectively solicits employees to report such protected activities to the Company. Accordingly, it is unlawful. See *Montgomery Ward*, 269 NLRB 598, 600 (1984) (employer's no-distribution rule directed employees to report conduct that it unlawfully prohibited). See also *Bill's Electric, Inc.*, 350 NLRB 292, 306 (2007); and *Dillon Cos.*, 340 NLRB 1260, 1267 (2003).

11. Guidelines to appropriate conduct

The handbook also contains a section entitled "Guidelines to Appropriate Conduct." It states in relevant part as follows:

> *Listed below are some of the rules and regulations of Shamrock. This list should not be viewed as all-inclusive. It is intended only to illustrate the types of behavior and conduct that Shamrock considers inappropriate and grounds for disciplinary action up to and including termination of employment without prior warning, at the sole discretion of the company, including, but not limited to, the following:*
>
> * * *
>
> [2.] Theft and/or deliberate damage or destruction of property not belonging to the associate, including the misuse or unauthorized use of any products, property, tools, equipment of any person or the unauthorized use of any company-owned equipment.
>
> * * *
>
> [6.] Any act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work, including sexual or other harassment, wasting the associate's time, harming or placing the associate in harm's way, immoral or indecent conduct or conduct that creates a disturbance in the workplace.
>
> Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the National Labor Relations Act. [GC Exh. 3, pp. 83–84.]

The General Counsel alleges that paragraph 2 above is unlawfully overbroad because employees "would reasonably understand it to encompass their use of [the Company's] email system or their engaging in conduct that [the Company] considered 'misuse' of that system," including protected communications on nonworking time (Br. 84). However, as discussed above, the employees do not have access to the Company's email system. Accordingly, this allegation is dismissed.

Unlike paragraph 2, paragraph 6 is not limited to use of the Company's computers or other equipment. Further, as indicated by the General Counsel, its broad prohibition on "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace" would reasonably be understood to encompass protected union or other concerted activities.[86] See *Ryder Transportation Services*, 341 NLRB 761 (2004) ("It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited."), enfd. 401 F.3d 815 (7th Cir. 2005). See also the discussion and cases cited in section B.7 above. Finally, as with other provisions, the Company does not contend that this provision is saved by the last sentence of the section purporting to preserve employees' "rights under Section 7 of the [NLRA]." Accordingly, the provision is unlawful.

12. No solicitation or distribution

The handbook also includes a section entitled "No Solicitation, No Distribution," which states:

> Shamrock believes that the work time of our associates should be devoted to their work-related activities, and that it is neither safe nor productive for our associates to be distracted by individuals engaged in non-work related activities during work time or in work areas. Thus, the conducting of non-company business related activities is prohibited during the working time by either the associate doing the soliciting or the associate being solicited or at any time in customer or public areas. Associates may not solicit other associates under any circumstances for any non-company related activities.
>
> The distribution of non-company literature, such as leaflets, letters or other written materials by an associate is not permit-

[85] As with the previous subsection, the Company does not contend that this subsection is saved by the last sentence purporting to preserve employees' "rights under Section 7 of the NLRA."

[86] The General Counsel's posthearing brief also argues that the term "harassment" would reasonably be interpreted by employees to include protected conduct. However, *Lutheran Heritage* itself held to the contrary, 343 NLRB at 648–649, and the General Counsel cites no legal or factual basis for distinguishing that case.

> ted during the working time of either the associate doing the distributing or the associate to whom the non-company literature is being distributed, or any time in working areas or in customer and public areas.
>
> It is important that we keep our associates informed on all matters that involve them. Company bulletin boards/email is our primary means for posting notices and other materials related to our associates and our business. In order to avoid any confusion over what may or may not be posted on Shamrock bulletin boards, and to avoid obscuring important business-related materials with items which are of a personal nature, Shamrock bulletin boards are to be used solely for the posting of Shamrock business-related notices and materials. If you would like to post any Shamrock business-related materials, please see your Department Manager, the General Branch Manager or the Human Resources Representative. Only these Individuals are authorized to approve and post information on Shamrock bulletin boards. [GC Exh. 3, p. 65.]

The first and second paragraphs of this section explicitly ban soliciting or distributing in customer or public areas at any time. Thus, as indicated by the General Counsel, they would reasonably be construed to prohibit off-duty employees from engaging in union solicitation or distribution in such areas, including in parking lots and other public nonworking areas between shifts. Accordingly, they are unlawful. See *Times Publishing Co.,* 231 NLRB 207 (1977), enfd. in relevant part and remanded on other grounds 576 F.2d 1107 (5th Cir. 1978) (employer's rule prohibited solicitation and distribution in public areas at any time); and *Bankers Club, Inc.,* 218 NLRB 22, 27 (1975) (employer's rule banned solicitation or distribution in customer areas at any time), cited with approval in *Purple Communications*, 362 NLRB No. 126, slip op. at 13. See also Golub Corp., 338 NLRB 515 (2002); and *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999), and cases cited there.

The General Counsel contends that the first paragraph is also overbroad because it bans, not just soliciting, but also "the conducting of non-company business related activities" during working time. The General Counsel argues that this language "would reasonably be read to prohibit employees from discussing their working conditions or . . . the state of an organizing campaign during working time, even though there is no restriction on other types of discussions at the facility." (Br. 86.) However, there are two problems with this argument. First, both the title of the section and the remainder of the paragraph indicate that the term "non-company business" refers to soliciting. Second, the General Counsel cites no record evidence that the Company actually permits discussions about personal matters other than working conditions and union organizing during working time. Cf. *Hertz Corp*., 316 NLRB 672, 687 (1995) (record evidence established that the employer had not enforced any restrictions on what employees could say to each other in working areas during working time). The argument therefore fails.

The General Counsel also alleges that the third paragraph is unlawful because it requires employees to seek approval before posting any information at the facility, including in nonworking areas, citing *Brunswick Corp*., 282 NLRB 794, 795 (1987). However, Brunswick involved a no-solicitation rule, not a no-posting rule. Unlike with solicitation/distribution, the law permits an employer to prohibit employees from posting materials anytime and anywhere in the facility as long as the employer does not apply the ban in a discriminatory manner. *Flamingo Hilton*, 330 NLRB 287, 293 (1999). See also St. Francis Medical Center, 347 NLRB 368, 370 (2006) ("The comparison between solicitation/distribution and posting is a comparison of 'apples to oranges'."). The General Counsel does not contend or cite any record evidence that the Company has applied its no-posting rule in a discriminatory manner. Accordingly, this allegation is dismissed.

13. Cell phone use

Finally, the General Counsel also alleges that the Company has unlawfully promulgated and maintained an overbroad cell phone rule (Tr. 750, 844). The rule is set forth in a January 2, 2015 memorandum that the Company posted entitled "Head/Ear & Cell Phone Use." The memo states:

> In an effort to improve the workplace safety environment, ensure the safety of our associates and to maintain compliance with State, Federal and regulatory agencies, the use of all musical devices to include, but not limited to cell phones and head/ear phone use within the warehouse is being discontinued effective January 4, 2015.
>
> Beyond the impact of the individual noise level, personal music devices create a potential hazard. They impair a worker's ability to hear surrounding sounds and compromise the user's general alertness and concentration; therefore they may be considered a hazard within the workplace. This is especially true if working around moving equipment or in circumstances where a worker must be able to hear warning sounds.
>
> An EMERGENCY phone line is in place should a family member need to be contacted while at work and the message will be relayed to you. This line is for emergency use ONLY. [GC Exh. 27].

The General Counsel argues that the foregoing memo sets forth a "a sweeping prohibition on the use of cell phones," which would reasonably be interpreted "to ban the use of cell phones for any purpose whatsoever, including recording working conditions for any number of reasons protected under the Act." The General Counsel contends that it is therefore unlawful, citing *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 4 (employer's rule banned use of cameras or any other type of audio visual recording equipment unless authorized for business purposes). (Br. 87.)

As indicated by the Company, however, the rule on its face does not ban employees from carrying cell phones or using them to take pictures or videos. Rather, it is clear from both the rule and the accompanying explanation/justification in the memo that the ban is limited to the use of cell phones for listening to music or making or receiving calls.[87] Accordingly, this

[87] Again, the General Counsel's posthearing brief omits and entirely ignores the second and third paragraphs of the memo.

allegation is dismissed.

CONCLUSIONS OF LAW

1. The Respondent Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Threatening employees at a January 28, 2015 town hall meeting that they would lose benefits if they supported a union.

(b) Soliciting employees' complaints and grievances and promising to remedy them at a January 28 roundtable meeting if employees refrained from supporting a union.

(c) Soliciting employees' complaints and grievances and promising to remedy them at a February 5 communication meeting if employees refrained from supporting a union.

(d) Telling employees at a February 24 union education meeting to report to management if union supporters solicited them to sign a union card.

(e) Promising or granting benefits to employees on April 29 by committing, both at a communication meeting and in writing, that employees would not be laid off, to discourage support for a union.

(f) Threatening employees at the April 29 communication meeting with unspecified reprisals if they supported a union.

(g) Informing employees at the April 29 communication meeting that it would be futile for them to support a union.

2. The Company also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Interrogating an employee on January 28, 2015 about whether he supported a union.

(b) Surveilling employees' union activities on January 28.

(c Creating the impression of surveilling an employee's union activities on April 27.

(d) Surveilling employees' union activities on April 29.

(e) Interrogating employees about their union activities on April 29.

(f) Surveilling and creating the impression of surveilling an employee's union activities on May 1.

(g) Orally promulgating a discriminatory and overbroad rule at a May 5 meeting with an employee that prohibited union supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated," and threatening the employee with reprisals if he violated the above rule.

(h) Promulgating a discriminatory and overbroad rule in a May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior," requesting employees to report to management if the rule was violated, and threatening to refer violations of the rule to law enforcement for prosecution.

(i) Taking union flyers away from employees on May 25.

(j) Interrogating employees on May 25 about whether they supported the union.

(k) Granting wage increases to employees on May 29 to discourage support for the union.

3. The Company also engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Maintaining an overbroad rule in its Associate Handbook on "Protecting the Company's Confidential Information" since at least October 15, 2014 that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

(b) Maintaining an overbroad rule in the handbook on "Blogging" since the same date that:

1. Discourages employees from publicly discussing on the internet "any work-related matters, whether confidential or not."

2. Requires employees to "protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information."

3. Prohibits employees from using blogs to "malign" or "disparage" coworkers or managers.

4. Prohibits or requires company approval for employees to use the company logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites.

5. Requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products.

6. Discourages employees from linking to the Company's external website from personal blogs.

(c) Maintaining an overbroad rule in the handbook on "Reporting Violations" since the same date that solicits employees to report any of the above prohibited blogging activities to the Company.

(d) Maintaining an overbroad rule in the handbook on "Guidelines to Appropriate Conduct" since the same date that prohibits "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

(e) Maintaining an overbroad rule in the handbook on "No Solicitation, No Distribution" since the same date that bans soliciting or distributing in customer or public areas at any time.

(f) Offering a "Separation Agreement and Release and Waiver" to an employee on April 6, 2015 that prohibited disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

4. The Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act by discharging Thomas Wallace on April 6, 2015 because of his protected concerted and union activities and to discourage employees from engaging in such activities.

5. The Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by disciplining Mario Lerma on May 5, 2015 because of his protected union activities and to discourage employees from engaging in such activities.

6. The Company did not otherwise violate the Act as alleged in the complaint.

REMEDY

The appropriate remedy for the foregoing violations is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, in the event Wallace has not already been reinstated, the Company will be required to offer him immediate and full reinstatement to his former position.[88] In addition, the Company will be required to make him whole for any loss of earnings and other benefits as a result of his unlawful termination. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010).

As set forth in *Don Chavas d/b/a Tortillas Don Chavas*, 361 NLRB 110 (2014), the Company will also be required to compensate Wallace for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.[89]

In addition, the Company will be required to remove from its files any reference to the unlawful termination of Wallace and discipline of Lerma, and to notify them in writing that this has been done and that the termination or discipline will not be used against them in any way.

The Company will also be required to rescind, in writing, the discriminatory and overbroad rule it orally promulgated at the May 5 meeting with Lerma, the discriminatory and overbroad rule set forth in its May 8 letter to all employees, and the overbroad separation agreement it offered to Wallace on April 6. The Company will likewise be required to rescind the overbroad handbook rules, and furnish all current employees with inserts for their current employee handbooks that (1) advise that the unlawful rule has been rescinded, or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rule, or (2) provide a lawfully worded rule.

In addition, the Company will be required to post a notice to employees, in both English and Spanish, stating that it will not continue to engage in the same or any like or related unlawful conduct and that it will affirmatively remedy its unlawful conduct as ordered.

Given the severity and scope of the Company's unfair labor practices, and the fact that many of them were committed by high-level officials and/or at large and small mandatory meetings, the notice must also be read aloud to the employees. Specifically, President/CEO Kent McClelland or Operations VP Engdahl, or, if the Company chooses, a Board agent in their presence, must read the remedial notice aloud to all warehouse employees at one or more mandatory meetings scheduled during working time to ensure the widest possible attendance. A Spanish-language interpreter must be present as well to translate the reading for employees who are not fluent in both English and Spanish. See OS Transport LLC, 358 NLRB 1048, 1049 (2012), reaffd. 362 NLRB No. 34 (2015); and Homer D. Bronson, 349 NLRB at 515, and cases cited there.

According, based on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[90]

ORDER

The Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or disciplining employees because of their protected concerted or union activities and to discourage employees from engaging in such activities.

(b) Threatening employees that they would lose benefits if they supported a union.

(c) Soliciting employees' complaints and grievances and promising to remedy them if employees refrained from supporting a union.

(d) Promising or granting benefits to employees by committing that they would not be laid off to discourage support for a union.

(e) Granting wage increases to employees to discourage support for the union.

(f) Telling employees to report to management if union supporters solicited them to sign a union card.

(g) Threatening employees with unspecified reprisals if they support a union.

(h) Informing employees that it would be futile for them to support a union.

(i) Interrogating employees about whether they support a union.

(j) Surveilling employees' union activities.

(k) Creating the impression of surveilling employees' union activities.

(l) Taking union flyers away from employees.

(m) Promulgating discriminatory or overbroad rules, either orally or in writing, that restrict employees' right to engaged in protected union activities.

(n) Requesting employees to report to management if the discriminatory or overbroad rules are violated.

(o) Threatening employees with discharge or other unspecified reprisals, and to refer the matter to law enforcement for prosecution, if they violate the discriminatory or overbroad rules.

(p) Maintaining overbroad rules in the Associate Handbook that prohibit, restrict, or discourage employees from engaging

[88] See, e.g., *Kellogg Co.*, 362 NLRB No. 86, slip op. at 8 (2015). On February 1, 2016, the U.S. District Court in Arizona (Humetewa, J.) granted the General Counsel's request for a temporary injunction under Section 10(j) of the Act requiring the Company to offer Wallace reinstatement pending a final decision by the Board. *Overstreet v. Shamrock Foods Co*., CV-15-01785-PHX-DJH.

[89] The General Counsel also requests search-for-work expenses, i.e. that the Company be required to reimburse Wallace for all expenses he incurred searching for interim work. This remedy is denied as it would involve a change in Board law. See *Katch Kan USA LLC*, 362 NLRB No. 162, slip op. at 1 n. 2 (2015).

[90] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in protected union and other concerted activities.

(q) Offering a "Separation Agreement and Release and Waiver" to employees that includes provisions prohibiting employees from engaging in protected union and other concerted activities following termination of employment.

(r) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Thomas Wallace full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Wallace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Compensate Wallace for any adverse tax consequences of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of the Board's Order, remove from the Company's files any reference to the unlawful April 6, 2015 termination of Wallace, and within 3 days thereafter notify him in writing that this has been done and that the termination will not be used against him in any way.

(f) Within 14 days from the date of the Board's Order, remove from the Company's files any reference to the unlawful May 5, 2015 discipline of Mario Lerma, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(g) Within 14 days of the Board's Order, rescind, in writing, the discriminatory and overbroad rule it orally promulgated at the May 5 meeting with Lerma that prohibited union supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated."

(h) Within 14 days of the Board's Order, rescind, in writing, the discriminatory and overbroad rule set forth in the May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior."

(i) Within 14 days of the Board's Order, rescind, in writing, the "Separation Agreement and Release and Waiver" that prohibits employees from disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

(j) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Protecting the Company's Confidential Information" that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

(k) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Blogging" that: (1) discourages employees from publicly discussing on the internet "any work-related matters, whether confidential or not"; (2) requires employees to "protect" their coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information"; prohibits employees from using blogs to "malign" or "disparage" coworkers or managers; (4) prohibits or requires company approval for employees to use the company logo or trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites; (5) requires company permission to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products; and (6) discourages employees from linking to the Company's external website from personal blogs.

(l) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Reporting Violations" that solicits employees to report any of the above prohibited blogging activities to the Company.

(m) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "Guidelines to Appropriate Conduct" that prohibits "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

(n) Within 14 days of the Board's Order, rescind its overbroad handbook rule on "No Solicitation, No Distribution" that bans soliciting or distributing in customer or public areas at any time.

(o) Furnish all current employees with inserts for their current employee handbooks that (1) advise that the above unlawful rules have been rescinded, or (2) provide lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules.

(p) Within 14 days after service by the Region, post at its warehouse in Phoenix, Arizona copies of the attached notice marked "Appendix"[91] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on

[91] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2014.

(q) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the warehouse employees by the Respondent's President/CEO Kent McClelland or Operations Vice President Mark Engdahl, or, if the Company chooses, a Board agent in their presence, with translation available for Spanish-speaking employees.

(r) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 11, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, discipline or otherwise discriminate against any of you for supporting Bakery, Confectionary, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL–CIO–CLC, or any other union.

WE WILL NOT threaten you with loss of benefits if you support a union.

WE WILL NOT solicit your complaints and grievances and promise to remedy them if you refrain from supporting a union.

WE WILL NOT promise or grant benefits to discourage you from supporting a union.

WE WILL NOT grant wage increases to discourage you from supporting a union.

WE WILL NOT ask or tell you to report if union supporters solicit you to sign a union card.

WE WILL NOT threaten you with unspecified reprisals if you support a union.

WE WILL NOT inform you that it would be futile for you to support a union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT watch or monitor you in order to find out about your union activities, or create the impression that we are doing so.

WE WILL NOT take union flyers away from you.

WE WILL NOT impose discriminatory or overbroad rules, either orally or in writing, that restrict your right to engage in protected union activities, request that you report if such rules are violated, or threaten to discharge or take unspecified reprisals against you, or to refer the matter to law enforcement for prosecution, if you violate the rules.

WE WILL NOT maintain overbroad rules in the Associate Handbook that prohibit, restrict, or discourage you from engaging in protected union and other concerted activities.

WE WILL NOT offer you a "Separation Agreement and Release and Waiver" that prohibits you from engaging in protected union and other concerted activities following termination of your employment.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the Board's Order, offer Thomas Wallace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wallace whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Wallace for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating Wallace's backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the Board's Order, remove from our files any reference to the unlawful April 6, 2015 discharge of Wallace, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the Board's Order, remove from our files any reference to the unlawful May 5, 2015 discipline of Mario Lerma, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, within 14 days from the Board's Order, rescind the "Separation Agreement and Release and Waiver" we offered to Wallace that prohibits disclosing "confidential information," including any "personnel or corporate information," and making remarks or taking actions that are disparaging or detrimental to the Company, following termination of employment.

WE WILL, within 14 days from the Board's Order, rescind, in writing, the discriminatory and overbroad rule we orally promulgated at our May 5 meeting with Lerma that prohibited union

supporters from "heckling" or "insulting" employees or soliciting in a manner "where somebody could perceive it as intimidation" or "feel threatened or intimidated."

WE WILL, within 14 days from the Board's Order, rescind, in writing, the discriminatory and overbroad rule set forth in our May 8 letter to all employees that prohibited union supporters from engaging in "unlawful bullying" or "unlawfully coercive behavior."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Protecting the Company's Confidential Information" that designates as confidential any "information, knowledge, or data" concerning "associates," "Company manuals and policies," and "compensation schedules."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Blogging" that: (1) discourages you from publicly discussing on the internet "any work-related matters, whether confidential or not"; (2) requires you to "protect" your coworkers' "home addresses" and "other personal information," and the confidentiality of accessible company "financial information" and "nonpublic information"; prohibits you from using blogs to "malign" or "disparage" coworkers or managers; (4) prohibits or requires company approval for you to use the company logo or trademarks, or post copyrighted information in documents containing the company name, trademark, or logo, on any personal blogs or other online sites; (5) requires company permission for you to post on personal blogs photos of company events, coworkers or company representatives engaged in company business, or company products; and (6) discourages you from linking to the Company's external website from personal blogs.

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Reporting Violations" that solicits you to report any of the above prohibited blogging activities to the Company.

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "Guidelines to Appropriate Conduct" that prohibits you from engaging in "any act" that "prevents an associate's enjoyment of work," including "conduct that creates a disturbance in the workplace."

WE WILL, within 14 days from the Board's Order, rescind the overbroad handbook rule on "No Solicitation, No Distribution" that prohibits you from soliciting or distributing in customer or public areas at any time.

WE WILL furnish you with inserts for your current associate handbooks that (1) advise that the above unlawful rules have been rescinded, or (2) provide lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to you revised associate handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules.

SHAMROCK FOOD CO.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-150157 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

SHAMROCK FOODS COMPANY

and

Cases 28-CA-167910
28-CA-169970

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

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, **IT IS ORDERED** that Case 28-CA-167910, which is based on a charge filed by the Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union (the Union) against Shamrock Foods Company (Respondent), in which a Complaint and Notice of Hearing issued on March 30, 2016, is consolidated with Case 28-CA-169970, which is based on a charge filed by the Union against Respondent.

This Order Consolidating Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the act as described below.

1. (a) The charge in Case 28-CA-167910 was filed by the Union on January 15, 2016, and a copy was served on Respondent by U.S. mail on January 19, 2016.

(b) The first amended charge in Case 28-CA-167910 was filed by the Union on March 29, 2016, and a copy was served on Respondent by U.S. mail on that same date.

(c) The charge in Case 28-CA-169970 was filed by the Union on February 18, 2016, and a copy was served on Respondent by U.S. mail on February 19, 2016.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in Phoenix, Arizona (Respondent's facility), and has been engaged in the wholesale distribution of food products.

(b) During the 12-month period ending February 18, 2016, Respondent in conducting its operations described above in paragraph 2(a) purchased and received at Respondent's facility goods valued in excess of $50,000 directly from points outside the State of Arizona.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondents within the meaning of Section 2(11) of the Act and agents of Respondents within the meaning of Section 2(13) of the Act:

Tim O'Meara	-	Operations Manager
Ivan Vaivao	-	Warehouse Operations Manager
Brian Nicklin	-	Warehouse Manager
Richard Gomez	-	Warehouse Supervisor
Johnny Banda	-	Warehouse Supervisor
Dave Garcia	-	Warehouse Supervisor

Tom Gomez	-	Warehouse Supervisor
Leland Scott	-	Warehouse Supervisor
Bob Washman	-	Floor Captain
Daniel Santamaria	-	Human Resources Business Partner
Ignacio (last name unknown)	-	Warehouse Supervisor

5. (a) About August 16, 2015, Respondent, by Leland Scott, at Respondent's distribution facility, by distributing orange, reflective shirts with the words, "We are Shamrock" printed on them:

(1) interrogated its employees about their union membership, activities, and sympathies; and

(2) created an impression among its employees that their union activities were under surveillance by Respondent.

(b) On a date in or around December 2015, a more precise date being unknown to the General Counsel, Respondent, by Ivan Vaivao, at Respondent's distribution facility, by telling employees that they were the topic of supervisors' conversations:

(1) created an impression among its employees that their union activities were under surveillance by Respondent; and

(2) threatened its employees with unspecified reprisals because they engaged in union activities.

(c) On a date in or around early February 2016, a more precise date being unknown to the General Counsel, Respondent, by Arthur Manning, at Respondent's distribution facility, by telling employees that they were topic of supervisors' conversations:

(1) created an impression among its employees that their union activities were under surveillance by Respondent; and

(2) threatened its employees with unspecified reprisals because they engaged in union activity.

6. (a) On a date in or around early January 2016, a more precise date being unknown to the General Counsel, Respondent verbally disciplined its employee John Tolliver (Tolliver).

(b) About the first week of January 2016, a more precise date being unknown to the General Counsel, Respondent issued a written discipline to employee Tolliver.

(c) About the first week of January 2016, a more precise date being unknown to the General Counsel, Respondent issued another written discipline to employee Tolliver.

(d) About January 24, 2016, Respondent began subjecting its employees, including Steve Phipps (Phipps), to stricter enforcement a previously unenforced break schedule.

(e) About January 26, 2016, Respondent subjected its employee Phipps to closer supervision.

(f) About February 1, 2016, Respondent issued a verbal warning to its employee Michael Meraz.

(g) About February 3, 2016, Respondent verbally disciplined its employee Tolliver.

(h) About February 11, 2016, Respondent subjected its employee Phipps to closer supervision.

(i) About February 11, 2016, Respondent verbally disciplined its employee Phipps.

(j) Respondent engaged in the conduct described above in paragraphs 6(a) through (i) because the named employees of Respondent formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

(k) Respondent engaged in the conduct described above in paragraphs 6(e), (h), and (i) as a result of the conduct described above in paragraph 6(d).

(l) Respondent engaged in the conduct described above in paragraphs 6(d) through (f), (h), and (i) because the named employees of Respondent gave testimony to the Board in the form of affidavits and/or testified at a Board hearing in Case 28-CA-150157.

7. By the conduct described above in paragraph 5, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

8. By the conduct described in above in paragraph 6, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

9. By the conduct described above in paragraphs 6(d) through (f), (h), and (i), Respondent has been discriminating against employees for filing charges or giving testimony under the Act in violation of Section 8(a)(1) and (4) of the Act

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above in paragraphs 5 through 7, the General Counsel seeks an Order requiring that at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent designate a representative to read the notice to employees in English with a Sign Language interpreter on work time in the presence of a Board agent.

Alternatively, the General Counsel seeks an order requiring that Respondent promptly have a Board agent read the notice to employees during work time in the presence of Respondent's supervisors and/or agents identified above in paragraph 4.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before May 9, 2016, or postmarked on or before May 7, 2016**. Respondent should file an original copy of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website

informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on May 24, 2016, at 9:00 a.m. (local time), at the Hearing Room of the National Labor Relations Board, 2600 North Central Avenue, Suite 1400, Phoenix, Arizona, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and

present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Phoenix, Arizona, this 25th day of April 2016.

/s/ Cornele A. Overstreet
Cornele A. Overstreet, Regional Director

Attachments

Form NLRB-4668
(6-2014)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Cases 28-CA-167910
28-CA-169970

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
(2) Grounds must be set forth in ***detail***;
(3) Alternative dates for any rescheduled hearing must be given;
(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Shamrock Foods, Inc.
3900 East Camelback Road #300
Phoenix, AZ 85018

Todd Dawson, Attorney at Law
1900 East 9th Street, Suite 3200
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Form NLRB-4668
(6-2014)

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- Special Needs: If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- Pre-hearing Conference: One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- Witnesses and Evidence: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 28

In the Matter of:

Shamrock Foods Company Case Nos. 28-CA-167910
28-CA-169970

and

Bakery, Confectionery,
Tobacco Workers' and Grain
Millers International Union,
Local Union No. 232,
AFL-CIO-CLC

_____

_____

Place: Phoenix, Arizona

Dates: May 24, 2016

Pages: 1 through 246

Volume: 1

OFFICIAL REPORTERS

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 28

In the Matter of: SHAMROCK FOODS COMPANY and BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC	Case Nos. 28-CA-167910 28-CA-169970

The above-entitled matter came on for hearing, pursuant to notice, before **AMITA BAMEAN TRACY,** Administrative Law Judge, at the National Labor Relations Board, Region 28, 2600 N. Central Avenue, Suite 1400, Phoenix, Arizona 85004, on **Tuesday, May 24, 2016, at 11:15 a.m.**

A P P E A R A N C E S

On behalf of the General Counsel:

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NATIONAL LABOR RELATIONS BOARD - REGION 28
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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Daniel Santamaria	19				
Ivan Vaivao	94	193			217

E X H I B I T S

EXHIBIT	IDENTIFIED	IN EVIDENCE
General Counsel:		
GC-1(a) through GC-1(s)	7	7
GC-2 and GC-3	36	36
GC-4	37	37
GC-5	86	86
GC-6	74	74
GC-7	139	139
GC-8	165	165
GC-9	168	169
Respondent:		
R-1	197	198
R-2	198	198
R-3 and R-4	200	201
R-5	205	206
R-6	208	208
R-7(a) and R-7(b)	217	218
R-8	221	221
R-9	228	228
R-10	229	229
R-11(a) and R-11(b)	239	240
R-12	239	240
R-13(a) through R-13(e)	242	243

1 **P R O C E E D I N G S**

2 JUDGE TRACY: All right, so the hearing will be in order.
3 This is a formal trial before the National Labor Relations
4 Board and Shamrock Foods Company and Bakery, Confectionary,
5 Tobacco Workers', and Grain Millers International Union, Local
6 Union Number 232, AFL-CIO-CLC, Case 28-CA-167910 and
7 28-CA-169970. The administrative law judge presiding is Amita
8 Bamean Tracy. I'm assigned to the San Francisco Office of the
9 Division of Judges. Any communication should be addressed to
10 that office and any requests for extensions of time should be
11 addressed to the associate chief judge in San Francisco in that
12 office. So will counsel and other representatives of the
13 parties please state their appearance for the record, so for
14 the General Counsel.
15 MS. DEMIROK: Counsel for the General Counsel, Sara
16 Demirok.
17 JUDGE TRACY: And for the Charging Party?
18 MS. INESTA: Your Honor, Nancy Inesta.
19 JUDGE TRACY: So you're the --
20 MS. INESTA: I'm sorry.
21 JUDGE TRACY: -- the Respondent.
22 MS. INESTA: That's right. Sorry.
23 JUDGE TRACY: That's all right. So for the Charging
24 Party?
25 MS. DEMIROK: For the Charging Party there has been a

1 notice of appearance that was filed and that is from --
2 JUDGE TRACY: David Rosenfeld?
3 MS. DEMIROK: -- David Rosenfeld and I believe it was a
4 Ms. Katrina Shaw from his office.
5 JUDGE TRACY: Okay. All right, so that will be part of
6 the record.
7 MS. DEMIROK: Okay.
8 JUDGE TRACY: And so then for the Respondent?
9 MS. INESTA: For the Respondent, Your Honor, for Shamrock
10 Foods, Nancy Inesta and Todd Dawson.
11 MS. INESTA: All right. So if settlement discussions are
12 desired at any time during the trial, please let me know. I
13 know that we talked about it before we went on the record and
14 at this time, you guys don't want any time to discuss
15 settlement; is that correct?
16 MS. DEMIROK: That's correct, Your Honor.
17 MS. INESTA: That's correct, Your Honor.
18 JUDGE TRACY: All right. So -- but if at any point during
19 this hearing that you all want some time to discuss settlement,
20 please let me know. I will always make that time available and
21 sometimes hearing some of the evidence parties positions can
22 change during the hearing.
23 All right. So first, Ms. Demirok, if you'll go ahead and
24 introduce the pleadings and the other formal papers.
25 MS. DEMIROK: Yes, Your Honor. So at this time, Your

1 Honor, I'd like to offer the formal papers and let the record
2 reflect that I'm showing the packet of paper to Respondent's
3 counsel at this time. And I offer into evidence the formal
4 papers that have been marked for identification as General
5 Counsel's Exhibit numbers 1(a) through 1(s). And this exhibit
6 has already been shown to all the parties and a copy of the
7 index of the -- a copy of the index of the formal papers has
8 been provided to the parties as well.
9 JUDGE TRACY: Okay. And any objections to General
10 Counsel's Exhibits 1(a) through 1(s)?
11 MS. INESTA: No objections, Your Honor.
12 MS. DEMIROK: Did you get the -- I'm sorry, you know how
13 this goes.
14 JUDGE TRACY: I mean, if you have an extra set, I'll take
15 it.
16 MS. DEMIROK: Yes.
17 **(General Counsel Exhibit Number 1(a) through 1(s) Received into**
18 **Evidence)**
19 JUDGE TRACY: Great. Okay. And then are there any other
20 motions at this time?
21 MS. DEMIROK: At this time, Your Honor, we would like to
22 move to amend the consolidated complaint and in our notice of
23 intent to amend, we put in there that we're going to add Mr.
24 Arthur Manning to the named individuals in paragraph 4 of the
25 consolidated complaint and those are the individuals who are

1 alleged to be supervisors under section 211 of the Act. And
2 agents under Section 213 of the Act. We would also like to
3 amend, I believe he is listed as Tom Gomez in paragraph 4 of
4 the consolidated complaint and that name should read Richard
5 Gomez.
6 JUDGE TRACY: And what's his position?
7 MS. DEMIROK: His position is an inbound supervisor and
8 the position for Mr. Arthur Manning, which I just mentioned as
9 a floor captain.
10 JUDGE TRACY: Okay.
11 MS. DEMIROK: And then the final amendment that we would
12 move for is there is a named individual by Ignacio with the
13 last name unknown and we would like to put his name in there as
14 Ignacio Varges.
15 JUDGE TRACY: And what's his position?
16 MS. DEMIROK: I believe he is also an inbound supervisor.
17 JUDGE TRACY: Okay. And Ms. Inesta, any objections?
18 MS. INESTA: No objections to the amendment, Your Honor,
19 we do deny supervisory status with respect to Arthur Manning,
20 but we are willing to stipulate and we wanted to go ahead and
21 get it on the record to supervisory status for Daniel
22 Santamaria.
23 JUDGE TRACY: And then what is his position?
24 MS. INESTA: He is a human resources partner.
25 JUDGE TRACY: Okay. All right, so and then any other

1 supervisory statuses that you all want to stipulate to at this
2 point?
3 MS. DEMIROK: I wanted to seek clarification about Richard
4 Gomez and Ignacio Varges. It's my understanding that they will
5 stipulate, but if we could just clarify that for the record?
6 MS. INESTA: Yes. And I think that -- yes as to Ignacio
7 Varges, he is a supervisor and we're willing to stipulate to
8 supervisory status. Richard Gomez is also a supervisor and
9 we're willing to stipulate.
10 JUDGE TRACY: So at this point, just to be clear for this
11 record, obviously there's other people mentioned here, but
12 supervisory status for Arthur Manning is the only one that's at
13 issue at this hearing; is that correct?
14 MS. DEMIROK: I believe there is also a Bob Washman.
15 JUDGE TRACY: And what's his position?
16 MS. DEMIROK: A captain, maybe a floor or a dock captain.
17 JUDGE TRACY: A floor or a who?
18 MS. DEMIROK: Floor or a dock captain. I think they go by
19 either.
20 JUDGE TRACY: Okay. Okay. All right. And then are there
21 any other motions to deal with at this point?
22 MS. DEMIROK: Counsel for the General Counsel would move
23 for an order of sequestration of the witnesses.
24 MS. INESTA: No objection, Your Honor.
25 JUDGE TRACY: Okay. All right, so who are the necessary

1 parties to stay in the room here. Is there anyone?
2 MS. DEMIROK: Counsel for the General Counsel would not
3 like to name anyone.
4 JUDGE TRACY: Okay.
5 MS. INESTA: Your Honor, we do have a client who sometimes
6 attends the hearings. We do not think she's ever going
7 to -- she's a potential witness, so Karen Williams, to the
8 extent that she does appear at the hearing is really just the
9 client representative.
10 JUDGE TRACY: Okay. So if she does appear, just let us
11 all know who she is, okay. And then for the gentleman in the
12 back, he's a witness.
13 MS. INESTA: He's a witness. He's the first witness, Your
14 Honor.
15 JUDGE TRACY: Okay. All right. So the sequestration
16 order is being issued in this proceeding. That means that all
17 the person who expect to be called as witnesses in this
18 proceeding, other than the persons designated as essential to
19 the presentation of party's case, will be required to remain
20 outside of the courtroom whenever testimony or other
21 proceedings are taking place.
22 And a limited exception applies to witnesses who are
23 alleged discriminatees in this matter. They may be present in
24 the courtroom at all times, other than when witnesses for the
25 General Counsel or Charging Party are giving testimony about

1 the same events about which the alleged discriminatees expect
2 to testify.
3 The sequestration order also prohibits all witnesses from
4 discussing with any other witness or any possible witness the
5 testimony he or she has already given or will give. Likewise,
6 counsel for a party may not disclose to any witness the
7 testimony of any other witness.
8 Counsel may, however, inform his or her own witness of the
9 content of testimony given by any opposing parties' witness to
10 prepare to rebut that witness' testimony. It's the
11 responsibility of counsel to see that their witnesses comply
12 with the sequestration rule.
13 Now, also one of the things that we spoke about before we
14 went on the record -- so I guess at this point, we'll ask for
15 any of the witnesses to step outside of the room. All right.
16 So before we do the opening statements, we had also talked
17 about some other motions that had been filed prior to the
18 hearing beginning. Do you want to go ahead and talk about
19 those motions?
20 MS. INESTA: We would, Your Honor. We'd like to discuss,
21 in particular, the motion to dismiss on the record.
22 JUDGE TRACY: Okay. And obviously as part of the motion
23 to dismiss, I have the General Counsel's opposition to that
24 motion to dismiss?
25 MS. DEMIROK: Yes, Your Honor.

1 JUDGE TRACY: So and that's part of these formal papers.
2 So what I'll say about the motion to dismiss, which is what we
3 talked about before we went on the record is at this point, I
4 am not denying the motion, but I'm also not agreeing to the
5 motion because the motion really deals with the issue of one
6 allegation, a complaint, with two subparts, which are alleged
7 to have already been litigated in a prior proceeding in this
8 case where you're still waiting for the ALJ's decision in that
9 matter and obviously don't even have the board's decision on
10 that. So that's why, at this point, I'm going to reserve my
11 ruling on the motion to dismiss in the decision.
12 That being said, though, I'm expecting the General Counsel
13 to really make sure that the testimony in this case and the
14 evidence that comes in is really focused on what is alleged in
15 the current complaint that I have before me. And not to as
16 much as possible, I understand that there is background
17 evidence that needs to be presented for me to have context, but
18 that the issue for me to decide is the focus of the evidence of
19 the testimony that comes in. And so that's what I expect there
20 and hopefully then that will resolve some of the issues
21 surrounding that motion to dismiss.
22 And at some point, Ms. Inesta, after hearing that at the
23 end of the hearing, you may wish to or perhaps in your closing
24 post hearing briefs, you can withdraw the motion to dismiss if
25 it turns out that what you hear is different and you just agree

1 that, yes, let the judge decide that issue without the extra
2 step of the motion to dismiss, but that's up to you. Okay.
3 MS. INESTA: Thank you, Your Honor. And just to clarify,
4 we do want a standing objection on the record as to any
5 evidence related to the T-shirts. We believe even as to this
6 particular incident, that's been alleged in connection with
7 this action. It really was covered by the allegations which
8 were very broad in the prior complaint and already litigated.
9 So if we could have a standing objection on the record.
10 JUDGE TRACY: Okay.
11 MS. INESTA: So just for continuity and not having me
12 interrupt every time.
13 JUDGE TRACY: All right, but if -- and so I'm not going to
14 rule on that, because again I don't know, but particularly
15 though, I'd expect that if there is things that you are
16 noticing that you feel definitely were covered in the last
17 hearing, which I wasn't the judge, then go ahead and object to
18 that and then that way we can talk about it at that point in
19 time to explain kind of almost as an offer of proof about what
20 that point of that goes to the issue that's before me. Okay?
21 MS. INESTA: Perfect. Will do. Thank you.
22 JUDGE TRACY: And then any other motions that we need to
23 deal with?
24 MS. INESTA: Should we also discuss that with respect to
25 the T-shirts there is certain evidence that we're going to seek

1 judicial notice of jointly in terms of at least one particular
2 witness just to cut down on having to call people?
3 JUDGE TRACY: Yeah, and so I was even in this little
4 break, but you guys aren't ready to present that yet?
5 MS. INESTA: No, not at this time.
6 JUDGE TRACY: So whenever you're ready to do that, go
7 ahead at any point during this hearing, you don't have to wait,
8 but once you have it together and you're ready to do that,
9 let's go ahead and do that.
10 But I just want to make sure, though, that this -- that
11 the testimony that's being contemplated is being introduced as
12 a joint exhibit for judicial notices, really it's just as a
13 background material. It's not going to be actual support or
14 defense in terms of the allegation.
15 Because my only concern is I just want to make sure that
16 there's no some additional credibility finding that I need to
17 make of that witness that you all are going to stipulate to
18 their testimony. If they only just said, yes I did receive a
19 T-shirt, so that's my only kind of cautionary thing about that
20 the more I was thinking about it is if it's just to kind of
21 explain the context of what was happening, but doesn't go to
22 the actual incident here that you're alleging as the
23 violations, then that's fine.
24 But if there is something where I need to accept that
25 person's testimony or not credit that witness, then that may be

1 something where I do need to hear that testimony. So you all
2 can figure out what you want to do, but that's -- because I
3 can't take -- until really technically the Board, it kind of
4 goes through the Board, take somebody else's testimony that has
5 not been -- gone through to the Board.
6 MS. DEMIROK: Yes, and I think in that regard, I could say
7 our position would be that we would need to call the one
8 witness in particular because I think his testimony really goes
9 toward the objective standard and what he is going to testify
10 about is going to tend to show what other reasonable employees
11 in the warehouse may have thought about the shirts, including
12 the individual who was given one.
13 JUDGE TRACY: Right, but also keep in mind that the issue
14 here, as far as I understand it, is how this one employee with
15 that objective standard in mind, when that person received the
16 T-shirt and not to the broader issue of the T-shirts being
17 handed out to everybody and what other people felt, because
18 it's not relevant to what this person thought.
19 MS. DEMIROK: And, Your Honor, that's not what the
20 testimony is.
21 JUDGE TRACY: Okay. Okay. So again, I'm speaking in a
22 vacuum because I don't know, but if it gets to the point where
23 you all agree to that, I just want to make sure that there
24 isn't something where I need to be addressing this person's
25 credibility. If you all agree what that person testified to is

1 just factual, you know, I received it on this day, so and so
2 gave it to me, done, done. I'm just kind of imagining what
3 they testified to, then fine. But if it's a little bit more
4 into that -- because again, it's not with the objective
5 standard, what they thought, they felt, whatever, it's none of
6 that. So anyway, I'll leave that to you all to discuss at some
7 point to figure out what you want to do.
8 MS. DEMIROK: Yes, Your Honor.
9 JUDGE TRACY: Okay. Anything else before we do the
10 opening statements?
11 MS. DEMIROK: Not from the General Counsel.
12 JUDGE TRACY: Okay.
13 MS. INESTA: Your Honor, were you also going to -- is
14 there one more motion that we were going to discuss, just get
15 it on the record?
16 JUDGE TRACY: There was the motion for the bill of
17 particulars.
18 MS. INESTA: That's right. I believe we've resolved that
19 issue for now, but I will check with my co-counsel make sure
20 just to reserve the right to see if there's anything still
21 outstanding.
22 JUDGE TRACY: Okay. So if you would do that, because then
23 at that point, if on the record, you could say well we're going
24 to withdraw our motion, then --
25 MS. INESTA: Exactly.

1 JUDGE TRACY: -- one less thing I have to deal with in the
2 decision. So just keep that in mind. And anything else?
3 MS. DEMIROK: No, Your Honor.
4 JUDGE TRACY: Okay. So let's go ahead and have the
5 General Counsel's opening statement.
6 MS. DEMIROK: Your Honor, this isn't the first time that
7 we have been here. In fact, we were here just two months ago
8 and six months prior to that. And there are a lot of
9 similarities. We've got the same parties, we've got the same
10 company. We've got the same organizing campaign and we'll even
11 have some of the same employees. Employees who are struggling
12 to exercise their Section 7 rights, their right to organize.
13 Now, not all things are the same. The company's tactics
14 in combating the union campaign, those have changed and that
15 makes sense and Respondent's not going to make the same blatant
16 mistakes that it has in the past. Rather, as you'll hear, Your
17 Honor, the company has employed much subtler tactics, but even
18 this conduct violates the act, nonetheless.
19 Your Honor, you'll hear from both Respondent's supervisors
20 and employees how the company's policies are being used to
21 interfere with employees' free choice in the warehouse. And
22 you'll hear from employees that who once were able to shift
23 their breaks around to pass out union flyers, suddenly they're
24 not able to. You'll hear how employees, thought to be the
25 ringleaders, how they're suddenly pegged as poor performers.

1 And you will also hear how employees who have not been afraid
2 to cooperate with the NLRB in the recent past, how they're
3 being treated differently in the warehouse.
4 Yes, you'll hear from those three employees, Steven
5 Phipps, John Tolliver, and Michael Meraz. And Your Honor,
6 you'll also likely hear from Respondent that it's just simply
7 enforcing its various policies. It's got a warehouse to run.
8 But that position, I'll show you, Your Honor, it's not going to
9 add up in the end.
10 While subtle in nature, the coincidental timing, the
11 evidence of disparate treatment will show that the company's
12 conduct is just steeped in pretext and running afoul of
13 Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act.
14 And when all is said and done, Your Honor, I ask that you
15 find the violations as alleged in the complaint, that you
16 recommend a notice to employees be posted and read allowed in
17 public and that the discretionary disciplinary records of these
18 employees be expunged. Thank you.
19 JUDGE TRACY: And Ms. Inesta, do you wish to do your
20 opening statement now your wait for your case in chief?
21 MS. INESTA: We would like to wait for our case in chief,
22 Your Honor.
23 JUDGE TRACY: Okay.
24 MS. INESTA: Thank you.
25 JUDGE TRACY: All right. So Ms. Demirok, your first

1 witness.

2 MS. DEMIROK: Yes, the first witness I'd like to call is

3 Mr. Daniel Santamaria.

4 JUDGE TRACY: Go ahead and raise your right hand.

5 Whereupon,

6 **DANIEL SANTAMARIA**

7 having been duly sworn, was called as a witness herein and was

8 examined and testified as follows:

9 JUDGE TRACY: Thank you. Go ahead and have a seat and

10 state your name and job title for the record.

11 THE WITNESS: My name is Daniel Santamaria, human resource

12 business partner for Shamrock foods.

13 JUDGE TRACY: All right. And Ms. Demirok, go ahead,

14 please.

15 MS. DEMIROK: Okay. Thank you, Your Honor.

16 **DIRECT EXAMINATION**

17 Q BY MS. DEMIROK: Mr. Santamaria, how are you?

18 A I'm good. Yourself?

19 Q Good. So as I'm sure you know, I am an attorney for the

20 federal government. I'm going to be asking you some questions

21 today. Have you reviewed any documents in preparation for your

22 testimony?

23 MS. INESTA: Your Honor, I'm going to object on grounds

24 that any reviewing of documents would have been at the

25 direction or to the extent that it was at the direction of

1 counsel is protected by the attorney-client privilege and also
2 by the work product doctrine in that whatever we selected to
3 show him really shows really would suggest what we, as
4 attorneys felt was an important document or not an important
5 document. We of course have no objection to Mr. Santamaria
6 testifying as to anything he felt he needed to review outside
7 of any meeting that he had with us in preparation for his
8 testimony.
9 MS. DEMIROK: Well, my question was just if he had
10 reviewed any documents. I'm not asking what documents and I'm
11 certainly not asking about what the attorneys may have told
12 him.
13 JUDGE TRACY: So I'm going to overrule the objection to
14 the extent that the question was limited, but certainly though,
15 if there is any advice or discussions with any of the attorneys
16 that are involved, your own attorneys here for the company,
17 that you wait for an objection from Ms. Inesta, okay?
18 THE WITNESS: Okay.
19 JUDGE TRACY: So go ahead and answer the question from the
20 General Counsel.
21 THE WITNESS: Can you repeat the question again, please?
22 Q BY MS. DEMIROK: Sure. So have you reviewed any documents
23 in preparation for your testimony today?
24 A I talked to my counsel, but that's it.
25 Q Okay. And other than counsel, have you spoken with anyone

1 else about your testimony?
2 A No.
3 Q And are you currently employed?
4 A Yes, I am.
5 Q And where is it that you work?
6 A I work at Shamrock Foods Company.
7 Q And what position do you work in?
8 A As human resource business partner.
9 Q And how long have been in that position?
10 A In this current position I've been here in June it's going
11 to be about a year.
12 Q Okay. So you started in that position in June of 2015?
13 A Yes.
14 Q Okay. And what were you doing before that?
15 A Before that I worked in the staffing department.
16 Q Okay. And at any point in time, did you work in the
17 warehouse as well?
18 A Yes, I did. I started in the warehouse back in January
19 2nd of 1996.
20 Q Okay. And for your current position, could you briefly
21 describe for us your duties?
22 A Current position, yes I do hiring, make offers, I also
23 review CPDRs, write-ups. I am involved in projects, involved
24 in terminations as well. You know, a lot of meetings. You're
25 in HR, so we go to a lot of meetings. We're involved in a lot

1 of meetings as well.

2 MS. DEMIROK: Okay. So, Your Honor, at this time I'm

3 requesting to continue my questioning, where appropriate, under

4 Rule 611(c) of the Federal Rules of Evidence.

5 JUDGE TRACY: Okay. Go ahead, please.

6 MS. DEMIROK: Okay.

7 Q BY MS. DEMIROK: Mr. Santamaria, can you explain why your

8 name, the title has business partner in it?

9 A That's the way it's -- that's the way the title, it is.

10 Q Okay.

11 A Under the HR, so I have an HR manager and then I'm under

12 the HR manager, almost like an HR generalist what you call,

13 but there it's called a human resource business partner.

14 Q Okay. And if I remember right, you report to Heather

15 Vines-Bright; is that right?

16 A That is correct.

17 Q Okay. And she's the HR manager?

18 A There, yes.

19 Q Okay. And in the -- let's talk a little bit about the

20 operation. So there's a Phoenix warehouse, right, and it's

21 about -- it's on 24th Street; is that right?

22 A No, it's not on 24th Street.

23 Q No? Where is it the warehouse?

24 A It's on -- the exact address is 2940 North 29th Avenue.

25 Q 29th Avenue.

A I guess it's 2540 North 29th Avenue.
Q Okay. And that's a pretty big building, right?
A It is.
Q Okay. And in that building there's several different parts, right?
A Yes.
Q Okay. So you've got one part has the -- some administrative offices; is that right?
A That's towards the front of the building, yes, that's where your -- most of your administrative people sit or have offices there.
Q And is that where some of the people who work in HR, is that where some of the people in HR work?
A My manager, Heather's office is in that location. We do have business partners that are at the locations where they're assigned to.
Q Okay, but your office is -- well it's within the warehouse, right?
A Right it's within the big facility we have, right.
Q Okay. And so the warehouse, you -- Shamrock Foods Company is engaged in the business of like shipping out food products; is that right?
A Correct.
Q A lot of different kinds of food products?
A Yes.

1 Q Okay. So there's like a dairy section; is that right?
2 A That's a different location
3 Q Well, like dairy products --
4 A Oh, yes.
5 Q -- in the warehouse, right?
6 A Uh-huh.
7 Q I think there's even a meat plant in there; is that right?
8 A That's on the other side of the facility as well.
9 Q Okay. So it's in the same building, but a separate part?
10 A Uh-huh.
11 Q Okay.
12 JUDGE TRACY: Can you say yes or no please?
13 THE WITNESS: Oh, sorry. Yes.
14 Q BY MS. DEMIROK: And in your position as an HR partner,
15 are there specific employees that you oversee or is it all of
16 Shamrocks' operations?
17 A I see all of the warehouse operations and the
18 transportation department and the fleet department as well.
19 Q Okay. Okay. And do you know about an ongoing union
20 organizing campaign, right?
21 MS. INESTA: Objection, Your Honor. Lacks foundation,
22 vague and ambiguous.
23 JUDGE TRACY: Well, I'm going to overrule the objection.
24 Go ahead and answer the question.
25 THE WITNESS: Can you repeat the question?

1 Q BY MS. DEMIROK: Sure. So you know about an ongoing union
2 organizing campaign at the warehouse, don't you?
3 A I do.
4 Q Okay. What do you know about that?
5 A I mean, just know that there is some people that want to
6 organize to bring a union.
7 Q Okay. And you've been made aware that charges have been
8 filed against the company with the NLRB in the past; is that
9 right?
10 A Yes.
11 Q Maybe not all of them, but you do know of some of them,
12 right?
13 A Yes.
14 Q Okay. Or do you know of all of them?
15 A I do not know of all of them.
16 Q Okay. And you also know that there's an injunction that's
17 been ordered against the company; is that right?
18 A I'm not too familiar with the legal terms and, you know,
19 so --
20 Q Okay. You are aware that the company had a posted notice
21 at the warehouse, right?
22 A Posted notice?
23 Q Uh-huh.
24 A Yes.
25 Q Okay. Have you ever seen that notice?

1 A I've seen the notice, yes.
2 Q Okay. Where did you see it then?
3 A It's posted by the breakrooms. That's where they're
4 posted.
5 Q Okay. Did you ever read it?
6 A Not thoroughly. I mean I just kind of glanced at it, you
7 know. But that's what I did.
8 Q Okay. How were you first made aware of that?
9 A I was told that we were supposed to post that, that posty
10 (sic) note.
11 Q So that was before it was posted?
12 A Yeah, before it was posted, right. --
13 Q Okay. And before that, you knew that the NLRB was seeking
14 -- well, did you know that the NLRB was seeking an injunction
15 prior to that?
16 A I wasn't aware of it.
17 Q Do you know what an injunction is?
18 A Like I said, the terms, I mean, not really, no.
19 Q So no one's ever explained to you what that posting is at
20 the warehouse?
21 MS. INESTA: Objection to the extent it violates the
22 attorney-client privilege.
23 JUDGE TRACY: So I'll sustain the objection.
24 Mr. Santamaria, if there's anything about your response if
25 it was advice given to you by an attorney, your attorney in

1 particular here -- and I say "your" meaning the Respondent, the
2 company -- then you don't have to answer that or you can just
3 say that, you know, I was told by counsel or that was, you
4 know, just leave that vague. And that goes for all of your
5 testimony today.
6 But we don't kind of know what his answer is, so. I have
7 to give you sort of that qualifier for your testimony.
8 So you might want to ask the question again.
9 MS. DEMIROK: Yeah.
10 Q BY MS. DEMIROK: So you testified that you didn't know
11 what an injunction was. And so the next question was so it was
12 never explained to you what an injunction was -- or, I'm sorry.
13 It was never explained to you what that posting meant?
14 A I just know that, you know, there is activity going on,
15 you know, and, you know, that there's been files against us
16 and, you know, that was the next step to do is that we had to
17 post that posting there. You know, I got other stuff that I do
18 have to do in my job, you know. And this is kind of, I didn't
19 pay too much, or not say interest but, you know it was just
20 okay. It was given to me as a, you know, to-do, so I mean it
21 was one of those stuff that I needed to do and I posted it.
22 Q You say that you posted it?
23 A Yes, I was one of the person that posted the forms that
24 they told me to post. Right.
25 Q Okay. And who told you to post it?

1 A I was advised by counsel.
2 Q Do you talk with any supervisors at the warehouse?
3 A Do I talk to the supervisors? Yeah, I mean, I see them
4 all the time.
5 Q Have you had any conversations about that posting?
6 A No.
7 Q Now, you mentioned -- well, I think you might have
8 mentioned this. But you're involved with terminations at the
9 warehouse sometimes?
10 A Correct.
11 Q Okay. And you review termination reports that come to
12 you, right?
13 A I review it, yeah.
14 Q Okay. And do you ever review any discipline?
15 A Disciplines? Yeah, I mean, they come to me so I can
16 review them.
17 Q Okay. Do you review every discipline that gets issued in
18 the warehouse?
19 A After they're signed by the associate, yes. The associate
20 and managers, yes.
21 Q Are you ever consulted with prior to the issuance of
22 discipline?
23 A Depending on what step it is.
24 Q Okay. At what step do you have to get involved before
25 it's issued?

1 A I normally get involved in the suspension levels or
2 termination levels.
3 Q Okay. And you mentioned steps. And that's because the
4 company, it has a progressive discipline policy; is that right?
5 A Correct.
6 Q Okay. And you're familiar with that policy, right?
7 A Yeah, yes.
8 MS. DEMIROK: Your Honor, may I approach?
9 JUDGE TRACY: Yes.
10 MS. DEMIROK: Your Honor, I'm sorry. Can I have a moment
11 off the record?
12 JUDGE TRACY: Okay. Let's go off the record.
13 (Off the record at 11:50 a.m.)
14 JUDGE TRACY: Okay. We're on the record. Go ahead.
15 MS. DEMIROK: Okay. Thanks.
16 Q BY MS. DEMIROK: So I was asking you about the progressive
17 discipline policy. Is that -- how long has that policy been in
18 place, do you know?
19 A The discipline? I mean I've been there for 20 years and
20 I've seen maybe four, so I mean it's been there, that I know
21 of, since, you know, since I've been there at the company.
22 Q Okay. And do you, has it changed at all since you started
23 in your current position in June 2015?
24 A Are you talking about steps or?
25 Q Yeah, how the progressive discipline policy operates.

A No, there's -- not that I'm aware of any changes, no.
Q Okay. And there's always been the same number of steps?
A Well, you have different violations that there is. I know there's been a change in the attendance one, the attendance. There was a change there a couple years ago on that policy for attendance, on steps.
Q Okay.
A But other than that, no.
Q And you started --
A That's the only one.
Q I'm sorry. You started to mention how it depends on what type of violation. Let's talk about that a little bit. So to move up a level in discipline, the conduct has to be similar to prior misconduct; is that right?
A Well, it depends on what it is. I mean you have your attendance violations, your punctuality, your tardy violations, stuff like that. So I mean it depends on, you know, when you get into more severe stuff, then -- yeah, you know, then that's when you kind of look at it to see what it -- where -- you know, what type -- what it is and then that's when you would assign the violation. But for the most part, I mean, it's pretty simple. Your attendance -- you know, all of them are like the same. You know, your procedure ones are the same. They start with verbals and, you know, they're on a step-by-step process.

1 Q But let's say an employee gets written up for like a
2 mispick. That same employee wouldn't move up the next step in
3 the disciplinary scale unless he already had a mispick?
4 A Well, there's rates that -- the error rates. Right. So
5 if you pass that error rate, then it triggers a violation.
6 Right, a, you know, verbal. Right. And then like in that one,
7 you have seven weeks. If you don't have another or you don't
8 go over that error rate again within the seven weeks, then that
9 falls off. But say you started, your first violation was a
10 verbal and then you have -- you go over that error rate again,
11 that triggers a written because I mean it's in seven week
12 increments. So if you go over that error rate within that --
13 inside that seven weeks, you know, or past that seven weeks,
14 that triggers another step of the violation and so on and so
15 on.
16 Q But I guess what I'm getting at is that to move up on the
17 scale of progression in the discipline, it has to be for
18 similar conduct. So if, let's say, an employee has a write-up
19 or a verbal for having their error rate go over, that's I think
20 what people commonly refer to as mispicks, right?
21 A Well, there's that disciplinary action there for error
22 rates. You know, you have your goals that you have to -- you
23 meet as an order selector and if you keep going over them, you
24 know, you're going to -- you trigger it the first time -- you
25 trigger a write-up and then you have seven weeks -- you have

1 seven weeks to go without, you know, any faltering like that or
2 exceeding that error rate again. If you do, then you get
3 written up again. If you don't, then that verbal falls off.
4 And then the next time you go over it, you would start over
5 again.
6 Q I just want to break it down a little bit. So let's just
7 start here. So with the error rate, mispicks are what result
8 in not meeting their error rate, right?
9 A Yes.
10 Q Okay. So when someone gets written up for not meeting
11 their error rate -- let's say an employee has a write-up for
12 not meeting their error rate. They're at the first level of
13 discipline. Let's say that happens again within that seven
14 week period, then they can move up the next step, right?
15 A If it's within, yes.
16 Q The seven weeks?
17 A Within because that triggers that write-up again.
18 Q Yeah.
19 A So then if you're at a verbal, now you go to a written.
20 Q But if -- let's say that same employee who's got the first
21 write-up for exceeding the error rate, let's say something else
22 happens like he didn't show up for work one day. He wouldn't
23 necessarily move up on the next step because of that former
24 write-up, right?
25 A Well, you're talking of two different scenarios. You're

1 talking error rate is all about mispicks. The error rate is
2 all considered errors, okay, picking errors or loading errors.
3 Right. And then if he didn't show up to work, that's an
4 attendance violation.
5 Q Right. So they're not going -- you're not going to mix
6 them up the same. Just because he has an error rate write-up
7 and then he gets an attendance write-up, they don't get mixed,
8 right?
9 A Those are different. Those are different.
10 Q Okay. And everything -- a lot of things just fall into
11 different categories.
12 A Correct.
13 Q Like there's the one for error rate, right? There's one
14 for shorts; is that right?
15 A Shorts are considered into your error rate.
16 Q Shorts go into error rate?
17 A Uh-huh.
18 Q Okay. And so then you have attendance. What are the
19 other categories?
20 A You have punctuality, time clock violations, not following
21 procedures. Those are like the main ones that are common that
22 you see.
23 MS. DEMIROK: Your Honor, may I approach now?
24 JUDGE TRACY: Yes.
25 MS. DEMIROK: Thank you.

1 Q BY MS. DEMIROK: So Mr. Santamaria, I'm handing you what's
2 been marked as GC Exhibit Number 2. And if you could take a
3 moment and look at this. Have you seen this document before
4 or?
5 A I have.
6 Q Okay. And is this part of the employee handbook?
7 A Yes, it is.
8 Q And is this the section on the progressive discipline
9 policy? Is this --
10 A Oh, I'm sorry.
11 Q Is this the progressive disciplinary policy that's in the
12 handbook?
13 A Yes, that's in the handbook. Yes.
14 Q Okay.
15 MS. DEMIROK: And Your Honor, may I approach?
16 JUDGE TRACY: Yes. And you don't need to keep asking.
17 MS. DEMIROK: Okay.
18 Q BY MS. DEMIROK: So I'm handing you what's been marked as
19 GC Exhibit Number 3. Have you seen this document before?
20 A I've seen that before, yes.
21 Q You've seen that before?
22 A Yes.
23 Q And this is kind of what you were explaining, right? This
24 might be one of those categories where if you have to, you have
25 to have the same kind of misconduct within the prior seven

1 weeks to move up the ladder, right?
2 A Within the seven weeks, yes.
3 Q Okay. And this is in effect today?
4 A Yes.
5 Q Okay. And has this been in effect since you were in your
6 position starting in June 2015?
7 A Yes, it has.
8 Q Okay. And all that time in-between was it in effect?
9 MS. INESTA: Objection, Your Honor, to the extent that I'm
10 a little bit confused if what she's asking is if this has been
11 in effect, the mispick policy, or the overall policy of
12 categorizing different types of violations and then moving up
13 within those categories.
14 JUDGE TRACY: So could you just clarify the question that
15 you just asked or the past couple of questions that you've
16 asked with reference to the GC Exhibit number although it
17 hasn't been admitted yet. Just go ahead and do that to make
18 sure the record is clear.
19 MS. DEMIROK: Sure.
20 Q BY MS. DEMIROK: So regarding GC Exhibit Number 3, this
21 policy is related to mispicks, right?
22 A It is.
23 Q And it talks about how an employee will move up on the
24 progression of the progressive disciplinary scale when getting
25 written up for a mispick, right?

1 A Yes.
2 Q Okay. And is this particular policy for mispicks?
3 A This is the policy for mispicks.
4 Q Okay. And has this particular policy been in effect since
5 June of 2015 through today's date?
6 A Yes, it has.
7 Q Okay.
8 MS. DEMIROK: And, Your Honor, I would move to admit GC
9 Exhibit Number 3 and also GC Exhibit Number 2.
10 JUDGE TRACY: Any objections?
11 MS. INESTA: No objections.
12 JUDGE TRACY: Okay. So General Counsel's Exhibits 2 and 3
13 are admitted into evidence.
14 **(General Counsel Exhibit Numbers 2 and 3 Received into**
15 **Evidence)**
16 Q BY MS. DEMIROK: Now, Mr. Santamaria, I'm handing you
17 what's been marked as GC Exhibit Number 4. Have you ever seen
18 this document before?
19 A I have.
20 Q Okay. And so what is this?
21 A This is the policy on shorts.
22 Q And is this the company's policy regarding discipline and
23 how employees move up the progression on the disciplinary scale
24 related to shorts?
25 A It is.

1 Q Okay. And was this in effect in June of 2015?
2 A Yes.
3 Q And up and through today has it been in effect?
4 A Yes.
5 Q Okay.
6 MS. DEMIROK: And General Counsel would move to admit
7 what's been marked as GC Exhibit Number 4.
8 JUDGE TRACY: Any objections?
9 MS. INESTA: No objection, Your Honor.
10 JUDGE TRACY: All right. So General Counsel's Exhibit 4
11 is admitted into evidence.
12 **(General Counsel Exhibit Number 4 Received into Evidence)**
13 Q BY MS. DEMIROK: Okay. Now, Mr. Santamaria, just for some
14 clarification. We were talking a little bit before about how
15 the error rate and you mentioned how shorts also go into the
16 error rate; is that right?
17 A Correct.
18 Q Okay. And so when employees get written up for mispicks,
19 let's say, I think you mentioned that they would be written up
20 for what's called the -- you know, exceeding the error rate,
21 right?
22 A Yeah, failed to meet the company standard error rate.
23 Q Okay. Now, this error rate, is it like an equation where
24 shorts are included and also mispicks or how is this error rate
25 determined?

A No, you have mispicks. You have for mispicks and you have for shorts. They're separate so they're not combined.
Q Two separate areas?
A Yeah.
Q Okay.
A That's why you have two separate discipline steps.
Q Right. Yeah, I just wanted to clarify that --
A Okay.
Q -- for the record. Now, can you explain for us what a short is.
A A short is a case that did not make it to the customer, you know. That's what a short basically boils down to being is a case that did not make it to the customer.
Q Okay. And this might seem obvious. But what is a mispick? Can you explain that.
A It's where you, as a picker if you went, say a customer ordered flour and you sent them dishwasher. You know what I mean.
Q Okay.
A Detergent, that's a mispick. It's an error.
Q Got you.
Now, going back to shorts. What's the most common reason why a short would happen?
MS. INESTA: Objection to the extent it calls for speculation or beyond the witness' knowledge.

1 JUDGE TRACY: So I'll sustain the objection. If you could
2 just qualify the question of "if you know".
3 MS. DEMIROK: Sure.
4 Q BY MS. DEMIROK: So you review the disciplinary forms that
5 get sent to you, right?
6 A For the most part, yes. I review.
7 Q Okay. And employees get written up for shorts, right?
8 A Well, it comes as error rate, as a quality error rate not
9 just particular for shorts. It's the error rate. That's what
10 we call it, error rate.
11 Q Okay.
12 A Going over the company error rate.
13 Q But having shorts results in going over the error rate,
14 right?
15 A Correct. If you have shorts, they'll go over. If you
16 have mispicks, you'll go over. But those are separate.
17 Q Do you ever look into, when reviewing those disciplinary
18 forms where an employee may have exceeded the error rate, do
19 you ever look into why that happens?
20 A Do I?
21 Q Yeah.
22 A I do not, no.
23 Q Okay. You worked in the warehouse before though, right?
24 A Yes, I have.
25 Q Okay. And what positions did you work?

1 A I started as a order selector. I loaded. I was a dock
2 captain. I was a receiver. I was a forklifter. I was a
3 supervisor.
4 Q Okay. So with your experience of like working in all
5 these different positions in the warehouse, do you know what
6 the most common reason for ending up with a short is?
7 MS. INESTA: I think it's also -- I'm going to object,
8 Your Honor. It's also overbroad with respect to what period of
9 time. And it lacks foundation.
10 I mean even to the extent he says he started working in
11 the warehouse in 1998, given whatever changes have taken place,
12 I don't know even if at the time that he worked in whatever
13 position there was any particular reason for shorts; may still
14 not even really even be relevant to what the shorts are today.
15 I would like to -- I think the question should be narrowed
16 with respect to something that would relate to what is at issue
17 in this case.
18 JUDGE TRACY: So I'll sustain the objection such that
19 perhaps you can limit the time period for his, the question
20 that you're asking him.
21 MS. DEMIROK: Okay. Thank you, Your Honor.
22 Q BY MS. DEMIROK: So as of -- since you've been in your
23 position, so for the past year do you know what the most common
24 reason for having a short in the warehouse is?
25 A I mean not, not the most common. I mean I've been out --

1 I don't, I'm not in the warehouse, you know.
2 Q Sure.
3 A I mostly do the office work. That's what I do.
4 Q So you don't know.
5 A Just I know that a short is if it didn't make it to the
6 customer.
7 Q Okay.
8 A That's considered a short.
9 Q What are the different positions that employees work in in
10 the warehouse?
11 A Different position employees work in the warehouse?
12 Q Yeah. What are the different types of positions?
13 A You have order selectors. You have loaders. You have
14 forklifters. You have sanitation people. You have inventory
15 control. You have runners. There's supervisors, managers --
16 Q Okay. In your position, are you familiar with the duties
17 and responsibilities of each one of those positions?
18 A There's job descriptions for those positions. Most of
19 them are all under general warehouse.
20 Q Okay. And are you expected to know those duties and
21 responsibilities?
22 A Am I expected, me, myself?
23 Q Yeah.
24 A No, I'm not expected to know them.
25 Q Okay. And I just want to get some background information

1 about how the warehouse runs. So are you familiar with the
2 difference between inbound and outbound work?
3 A I am.
4 Q Okay. And could you tell us what the difference is
5 between the two?
6 A Basically inbound is all like the receiving of
7 over-the-road trucks where we're receiving the products. And
8 in the inbound, you have your receivers and you have your
9 forklifters that put away product to locations in the
10 warehouse. We have forklifters that also replenish, you know,
11 product that is needed for order selectors. That's mainly like
12 the inbound.
13 The outbound is more the shipping part of the business.
14 That's, you know, your order selectors -- selecting cases, your
15 loader is loading trucks to go out to our customers.
16 Q Okay. So the company ships out product, but the product
17 has to come from somewhere, right?
18 A Yes.
19 Q Okay. So there's one part of the operations that deals
20 with receiving all that product that comes to the warehouse; is
21 that right?
22 A Yes.
23 Q Okay. And that would be --
24 A That's the inbound team.
25 Q -- that's the inbound team.

1 A Uh-huh.
2 Q Okay. And then to ship it out, you have the outbound
3 team?
4 JUDGE TRACY: So make sure --
5 THE WITNESS: Yes.
6 JUDGE TRACY: -- I'm sorry, that you say yes or no --
7 THE WITNESS: I'm sorry, yeah.
8 JUDGE TRACY: -- because in the transcript it will show up
9 as inaudible or nothing.
10 THE WITNESS: Sorry about that.
11 JUDGE TRACY: That's all right.
12 Q BY MS. DEMIROK: Okay. So that's the inbound team. And
13 then the outbound team are some of the forklifters, you've got
14 the pickers, the loaders, and those are the ones who take the
15 product once it's been received, and then load it onto the
16 trucks, right?
17 A The orders are picked, the loaders load our trucks that go
18 out to our customers, correct.
19 Q Okay. And so there's forklift operators who work in both
20 inbound and outbound; is that right?
21 A Yeah, you do have some -- yeah.
22 Q Okay.
23 A Yes.
24 Q Now, are there different sets of managers or supervisors
25 that oversee the inbound group as compared to the outbound

1 group?
2 A Are they different people you said?
3 Q Are there like different sets. Are there some that just
4 supervise inbound and some that just supervise outbound?
5 A There -- they have supervisors for each -- for each
6 inbound and outbound.
7 Q Okay. And is Richard Gomez -- he's an inbound supervisor,
8 right?
9 A Yes, that is correct.
10 Q Okay. And David Garcia, he's an inbound supervisor?
11 A That is correct.
12 Q And Leland Scott, he's an outbound supervisor, right?
13 A Yes, that is correct.
14 Q Okay. And --
15 A Some of their duties might have to oversee sometimes --
16 like Leland's -- you know, Mr. Scott there --
17 Q Uh-huh.
18 A -- he sometimes has to see some of the forklifters as
19 well. So it just depends.
20 Q Okay. And is that because before the forklifters were
21 doing both inbound and outbound work it was kind of mixed up?
22 A Yes.
23 Q Okay. But recently it's changed and now they're either
24 outbound or inbound; is that right?
25 A Correct.

1 Q Okay.
2 MS. INESTA: Your Honor, a belated objection on that in
3 terms of being overbroad, in terms of timing of when anything
4 changed. I don't know if there's any way to get some
5 clarification on that.
6 JUDGE TRACY: Well, I mean, part of it is your objection
7 is a little late, because he has already answered the question,
8 but if you could just clarify for the record by asking some
9 questions about the time period for the changes that you're
10 describing before it was mixed together, and then it changed to
11 be separate.
12 MS. DEMIROK: Sure, and it was mostly follow-up on why
13 that supervisor may have supervised both and that could be
14 explanation.
15 Q BY MS. DEMIROK: But it was January 24th when that change
16 occurred, is that right?
17 JUDGE TRACY: Of this year.
18 Q BY MS. DEMIROK: Of this year, thank you.
19 A I'm not aware of the -- or I'm not aware of the change,
20 that exact -- that date, you know, that you said -- had
21 mentioned.
22 Q Okay. So you don't know when it changed?
23 A No, I didn't know when.
24 Q Okay. But you do know at one point in time it was -- they
25 just did inbound work or outbound work. And now the fork --

1 now the forklifters either do one or the other, but before they
2 did both; is that what you understand?
3 A Can you repeat that question again?
4 Q Yeah, sorry, that was a little confusing. So you do know
5 that now forklifters either do inbound work or outbound work;
6 is that right?
7 A I'm guessing -- I'm having a little -- because we have
8 shifts that -- you know, different shifts that you have
9 forklifters that are to doing the outbound or are assigned to
10 outbound, but, at the same time, though you still do have --
11 because of those shifts you have three shifts, so there's still
12 forklifters doing inbound and outbound, you know. That's why
13 I'm a little -- that's why I'm not --
14 Q Okay.
15 A -- understanding.
16 Q So there's not really a distinction between inbound and
17 outbound when it comes to forklifters?
18 MS. INESTA: Objection to the extent it lacks foundation
19 and to the extent it calls for speculation. This witness is
20 not competent to testify as to the intricacies of how the
21 operations work.
22 I mean I still -- I don't know -- I don't think there's
23 even really like other than past experience that he worked
24 there or starting in 1980 whenever, if there's really
25 sufficient foundation, that he should be speaking to the

1 intricacies of the operations. He says he's not in the
2 warehouse, he works in the office. His position prior to his
3 position now was also not in the warehouse, Your Honor.
4 So my only concern is that some of these questions are
5 very -- are kind of very intricate in terms of the operations
6 and this witness -- I don't think there's been really
7 sufficient foundation laid that this witness is competent to
8 answer all of these questions.
9 I mean, I think there's a general understanding when
10 you're an HR person, but to this detail, to the extent he could
11 be relying on information he has from his prior time in the
12 warehouse, which, again, may not be relevant. So I'm just
13 concerned about how the record --
14 MS. DEMIROK: Well, I would just say he's not off in HR.
15 His office is in the warehouse, he works in the warehouse, he
16 has experience in the warehouse, and he's expected to know --
17 he's already testified to this -- of the duties and
18 responsibilities of each position in the warehouse. I mean, if
19 he doesn't know the answer to a question, he can say I don't
20 know, and I'll move on.
21 MS. INESTA: And, Your Honor, he actually testified that
22 -- when she asked if he was obligated to know all of the duties
23 of each position, I think his test -- he answered no.
24 JUDGE TRACY: Well, you know, I'm going to overrule the
25 objection just to the extent -- Mr. Santamaria, you need to be

1 testifying as to what your actual knowledge is currently in
2 your position and not from your experience in the past, but I
3 will note that -- if I recall his testimony -- he's the one who
4 -- Mr. Santamaria is the one who actually mentioned there was a
5 change, if I recall. So there is some knowledge there.
6 MS. DEMIROK: Yes, yes.
7 JUDGE TRACY: And so that's where we could get some
8 clarity on where -- what knowledge you have versus just, I
9 guess, speculating. I'm not sure.
10 So if you like, Ms. Demirok, as this line of questioning
11 is important to your case, if you want to kind of go back and
12 clarify or be clear on the time periods we're looking at and
13 also what -- and if he knows. If he knows, based on his own
14 knowledge.
15 MS. DEMIROK: Okay.
16 JUDGE TRACY: Okay.
17 MS. DEMIROK: I think there will be other witnesses that
18 can testify on this issue, I'll --
19 JUDGE TRACY: Okay.
20 MS. DEMIROK: -- in the interest of time --
21 MS. INESTA: Yes.
22 MS. DEMIROK: -- I'll --
23 JUDGE TRACY: Okay.
24 MS. DEMIROK: -- I'll move along.
25 JUDGE TRACY: All right.

1 Q BY MS. DEMIROK: Now, you had mentioned that one of these
2 categories for employees to get written up is not following
3 procedures; is that right?
4 A Correct.
5 Q Okay. And let's say with forklifters, there's certain put
6 away procedures, right?
7 A You're asking if there's certain put away procedures?
8 Q Yeah, is there a put away procedure that they have to
9 follow?
10 A Yes.
11 Q Okay. And being in charge, do you have to be familiar
12 with the different procedures in the warehouse?
13 A Do I have to be?
14 Q Yeah.
15 A Not necessarily.
16 Q Okay. So when an employee gets written up for not
17 following a certain procedure, what do you -- what do you do at
18 that point when it comes across your desk?
19 A When it comes across my desk --
20 Q Uh-huh.
21 A -- if it's brought up to me?
22 Q Yeah.
23 A Then I'll -- you know, I'll investigate why that person
24 was written up --
25 Q Okay

1 A -- for a procedure.
2 Q And so if you don't -- are there some times when you do
3 know the procedures, where you don't have to investigate what
4 the procedure is?
5 A Well, just like the ones we mentioned about the air raid,
6 I mean that's a standard procedure or, you know, there's a
7 standard number. If you go over it, then you're getting
8 written up for it, you know.
9 Q Okay. So are there certain procedures -- put away
10 procedures, in particular, that forklift operators have to
11 follow?
12 A Well, there's training, yeah, that they've gotten and
13 that's what the procedure is, is the training, you know, if
14 that's what you're referring to.
15 Q Okay. You looked into a discipline for Mr. Michael Meraz;
16 is that right?
17 A Yes, I did.
18 Q Okay. And that was a discipline -- it was from an
19 incident that occurred on, I think, January 13th, 2016?
20 A I know it happened this year. I don't know the exact --
21 Q Okay.
22 A -- date.
23 Q And you know who Michael Meraz is, right?
24 A Correct.
25 Q Okay. He's one of the inbound forklift operators; is that

1 right?
2 A He's a forklifter.
3 Q He's a forklifter?
4 A Uh-huh.
5 Q Okay.
6 JUDGE TRACY: And yes or no, please. If you could,
7 please.
8 THE WITNESS: What was --
9 JUDGE TRACY: I think her question was --
10 THE WITNESS: -- inbound and --
11 JUDGE TRACY: -- inbound forklifter, and then I think that
12 your response was forklift, but then you also ended with uh-
13 huh. So we can't have that for the record, so if you could
14 just say if there was a yes after your answer. I'm not sure.
15 THE WITNESS: So he is a forklifter.
16 Q BY MS. DEMIROK: Okay. Does he do inbound work or
17 outbound work?
18 A He does replenishing, so that would be outbound.
19 Q That would be outbound?
20 A Yes.
21 Q Can you just explain what's replenishing?
22 A It's replenishing the slot. So, say for instance, the
23 order selector goes to a specific slot, there's no -- there's
24 no items there, he'll call what we call a fork. So he'll get
25 with the forklifter to replenish that slot. So the

1 forklifter's duty is to look in the system where it's the next
2 -- he'll see what the next palette that needs to go in there
3 or, you know, the item, you know, because of -- we got code
4 dates on there and stuff like that.
5 So the system will direct him to where to go to pick-up
6 that palette that needs -- the next palette to go in rotation
7 into that empty slot -- empty pick slot. So then he fills it.
8 He scans the -- he scans the label of the product, and then he
9 scans it into the location it needs to go.
10 Q Okay. Then some forklifters do -- I'm not sure of the
11 exact terminology, but they take the items that are received,
12 and they put them in overstock, right?
13 A Yes.
14 Q Okay. And is that what you would consider inbound work?
15 A Yes.
16 Q Okay. So this incident that you looked into with Mr.
17 Meraz, he got -- it was a written verbal warning for failing to
18 follow put away procedures; is that correct?
19 A Yes.
20 Q Okay. And you investigated that incident, right?
21 A I did.
22 Q Okay. And that's because he came to you, right?
23 A Correct.
24 Q Were you aware of that incident prior to Mr. Meraz coming
25 to you?

1 A No.
2 Q Okay. So that was the first time that you heard about it,
3 when he got to you?
4 A Yes.
5 Q And he came to your office, right?
6 A He came to my office.
7 Q Okay. And the whole incident -- I mean, you know about
8 the incident, because you investigated it, right?
9 A I did do the investigation on it, yeah.
10 Q Okay. And it involved a missing palette; is that right?
11 A Correct.
12 Q Okay. And during this incident was he involved with --
13 was he doing inbound or outbound work?
14 A I believe he was doing outbound, because he was
15 replenishing.
16 Q Okay. And -- but the missing palette, it wasn't noticed
17 for a couple of days; is that right?
18 A It wasn't missing for a couple of days.
19 Q No?
20 A Not that I'm aware of.
21 Q And you investigated the incident, right?
22 A Because that caused shorts -- a major short to a customer,
23 so it had to have happened that day it happened.
24 Q Okay. And can you explain to us why would that make
25 sense?

1 A What the shorts or?
2 Q Yeah, like if it -- because it resulted in shorts --
3 A Well, because --
4 Q -- why would it make sense --
5 A -- basically --
6 Q -- in your mind?
7 A -- basically, because it was the last palette. There was
8 only one palette in the whole warehouse that item that a
9 customer needed, and we had -- they had to short out -- they
10 had to short out -- I believe it was like 30 cases that they
11 shorted the customer and that's why they knew about it right
12 there and then.
13 Q Right then and there. Okay. Now, I believe it was
14 Richard Gomez and David Garcia, they met with Mr. Meraz before
15 Mr. Meraz came to you, right?
16 A Yes, because he -- yes.
17 Q Okay. And they were going to write him up; weren't they?
18 A They presented that write-up.
19 Q Okay.
20 A The verbal write-up.
21 Q So I'm handing you what's been marked as GC Exhibit number
22 5. And so you've seen this before, right?
23 A Yes.
24 Q Okay. And so this is a verbal write-up that was first
25 presented to Mr. Meraz by Richard Gomez and David Garcia; is

1 that right?
2 A Yes.
3 Q But Mr. Meraz didn't sign it when they presented it to him
4 that day?
5 A No, he didn't.
6 Q Okay. In fact, Mr. Meraz didn't sign it until February
7 1st, when you met with him again, right?
8 A Yes, that's when he -- that's when he dated it.
9 Q Okay. Now, when Mr. Meraz came to see you, he explained
10 the situation, right?
11 A He just told me that he was getting written up for a
12 palette supposedly that he didn't follow proper procedure --
13 put away procedures, and he was getting written up for that.
14 Q Okay. He said it was for not following put away
15 procedures, and he was adamant that that didn't happen?
16 A Yeah, that -- yeah.
17 Q Okay. Now, when he met with you, that was in your office,
18 right?
19 A Correct.
20 Q Okay. And do you know, did he come to you right after
21 meeting with Mr. Garcia and Mr. Gomez?
22 A I believe he stated, yeah. Yes.
23 Q Okay. And he told you that if the company wanted to write
24 him up, he would have to go file allegations with outside
25 agencies; isn't that right?

1 A If the company wanted to write him up?
2 Q Yeah, if he was going to get written up, that he would
3 have to file allegations with outside agencies.
4 A He stated to me that he was going to go file. Mr. Meraz
5 stated himself that he was going to go file.
6 Q Right. And I --
7 A But we -- just because you're getting a write-up, that
8 doesn't mean that you have to go file, you know what I mean?
9 It's -- I'm not -- I guess I'm not understanding your question.
10 Q My question was did he tell you -- when he came to you,
11 and he was talking to you about the write-up that he was going
12 to get, he told you that if they were going to write him up, he
13 would have to file allegations with outside agencies?
14 A No, he said that he was going to.
15 Q He said that he was going to?
16 A Yes.
17 Q Okay. But at that point, he hadn't -- he had been
18 presented with this form, but he hadn't signed it, right?
19 A Right. He was presented with it, and he was -- that's why
20 he came to see me, because he wasn't going to sign it, and then
21 that's when he stated, well, I'm going to -- I'm going to go
22 and file.
23 Q Okay. Because he didn't think this was right?
24 A Correct.
25 Q Okay. Now, he also gave you several reasons why the

1 palette may have been in a different location from what it was
2 scanned to, right?
3 A Did he give me reasons?
4 Q Yeah.
5 A No.
6 Q He didn't give you any explanation for why this palette
7 might be missing or put in a different spot?
8 A Not that I recall, no.
9 Q You took notes during that meeting; didn't you?
10 A I don't -- I don't remember, because -- no, I don't
11 believe I did.
12 Q Okay. And it's after Mr. Meraz came to you or at the time
13 that he came to you, that's when you started investigating this
14 incident, right?
15 A Correct.
16 Q Okay. Do you generally take notes when you're looking
17 into an incident?
18 A Depending on the incident.
19 Q Okay. Were you asked to -- well, let me ask you this. Do
20 you keep your notes in a certain place, or file, or how do you
21 do that?
22 A Yeah, I keep my notes in a -- in a file.
23 Q Okay. Were you asked to look to see if you had any notes
24 on this incident?
25 A Was I asked?

1 Q Yeah, were you asked -- in preparation before coming here,
2 were you asked to go and check and see if you had any notes on
3 this incident?
4 A Well, I know --
5 MS. INESTA: And, Your Honor, I'm going to object only to
6 the extent that it invades the attorney-client privilege.
7 JUDGE TRACY: Well, I'm going to overrule the objection,
8 because this is -- well, before I do that. Go ahead with your
9 response.
10 MS. DEMIROK: Your Honor, this goes to a subpoena issue.
11 So I have reason to believe that there may have been notes, so
12 I would like to pursue that.
13 JUDGE TRACY: So I'm going to overrule the objection to
14 the extent that there was a subpoena request that led to this.
15 Again, you can go ahead and answer the question, specifically
16 of what she's asking, which I'm sure you're going to have to
17 repeat.
18 MS. DEMIROK: Sure.
19 Q BY MS. DEMIROK: So were you asked by anyone to go and
20 check and see if you had any notes regarding this incident?
21 A I was asked to send the file over, but not any particular
22 notes on this -- on this incident.
23 Q Okay. And when you say send the file over, like what kind
24 of -- can you tell us like what did you keep on this incident?
25 What was in the file?

1 A Oh, on this incident what did I keep? I didn't -- I
2 didn't keep anything on this incident. I mean we have files --
3 you know, personal files that we put stuff into, but that's.
4 Like I said, I don't believe I took notes on this incident
5 here.
6 Q Okay. So when Mr. Meraz was in your office, you weren't
7 taking notes while he was in there?
8 A No.
9 Q Okay. And just for clarification, it's also your
10 testimony that he didn't give you some explanations about why
11 the palette might be scanned to one location, and it was found
12 in another?
13 A No, he didn't give me no explanation.
14 Q Okay. But eventually you decided to go and physically see
15 the locations, right?
16 A Yeah, I went down there with him to look at the -- what he
17 was talking about.
18 Q Okay. Now, just so -- to give us a better idea, could you
19 take a look at GC Exhibit Number 5? And in here where it talks
20 about the reason for the write-up, you talk -- you say in here
21 -- I'm sorry, I said you said, but I'm not sure who drafted
22 this -- but it says associated moved LPN, and it has a long
23 number, logically to CL2023105, but physically placed the
24 palette in another -- at another number. Could you explain, if
25 you know, what it means to logically place a palette somewhere?

A So basically on this, each palette has an ID number with -- ID number --

Q Uh-huh.

A -- and as a forklifter you need to -- anytime you're going to make any -- any time you touch a palette, you need to scan that palette ID number. Okay. So that's what he did. Physically, he scanned that palette ID number -- I'm sorry, logically. Okay.

Q Uh-huh.

A And what it means by physically placed it in this other location, so he put it in the other -- in a different location. That's what that means.

Q Okay. And they do -- they have handheld scanners, right? That's how --

A They have -- forklifters are a truck mounted computer with a scanner. Kind of like a -- you know, like a scanner wand thing.

Q Like when you go through the grocery store, they might take it out and scan an item?

A Yes --

Q Is that kind of what it looks like?

A -- like that. Yeah, but it's connected to the terminal of the -- of the mount on the forklifter.

Q Okay.

A Forklift, sorry.

1 Q So I guess to simplify, he scanned one location, but then
2 he put the product somewhere else?
3 A That is correct.
4 Q Okay. And so, you went down with him to go look at those
5 two locations, right?
6 A Yes, I did.
7 Q Okay. And at this point, you've already said that you
8 were -- you investigated this incident, but were you
9 investigating whether the discipline was justified? Is that
10 what you were doing?
11 A If it was justified?
12 Q Uh-huh.
13 A Yes -- yes, I was.
14 Q Okay. So looking at the physical location that would have
15 weighed on your decision; is that right?
16 A Looking at the physical --
17 Q Because you went down there during your investigation to
18 look at the physical location, right?
19 A Well, I told him -- so he showed me, and I told him, okay,
20 let me do some research. Let me find out, you know -- because
21 like I said, I didn't have stuff in front of me to know. He
22 was just telling me. Okay. So I went down there to look --
23 visually look. I said, okay. You said you put it here, but it
24 wasn't there. They found it over here.
25 Q Uh-huh.

1 A So, you know, okay, let me look -- I told Mr. Meraz, all
2 right, I'll look into it. You know, get with inventory control
3 and see what -- you know, look at -- because each forklifter
4 has a task -- user task where you can look up their moves and
5 stuff like that, so their work. They have that in the system.
6 Okay. So when I told -- when he told me this, I said,
7 okay, well let me look into it, and I'll get back with you and
8 let you know what -- how we proceed with this.
9 Q Okay. Let's go back a little bit. He comes to your
10 office, he tells you he's getting a write-up, he says that he
11 doesn't think it's justified, right?
12 A He doesn't think it's right.
13 Q He doesn't think it's right. Before you go and look at
14 the physical locations, did you look anything up prior to that
15 about the incident?
16 A No.
17 Q No. Did you talk with anybody other than Mr. Meraz about
18 the incident before you went and looked at the physical
19 location?
20 A No
21 Q Okay. So you're saying the only thing that you knew about
22 the incident was what he was telling you?
23 A What he was telling me.
24 Q So you --
25 A And that's why -- yeah, go ahead.

Q -- okay. So at that point in time, you didn't know what -- well, do you guys have a certain name for the CL number, like that's in this write-up? It starts with a CL. Do you guys -- what do you guys call that? What's the common terminology?

A That is the cooler location.

Q Cooler location.

A Uh-huh.

Q Okay. So before you went and physically looked, did you know what the locations were that were in the write-up?

A No.

Q No. Okay. And so that's why you maybe you were going to go down and look at it, so he could show you, right?

A Yes, because he was -- he was there. He was saying I'm not going to sign this. So it's like, okay, let's go look. Let's go look at what you're telling -- talking to me about.

Q Okay. But at the time when you went to look, looking at the physical locations, would that have any impact on your decision?

A Well, if the palette -- if he scanned the label and said that he put it there, and it wasn't there --

Q Uh-huh.

A -- that's not following his job procedure. So I just went over there just to get a clear -- just to get a picture of what he was talking about.

Q Okay. Let's talk about like this cooler label number. Do you know how to read those types of numbers?
A Do I know how to read those types of numbers?
Q Yeah.
A Well, the CL -- to answer your question, yes.
Q Okay. So -- and does each part of that number refer to something?
A Yes.
Q Okay. So -- and each part would refer to or direct you to what part of the warehouse it is, right?
A Correct.
Q Okay. So CL, that refers to cooler location, I think --
A Uh-huh.
Q -- right? And that's a particular part of the warehouse; is that right?
A Yes.
Q And then what are the next numbers that might indicate the physical location?
A Twenty.
Q Okay. And what does that refer to?
A That's the aisle number.
Q Okay. And what's the next set of numbers --
A Two --
Q -- that refer to something?
A -- 231 is the actual bay location, and 05 is the actual

level, because you -- we have racking that's up to six to seven levels --

Q Okay.

A -- high. So the five on the end, it would be at the five levels high?

A Yes.

Q Okay. By looking at the two numbers, the CL numbers in the write-up, would you be able tell from those two numbers how close those spots are to one another?

A By looking at those?

Q Yeah, just from the numbers alone. I know -- you did go and see the locations, so you know, but if you hadn't looked at the location, would you be able to know just by looking at the numbers?

A Yes.

Q Okay. Now, you went down to look you did see that the two locations were only four steps away from one another, right?

A Yes.

Q Okay. Just one bay over?

A Yes.

Q Okay. And Mr. Meraz, he came with you when you went to go look, right?

A Correct.

Q Did you ever tell Mr. Meraz, after looking at those locations that the inventory control associate made a mistake?

A Did I ever tell him that?
Q Uh-huh.
A No.
Q No. Because inventory control -- is that what you call it, inventory control associates or the personnel?
A Inventory control clerk.
Q Clerk.
A Yeah.
Q Okay. So I'm going to refer to it as a clerk, but the clerks are -- they're trained to -- once they're notified that there is something missing, they're trained to go check the aisles, right?
A Correct.
Q Okay. They're trained to look above the location that it's been scanned to, right?
MS. INESTA: Objection. Seeks -- lacks foundation. Seeks that he -- it's beyond his knowledge on the exact way that they're trained.
MS. DEMIROK: I --
JUDGE TRACY: So I'll sustain the objection.
MS. DEMIROK: -- thank you, Your Honor.
Q BY MS. DEMIROK: Do you know what an inventory clerk is supposed to do when they get notified that there's a missing palette?
A Do I know?

1 Q Uh-huh.
2 A I know they're supposed to go and check --
3 Q Okay.
4 A -- to try to find the product.
5 Q Okay. Do you know how they are supposed to go about doing
6 that?
7 A No, I do not.
8 Q Okay. While you were looking at the physical locations,
9 did Mr. Meraz at that time give you some explanations of why
10 that might have happened?
11 A No, all he kept saying was they said I did this, I did
12 this, I did this. You know, he didn't give me no explanation.
13 Q Okay. Did you talk with any other associates on the floor
14 while you were down there looking?
15 A Not -- no, not in that area, no.
16 Q Okay. On your way back to your office did you talk with
17 any other associates about that?
18 A About the distances?
19 Q Uh-huh.
20 A No.
21 Q Okay. So Mr. Meraz, did he insist that you talk with
22 somebody, another associate, about what could have happened?
23 A Did he insist? No.
24 Q Did he flag someone over and say -- and start asking them
25 if what he was telling you could be true?

1 A Yeah, he did. Yes, he did.
2 Q Okay. He was telling you that the -- sometimes the system
3 kicks him out -- kicks their locations out from their scanners,
4 right?
5 A Yeah, he mentioned that.
6 Q Yeah, he had been telling you that all along; didn't he?
7 A That he's been telling me -- he tells me that there's --
8 that there's issues with the RF scanners, right, yeah.
9 Q Okay. And wasn't he telling you that because that could
10 be a reason, an explanation for why --
11 A Well, he wasn't telling me --
12 Q -- just let me finish.
13 A -- on exact -- that exact --
14 Q If I could finish.
15 A -- the exact one.
16 Q So didn't he bring up the problem with the RF scanners in
17 an effort to explain to you how that could have happened, where
18 the palette was in one place and the scanned to another
19 location?
20 A But if you're getting a scan on it --
21 Q I'm just asking you if that's what he -- isn't that why he
22 brought up that issue?
23 A -- he did mention that.
24 Q Okay.
25 A He did mention the scanner issues that happened, uh-huh.

1 Q So he did give you explanations for why this could have
2 happened?
3 A Oh, yeah.
4 Q Okay.
5 A Yeah. Yes.
6 Q Because I thought you said he never gave you any
7 explanations.
8 A Well, not like -- yeah, if you're referring to that --
9 those explanations, yes, he did tell me about the RF --
10 sometimes the RF functions are failing, but in this particular
11 case here, he scanned it -- he's already scanned it, and he
12 scanned it -- scanning it, there shouldn't be no -- if he
13 scanned it right there, and he put it away to the wrong
14 location, that has nothing to do with the RF scanners being --
15 or the system, because the system had already taken it.
16 Now, if it wouldn't -- if it wouldn't have shown on the
17 moves that he did, then I would agree with you on saying -- you
18 know, I would agree with him on, okay, there was an issue
19 there, but he scanned -- he had already scanned it and put it
20 away to a different location.
21 Q Okay. But what I was asking you was whether or not he
22 gave you any explanation for why that might have happened? I
23 wasn't asking you if that could explain what happened or could
24 not explain what --
25 A Okay.

Q -- happened. I'm asking you if he, during this conversation when you met with him, if he would have given you any explanations?

A Yeah. And, yes, he did.

Q Okay. Other than the RF scanner, did he give you any other possible scenarios of why that might have happened?

A No, not that I recall. No.

Q Okay. And so, you did talk with another associate on your way back to your office; is that correct?

A Yes, we did flag -- he did flag somebody down, yes.

Q Okay. And you asked that associate who was a forklifter; is that right?

A I asked him if that happens, and he just said yes.

Q Okay. Now, after you met with Mr. Meraz, what else did you do to investigate what happened?

A I know that there is an email that was sent out by inventory control stating that they had looked for this palette. So that's some of the facts that I had there. Okay. I asked if they can give me any more information, so they sent me a list of his tasks that day or who was the last person that touched this palette.

So they gave me that information. And that's what I looked at -- at the information I had in front of me. The user tasks, the -- who was the last person, you know, that received -- or who was the last person that touched this palette, and

1 the email from inventory control.
2 Q And how soon after you talked with Mr. Meraz did you
3 initiate further -- did you seek out more information?
4 A I don't recall. Are you looking for exact date?
5 Q No, was it like immediately, was it like the top of your
6 priorities, was it a few days later?
7 A I would say a couple days later.
8 Q Okay. At any point did you talk with Mr. Gomez or Mr.
9 Garcia about it?
10 A About this incident?
11 Q Yeah. You never talked to them about it?
12 A No.
13 Q Weren't they the ones who were going to write him up
14 initially?
15 A Well, those -- yeah, they were the ones that were going to
16 write him up, but I never went and talked to them about it,
17 because when they went to write him up, he -- Meraz refused to
18 sign, and he came straight to my office.
19 Q Okay. But they must have had some idea of what happened
20 if they were going to write him up in the first place; would
21 you expect that?
22 A Well, it says it right here, you know, that there was --
23 that there was -- the proper procedure wasn't followed, so
24 that's why this -- this CPDR got generated.
25 Q So then are you familiar with the put away procedures in

1 that area?
2 A Am I familiar with it? I know what needs to be done is if
3 you grab a palette, your job is to scan it and put it to the
4 right location.
5 Q Okay.
6 A Anytime you scan a palette, or do a move, or replenish
7 it's your job as a forklifter to, you know, follow through and
8 do the right -- the right thing and put it to the right
9 locations where you're scanning it to.
10 Q Okay. So I'm handing you what's been marked as GC Exhibit
11 number 6. And I think you mentioned that you received some
12 information when you started investigating.
13 A Correct.
14 Q Is this what you were referring to?
15 A Yes, this is one of the tasks by day, by the user.
16 Q Okay. And if you could turn to the second page on here.
17 There's some notations. Are the -- who made -- do you know who
18 made those notations? Was it you?
19 A No.
20 Q Okay. Do you know who else would have done that?
21 A If this email is coming from Brian, then probably Brian.
22 Q Okay. And now who is Brian Nicklin?
23 A He's an inbound supervisor.
24 Q Inbound supervisor?
25 A Right.

1 Q Okay.
2 A I'm sorry, he's a manager. I'm sorry, he's an inbound
3 manager.
4 Q Okay. And why was he sending you this? What was this
5 report going to tell you?
6 A This report tells me what -- first of all, it tells me who
7 was the last person to scan to the palette or what tasks that
8 person had performed that day.
9 Q Okay. And if you could turn to page 2 again. Are --
10 where there's an X over on the right hand side, like a
11 handwritten X, is that the task that was --
12 A If you notice that number, that long number there --
13 Q Uh-huh.
14 A -- it ends in 19637, that is the same LPN number on the
15 write-up.
16 Q Oh, okay.
17 A Okay. So then it tells you where the palette was
18 originally at. So it was a CL19 -- 1909 -- or 090806. Okay.
19 And then it tells you where the last person put it at. And
20 supposedly this palette got put in 20231 fifth. That's what
21 the system recognized. That's what Mr. Meraz scanned saying
22 that he put it there after doing the palette move.
23 Q Okay. And then the palette was found?
24 A And the palette was found at 20225 five, just like the
25 CPDR states.

1 Q Who found the palette?
2 A That I do not know who found the palette.
3 Q Okay.
4 MS. DEMIROK: Your Honor, I'd like to move to admit what's
5 been marked as GC Exhibit 6.
6 MS. INESTA: No objection, Your Honor.
7 JUDGE TRACY: All right. So GC Exhibit 6 is admitted into
8 evidence.
9 **(General Counsel Exhibit Number 6 Received into Evidence)**
10 Q BY MS. DEMIROK: And you said this was one of the things
11 that you received while you were investigating. I'm sorry,
12 what -- who else did you receive information from?
13 A There's an email sent out by inventory control.
14 Q Okay. And he sent that to you?
15 A No, it was sent that night, because of the shorts.
16 Q Okay.
17 A So when -- when there are shorts, or cause of shorts, or
18 palettes that are not found, inventory control does send out
19 like to -- like a group kind of deal, letting you know, hey,
20 you know, we had this kind of like an issue.
21 Q Okay. And who would have first noticed that the palette
22 was missing?
23 MS. INESTA: Objection to the extent it calls for
24 speculation.
25 JUDGE TRACY: Sustained. So he could just qualify the

1 question.
2 Q BY MS. DEMIROK: So during your investigation, did you try
3 to figure out who would have been the next person to touch that
4 palette after Mr. Meraz?
5 A Well, if the -- if the palettes were called or -- if the
6 palette was called as an out and inventory got involved, it
7 would be inventory that did the reviewing.
8 Q Okay. So would then -- is what you're saying that
9 inventory would -- at the time that it was noticed that it was
10 missing, it would have been a clerk who would have been --
11 A Yeah, it was a clerk.
12 Q -- notified at the time that it was --
13 A Right, and then the clerk that does the -- you know, the
14 investigating part of trying to find that palette -- the
15 product.
16 Q Okay. And during the course of your investigation, did
17 you determine who would have been the person to contact
18 inventory control to start looking for the palette?
19 A Who would have been the person to contact?
20 Q Yeah, I mean, how does inventory control even know that
21 there is a missing palette?
22 A Well, because just from prior -- I know that when -- like
23 I mentioned again, before when an order selector goes to the
24 location, if there's nothing there, he'll let the forklifter
25 know, and then if there's no more product for that palette,

1 he'll let -- he'll let the picker know and say it's an out, you
2 know.
3 So then the picker will report it to the captain -- the
4 floor captain, and the captain reports it up to inventory and
5 says, hey, you know, we don't have this -- this item. There's
6 no more -- we can't find this, and then that's when inventory
7 gets involved and starts doing their reviewing of all the --
8 you know, of all the stuff or see where they can try to find
9 the product, if they can.
10 Q Okay. So by knowing what the process is, you would know
11 that it was an order selector who would have gone to find the
12 product, but it was gone, and it wasn't there?
13 MS. INESTA: Objection.
14 THE WITNESS: Well --
15 MS. INESTA: To the extent it --
16 Q BY MS. DEMIROK: Is that the process?
17 MS. INESTA: -- objection to the extent it calls for
18 speculation, to the extent lacks foundation, to the extent that
19 he testified based on his experience, which, again, was how
20 long ago. That's how he started his response.
21 JUDGE TRACY: So I'm going to sustain the objection.
22 Again, you know, if we could just focus on what happened --
23 what his knowledge is of this incident and what happened next.
24 MS. DEMIROK: Okay.
25 Q BY MS. DEMIROK: So you received information from the

1 clerk; is that right?
2 A That email was sent out by the clerk, yes.
3 Q Okay. And who sent you that email that was sent by the
4 clerk?
5 A I can't recall who sent it to me.
6 Q What did you learn from what the clerk -- the email that
7 the clerk had sent?
8 A The email that the clerk was sent, I learned that that
9 palette was called -- as of now that they couldn't find the
10 product, that that clerk researched it and could not find the
11 palette where it was scanned to.
12 Q Okay. Did you ever talk to the clerk personally?
13 A Personally, no, I didn't.
14 Q Okay. And how did that weigh in on your decision?
15 A You mean not talking to the clerk?
16 Q No, what you learned from the email, I'm sorry.
17 A Okay. So I just based it on all the -- on all the
18 different facts that I had. You know, who was the last person
19 to touch it -- to touch the palette. Inventory doing research
20 and could not find it in that location that it was scanned to.
21 And that's how I based my decision.
22 Q Did you ultimately give a recommendation about whether Mr.
23 Meraz should be disciplined?
24 A Did I give a recommendation?
25 Q Uh-huh.

A I said, yes, you know, this -- you know, this man does a verbal, so --

Q Okay.

A -- so we're good to go -- move forward with what I had. I made that decision to move forward with the fact that I had to go ahead and issue the -- to go ahead and issue the verbal with -- to Mr. Meraz.

Q And then you met with Mr. Meraz one more time, right?

A I did.

Q Okay. And Mr. Vaivao was there with you; is that right?

A When I met with Mr. Meraz to go -- to tell him that we were going to proceed?

Q Uh-huh.

A I believe so. I believe Ivan was there with me.

Q Okay. I'm sorry, but let's just take a quick step back, but in making your recommendation, did you consider the possibility that the scanners -- those RF scanners that we talked about, did you consider how those or the computer system may have played a part in how the palette was missing?

A No, I did not.

Q You didn't consider that?

A No.

Q Okay.

A Because of the -- of what I have in front of me with everything here, I did not consider that.

Q So you never looked into whether that could be the cause?
A Correct, because even if you notice, it tells you right here the times. The scans were right after each other. From the last scan, it was two minutes -- a couple of seconds -- or two minutes apart from his last task that he had scanned.
Q Maybe I'm not following, but how -- what would that indicate to you? Could you explain why?
A Well, that computer system was up and running correctly. That's why I didn't take, you know, into consideration when you asked me about the scanner is not working.
Q But wasn't this problem with the scanner that he raised, was that they just kind of -- it will drop them out of the system every once in a while?
A If it drops, and they're in the middle of a task, I believe they call inventory control and let them know.
Q Okay. So you know what that procedure is too, right?
A Well, that's what they tell me.
Q Okay.
A I'm not too sure if that's the right -- the procedure, but that's what I've heard.
Q Did you speak with anyone during your investigation about the possibility of whether the scanners could have played a part?
A No, I didn't.
Q Okay. Other than talking with the other associate when

1 you went down to look at the physical location, did you learn
2 whether other forklift operators ever run into that problem
3 wherein -- when they're in that part of the warehouse?
4 A They've -- a forklifter did mention that say happens,
5 but --
6 Q And that was -- is that the forklifter that you talked to
7 on that day when you were with Mr. Meraz?
8 A Yes.
9 Q Okay. So you didn't talk with any other forklifters later
10 on; did you?
11 A No.
12 Q And you didn't talk with any supervisors about whether or
13 not that was a common problem, right?
14 A Right.
15 Q Okay. Did you -- during the course of your investigation,
16 did you ever consider the possibility that another forklift
17 operator could have moved that palette after Mr. Meraz did?
18 A No.
19 Q Okay. Did you ever look into whether that could be the
20 cause?
21 A No, because again it's assigned -- he scanned it. It's a
22 scan -- it says it right here by his task, he was the last one
23 to scan it, and he put it in the wrong location. No forklifter
24 is going to grab a palette -- they get -- forklifters are
25 getting paid by their moves. So I believe that no forklifter

is just going to get a palette just to move it and waste his time and not get paid for it.

Q Those forklifters also condense stacks; don't they?

A Do they condense stacks?

Q Uh-huh.

A When needed.

Q Okay. And people make mistakes, right?

A Yes.

Q So if someone is -- if one of them is condensing a stack, it's possible -- do you think it may be possible that they pulled out that palette while condensing stacks, and they forgot to scan it? Is that a possibility?

A I don't think that's a possibility.

Q No. Did anyone raise that to you as a possibility?

A No.

Q Okay. During the course of your investigation, did you consider whether inventory -- the inventory control clerk should have been held responsible?

A No, because I -- he went and checked for -- I mean, he -- he's not the one that put the palette in the wrong location, so I don't believe he should be responsible for that.

Q So you didn't consider that?

A I did not consider that.

Q Okay. So was that clerk issued any discipline as a result of that incident?

A No, why would he get disciplined. He's not the one that did the mistake.

Q Okay. Okay. Now, you said that you do review some of the disciplinary forms that you come across, right, if it's at a certain level?

A At a certain level, yes.

Q Okay. Are you aware of any discipline that's been issued to a forklift operator who's been doing -- who was doing inbound work, for having shorts?

A Well, this is a degree of 30 shorts or 30 -- the degree is that he -- that this person did not put the palette where it was supposed to go and that caused the 30 short.

Q But that's not my --

A So for a customer -- so it's -- so your question was has anybody else been written up for short -- or a forklifter being written up for shorts.

Q Not anyone else. I'm just asking you, are you aware of any discipline issued to an inbound forklift operator for having shorts?

A For having shorts, no.

Q Okay.

A This write-up is not for shorts though. Those write-up is for not following the procedures, of not putting a scanned palette to a location, and then put it at that location he scanned it to. So this write-up is for not following the

1 proper put away procedure, not for shorts.
2 Q And when was the last time, besides Mr. Meraz, that you've
3 seen a discipline for an inbound forklift operator for failing
4 to put away -- for failing to follow proper put away
5 procedures?
6 A I can't -- I can't recall. I go through many, you know,
7 disciplinary actions. I mean this is a verbal. It goes away
8 in seven weeks. It's a verbal. I mean, I just kind of go
9 through them, kind of review, okay, verbal. I mean like the
10 ones I try to focus -- or I focus more is like the suspension
11 ones and see if that falls in place, why, you know, and if it's
12 the correct step and stuff like that.
13 On a verbal like this, that falls off in seven weeks, you
14 know, I mean like I said, I look -- I look at, you know, 500 --
15 I've got 500 plus associates that I -- that I oversee and for
16 -- to me to be checking every single one, I just kind of, you
17 know, go through them and review them as quickly as possible,
18 and then send them on to get filed.
19 Q Other than Mr. Meraz, can you think of any kind of similar
20 example where you've seen an employee disciplined for a
21 forklifter --
22 A For not following procedures?
23 Q -- not following put away procedures?
24 A I know we had a few for like receiving. There's been some
25 that, you know, mislabeling palettes. I think we had one for

1 -- for another forklifter similar to this, putting -- not
2 putting it away in the right location.
3 Q Okay. Do you know who that was?
4 A I believe it's -- I want to say Benny Washman. He had
5 one.
6 Q Can you tell us what you know about that incident?
7 A I wasn't involved in it, but I just know that he had one
8 before.
9 Q Do you know when that was?
10 A No, I can't recall what date it was.
11 Q Do you know if it was before or after Mr. Meraz' incident?
12 A No, I don't know.
13 Q Okay. Is that the only one that stands out in your mind?
14 A For a forklifter, yeah.
15 Q Okay. Now, going back you did meet with Mr. Meraz and Mr.
16 Ivan Vaivao was there as well, and it was on February 1st,
17 right?
18 A Yeah, because that's when he signed off on it, because I
19 presented it to him and I said hey, did my research in this.
20 Q Okay. And that was in the afternoon, right?
21 A I don't recall what time it was. Right. I know that it
22 could've been, because Mr. Meraz starts at 2 in the afternoon
23 is his start schedule.
24 Q Okay.
25 A So yeah.

1 Q And how late do you work until?
2 A It depends. I mean I'm always -- normally out of there by
3 5 in the afternoon.
4 Q So what would you say was the most important factor in the
5 decision to issue this discipline to him?
6 A The most important factor? Just what I had in front of
7 me, the -- you know, that he was the last person to touch that
8 and that, you know, inventory control went and did their review
9 of trying to find a pallet and it wasn't found.
10 Q Okay. When you met with him, did you explain to him that
11 it was just because he was the last one that has scanned in the
12 products, and that's what the system showed? Is that --
13 A Well, that's what the system showed. And I told him. I
14 said look, after doing research and seeing, you know, that you
15 were the last one to touch it, to touch that pallet, and you
16 scanned it to a pallet location where it wasn't, and that's
17 what I based my decision on. And that's what I told him.
18 Q Okay. And when you were there, he signed his form, right?
19 A Yes.
20 Q Okay.
21 MS. DEMIROK: Your Honor, I'd like to move to admit what's
22 been marked as GC Exhibit Number 5.
23 JUDGE TRACY: Any objections?
24 MS. INESTA: No objection.
25 JUDGE TRACY: All right. So GC Exhibit Number 5 is

1 admitted into evidence.

2 **(General Counsel Exhibit Number 5 Received into Evidence)**

3 Q BY MS. DEMIROK: Now if you could take a look at GC

4 Exhibit Number 5. And there's a couple different dates on

5 here. So when we've got the description of the incident, we

6 have that he failed to follow proper put away procedures on

7 1/13 of 2016. And then the date is January 18th up on the top.

8 Do you know why this would have January 18th at the top?

9 A That's when this CPR was processed.

10 Q Okay. Would that have been the same day that Richard

11 Gomez and David Garcia initially brought this to him?

12 MS. INESTA: Objection as to the extent it calls for

13 speculation.

14 JUDGE TRACY: Sustained.

15 Q BY MS. DEMIROK: Do you know when they brought the form to

16 him?

17 A No, I don't recall the date, the exact date, no.

18 Q Are you familiar with the break time policies for

19 employees?

20 A Yes.

21 Q And --

22 JUDGE TRACY: Ms. Demirok, let me just ask you something.

23 How much longer for him?

24 MS. DEMIROK: Not that much longer.

25 JUDGE TRACY: So shall we take a break after him? Nobody

1 has had a lunch break or anything.

2 MS. DEMIROK: I didn't realize it so late either.

3 JUDGE TRACY: Yeah.

4 MS. DEMIROK: Yeah.

5 MS. INESTA: When you say not that much longer, what do

6 you -- do you mean like 30 minutes? Do you mean --

7 MS. DEMIROK: I think about 15 minutes or so.

8 MS. INESTA: Okay.

9 JUDGE TRACY: And then you'll have some questions, I'm

10 assuming?

11 MS. INESTA: Your Honor, we may reserve to do both cross

12 in -- as part of our direct.

13 JUDGE TRACY: Okay, all right. So I just wanted to see

14 how things were going. I don't know when things close around

15 here or anything. It looks like place downstairs is 2:50. So

16 you know, we'll finish him up, and then we will see if you want

17 to ask questions or what, and then take a break.

18 MS. INESTA: Okay.

19 JUDGE TRACY: It might be shorter rather than longer,

20 because we have to make up some time for this morning.

21 MS. INESTA: Yeah. And the reason, also, we're waiting is

22 because we think, from an operational perspective, there's

23 going to be more testimony. So I don't want to -- so --

24 JUDGE TRACY: That's fine.

25 MS. INESTA: -- I'm pretty sure we'll wait to cross.

1 JUDGE TRACY: Okay, that's fine.
2 MS. INESTA: Thank you.
3 JUDGE TRACY: All right. Sorry. I don't mean to
4 interrupt, but go ahead --
5 MS. DEMIROK: Okay.
6 JUDGE TRACY: -- with your questions.
7 Q BY MS. DEMIROK: Before I forget though, so was it -- did
8 you make the final decision to write Mr. Meraz up?
9 A Did I make -- I -- with my facts that I had in front -- I
10 said we're okay to proceed with the write-up.
11 Q Okay. So we were talking about break times. And you said
12 you were familiar with the break time policies for the company;
13 is that right?
14 A Yes.
15 Q Okay. And break times have been designated for each group
16 of employees in the warehouse. Well, they are designated for
17 each -- I'm sorry. Let me start that one over. So since
18 you've been in your position, have break times been designated
19 for each group of employees that work in the warehouse?
20 A Since I've been in my position, designated?
21 Q Designated.
22 A Not that I'm aware of. I mean I don't -- you know, I
23 don't -- I see sometimes -- I mean my office is like right by
24 the break room.
25 Q Uh-huh.

A By the break room. So I'll see people come in at different times, you know, the break room. So I don't know. I mean I'm not too sure. I haven't asked or anything like that, you know, if they're designated. I don't get into -- I mean breaks are breaks. I mean -- you know what I mean? I don't get into that. I mean I don't think that's --

Q Okay. So what do you know about the break time policies?

A I know that when we call -- when there's breaks -- when there are breaks, everybody goes on break. Okay. Everybody goes on breaks. And when they call break, it's break, and everybody goes on break or lunch, whatever time it is.

Q Okay. And you said something about like when they call for breaks. Is that because like when some of the outbound groups -- they call over the radio, right, and say -- tell them when they can take their break?

A Well, on the outbound?

Q Yeah.

A On the outbound and the shipping group, yes, they'll say okay, hey -- because they'll look at a pertinent time of the day to see when they're available to take the break, and they will call break time.

Q Okay.

A Because that's still -- when I was in the warehouse, that's what we used to do when I was in outbound -- in the outbound -- in the shipping department.

1 Q And do they still do that today?
2 A Yes.
3 Q Were they doing that in June?
4 A I don't know. I mean --
5 Q So you said you were familiar with the break time
6 policies. I mean just -- you just know that they have to take
7 breaks when there's breaks?
8 A Well, there's breaks that we have to take, you know, that
9 our employees take. I don't know the exact times, no, if
10 that's what you're referring to. I don't know the exact times
11 they have.
12 Q How many breaks are employees allowed?
13 A They'll have their 15-minute -- their two 15-minute breaks
14 and then lunch time.
15 Q Okay. Do they have to clock in and out for those?
16 A No.
17 Q Okay. Now you mentioned that calling out for breaks for
18 the outbound, is that the same with the inbound team?
19 A I don't know.
20 Q You don't know?
21 A No.
22 Q Okay. And just -- do you know -- are you ever involved in
23 transfers like when employees want to transfer from one
24 department to another?
25 A Well, there's a process there for transfers, yeah. Yes.

Q Okay. Are you familiar with that process?
A Yes.
Q Okay. Are you involved in making decisions about whether or not someone can transfer?
A Am I involved in it?
Q Uh-huh.
A No.
Q Okay. So you deal with hiring, right?
A Yes.
Q And you deal with terminations, right?
A Correct.
Q But you don't deal with transfers?
A The transfers, it's like -- you have to -- it's like you're saying hey, can I just transfer or you're transferring over. It's not just like that. It's -- there's a process you follow. There's an internal app that gets filled out, you know. There -- it gets reviewed by the department manager where that person wants to get transferred. And then if -- you know, they'll interview that person if an interview needs to happen. They'll interview it -- interview him. And then if they make that decision, then they'll fill out the offer, if there's a differ offer that is going to happen, different like pay structure or stuff like that. That gets handled by staffing.
Q Okay. Are there any requirements that you know of in --

1 for an employee to be able to transfer?
2 A I know for any transfers you can't be on a final.
3 Q Okay.
4 A And you'd have to be in your position for one year before
5 -- the current position for one year before you can transfer.
6 Q Okay.
7 MS. DEMIROK: I don't have any other questions, Your
8 Honor.
9 JUDGE TRACY: Okay. And, Ms. Inesta.
10 MS. INESTA: Your Honor, we're going to do our cross-
11 examination as part of our -- also our direct examination of
12 this witness.
13 JUDGE TRACY: Okay, all right. Thank you.
14 MS. INESTA: Thank you.
15 JUDGE TRACY: So, at this point, there aren't any further
16 questions for you. However, it seems as though you're going to
17 be called back again.
18 THE WITNESS: Again.
19 JUDGE TRACY: And then we haven't closed the record yet
20 for the hearing. So I'm just asking you not to discuss your
21 testimony with anyone else until after the close of the
22 hearing.
23 THE WITNESS: Okay.
24 JUDGE TRACY: Okay, all right.
25 THE WITNESS: All right.

1 JUDGE TRACY: Thank you. Okay. So it's 1:30 about. So
2 how long of a break do you all need for lunch? I know
3 Mr. Dawson ought to be back at some point. How long would you
4 guys like? Forty-five minutes, is that enough or --
5 MS. INESTA: We have to head back to the -- I mean we were
6 going to head back down the street.
7 MS. DEMIROK: Yeah. I'm trying to think of -- in the last
8 trials, we've either done an hour or even sometimes an hour-
9 and-a-half. But I don't know if we want to do that, because
10 mostly I think --
11 MS. INESTA: Yeah. I'd say we don't do an hour-and-a-half
12 but maybe an hour, Your Honor.
13 JUDGE TRACY: Okay. So we'll start again at 2:30.
14 MS. INESTA: 2:30?
15 JUDGE TRACY: Uh-huh. So we can go ahead and go off the
16 record.
17 (Off the record at 1:25 p.m.)
18 JUDGE TRACY: Okay. So let's go ahead and go back on the
19 record.
20 All right. Ms. Demirok, your next witness, please.
21 MS. DEMIROK: Okay. Counsel for the General Counsel calls
22 Ivan Vaivao.
23 JUDGE TRACY: Okay. Go ahead and raise your right hand,
24 please.
25 Whereupon,

1 **IVAN VAIVAO**

2 having been duly sworn, was called as a witness herein and was
3 examined and testified as follows:
4 JUDGE TRACY: Okay, thank you. Go ahead and have a seat
5 and state your name for the record as well as your current job
6 title.
7 THE WITNESS: My name is Ivan Vaivao, I-V-A-N. Last name
8 is Vaivao, spelled V, as in Victor, A-I-V-A-O. I am the
9 operations warehouse manager, Shamrock Foods -- Food Division.
10 JUDGE TRACY: Ms. Demirok, go ahead, please.
11 MS. DEMIROK: Okay.
12 **DIRECT EXAMINATION**
13 Q BY MS. DEMIROK: Hi, Mr. Vaivao.
14 A Hi.
15 Q So as you know, I'm an attorney with the federal
16 government. So I'm going to be asking you some questions
17 today.
18 A Yes.
19 Q Okay. And have you reviewed any documents in preparation
20 of your testimony?
21 A No.
22 Q Okay. And have you spoken with anyone in regards to your
23 testimony today?
24 A Counsel.
25 Q Anyone other than counsel?

1 A No.
2 JUDGE TRACY: And make sure you stay speaking up.
3 THE WITNESS: Okay.
4 JUDGE TRACY: Okay.
5 Q BY MS. DEMIROK: Okay. So how -- you said that you're the
6 operations manager; is that right?
7 A The warehouse -- operations warehouse manager, yes.
8 Q Okay. And how long have you been in that position?
9 A Been in this position four years.
10 Q And where do you fall in the chain of command. Who
11 reports to you and then who do you report to?
12 A I have four -- I have three managers reporting to me,
13 Brian Nicklin, the inbound manager, two outbound managers, Jeff
14 Vandawalker, Armando Gutierrez reports to me. I report up to
15 Tim O'Meara, which is the captain's operations manager in
16 charge of warehouse operations and transportation. And Tim
17 reports up to Mark, which is Mark Ingold, which is the VP of
18 operations.
19 Q And can you briefly describe your duties in your position?
20 A I receive all inbound and outbound operations.
21 Q Okay.
22 MS. INESTA: And, Your Honor, at this time, I'm requesting
23 to continue my questioning under Rule 611(C) under the Federal
24 Rules of Evidence.
25 JUDGE TRACY: Okay. Go ahead, please.

1 Q BY MS. DEMIROK: So we talked a little bit about where you
2 fall in the chain of command, but I want to talk to you about
3 some other people. And you mentioned Tim O'Meara, and he's the
4 one that you report to, right?
5 A Correct.
6 Q Okay. And he wasn't -- he hasn't always been in that
7 position, right?
8 A No.
9 Q Okay. It used to be Jerry Kropman; is that right?
10 A Yes.
11 Q Okay. And when did Tim O'Meara take over for him?
12 A I believe Tim O'Meara took over early December.
13 JUDGE TRACY: Of what year, please?
14 THE WITNESS: Of 2015.
15 Q BY MS. DEMIROK: Okay. And you may have mentioned David
16 Garcia. Is he a forklift supervisor?
17 A David Garcia is second shift inbound supervisor.
18 Q Okay. And then he reports to Brian Nicklin; is that
19 right?
20 A Yes.
21 Q Okay. And then Brian reports to you; is that right?
22 A Correct.
23 Q Okay. And with Richard Gomez, is he at the same level of
24 supervision as David Garcia?
25 A Yes.

Q Okay. So he also reports to Brian Nicklin?
A Correct.
Q Okay. And then there's Leland Scott. What does he do?
A Leland Scott is a shipping supervisor reporting to Jeff Vandawalker.
Q Okay. And how about Johnny Banda?
A Johnny Banda is a inbound supervisor first shift reporting to Brian Nicklin.
Q And what about Ignacio Vargas?
A Ignacio Vargas is a shipping supervisor reporting to Jeff Vandawalker.
Q Okay. And then does Jeff Vandawalker then report to you?
A Jeff Vandawalker then reports to me, yes.
Q Okay. And just a couple more. Art Manning, what does he do at the warehouse?
A Art Manning is a lead. We call the captains on the dock.
Q Okay. Is that also referred to as a floor captain?
A Dock captain. I'm not quite sure they refer to it as a floor captain. Dock captain because he works in the dock area.
Q Okay. So are there floor captains or you just call them dock captains?
A No, they call them dock captains. Everybody is a captain in every area. The captain kind of took over the lead. So everybody is considered a captain. Where you're at is considered a dock captain. You're a high-rise captain if

1 you're up in the high-rise area. You're a cooler captain if
2 you're a lead in the cooler area, cross dock captain, depending
3 on what area.
4 Q Okay. And what areas is Art Manning?
5 A Art Manning, primarily over the dock.
6 Q Okay. We mentioned Brian Nicklin. But again, what's his
7 title?
8 A Brian Nicklin is the inbound manager.
9 Q Okay. And you mentioned inbound. Are the operations at
10 the warehouse, are they divided into like shipping and
11 receiving?
12 A Shipping and receiving. Inbound is receiving.
13 Q Okay.
14 A And outbound is shipping.
15 Q Okay. And based on the shipping and receiving, it may
16 seem intuitive. But what is the -- what are the primary
17 objectives of the shipping group?
18 A Well, two operations. Primary objective of shipping is
19 servicing our sales department, our customers. So they select
20 orders, load up trucks, and dispatch trucks.
21 Q Okay. And that's also referred to as like the outbound
22 group?
23 A That's also referred as the outbound group, yes.
24 Q Okay. And then with receiving, what would you say is
25 their primary objective?

A Their primary objective is receiving product incoming to Shamrock. The account, they verify the quality in accounts. And then they put it away in the reserved room locations.

Q Okay. Again, that would be the inbound group?

A That would be the inbound group, yes.

Q Okay. And let's talk a little bit about the outbound group. What types of positions are included in the outbound group?

A There's a number of classifications for outbound groups, loaders, pickers, forklifters, captains, supervisors.

Q Okay.

A Towers.

Q So there's forklift operators that do that kind of work?

A Correct.

Q Okay. And that group, they work on -- at putting the -- getting the product from the warehouse into the trucks that are outgoing, right?

A They -- overall, yes. It's a process from getting the product from the reserve location to a pick location. And there's a group of people that pick it from the pick location to the belts. There's a group that takes it off the belt and put it -- place it into the trucks. So yes.

Q Okay. So it starts at the reserve location; is that right?

A Yes.

1 Q Okay. And would be a forklift operator that goes to the
2 reserve location?
3 A Correct.
4 Q Okay. And then the forklift operator takes it to, what'd
5 you call it, a pick slot or --
6 A A pick location, yes.
7 Q Pick location?
8 A Yeah.
9 Q Okay. So then the forklifter drops it in the pick
10 location, and then an order selector takes that product from
11 the pick location, right?
12 A Correct.
13 Q And then they bring it over to the conveyor; is that
14 right?
15 A Either conveyor or pick to a cart, which is transported to
16 a area called cross docking. So that area, their steward is
17 there that put is on -- that puts it on the belt in sequence of
18 the entire workload, yes.
19 Q Okay. And then from either the conveyor or the dock, then
20 it would be a loader who gets it into the trucks; is that
21 right?
22 MR. DAWSON: Objection, Your Honor. It's a dock. And not
23 to be difficult, but I think there are multiple -- I believe
24 what counsel may have intended to refer to is cross dock, which
25 is different than the dock.

1 THE WITNESS: Loading docks, right.
2 MR. DAWSON: So we may want to be specific on the
3 terminology.
4 JUDGE TRACY: Okay. So with that in mind, just clarify,
5 perhaps --
6 MS. DEMIROK: Sure.
7 JUDGE TRACY: -- your use of the terminology.
8 MS. DEMIROK: Okay.
9 Q BY MS. DEMIROK: Well, let's see. In the instance where
10 the order selector puts it on the conveyor belt, the conveyor,
11 who takes that product from that point?
12 A The conveyor transport it from that area to a merge
13 location. A merge location has a merger operator there that
14 releases in sequential order of how the route was built. From
15 then on, it gets into a sorter location, which is a quarter
16 mile long belt through the information that's on the pick
17 ticket. It determines the corresponding door to be diverted
18 to. So then it comes down to a belt to a loader. The loader
19 essentially places it according to the load -- the workload,
20 the work order.
21 Q Okay. So order selector puts it on the belt, makes its
22 way around the belt, and eventually ends up with a loader; is
23 that right?
24 A Correct.
25 Q Okay. And then the loader puts it in the truck?

1 A Yes.
2 Q Okay. And do those -- do the outbound group, they work on
3 -- they have set shifts?
4 A They have start times. They work until the work is done.
5 Compare the two operations, they don't have set shifts like two
6 operations. They do have set start times, right. Depending on
7 how large of a night determined kind of how long the ship would
8 go.
9 Q Okay. And how are their breaks determined?
10 A Their breaks are -- we have primarily standard breaks for
11 our shipping team. They take a 45-minute break, and they take
12 of 15-minute break later on in the day, according to the
13 shifts.
14 Q Okay. And are they released over radio when they're to
15 take their breaks?
16 A There's -- the main way is that -- the main way is common
17 knowledge, right? They know exactly what time to go. It's on
18 the ticker. We have tickers and we have electronic boards
19 throughout the warehouse that says break is from this time to
20 this time. So that's kind of how they know what time to take
21 break.
22 Q So their break times are designated?
23 A Yes, by directions of the shipping manager or supervisors.
24 Q Does that fluctuate depending on the schedule of the
25 trucks that need to go out?

1 A If I would testify, it's 99 percent of the time. It's
2 pretty much right on the money, same time every day. In the
3 event that a conveyor breaks down, you know, a system goes
4 down, we might move. But everybody takes breaks the same time.
5 Everybody takes breaks at the same time.
6 Q Okay. And we've talking about the shipping?
7 A The shipping too, yes.
8 Q Okay. How many trucks go out in a day?
9 A We have, on the average, 140, 150 trucks go out --
10 Q Okay.
11 A -- on a day.
12 Q And how -- if you know, on average, how long does it take
13 to load one truck?
14 A On the average, two hours, two-and-a-half hours, depending
15 on the size of the trucks. I mean there's trucks that, you
16 know, they can load within 45 minutes. So it depends on how
17 big a truck is. We don't have standard size trucks. Depending
18 on the geological -- geographic location --
19 Q Uh-huh.
20 A -- or where the truck goes is how big a truck is. So --
21 Q Okay.
22 A -- it differs.
23 Q So how many cases do you move through the warehouse every
24 day from, let's say, those reserve slots into a truck?
25 A We ship out on the average of 120,000 cases a nice.

1 Q Okay. Now you're -- you know about a union organizing
2 campaign at the warehouse, right?
3 A I'm made aware. Associates come up and complained about
4 being harassed.
5 JUDGE TRACY: Let me just intervene here. I had a
6 question. Associates, what does -- is that another term for
7 employees?
8 THE WITNESS: Employees. Yes, ma'am.
9 JUDGE TRACY: Okay.
10 Q BY MS. DEMIROK: Okay. So I asked you what you know about
11 a union organizing campaign in the warehouse or that you know
12 about it, and you said yes, because employees come up and tell
13 you about it?
14 A There's a union campaign going on. I'm not aware there's
15 an official union campaign going on. I know there's guys out
16 there harassing our associates. I know that our associates
17 have come up to see me personally and say hey, how can you make
18 it stop, how can you tell these guys to stop. So through that,
19 yes.
20 Q But you know who the organizers are, don't you?
21 A I know who the organizers -- same way. They're out there
22 passing out flyers. I haven't seen them pass out flyers. It's
23 knowledge on the warehouse that so-and-so passed out the
24 flyers. Have I seen somebody actually passing out flyers? No.
25 I haven't seen.

1 Q Okay.
2 A Which is I do know -- the one person, he declared that he
3 was involved in union activities.
4 Q Okay. And that was Steve Phipps, right?
5 A Yes.
6 Q And you kind of touched on this. But you also know that
7 employees talk about the Union on the warehouse floor?
8 A I do know, because they bring it up to me. Don't hear it
9 as often anymore, but they do.
10 Q So how do you know that they talk about it on the
11 warehouse floor?
12 A Associates would bring it up to me. They say hey, so-and-
13 so just stopped me and asked me to send a card. So-and-so
14 stopped by and talked to me about the Union. I -- can you make
15 it stop. I have associates that ask for their cards back. So
16 I've got nothing to do with that. I would have no idea how
17 would you get your card back.
18 Q How many different associates come to you to talk about
19 that kind of stuff?
20 A I haven't had one in a while, but -- from beginning to
21 now. But when it started, about 20 or so associates.
22 JUDGE TRACY: And so, please just make sure that you let
23 these attorneys finish asking their question before you start
24 answering it, because you could be answering the wrong
25 question. And also, we need the transcript, because what will

1 happen is -- afterwards, what will happen, what I see, is it
2 gets cut off. And then it makes the transcript really unclear
3 about what you're testifying about.
4 THE WITNESS: Yes, ma'am.
5 JUDGE TRACY: Okay, thank you.
6 MS. DEMIROK: Thank you, Your Honor.
7 Q BY MS. DEMIROK: So when was the last time that an
8 associate came to you to tell you that there was talk on the
9 floor?
10 A Last week.
11 Q Okay. And Mr. Phipps, he made his announcement back in --
12 I think that was April; is that right?
13 A I don't recall, you know, the timeframe. I know it's with
14 a -- it was a -- he came in on the safety review. And he said
15 hey, I am part of the union operation and, you know, union
16 activity. And I feel that this is a hostile group. That's how
17 we knew. I didn't know at that time.
18 Q The safety group. So was this in 2015?
19 A I don't particularly know the timeframe. I know it might
20 have been 2015.
21 Q Okay. And it was during a safety group meeting?
22 A It wasn't a safety group meeting. It was an appeals that
23 he came in and declared that he was part of -- he was -- he had
24 a safety violation. So he came in on appeal, that he didn't
25 commit the violation. So he came in through -- he then looked

1 at everybody that was in there and declared that he was, you
2 know, with the union, doing union activities.
3 Q Was this regarding the lettuce incident?
4 A I'm not sure if it's the lettuce incident. I'm not sure.
5 He -- I've been in a couple. I don't remember which one. So I
6 don't recall which incident. I just knew he came in on one of
7 the safety violations.
8 Q But you knew that Steve has been organizing since the
9 inception of the campaign, don't you?
10 A I knew he was out there, yes, because associates brought
11 it up to me that hey, Steve approached me.
12 Q And was that before or after you had this meeting with Mr.
13 Phipps?
14 MR. DAWSON: Objection, Your Honor. It's a meeting with
15 Mr. Phipps. I think the testimony was it was an appeal.
16 JUDGE TRACY: Okay. So I'm going to sustain the
17 objection. Just clarify the question, please.
18 MS. DEMIROK: Sure.
19 Q BY MS. DEMIROK: So when you're in this appeal with Mr.
20 Phipps, was that before or after you learned from associates
21 that Steve had been approaching them?
22 A This was after. When I learned from associates, it was
23 associates mentioning Steve's name. This is the first time I
24 heard it from Steve, that hey, I am involved with union
25 activity.

1 Q Okay. But you knew before then?
2 A Yes, I had knowledge from associates.
3 Q So are there certain employees that come to you with
4 information?
5 A It's a different group, different associate, depending on
6 who approaches him or how it is. It wasn't the same guy every
7 day. It was a different person coming to let me know, like
8 he's in there passing out flyers. Hey, he stopped by again. I
9 told him I didn't want to be part of it, and he stopped by
10 again. How can I make this guy stop?
11 Q Okay. And so, you mentioned this, but you also know that
12 union flyers are being passed out in the warehouse, right?
13 A Yes.
14 Q Okay. And you've seen some of those flyers?
15 A Yes.
16 Q But you know that it's not just Steve that's organizing,
17 right?
18 A I do. I do. I know that it's not just Steve. I know
19 through associates, there's a couple other people passing out
20 flyers.
21 Q And who are the people that you know of?
22 A I know of Steven Diddle passing out flyers, because an
23 associate brought it to my -- that's kind of how I kind of know
24 who's out there. Steven Diddle passed out flyers. So yes.
25 MR. DAWSON: Your Honor, may I object? To the extent that

1 this is being offered for the truth of the matter asserted,
2 these aren't management individuals, as I understand it from
3 Mr. Vaivao's testimony, that are reporting on people passing
4 out flyers. So to the extent that General Counsel is eliciting
5 this testimony to show that, for example, Mr. Diddle, in fact,
6 was passing out flyers, we would object on hearsay grounds.
7 MS. DEMIROK: Well, I don't think that's what we're
8 eliciting. But really, what matters is what he knew or what he
9 thought to be true.
10 JUDGE TRACY: Okay. So I'm going to overrule the
11 objection and just leave at what his testimony is in terms of
12 what he knew, which is what she had asked -- the General
13 Counsel had asked.
14 Q BY MS. DEMIROK: Okay. So you were involved in a
15 disciplinary write-up for Mr. Meraz regarding the missing
16 pallet. Do you recall that?
17 A Yes.
18 Q Okay. And you know who Mr. Meraz is, right?
19 A Yes.
20 Q Okay. He's an inbound forklift operator; is that right?
21 A Yes, ma'am.
22 Q And he's worked for the company for a few years; isn't
23 that correct?
24 A Yes, ma'am.
25 Q Okay. And when you met with him, that was on February 1st

1 of 2016; is that correct?
2 A I'm not sure on the date, but yes.
3 Q Okay. Now do you know who made the final decision to
4 issue that discipline?
5 A I did.
6 Q You did. Okay. And who brought that up to you?
7 A Nobody brought it up to me. I get a report every morning,
8 an outs report, end of the day report. I take a look at all of
9 these reports and question to my staff hey, what happened here?
10 How come we weren't running when we were supposed to be
11 running? How come we had all these outs to service our
12 customers? So that's kind of how I knew about it.
13 Q Okay. So you found out about it just by looking at a
14 computer screen?
15 A No. It was a -- well, it's a report that's sent out every
16 night. After every shipping night --
17 Q Uh-huh.
18 A -- there's a report that comes out. Part of my job is to
19 review those reports. So when I review those reports, I take a
20 look at the end of day report, I take a look at the outs
21 report. So the outs report is important to us, because a POP
22 score -- a perfect order process for us, it's our service level
23 to our customers. All right. So that's the reason why I look
24 at these reports. But when I look at these reports, I see out
25 -- one case out, two cases out, one case of this item, one case

of this item. In this particular instance, it was 30 cases of one item. So I questioned and says hey, it says here missing pallet. Let's take a look at -- find out what happened to the missing pallet. That's kind of how I found out, and that's kind of how I asked for the communication, to find out what happened to the pallet. So it's not unusual that I see that. I see -- if I see something in there, this one right here is 30 cases of one time, that's -- it's rare that we see outing a customer 30 cases. So it's kind of how I found out.

Q Okay. And when you're saying like outing cases, is that the same thing as like a short?

A So there's a couple different shorts in our process. There's a purchasing out or a warehouse out. A purchasing out is our vendor didn't get us the out. Our customer understands that. It's quantity ordered minus quantity allocated. So our customer would call in and say hey, I need 10 cases of potatoes. We say we only have eight cases of potatoes.

Q Uh-huh.

A They understand, at that point, a customer has an option. Okay. You shorted me. That's fine. Send me eight. Or fine, send me eight. Is there a different type of potato that you guys have? They have options at that point.

The second type of out that we have, or short, is a warehouse out, is that we committed to the customer that we have all 10. The customer then receives eight. What happened?

1 You asked me -- you told me you had 10. You only delivered
2 eight. So those are the two different outs, a warehouse out
3 and a purchasing out.
4 Q Okay. And are both of those considered shorts?
5 A They're not considered shorts. They're considered -- one
6 is considered purchasing out. One is considered warehouse out.
7 The warehouse out is also -- terminology, is considered a
8 warehouse short. A warehouse short is significant, because the
9 warehouse short is our service to a customer. We promised you
10 that we have 15. The customer has visibility to all 15,
11 requires 15, and we're only going to give you 10. So I mean
12 it's our service to our customer. The warehouse out is part of
13 our DSI, and our DSI is part of our pay plan.
14 Q Okay.
15 A So groups like receivers and forklifters and runners and
16 merge operators, they all get measured under our service to our
17 customers.
18 Q So would it be fair to say that there is a warehouse short
19 when there's a product that was supposed to get on a truck, but
20 it didn't make it there?
21 A No, not necessarily. All right. So that's a transfer.
22 The warehouse short is the commitment to the customer that we
23 have it. Now we're going to invoice you less than what you
24 ordered. We're telling the customer hey, we don't have it. We
25 thought we had it. We don't have it.

1 Q Well, in the warehouse, what is commonly referred to as
2 shorts?
3 A Warehouse shorts is one of them, or a trans short. A
4 trans short is a driver gets to location, and that item is not
5 on the truck.
6 Q Okay. And that one -- because you have a short policy,
7 right?
8 A Yes.
9 Q A policy on shorts.
10 MS. DEMIROK: Your Honor, if I could just have a second.
11 JUDGE TRACY: Yes.
12 MS. DEMIROK: Thank you.
13 JUDGE TRACY: Let's go off the record.
14 (Off the record at 3:13 p.m.)
15 JUDGE TRACY: Okay, go ahead.
16 Q BY MS. DEMIROK: So I just want to make sure we're on the
17 same page here. I'd like to show you what's been marked as GC
18 Exhibit Number 4 and what's been admitted as GC Exhibit Number
19 4. So on the top here, it says -- have you seen this document
20 before?
21 A Yes, I have.
22 Q Okay. You know what that is, right?
23 A Yes.
24 Q Okay. On the top, it just says shorts, right?
25 A Right.

Q Okay. And do you -- what type a short that you were talking about is this related to?

A Right. So this -- the short we talked about, warehouse shorts, is not related to this. All right. So I think we're talking about two different type of shorts, right?

Q Yeah.

A This is the sort that a picker picks and verifies that hey, I picked it. I selected it. I have it. The customer doesn't get it. All right.

The warehouse shorts is what we have. A customer orders. We invoice them, and then we come back and says the reason why we shorted this is we thought we had 11. We only have eight. So those are two different types of shorts. One is an inventory control -- inventory assurance short, and the other one is a operational short, which hey, I picked it. I thought I picked it. I had 10 cases. I picked nine. And I double labeled an item. Now I get to the customer. There's only nine cases versus 10. So there's -- there are two different types of shorts.

Q Okay. But in the circumstance where there's a picker that was supposed to pick a product and it doesn't get on the truck, that's one of those types of shorts, right?

A That's one of these type of shorts.

Q One of those type of shorts.

A Yeah.

1 Q Okay.

2 JUDGE TRACY: And those, you're referring to Joint -- GC

3 Exhibit 4?

4 MS. DEMIROK: Yes. Thank you, Your Honor.

5 Q BY MS. DEMIROK: Now with the other type of shorts, not

6 the one referred to in GC Exhibit Number 4, but the other one

7 that you described, who gets held responsible for those?

8 A Everybody does, right.

9 MR. DAWSON: Your Honor, I think Mr. Vaivao testified

10 to --

11 JUDGE TRACY: So is there an objection?

12 MR. DAWSON: Yeah, I'm sorry.

13 JUDGE TRACY: Okay.

14 MR. DAWSON: Objection as to the question. I think Mr.

15 Vaivao testified that there are trans shorts and warehouse

16 shorts or outs. It might be better if the question was

17 specific as to which short he's being asked about.

18 JUDGE TRACY: Okay. So I'll sustain the objection.

19 If you could just clarify in your question which type of

20 -- or just be clear. I think it was following along, but be

21 clear in what you're referring to.

22 And certainly, sir, if there's anything, in terms of any

23 questions, if you're not clear, please tell --

24 THE WITNESS: Yes, ma'am.

25 JUDGE TRACY: -- respond that you're not clear or don't

1 understand the question, okay?
2 THE WITNESS: Yes, ma'am.
3 Q BY MS. DEMIROK: Okay. So you talked about warehouse
4 shorts, right?
5 A Yes.
6 Q And trans shorts, right?
7 A And trans shorts.
8 Q Which one again, could you tell us, is referred to --
9 A Those are trans shorts.
10 Q I'm sorry. Let me finish so we get the record clear. But
11 which one is referred to in GC Exhibit Number 4?
12 A Trans shorts.
13 Q Trans shorts.
14 A Yes.
15 Q Okay. And we were also talking about trans shorts when we
16 were talking about how that often happens when a picker doesn't
17 pick the product or doesn't make it on the truck. Were we
18 talking about trans shorts at that time?
19 A When there's a breakdown -- that shows a breakdown in the
20 process when the picker picks it, says he picks it, puts it in
21 the wrong location, doesn't take it where it needs to go. The
22 customer doesn't get it.
23 Q Uh-huh.
24 A It has verification that hey, a picker picked it. Those
25 are considered trans shorts.

1 Q Okay. And that's also what we're referring to or what GC
2 Exhibit Number 4 touches; is that right?
3 A Correct.
4 Q Okay. Now with the warehouse shorts -- well, let me ask
5 you this. Do pickers get held responsible when there's a short
6 -- when there's a trans short?
7 A Yes.
8 Q Okay. And if there's a warehouse short, is there anyone
9 to hold responsible for that?
10 A Yes.
11 Q Okay. How does that break down?
12 A Our DSI -- measuring our DSI, that's a component of our
13 pay. Receivers, forklifters, runners, merge operators, are all
14 measured under that component of the warehouse. So part of
15 their pay is that DSI component.
16 Q Okay. Now, so it affects their pay. Is that what you're
17 saying?
18 A That affects their compensation, yes.
19 Q Okay. But does anyone ever get written up when there's a
20 warehouse short?
21 A If it's clear, yes. If it's clear -- a lot of people
22 handle pallets coming in, in the building. If it's an incident
23 or a situation that is very, very clear that hey, this person
24 committed it, this person did it, then yes, we can look back at
25 the records. Are there people that don't get disciplined?

1 Because we can't -- there's a lot of people that handles
2 pallets when they come in. It's not just one person handling
3 it.
4 Q Right. So each pallet moves through quite a few different
5 hands before it gets to the -- is it called the reserve area or
6 the reserve sell lot?
7 A Reserve location, yes. Reserve location, yes.
8 Q Okay. So there are several different people that may
9 touch that pallet before it ends up there; is that right?
10 A Yes.
11 Q Okay. So we started about all that, because you said you
12 got a report, and it showed that there were 30 shorts; is that
13 right?
14 A Yes.
15 Q Okay. And those 30 shorts that you saw in the report,
16 what type of shorts were those?
17 A Those were warehouse shorts.
18 Q Warehouse shorts.
19 A Yes.
20 Q So when you saw those shorts, who did you first speak with
21 about that?
22 A I spoke with Richard Gomez, which was the inbound
23 supervisor on duty.
24 Q How did you speak with him?
25 A I called him. I specifically spoke with him. I spoke

1 with Brian Nicklin as well.
2 Q Okay.
3 A Because he ultimately is the inbound manager.
4 Q And what, if anything, did you instruct them to do?
5 A Find out what happened to the pallet. That's exactly what
6 I found out. I found out -- I asked them find out what
7 happened to the pallet. This is a specific item that was
8 brought in for a specific customer. And we're now having to
9 call the customer and tell them that we don't have the pallet.
10 So find out through our -- the process what happened. How come
11 we could have lost this pallet?
12 Q And did any of those individuals come back to you and tell
13 you what happened?
14 A Yes.
15 Q Okay. And who was that?
16 A I believe Richard Gomez. Both Richard Gomez and Brian
17 told me yeah, it came in today. It was received by so-and-so.
18 It was put away by so-and-so. And it's missing. It's not in
19 the location where it's supposed to be.
20 Q And do you know how many days after the customer was
21 supposed to receive this product that you noticed this and
22 started looking into it?
23 A It was the next morning.
24 Q The next morning, okay.
25 A The next morning.

1 Q So let's talk about -- let's take them one at a time. You
2 said you talked to Richard Gomez and he came back to you with
3 some information. Would, first of all -- what did he tell you?
4 Like what did he tell you happened?
5 A I told her that Michael Meraz scanned the location. In
6 the location, there's nothing there. The pallet was at a
7 different location.
8 Q Did he tell you that he had talked with Michael Meraz?
9 A He didn't say he spoke with Michael Meraz or not.
10 Q Okay. Did he tell you how he knew that?
11 A He looked it up in our information, in our system.
12 Q Okay. Did you ask him if he had done anything other than
13 looking it up in the system?
14 A I didn't ask him anything. I believe by the time I called
15 him that morning, inventory control, that's their normal
16 process, right? So the next morning, they take a look at outs
17 report as well and says hey, this pallet was missing from last
18 night's shipping. They start to research on what happened to
19 that pallet.
20 Q Yeah. So tell me about that. So how does inventory
21 control get involved?
22 A The same report. Inventory control manager, and inventory
23 control team, they get that report every morning. So from that
24 report, they go out the next day and try to reconcile. A, try
25 to reconcile and lock those lost items if they can't find it,

1 to prevent the customer from ordering against those same items
2 that we can't find.
3 Q But are they ever notified with -- by the -- I guess, in
4 some circumstances, it may be an order selector. In other
5 circumstances, it may be a forklift operator. Like the next
6 person who's supposed to touch that product, are -- is
7 inventory control ever notified by them?
8 A They're notified. They're notified -- forklift operators
9 notify inventory control. That is the process. The process is
10 -- their normal process is it calls for replenishment. They go
11 to that location. If it's not there, they call inventory
12 control and says, hey, I've been called for a task. It's at
13 this location. It's not there. Is there another available
14 pallet? So then inventory control says okay, there's another
15 available pallet here. Go grab that and complete the task, and
16 I'll do the research on the pallet that's missing.
17 Q Okay. So did you learn -- in this particular
18 circumstance, did the control clerk, the inventory control
19 clerk, were they notified by another employee in the warehouse?
20 A I don't know if they were notified. I know they do notify
21 them. I don't know -- in order for them to put it, they have
22 to have been notified. All right. Inventory control would
23 have had to have been notified for them to out the product. So
24 what they do, they come down and confirm that it is true
25 there's no pallet there, then they out the product.

1 Q Did you speak with the inventory control clerk about this?
2 A No.
3 Q And so, at some point, did you tell Richard Gomez and
4 David Garcia that they should issue a discipline to Mr. Meraz?
5 A They -- Richard Gomez and Brian Nicklin, when they came
6 back with what they found, according to what had happened with
7 the 30 cases, yes, I suggested hey, let's go ahead. I
8 recommended a CPDR. So yes.
9 Q Okay. And what are all the things that you made your
10 recommendation on?
11 A The recommendation is -- this is special circumstances,
12 all right? This is a real special circumstance that this
13 pallet came in the same day, was put away the same day, and we
14 lost it that same day. It wasn't one of those -- and it was a
15 special order pallet that came in for a catering company. So
16 they wanted their 30 case. They didn't get it. So this was a
17 special. It was one time. Normally, we wouldn't find out
18 until the next day. But the customer -- it's transparent to
19 the customer. They still get it. But this situation, that was
20 the only pallet that we brought in.
21 So normally, when a pallet is called, the inventory
22 control says hey, we'll service our customers. We'll grab this
23 other pallet that we have in reserve. I'll send that to the
24 customer. We'll do the research on this pallet. This
25 situation, or this scenario, this was the only pallet that we

1 had. It was a special order product by the customer for an
2 event, this catering company. They didn't get it. It wasn't
3 -- it was a little different from normal warehouse outs. The
4 sheer amount of cases that were outed because of this issue was
5 30 cases. So they didn't get -- they got zero cases for an
6 event.
7 Q Now was Mr. Meraz doing inbound work or outbound work at
8 that time?
9 A He was doing inbound work.
10 Q Okay. Now you talked about like the consequence to the
11 customer and the business. But was there any other reason why
12 he was written up?
13 A Right. It's the process. That was his process. His
14 process is to verify that this pallet is at this location. How
15 do I know that? He scanned the pallet, and then he scanned the
16 location where he put the pallet. Then the -- our system
17 requires an additional scan. It'll tell you is this the actual
18 location and this is the actual pallet, yes, scan, rescan. So
19 he scanned it three times. You scan the pallet to be put away.
20 You can the location where the pallet is going. And then the
21 system will ask you if this -- is this pallet in this location,
22 and then you'll scan it again. So there's a confirmation
23 there, yes.
24 Q So when you made the decision, did you just rely on the
25 what the computer systems that?

1 A Yes. I looked at the -- well, the process that he was
2 supposed to follow, where the pallet was found -- pallet was at
3 in reference to where the pallet scanned to.
4 Q And at the time when you made that initial decision to
5 have the discipline issued, did you consider the possibility
6 that maybe the scanners or the computer system played a part in
7 the missing pallet?
8 A Absolutely had nothing to do with the scanners, and I'll
9 tell you why. It's because it did confirm it, that that LPN --
10 it's a 20-digit license plate -- is supposed to be at this
11 location. So it verifies that hey, the system was working.
12 Q So -- okay. But have you ever heard of forklift operators
13 complaining about their scanners?
14 A With scanners. But in this situation, it's not true.
15 This situation right here, normally, when it goes out, there's
16 no location. This no location attached to it. This pallet,
17 right, had a location attached to it.
18 Q Okay.
19 A So if the scanner would go out, there'd be no location
20 attached to it.
21 Q But my question was just that you have heard forklift
22 operators complain about their scanners, right?
23 MR. DAWSON: Objection as to relevance, Your Honor.
24 JUDGE TRACY: I'm going to overrule the objection.
25 Go ahead. Please answer.

1 THE WITNESS: Connectivity, hey, I -- the signal dropped.
2 But in reference to this location, no. The signal was there,
3 because he scanned it to a location. There's a confirmation
4 that he scanned it to a location. If there's -- if a signal
5 was dropped, it won't pose a location.
6 Q BY MS. DEMIROK: Did you consider the possibility that
7 another forklift operator could have moved that pallet?
8 A We looked at it. We looked all the transactions. The
9 transaction is very, very clean. There was footage provided by
10 his manager. He was the only forklift around that area. So
11 looking at the system, it's very, very clean. He placed it at
12 this location and scanned it at that location. So it --
13 Q So who looked at the footage?
14 A I believe Brian Nicklin looked at the footage.
15 Q When did he look at it?
16 A After -- probably a couple days after that or that same
17 day. I'm not sure what he did, but he did look at the footage.
18 Then he told me that hey, it is verified that he put it in the
19 wrong location.
20 Q Is that before or after you made your -- the initial
21 decision to issue the discipline to him?
22 A That was -- initially, that was -- when I asked what
23 happened to this, that's the response from Richard and Brian
24 Nicklin. Says, hey, I reviewed the footage. He did put it in
25 the wrong location.

1 Q But I guess that doesn't quite go to my question either.
2 Did you consider the possibility that another forklift operator
3 could have moved the pallet after Mr. Meraz did?
4 A By looking at the report, looking at the scans, no, it
5 couldn't have happened. Another forklifter coming around and
6 moving it, no. It was -- I think it was right after the other,
7 the -- he had scanned it right into the pick. It wasn't --
8 looking at that, it could've -- another forklift, it could have
9 came and put it in a different location.
10 Q So you didn't consider that as being a viable option?
11 A I looked at it. Just by looking at that, it wasn't the
12 case. All right. Just by looking at the scans timeframe, it
13 wasn't the case. It was a case of I -- he put it in the wrong
14 location.
15 Q Okay. Did you consider whether the inventory control
16 clerk, whether they should have been held responsible instead?
17 A Well, inventory control clerk, that's not their main
18 responsibility, right, at nighttime. Their main responsibility
19 is to come down and verify that it is true that it is reported
20 the pallet is missing. Like I said, normally, how it happens
21 is report it. There's some time for them to do some research.
22 The way this happened, it was a decision that's made. Hey, 30
23 cases is missing. This truck needs to leave right now. Do we
24 say hold the truck back, let's do the research, let's map all
25 the pallet in that area, search for those 30 cases, and this

1 service the other 12 customers that on the same truck? It was
2 a decision. It's one of those decisions that's made every
3 night on the shipping team. Hey, do we disservice all 13
4 customers? Or do we just disservice this one customer, and
5 then we can figure out what happened? So it was a timing
6 thing.
7 This situation was a timing. It was a special order item
8 that was ordered for a specific customer. It was brought in
9 today, put it away today. There is no other reserve pallets
10 for this item. It was the only item. Now by the time it was
11 discovered that hey, this truck need to depart, we're missing
12 30 cases. Where those 30 cases? It was a decision. Do we
13 hold the truck back, disservice everybody else that's on that
14 same route, or do we make the call right now and consider it as
15 a warehouse out?
16 One that report the next day, inventory control looks at
17 it. Operations looks at it and says, hey, let's find out what
18 happened to this pallet.
19 Q so after you authorized the discipline to be issued, at
20 some point, did Daniel Santamaria come talk to you about it?
21 A Danny Santamaria didn't come talk to me about it.
22 Q Okay.
23 A I offered the -- for a CPDR. They presented it to
24 Mr. Meraz. And apparently, he did sign it. He refused it. He
25 wanted to dispute it.

1 Q So, but I'm saying after that, did Mr. Daniel Santamaria
2 ever come to you and talk to you about the incident?
3 A The day of, when Daniel Santamaria had scheduled with
4 Michael Meraz to come sit with him, he said hey, you want to
5 sit with me, with Michael Meraz. He's here to dispute his
6 write-up, his verbal write-up.
7 Q So you -- so between -- so you never talk to Mr.
8 Santamaria in between those dates?
9 A No, I never talk to Santamaria. I spoke to -- when I did
10 spoke -- I spoke to -- I believe I spoke to Michael Meraz. He
11 came to me and says hey, talk to Daniel Santamaria. He has all
12 the information. He'll look over all the information, and then
13 we'll go from there. So Daniel Santamaria then said hey,
14 Michael Meraz is disputing a write-up. I went over. We sat
15 down. We explained to Michael Meraz. Michael Meraz agreed.
16 He signed off on his CPDR, and on he went.
17 Q Okay. And did you tell anybody to send Daniel Santamaria
18 information regarding the incident after you made the decision
19 to issue this CPDR?
20 A I'm not aware I told anybody to copy -- I'll procedure was
21 hey, we copy HR just in case they refused to sign. And then HR
22 can sit in. I'm not aware that I asked anybody to copy.
23 Normally, we do copy. Everybody copies everybody in the chain
24 of command. They copy me because I'm the ops supervisor -- ops
25 manager. They copy Danny Santamaria, because, ultimately, any

1 kind of dispute, normally, Danny Santamaria will sit down and
2 review. Hey, these are all the documentations. Let's take a
3 look at it.
4 Q Okay. Did you know that Daniel Santamaria was
5 investigating the incident after Mr. Meraz refused to sign the
6 write-up right away?
7 A I don't -- I'm not sure that I knew that he did it.
8 Daniel Santamaria approached me that day. Michael Meraz is
9 coming in to see me about the -- what do I know? I said well,
10 it's clear. It's there. All the evidence is there that he did
11 it. So I can sit down with you and explain to Michael Meraz if
12 he didn't understand exactly what was going on. So we did. We
13 sat down. Daniel explained the situation, the evidence that he
14 collected from Brian Nicklin and probably Richard and whoever
15 was involved, inventory control. But I was there to kind of
16 support that yeah, this is what happened.
17 Q So did you know -- so you just said Daniel collected
18 information. So my question was did you know that Daniel
19 Santamaria was investigating what happened in between the time
20 that you made the first decision to issue the CDPR and when
21 Mike -- you know -- I'm sorry. There was a time when Daniel
22 Santamaria was investigating, right, this incident?
23 A Yeah. I believe Michael Meraz went to Daniel Santamaria.
24 So yes, Daniel Santamaria then was probably looking into it.
25 Do I know that Danny Santamaria was when I offered the CPDR?

1 No, I didn't know he was investigating. Daniel said Maria
2 would've known when Michael Meraz came up to him.
3 Q Yeah. Not when you issued the CPDR, but after you issued
4 the CPDR, you learned that Michael Meraz wouldn't sign it,
5 right?
6 A Yes.
7 Q Okay. And it's after that point in time you learn that
8 Daniel Santamaria was investigating the incident; is that
9 right?
10 A I knew that Danny Santamaria was looking into it, yeah.
11 Q Okay. And so, did you talk with Daniel Santamaria while
12 he was investigating?
13 A No, not during the investigation. It was clear that he
14 got all this information from everybody else. Danny Santamaria
15 used to be in the warehouse. He used to be a forklifter. So
16 he knows multiple systems. He looks into it. So he approached
17 me that day and said hey, Michael Meraz is coming in. Do you
18 want to come in? Because I don't know if Michael Meraz is
19 going to ask anything that I don't know. I'll come in. I'll
20 sit down with Michael Meraz.
21 Q And is that the day that Michael Meraz signed the written
22 form?
23 A That's the day that Michael Meraz signed, yes.
24 Q Okay. Because -- but there's some time in between there.
25 So he signed -- and I'm going to show you what's been marked

1 and entered --

2 JUDGE TRACY: He also has it up there.

3 MS. DEMIROK: Oh, okay.

4 Q BY MS. DEMIROK: As GC Exhibit Number 5.

5 JUDGE TRACY: He won't need that. He --

6 THE WITNESS: Okay. This one right here?

7 JUDGE TRACY: Yeah.

8 Q BY MS. DEMIROK: Okay. So have you seen this before?

9 A I've seen this before, yes.

10 Q Okay. And you were here when he signed -- Mr. Meraz

11 signed the document, right?

12 A Yes.

13 Q Okay. And it looks like it's been signed as -- on the

14 date of February 1st of 2016; is that right?

15 A Yes.

16 Q Okay. And there are some other dates on the form. For

17 example, on the top, it says date, and it's typed in January

18 18th, 2016.

19 A Yes.

20 Q Is that the date that you issued the CPDR?

21 A That's the date that the CPDR was created. I'm not aware

22 what -- when they issued the CPDR. I didn't issue the CPDR.

23 Q Oh, okay.

24 A So a CPDR normally goes down to Michael Meraz' supervisor.

25 So his supervisor probably sat down with him and refused it.

1 Q Okay.
2 A So I don't -- I didn't -- I don't issue -- I don't sit
3 down with the associate and do the CPDRs.
4 Q You just authorize it?
5 A I authorize -- yes, I authorize this right here, because I
6 looked into it. I looked into it and I saw the -- you know,
7 what had happened. But I didn't sit down with Michael Meraz
8 and ask him to sign this would give him -- or minister the
9 CDPR, no.
10 Q Okay.
11 (Counsel confer)
12 Q So do you know how to read these location numbers?
13 A Yes.
14 Q Okay. And --
15 MR. DAWSON: Your Honor, objection. If we could just get,
16 for identification, the exhibit number. Which numbers are we
17 referring to?
18 MS. DEMIROK: Yes. So GC Exhibit Number 5.
19 MR. DAWSON: Okay.
20 Q BY MS. DEMIROK: There are two examples of it location
21 numbers on there; is that right?
22 A Yes.
23 Q Okay. And you do know how to read location numbers,
24 right?
25 A Yes.

Q Okay. And the numbers will tell you a lot about where the location in the warehouse is, right?
A Yes.
Q For example, the first number where is referring to where the product was logically placed, it starts with CL; is that right?
A Yes.
Q And that stands for cooler location or --
A Cooler.
Q Cooler. Okay. And then the second two numbers, that's the aisle; is that right?
A Yes.
Q Okay. And then you've got the next three numbers, then that would be the actual -- is that the bay?
A That's the bay, yes.
Q Okay. Are you pretty familiar with the warehouse even in regards to like where the -- if you looked at a number, could you figure out by like where that is in the warehouse?
A Yes.
Q Okay. By looking at that number, do you know if that's a -- is that a small bay or big bay?
A By looking at that number, you wouldn't know if it's a small bay or a big bay. But, knowledge, knowing aisle 20 --
Q Yes.
A -- is small bays, yes.

1 Q Okay. And there are like three slots within the -- those
2 bays?
3 A Three slots in the bay, yes.
4 Q Okay. And you can even tell what slot that is by looking
5 at that number; is that right?
6 A Yes.
7 Q Okay. So by looking at the two numbers of GC Exhibit
8 Number 5, could you tell us how far away are those slots? How
9 many slots away from each other are they?
10 A Average bay is 10 feet, so it's 10 feet apart.
11 Q Okay.
12 A On the average beam to beam. All right. This is probably
13 over 10 feet apart. Note that the last two numbers is 0-5.
14 Q Uh-huh.
15 A It's level five. All right. We have six levels in the
16 warehouse. This is about 30 feet up in the air.
17 Q Thirty feet of any air?
18 A Approximately about 30 feet up in the air.
19 Q Okay. I'm handing you, Mr. Vaivao, what's been marked as
20 GC Exhibit Number 7. And if you could take a moment and look
21 at this. It looks like a string of emails; is that right?
22 A Yeah.
23 Q Okay. And on the first page, it's an email from you to
24 Brian Nicklin; is that right?
25 A An email from Richard Gomez to Melanie Merilee (phonetic).

1 So if you look at it from bottom to top.
2 Q Uh-huh.
3 A All right.
4 Q But the most recent in time is the one from you; is that
5 right?
6 A Most recent in time. Which page are you referring to?
7 The one right there in the middle?
8 Q Yeah, the very first page.
9 A January 25th?
10 Q Yes.
11 A Okay.
12 Q So I was hoping you could explain what this report is on
13 the second page.
14 A Yes. It shows the movement of the pallet from before
15 user, previous location, to the next location.
16 Q And who is Robert Coleman?
17 A Robert Coleman is inventory control associate.
18 Q Do people also refer to him as Lee Rick?
19 A I personally haven't heard that.
20 Q Okay.
21 A I personally don't know if that's his -- I know him as
22 Robert Coleman.
23 Q Now on January 25, 2016, you were telling Brian to send
24 all the information about this issue to Daniel Santamaria; is
25 that right?

1 A Yes.
2 Q Why were you -- why did you have him do that?
3 A After learning that he refused to sign it, there's going
4 to be a dispute, so I says hey, make sure that Daniel
5 Santamaria has it, because he's going to end up in Daniel
6 Santamaria's office disputing this information.
7 Q He's going to end up at Daniel Santamaria's office?
8 A He had mentioned that to Dave Garcia when they sat down
9 with him to administer the CPDR.
10 Q Yeah.
11 A That I want to talk to Daniel Santamaria.
12 Q So why were you instructing them to -- I guess I just
13 didn't understand. Why were you telling them to send
14 information to Daniel Santamaria?
15 A Because Daniel Santamaria is our HR rep. Any dispute goes
16 up to Daniel Santamaria.
17 Q Uh-huh.
18 A So I learned that hey, I refuse to sign it, I'm not going
19 to sign it, I refuse to sign it, I want to talk to Danny
20 Santamaria, I says okay, fine. Send information to Danny
21 Santamaria. That way Danny Santamaria knows. It's kind of the
22 normal process, right? Danny Santamaria will sit down and
23 review all the documentation of what had happened.
24 Q At this point, on January 25th, did you know if Daniel
25 Santamaria was already looking -- investigating the incident?

1 A No, I didn't know at this point. This is -- I didn't know
2 that he was looking into it, right. So normally, when the
3 information got to me and said hey, he refuses to sign, he
4 wants to speak with Danny Santamaria, okay. Send the
5 information up to Danny Santamaria.
6 Q And so, how are you informed that Mr. Meraz refused to
7 sign the CPDR?
8 A I received a call.
9 Q A phone call?
10 A A phone call, yeah.
11 Q Okay. Why did you put on here to copy Tim O'Meara?
12 A Because he's my boss. I normally copy him on everything
13 that comes my way. I make sure that he understands.
14 Q And just to be clear, when you're informing Brian Nicklin
15 to send information to Daniel, was it information regarding his
16 refusal to sign or was it information regarding the incident?
17 A No, it was information regarding the incident, information
18 regarding that hey, he scanned it to this location. It wasn't
19 there. Created 30 outs. So all that information -- those are
20 informations, it's not for him to refuse to sign, right,
21 because he's going to go up -- he's going to explain his reason
22 for refusal. And Daniel needs to understand hey, this is what
23 happened. According to this, this is what happened.
24 Q Okay.
25 A It has nothing to do with refusing to sign.

1 Q Could you take a look at the third page?
2 A Okay.
3 MS. DEMIROK: And were still on GC Exhibit Number 7.
4 Q BY MS. DEMIROK: It looks like -- it's hard to read kind
5 of how this communication is, but it looks like it was in the
6 trail of emails. And it says, "Pallet was received 1/15/2016
7 by Tim Franks."
8 Do you know what this is referring to?
9 A This is referring to -- pallet received. Couldn't find
10 the reserve.
11 Probably referring to the issue of the pallet missing.
12 Q Okay. And who is Tim Franks?
13 A Tim Franks is the receiver.
14 Q What is he do in receiving?
15 A What does he do in receiving?
16 Q Yeah. Like what's his position? Is he --
17 A He's a receiver. He -- we have a third party unloader
18 that unloads it and breaks the party down by Shamrock
19 configuration, pallet configuration. They break it down to the
20 pallet configuration, a receiver. According to this, Tim
21 Franks was the receiver. He comes in and verifies that that
22 will is the right -- correct product. He verifies the quality
23 of the product. And he verifies the count on the pallet. From
24 there, it creates a -- he confirms it into our system. It
25 creates a -- an LPN, a 20-digit code, LPN, a license plate that

1 goes on to that pallet. When it's placed on that pallet, it's
2 ready to be put away.
3 Q Okay. So Tim Frank actually receives the product.
4 A Yeah.
5 Q And then he goes to a forklifter who will put it in a
6 reserve slot?
7 A Yes.
8 Q Okay. And Mike Meraz is the forklift operator who
9 would've put that pallet in the reserve slot, right?
10 A Yes.
11 Q Okay.
12 MS. DEMIROK: And, Your Honor, I would like to move to
13 admit GC Exhibit Number 7.
14 JUDGE TRACY: Any objection?
15 MR. DAWSON: No objection.
16 JUDGE TRACY: All right. So General Counsel's Exhibit 7
17 is admitted into evidence.
18 **(General Counsel Exhibit Number 7 Received into Evidence)**
19 Q BY MS. DEMIROK: Now before you met with Mr. Meraz on
20 February 1st when he assigned the disciplinary form that's in
21 GC Exhibit Number 5, had you spoken with him about this
22 incident before that?
23 A He came to see me. I said hey, Daniel Santamaria is
24 already planning to talk to you. Ask Daniel Santamaria. We'll
25 sit down and we'll go over it. We'll go over everything that's

1 there.
2 Q And did you learn what Mr. Meraz' position was on the
3 incident?
4 A Did I learn what his position was on the incident? Not at
5 that time.
6 Q Okay. When did you learn what he thought about it?
7 A When we sat down in Daniel's office.
8 Q Okay. So prior to this incident with Mr. Meraz, when was
9 the last time that you had authorized discipline to go to an
10 inbound forklift operator for warehouse shorts?
11 A I don't remember a specific date, but I have in the past.
12 Looking at similar type of, you know, very clear cut type of
13 scenarios, we bring them in and sit down and says hey, this is
14 what happened. Yes, but I have. Specific dates I can't tell
15 you right offhand.
16 Q Can you give us an example of one?
17 A I couldn't even tell you. It happens all the time. It
18 happens all the time. We do the research. They get to a point
19 where hey, a pallet was put in the location. I put in the
20 location. It's -- there's nothing there. This one right
21 here, we had footage to verify that he put it. This one right
22 here was very clear. He was the only forklifter that scanned
23 it and put it in that location.
24 So -- but dates, no, I can't provide you any dates.
25 Q Maybe not a date, but just a specific -- like an example

1 of you writing someone up in a similar incident.
2 A Nothing offhand. But if it's the same scenario, hey, I
3 put it in the wrong aisle, wrong location, that type of thing
4 that we can see, we've offered -- issued CPDRs for other
5 inbound associates not following the procedure.
6 Q And you said inbound associate. Would that be inbound
7 forklift operators?
8 A Inbound forklift operators.
9 Q Now --
10 A Inbound receivers.
11 Q -- if you were going to issue a CPDR or authorize a CPDR
12 in this incident, would you word it any other way other than
13 how it's worded in GC Exhibit Number 5?
14 A Say that again.
15 Q So in GC Exhibit Number 5, it says -- gives an explanation
16 of what the violation is, right? Now is there any other way
17 that you would describe the incident that Mr. Meraz --
18 involving Mr. Meraz?
19 A No. This was just a failure to follow proper put-away
20 procedures. Put-away procedures, it's very clear. The system
21 kind of guides you there, right. So in this situation, the --
22 you scan the pallet. You put to the reserve location. The
23 system will ask you if that's the right pallet in that
24 location, yes or no, rescan. So rescan the pallets. So it's a
25 -- obviously, that didn't happen, right. Obviously, that

1 didn't happen.
2 Q So if I were to look for other disciplinary reports for
3 similar incidents -- you said it happens all the time, could I
4 look for forms that say associate failed to follow proper put-
5 away procedures?
6 MR. DAWSON: Objection, Your Honor. That calls for
7 speculation. Mr. Vaivao didn't testify that he's the only one
8 that issues discipline on this. And I don't think he can
9 testify as to how someone else might describe the same
10 violation.
11 MS. DEMIROK: Well, I asked him just what I could look
12 for, and I've --
13 MR. DAWSON: Same objection, Your Honor. I mean
14 Mr. Vaivao can't, I don't believe, testify as to what Ms.
15 Demirok should look for on discipline that he didn't author. I
16 don't know how he would have personal knowledge of that.
17 JUDGE TRACY: So I'm going to sustain it, the objection.
18 But if you could just -- if you can clarify the question --
19 MS. DEMIROK: Yeah.
20 JUDGE TRACY: -- limiting it to the discipline that he's
21 issued.
22 MS. DEMIROK: Okay.
23 Q BY MS. DEMIROK: So when you authorized discipline for
24 these similar incidents, is there any other way that it could
25 be described other than how it's described in GC Exhibit Number

1 5?

2 A Other than following proper put-away procedures, forklifts

3 that are put in the wrong location, they see that's what that

4 is. I mean --

5 Q So was a put-away procedure, is that a certain thing?

6 A Yes.

7 Q Okay. What is -- are those written anywhere?

8 A I don't know if it's written anywhere, but this is common

9 knowledge. This is -- if it's not written anywhere, it's

10 directed by our system.

11 You can't close a transaction without confirming that that

12 pallet you put away, you put away at that location. You can't

13 go grab another pallet until that is -- that pallet is consumed

14 to that location.

15 So it's directed to -- if it's not written anywhere, the

16 system guides you to do that. There's a confirmation. Like I

17 said, there's three scans. You scan the pallet, hey, I

18 received it. You scan a pallet, this is the location I placed

19 it. And you scan the pallet confirming that hey, this pallet

20 is in this location.

21 Now, how this happened, he confirmed that he put it in --

22 in 223105. That's where he confirmed that that pallet is. Was

23 that pallet there physically? No, it wasn't there. It was

24 found at a different bay.

25 Q Okay. But it is your testimony that employees get written

1 up for similar incidents?
2 A Yes.
3 Q Okay. If you can, give us an example.
4 A There's also receiving on our inbound team. All right? A
5 receiver mistags a pallet. He brings two pallets, and one's
6 cheddar, one's mozzarella. Same number, you know. That's a
7 failure of -- that's a failure to follow proper inbound
8 procedure. So that's a -- that's a procedural CPDR.
9 Q But what about with a forklift operator?
10 A Same thing. If a forklifter puts it in a wrong location,
11 yes, we would do the research and find out that hey, he put in
12 the wrong location.
13 Shipping, a shipping forklifter, they -- they're called
14 for a pallet of 30. I bring down a pallet of 20 and scan it,
15 and the there you go.
16 So it's a breakdown of the process. If everybody was
17 following the process, it would be -- it'd be at location
18 223105, if he followed the process.
19 Q Okay. But I'm asking if you can give a specific example?
20 A I did. I just did. I just did. I told you we've written
21 up, you know, receivers when they -- when they swap. Do I have
22 names? I don't have specific names.
23 Q Okay. Well, before when we were talking about it, we were
24 talking about forklift operators, and specifically inbound
25 forklift operators, who got written up for similar incidents.

1 You said there was plenty of times. I'm asking you again can
2 you give me a specific example of an inbound forklift operator
3 who was written up for a similar infraction?
4 A Don't have a name. The reason why this sticks out,
5 because he refuses. Normally, it's very, very simple. You
6 present it to an associate and it says, hey, this is what
7 happened. You scanned here, it's supposed to be here. You
8 sign off on it, it comes to my desk, sign off on it.
9 In this -- in this case, he said, no, I didn't do it. I
10 didn't -- I'm not going to sign it. I refuse to sign.
11 Q But there are at least some occasions when you were the
12 one who authorizes these specific types of disciplines, right?
13 A Right.
14 Q Because you authorized this one, right?
15 A Right. I authorized --
16 Q So --
17 A -- this one because I initiated -- I imitated the
18 question. Right? I initiated the question saying that, hey,
19 what happened to these 30 cases, not knowing who did it. It
20 didn't matter who did it. It's like, not knowing who did it --
21 what happened to those 30 cases? Let's find out. Let's find
22 out exactly what happened.
23 So that's what happened. We found what happened. This is
24 -- this is exactly what happened. It's -- so to me, it's very
25 clear cut, that this was a case of I didn't follow proper

1 procedures.
2 Q But I'm sure that's not the only time that a warehouse
3 short has shown up on your daily report in the morning, is it?
4 A No, you're right. No, but 30 cases of one -- if you see
5 that -- that report, that's one case of one item, one case of
6 another item. This is 30 cases of one item. The significance
7 of this 30 cases, it went to a catering company. There was a
8 specific item ordered for this specific customer.
9 Q Salad dressing, right?
10 A It was ranch salad dressing, yes.
11 Q Okay. But again, this may have been a special order and
12 you looked into it because there were 30 cases missing. But
13 again, this isn't the first time that cases have shown up
14 missing on your daily reports, right?
15 A No.
16 Q And so have you ever, based on looking at a report,
17 investigated to find out what happened and then it -- and you
18 ended up authorizing a discipline just like this?
19 MR. DAWSON: Objection, Your Honor. It's a compound
20 question. I think there are a couple of different questions in
21 there. If counsel can maybe break that down a little bit, I
22 think there's a lot sort of packed in there.
23 MS. DIMIROK: I can do that.
24 JUDGE BAMEAN TRACY: Okay. Thank you.
25 Q BY MS. DIMIROK: Has there ever been a time, when based on

1 your daily report, you had to investigate something?
2 A Has there ever been a time based on my daily report that
3 we investigated something? You know what? Yes. There's
4 probably other times that we've done it.
5 Q Yeah, I mean, in this particular case is one of those
6 examples, right? You saw it on your report and you
7 investigated it, right?
8 A Correct.
9 Q Okay. I'm going to try to keep it simple and go step by
10 step. So you -- so there's been other circumstances where you
11 had investigated incidents based on those reports. And have
12 you ever started to investigate based on a number of shorts,
13 and in particular, warehouse shorts that end up -- I'm sorry.
14 Now I'm getting caught up.
15 So have you ever investigated based on shorts but on your
16 report?
17 A Have I ever investigated based on the shorts of the
18 report? I look at this report and I see big numbers like that
19 speaks to me, this is -- we just service our customers, right?
20 So then I ask the question. I ask the question, hey, what
21 happened here? That's kind of how it is. I don't -- I don't,
22 per se, do all the investigation. I just ask the question and
23 then they look into it, especially with missing pallets. Are
24 there -- are there missing items every day? Yes. But there's
25 a lot of different ways where an item is miss (sic).

1 Q Okay.
2 A You see one -- if -- you see one -- ones and twosies. The
3 ones and twosies, we deal with it all the time. Do we like
4 having warehouse outs? No, we don't. We -- it's important for
5 us to make sure that we have inventory accuracy.
6 Ones and twosies, they're all in those reports. But when
7 I saw that report on a -- on a small night, as a Friday night,
8 that's the smallest night, and it has 30 outs for a specific
9 customer, you know, I have to ask the question. That's my job.
10 Have to ask the questions, hey, has anybody looked into this?
11 What I -- what I did found (sic) out is that hey, these
12 were missing. I asked the question how come we didn't look for
13 it? How come we didn't look for it and find out? How come we
14 did -- we, well, it's because there's a timing. There was a
15 timing there. We didn't have that opportunity to look for it
16 and make sure. We didn't have the -- an additional pallet in
17 the reserve to service our customer, and then we do the
18 research.
19 Q So let me ask you this, have you ever authorized a CPDR as
20 a result of an investigation that you initiated, maybe that --
21 that you conducted but that you had someone look into
22 something?
23 A Yes, I have. You know, when the pallet comes missing, I
24 say hey, what are we doing with this? When the pallet is --
25 when -- when a pallet is misreceived, hey, what's going on?

1 What happened here?
2 So have I ever conducted -- have I ever authorized a CPDR?
3 Yes, I have. I -- I've authorized a CPDR based on some of --
4 some of our procedural issues.
5 Q So have you ever authorized a CPDR to be issued to an
6 inbound forklift operator based on what's been found in an
7 investigation that you initiated?
8 A I'm pretty sure I have. I mean, that's kind of my job.
9 It's the -- to look at it.
10 Have I ever offered a -- without the -- fully
11 understanding? No. I take a look at everything, making sure
12 that inventory control -- do the research, make sure that our
13 inbound manager do all the researches.
14 Then, yes. What I do ask is that hey, do the research.
15 Make sure -- make sure we find out exactly what happened. Then
16 document it. It's an opportunity for our associate to
17 understand hey, this has impacted our customers.
18 This is -- this is a verbal that we're talking about,
19 seven weeks. It goes on your record for seven weeks and it
20 comes off. It falls off. This is an opportunity for us to sit
21 down and says, hey, Mike, this is what happened. You know,
22 this is what happened. Be on the lookout the next time.
23 Q So it's not really a big deal in your mind?
24 A It is. It's servicing our customers. It's servicing the
25 customer. But this is a verbal we're talking about. It's an

1 opportunity for supervisors to sit down, a manager to sit down
2 and talk to the -- to the associate, talk it through and says
3 hey, this is a procedure issue. Next time be on the lookout
4 for this, Mike. Make sure that we're verifying these. Make
5 sure we -- we're scanning the right pallet to the right
6 locations.
7 Q So when was -- can you give us an example, I'm just going
8 to ask one more time, can you give us an example of when you
9 authorized or maybe you know of a CPDR that was authorized to
10 an inbound forklift operator for failing to put away -- failing
11 to follow proper put-away procedures?
12 A I've offered. I -- forklifters, do I remember
13 specifically an inbound forklifter? No, I can't give you --
14 I'll be honest with you. I can't give you an example, but a
15 replenishment forklifter, yes. Have you written up associate
16 for similar? Yes. This is something that -- that came up and
17 I saw it.
18 Normally, Brian Nicklin, that's his manager. Normally,
19 Brian Nicklin would look at it and says, hey, this is pretty
20 clear-cut. Go ahead and look at it.
21 I opened that up, and I initiated hey, what happened to
22 this? What happened to this? How come this customer didn't
23 get the 30 cases?
24 Q Okay. So you also met with Steve Phipps in February of
25 this year, correct?

1 A Yes, I have.
2 Q Okay. And we talked about Mr. Phipps already a little
3 bit, right?
4 A Yes.
5 Q Okay. He's the one who -- he even told you straight out
6 he was organizing for the union, right?
7 A Yeah.
8 Q Okay. But you knew about that prior, right?
9 MR. DAWSON: Objection. Prior, prior to what?
10 Q BY MS. DIMIROK: Prior to Mr. Phipps telling you that he
11 was organizing?
12 A Did I verify? No. When I met with Steve Phipps, he --
13 that's the first day that I knew for sure. All right? When
14 Mr. Phipps, like I told -- I already -- I already you that.
15 That's the first day I knew for sure that Mr. Phipps was
16 involved in -- in union activity.
17 Before that, an associate would bring up to -- will bring
18 his name up to me. But is the day that Mr. Phipps said that
19 hey, I am Steven Phipps. I am part of a union, part of the
20 union activity.
21 Q Now, Mr. Phipps has worked at the warehouse for quite a
22 while, right, almost 20 years?
23 A Almost 20 years.
24 Q Okay. And you met with Mr. Phipps in February, on I think
25 it was about February 11, 2016; is that right?

1 A I'm not sure of the date, but I met with him recently,
2 yes.
3 Q Okay. And this is the incident where you were there with
4 Mr. O'Meara?
5 A Yes.
6 Q Okay. And were you -- whose office did you meet in?
7 A We met in Tim O'Meara's office.
8 Q And Mr. O'Meara, just to refresh, he's your boss, right?
9 A Yes, ma'am.
10 Q Okay. And who decided that you and Mr. O'Meara would meet
11 with Mr. Phipps?
12 A Mr. O'Meara wanted to speak with Mr. Phipps. I told
13 Brian Nicklin and Richard Gomez hey, send Mr. Phipps up to meet
14 with Tim O'Meara and I.
15 MS. DIMIROK: Your Honor, do you mind if we take a quick
16 break, maybe five minutes, just to get a glass -- a drink of
17 water before we continue?
18 MR. DAWSON: Objection.
19 JUDGE BAMEAN TRACY: Yeah, let's take a five-minute break.
20 We'll go off the record.
21 (Off the record at 4:14 p.m.)
22 Q BY MS. DIMIROK: So we were talking about Mr. Phipps and
23 when you met with him with Mr. O'Meara. So did Mr. O'Meara
24 tell you why he decided to meet with Mr. Phipps?
25 A Yes.

1 Q Okay. And what did he tell you?
2 A A coaching opportunity because Mr. Phipps had mentioned
3 that he can take his breaks as he see (sic) fit, and if we
4 didn't -- if we didn't know, we should ask HR, ask your boss,
5 or ask your counsel, company counsel.
6 Q And did he tell you how he learned that Mr. Phipps was
7 apparently taking his breaks as he saw fit?
8 A Are you talking about O'Meara?
9 Q Mr. O'Meara.
10 A No, he -- Brian Nicklin and Richard Gomez came up to us.
11 They saw Mr. Phipps out on the dock during break time and
12 approached him and says, hey, make sure you take your breaks.
13 And he says, no, I'll take my break as I see fit. So, Mr.
14 Phipps told them that I'm going to take my break as I see fit.
15 Do you want to understand more? Ask your -- ask HR, ask your
16 boss, ask your company counsel.
17 So when they came up to talk to me, I said, well, that's
18 -- Tim overheard. Tim say, what's going on? They explained to
19 Tim. Tim's say, well --
20 Q And were you -- were you there when that happened?
21 A I was -- I was there in the -- in the -- I was there.
22 Q Okay. So this interaction that you just described with
23 Richard -- or I'm sorry. Was it Richard Gomez?
24 A Richard Gomez, yes.
25 Q And Brian Nicklin, is that what they explained to you?

1 A That's what they explained to me.
2 Q Okay. And so Mr. Phipps was, from your understanding,
3 from what they told you, Mr. Phipps was approached when he was
4 taking his break -- when he wasn't taking his break during the
5 designated time period; is that right?
6 A Yes.
7 Q And Mr. Nicklin was speaking with you and Mr. O'Meara
8 immediately prior to when Mr. Phipps came to Tim O'Meara's
9 office; is that right?
10 A Yes.
11 Q And was Mr. Gomez also there?
12 A With that -- yes, he was there. He was in that -- that
13 same -- after they came up, Tim was there. Tim said, hey,
14 let's talk to Mr. Phipps. I told those guys, hey, make sure --
15 tell Mr. Phipps to come and talk to Tim and I. So Mr. Phipps
16 came up and spoke to Tim and I in Tim's office.
17 Q Okay. And when Mr. Nicklin and Mr. Gomez came to tell you
18 about what happened, did either of them tell you how they knew
19 that Mr. Phipps was not on his break at the designated time?
20 A It's just, when it's break time, nobody's on the docks.
21 So they didn't know that it was break time.
22 Q On the docks; do you mean like the cross dock or --
23 A The receiving dock where they --
24 Q Receiving dock.
25 A -- where they operated. There's no inbound associates

1 in -- all of inbound associates, they take their breaks at the
2 same time -- or inbound crew.
3 Q And so that's what Brian Nicklin and Richard Gomez told
4 you about how they knew?
5 A Yes. They came across, they say Phipps on the dock. Told
6 him, hey, how come you're not taking your break? He said, I
7 take my break as I see fit.
8 Q Did Mr. Nicklin tell you anything else about his
9 conversation with Mr. Phipps that day?
10 A I believe he asked him, do you know what -- when break
11 time is?
12 Q Uh-huh.
13 A And I believe he said yes, but I'm going to take my -- I'm
14 going to take my breaks as I see fit. If you don't understand,
15 refer to your boss, HR or your company counsel.
16 Q Now, Mr. Nicklin, he's not Mr. Phipps' immediate
17 supervisor, is he?
18 A He is Mr. Phipps' manager.
19 Q Okay. So he's -- so there's a supervisor, and then
20 Mr. Nicklin's the manager over --
21 A Yes.
22 Q Okay. And where is Mr. Nicklin's office?
23 A Mr. Nicklin's office is in the warehouse.
24 Q Where is it in relation to the receiving dock?
25 A In relation to the receiving dock, it's on the other side

1 of the warehouse.
2 Q Okay. Now, let's go back to the meeting you had with
3 Mr. Phipps with Mr. O'Meara. You told Mr. Phipps that break
4 times were posted on the new schedules; is that correct?
5 A I told him that, yes.
6 Q Okay. And when you said "new schedules", you were
7 referring to the schedules that come out on January 24, 2016;
8 is that correct?
9 A I told him the reports and on the schedules. I asked him,
10 does he know what time to take break; he says yes. I says it's
11 posted. Is that -- he said yes. So I asked him, do you
12 understand that that's what time you take a break? He said
13 yes.
14 That meeting, Tim O'Meara was the one conducting the
15 meeting. My boss was there, and he was the one pretty much
16 conversating (sic) with -- I was there in the room as well.
17 Q Now, the break times haven't always been posted on the
18 schedules for the receiving, have they?
19 A Not always. It hasn't always been on the break schedules,
20 but we have changed shifts. We went from a different operation
21 shifts from a one-day shift to a 24-hour operation, required
22 more standard shifts, eight-hour shifts. So that operation
23 changed.
24 Q And that -- was that January 24, 2016 when that change
25 happened?

1 A That change happened -- 2015, February 2015 there was a
2 change in shifts. 2000 -- January of 2016 there was another --
3 there was -- there was another change to the shifts.
4 Q Okay. But on January 24, 2016, was there a change at that
5 time?
6 A There was a change. There was a change of split,
7 forklifts, from inbound forklift -- inbound forklifters and
8 outbound forklifters.
9 Q Okay.
10 A They were essentially all reporting to Brian Nicklin.
11 Q So let's, just to be clear, how was it before January 24th
12 in regards to how -- who forklift operators reported to?
13 A Before January 24th, everybody was reporting to
14 Brian Nicklin.
15 Q Okay.
16 A Before then, everybody was taking their breaks at the same
17 time. Everybody knew what break times were. It was
18 communicated in meetings that these are the break times.
19 Q Okay. So there have always been designated break times?
20 A Yes.
21 Q Okay. But after January 24, 2016, then the break times
22 started to be -- get posted on their daily schedules; is that
23 right?
24 A Correct.
25 Q Okay. And these schedules, they get posted on a daily

1 basis, right?
2 A They get posted once a week.
3 Q Now, with this change in forklifters reporting to
4 Brian Nicklin, is it now that some of the forklifters don't
5 report to Brian Nicklin; is that what the change is?
6 A Yes.
7 Q Okay. And is that because forklifters used to do both,
8 kind of a mix of inbound and outbound work?
9 A Yes.
10 Q Okay. But now it's separated. Some of them do inbound,
11 and some do outbound; is that right?
12 A Yes.
13 Q Okay. And that change is consistent with January 24th,
14 2016?
15 A Yes.
16 Q Okay. Now these schedules that get posted, there's not
17 just one posted for the receiving group, right?
18 A No. There's -- the receiving schedule, it's one
19 three columns, three different shift. There's a separate
20 posting for the shipping group.
21 Q Okay. So there's ones for outbound, and there's one for
22 inbound?
23 A Yes, ma'am.
24 Q Okay. And the outbound group, they don't -- their break
25 times aren't posted on their schedules, right?

1 A No, they're not.
2 Q Okay. And we talked about that. That's because they get
3 relieved, over the radio, right?
4 A No. They don't get relieved over the radio. We talked
5 about that. They're on a ticker. Ninety-nine percent of the
6 time they take break at the same time every day, and that's
7 recorded. We know what time they take breaks and lunches.
8 Q And those are on your daily shipping reports, right?
9 A Those are end of the day shipping reports, yes.
10 Q Okay. And you said you also have those electronic boards
11 that notifies the outbound group, when their breaks are?
12 A Yes.
13 Q Okay. Now this meeting with Mr. Phipps, it was to counsel
14 him on when he needed to take his breaks?
15 MR. DAWSON: Objection, Your Honor. I don't think there
16 was any testimony about counseling. I think was Mr. Vaivao
17 said was friendly coaching. And, Your Honor, the reason that
18 that objection is important, is because as I believe General
19 Counsel has already sought admission of the disciplinary policy
20 that has stuff on it as counseling.
21 So I think it's improper for General Counsel to start
22 inserting disciplinary terms in there, when that was not the
23 testimony of the witness.
24 MS. DEMIROK: I have no problem changing it. It's how I
25 had written and it didn't -- it wasn't meant -- it was what I

1 expected him to say, was counsel.
2 JUDGE TRACY: Okay.
3 MS. DEMIROK: So I'll change it to coaching.
4 MR. DAWSON: Thank you, Your Honor.
5 Q BY MS. DEMIROK: Now this meeting with Mr. Phipps was to
6 coach him on when he needed to take his breaks; is that right?
7 A Yes.
8 Q So you never told him that it was to counsel him?
9 A No. He asked if this was disciplinary action. Tim
10 specifically said no, this is not disciplinary. This is a
11 coaching opportunity, for you to know when to take break. Tim
12 asked him, "Do you know when to take break?"
13 He said, "Yes. I know when to take a break."
14 Q Did you or Mr. O'Meara ever tell him that he was being
15 counseled?
16 A No. We never told him that he was counseled. We never
17 told him that he was being disciplined. He specifically asked
18 if he was being disciplined. We said, no, we're not
19 disciplining you. This is just for any coaching opportunity,
20 so that way you understand that you don't take your break as
21 you see fit. And nobody else takes break as they see fit.
22 Nobody in our -- nobody in our operation just takes break
23 because they see fit. They're designated for a reason.
24 Q Okay. But I just want to be clear, you never told
25 Mr. Phipps that he was being counseled --

1 A No.
2 Q -- right? Okay. Mr. O'Meara never said that he was being
3 counseled; is that what you're saying?
4 A He never told him that he's being counseled. I
5 specifically heard -- Mr. O'Meara says, responding to Phipps,
6 "Am I being disciplined?"
7 Mr. O'Meara said, "No, you're being coached."
8 Q Okay. But as we know words matter. So did he -- did
9 anyone say counseling --
10 A No.
11 Q -- counseled? Anything with counsel in it?
12 A Not that I -- not that I know. No.
13 Q Okay. But you do know that counseling is the first step
14 of the progressive disciplinary?
15 A Yes.
16 Q Okay. Okay. And just -- if you could take a look at GC
17 Exhibit Number 2, it's a two-page document. If you could just
18 take a moment and look at that. And is this a progressive
19 discipline policy as you know it?
20 A Yes.
21 Q Okay. So you mentioned that Mr. O'Meara had taken over
22 for Jerry Kropman in December of 2015. How many times have you
23 been present where Mr. O'Meara coached employees in his office?
24 A Not in his office. I mean, I've been in different areas
25 where Jim has talked to associates.

1 Q Okay. How many times have you been present where
2 Mr. O'Meara has coached employees, where employees were called
3 to his office?
4 A This is the first time that I've been with Mr. O'Meara,
5 that somebody was called to his office.
6 Q Yeah.
7 A And I believe because of Steve Phipps stating, that, hey,
8 I seen -- I take my break as I see fit. If you don't
9 understand ask your boss, ask your HR rep.
10 Q Now you worked with Mr. Kropman when he occupied the
11 position before Mr. O'Meara, correct?
12 A Yes.
13 Q Okay. And in fact you were in your position, I'm sorry,
14 for how long now, four years?
15 A Four years.
16 Q Okay. And was Mr. Kropman in that position during that
17 entire time, except for -- now with Mr. O'Meara being in that
18 position? That's a bit confusing. So now it's Mr. O'Meara.
19 Before it was Jerry Kropman --
20 A Yes.
21 Q -- but while you've been in your position has there been
22 anyone else who's occupied that position?
23 A Matt Miller, about five years ago was there, prior to
24 Jerry Kropman.
25 Q Okay. But at that time you weren't in your position that

1 you are in now, right?
2 A I thought right before Jerry Kropman in this position,
3 right before Jerry Kropman came in, give or take two months --
4 Q Okay.
5 A -- so --
6 Q So you worked with Mr. Kropman -- so over three years,
7 right?
8 A Yes.
9 Q Okay. How many times have you been present where
10 Mr. Kropman coached employees in his office?
11 A A couple of times, a handful of times.
12 Q Okay. Do you recall what the circumstances were?
13 A It's associates -- my recollection I was in there with
14 Mr. Kropman, an associate that -- that came in late. You know,
15 wanted to know why he was -- he's going to be disciplined for
16 being late. Well, Mr. Kropman was there, and he said, hey,
17 it's because of the policy. A policy -- you're supposed to be
18 here at a certain time, there's a reason why.
19 Q And in that circumstance was the employee called to
20 Mr. Kropman's office?
21 A I can't verify whether he was called on this -- whether he
22 was called to his office. This situation, he -- Mr. Phipps
23 specifically told Ron Nicklin and Richard Gomez, if you don't
24 understand ask your boss. Ask -- ask HR. We've never come
25 across, you know, that type of circumstance.

1 It's when a manager walks by and say, hey, do this, or
2 hey, take a break. Okay, yes, sir. You know, that type of
3 thing. We've never had it to where, hey, what are you doing,
4 go take a break. Well, I'm going to take my break when I --
5 when I see fit. It doesn't work that way. There's a reason
6 why we take breaks together.
7 Q So, Mr. Vaivao, I'm handing you what's been marked as June
8 6, Exhibit Number 8. And I'm not quite sure. Is that your
9 signature at the bottom?
10 A Yes.
11 Q Okay. And is this a statement that you drafted?
12 A Yes.
13 Q Okay. And this is regarding the incident that we were
14 just -- that you just testified about, right?
15 A Yes.
16 Q Okay. And if you could take a look for me in the first
17 paragraph. It looks like you're documenting what Brian Nicklin
18 and Richard Gomez reported to you?
19 A Correct.
20 Q And I don't believe you testified at any point in time
21 that Steve actually said that he was going to take his breaks
22 as needed so he can speak with associates about the Union?
23 A No. I didn't say union. He takes his breaks as he see
24 fit --
25 Q As he --

1 A Yeah. That's what I --
2 Q Yeah.
3 A That's what I heard. I'm not sure he said he was in the
4 Union. I didn't --
5 Q But you drafted this, right?
6 A Yes.
7 Q Okay. And you drafted this based on what you -- on what
8 you were told by Brian Nicklin and Richard Gomez?
9 A My recollection of -- it's -- this is based on my
10 recollection of -- of when they came up, is my recollection.
11 Q And when did you draft this statement?
12 A It was -- it was that day, after -- after we spoke to
13 Steve.
14 Q Okay.
15 MS. DEMIROK: And, Your Honor, I would move to admit
16 what's been marked as GC Exhibit Number 8.
17 JUDGE TRACY: Any objections?
18 MR. DAWSON: No objection, Your Honor.
19 JUDGE TRACY: Okay. GC Exhibit 8 is admitted into
20 evidence.
21 **(General Counsel Exhibit Number 8 Received into Evidence)**
22 Q BY MS. DEMIROK: And to follow-up on this, the second
23 paragraph, that talks about your conversation that you had with
24 Mr. O'Meara and Mr. Phipps, right?
25 A Yes.

1 Q Okay. And we talked about this a little bit. But you
2 said that even prior to January 24th there were designated
3 break times, right?
4 A Yes.
5 Q Okay. And so prior to your meeting with Mr. Phipps, when
6 was the last time you had coached, or even disciplined an
7 employee for taking a break outside their designated break
8 time?
9 A Not -- I personally haven't -- haven't came across --
10 haven't come across somebody not taking their break. It's
11 always the opposite. When I walk by the breakroom and I see
12 somebody, I say, Dude, go to work, let's go -- let's go to
13 work, man. It's kind of -- more often you see that than the
14 other side. But it's that, oh, I'm getting myself a quick
15 water. So it's a conversation with associates, you know. I've
16 had that quite a bit, when I see somebody, you know, somewhere
17 they're not supposed to be.
18 Q So maybe taking an extra break?
19 A Not necessarily taking an extra break. You know, going
20 down after. We're talking about, hey, break is up at 15, it's
21 17, and so it happened. It's kind of one of those things, you
22 walk by, and they're like, oh, man, he walks by and it's five
23 minutes after.
24 But it's just conversation with associates. It's hey, let's go
25 -- let's go to work. You know, kind of friendly conversation,

it's never -- it's rarely you see somebody -- it's rare you see somebody not working during break time. Because everybody has got to take off, everybody has got to go get some -- something to eat. It's always the other side that I see. But have a I seen anybody not take their break? I personally haven't. I haven't seen anybody.

Q You mentioned this a little bit too, you know that the employees pass out Union flyers, right, in the warehouse?

A I know of two associates that passed Union flyers.

Q Okay. And you've seen some of the Union flyers, right?

A Yes, ma'am.

Q Okay. And some of them are printed on color paper; is that right?

A Different color papers, regular paper.

Q Could be white, right, you've seen those?

A Yes.

Q Some of them were on green paper; is that right?

A Yes.

Q Okay. I think even maybe an orange-ish colored one; have you seen that one?

A Yellow, orange, green, blue. Yeah.

Q Okay. And even red. There was a red one, right?

A I'm pretty sure there was. It was a different color.

Q So I'm handing you now what's been marked as GC Exhibit Number 9.

1 A Okay.
2 Q And let the record reflect that I have handed the witness
3 a red colored piece of paper, and the other copies we're
4 looking at are copies of that piece of paper. So you've seen
5 this one before, right?
6 A Yes.
7 Q Okay. And this is one of the Union flyers that's been
8 passed out in the warehouse?
9 A Yes.
10 Q Okay. And you do know that Steve is one of the
11 individuals who passes out Union flyers, right?
12 A Yes.
13 Q Okay.
14 MS. DEMIROK: And, Your Honor, I would move to admit
15 what's been marked GC Exhibit Number 9.
16 JUDGE TRACY: Any objections?
17 MR. DAWSON: Your Honor, I don't think the relevance has
18 been established. And so for that reason we would object on
19 relevance grounds. I don't think there's really been a
20 foundation laid for that.
21 MS. DEMIROK: I think it's plainly related to discriminant
22 to his Union activity in the warehouse and his knowledge of it.
23 MR. DAWSON: But there's no connection to Phipps. And
24 there's no -- I mean, maybe there's another witness that will
25 testify on this, but all Mr. Vaivao said, yeah, he's seen this

1 flyer before. There is no -- at least as of right now there's
2 no connection to Mr. Phipps, or really anything else.
3 JUDGE TRACY: So at this point I'm going to overrule the
4 objection, I'm going to allow the exhibit. However, I would
5 agree that -- and I'm allowing it to be admitted at this point
6 because Mr. Vaivao has testified that he has seen it. But I
7 leave it to you, Ms. Demirok, to make the connection between
8 how it's relevant in this hearing, and these allegations.
9 MS. DEMIROK: Absolutely.
10 JUDGE TRACY: Okay. So General Counsel's Exhibit 9 is
11 admitted into evidence.
12 **(General Counsel Exhibit Number 9 Received into Evidence)**
13 JUDGE TRACY: Because, you know, let me just add that it's
14 not even clear what date this is when it was given.
15 MS. DEMIROK: Yeah.
16 JUDGE TRACY: However, because we've now already had two
17 witnesses testifying about there was the Union campaign going
18 on, but I'll allow it for that purpose at this point. But
19 really there needs to be a connection with what is going on in
20 this complaint. Okay?
21 MS. DEMIROK: Yes, Your Honor, I'll make sure there is
22 dates --
23 JUDGE TRACY: Okay.
24 MS. DEMIROK: -- times, people.
25 Q BY MS. DEMIROK: Okay. So you have what are called "dock

1 captains" who work in the warehouse, right?
2 A Yes.
3 Q Okay. And are you involved in the hiring or promotion
4 process for captains?
5 A I'm not. Well, I can say I am, because ultimately they
6 report up to me. The managers -- the managers in those areas,
7 Jeff Vandawalker, Brian Nicklin, Mona Gutierrez. They would be
8 the ones that, you know, involved in the -- the hiring. More
9 they report to them. All right. So --
10 Q I'm sorry, who reports to them?
11 A Captains. Captains report to supervisors and managers.
12 So am I -- am I involved in the hiring of a captain?
13 Ultimately I -- they report up to me, but I'm not the one
14 that's making the determination, hey, this is -- this is the
15 person who is going to be the next captain.
16 Q Okay. Are captains always -- are they ever hired from
17 outside, or is it just a promotion that's received in the
18 warehouse?
19 A It's a promotion from -- from within.
20 Q So then are one of the requirements that to be a captain
21 you have to have experience in the warehouse?
22 A One requirement is to understand all the areas, or the
23 areas in the warehouse.
24 Q Do captains ever have meetings?
25 A Captains don't have meetings. They don't hold meetings.

1 Q Where do they meet with each other?
2 A They don't meet with each other. Well, I don't know if
3 they meet with each other. They have captain's meetings. They
4 don't meet with each other, but they have -- they don't hold
5 meetings. If you're asking me if they hold meetings with
6 associates, no, they don't hold meetings with associates.
7 Do they meet with each other and conversate? I've seen
8 them meet with each and say, hey, I'm over here in this area,
9 this is what I'm experiencing, that type of thing, but like
10 team meetings. But they don't hold meetings with associates.
11 Q Okay. That's not really what I was asking. You said
12 something about a captain's meeting. So what's a captain's
13 meeting?
14 A A captain's meeting is a supervisor. Or Jeff Vandawalker
15 would say, hey, all the captains, hey, this is a -- you know, a
16 communication meeting to you guys. Today we have 130,000.
17 Make sure everybody is on their game. Make sure we're picking.
18 Make sure we're verifying. Make sure we're closing routes.
19 Make sure we're not experiencing late delays. If there are any
20 issues in the system please call me, or call a supervisor to go
21 over.
22 And so those -- those are the type meetings. So meetings
23 are held by managers, for captains, right. So it's just a
24 communication meeting that they have.
25 Q Okay. And so associates have to check out with captains

1 before they leave work, don't they?
2 A Yes.
3 Q Okay. And what are the captains expected to do if an
4 associate does not check out with them?
5 A If associate -- they call a supervisor. He says, hey, so
6 and so didn't -- didn't check out with me, he's not here.
7 Q Okay. And that could result in discipline, right?
8 A It could.
9 Q And it has before, right?
10 A Yes.
11 Q So there was an employee, I think he went by the nickname,
12 Snoop, do you remember him?
13 A Well, what his name?
14 Q Duane Scott, I think. I could be --
15 A Duane Scott?
16 Q -- wrong about that. Yeah.
17 A Duane Scott?
18 Q Duane Scott, okay.
19 A Yes.
20 Q He used to work for the company, right?
21 A Yes.
22 Q Okay. And he was let go last year, right?
23 A He was let go some time ago. I'm not sure if it was last
24 year.
25 Q After he was let go you held a meeting with employees,

1 right?
2 A I don't -- I don't know if I held meetings with employees.
3 I have some communication meetings with employees, yes.
4 Q Okay. And the meeting I'm referring to, you held a
5 meeting with employees right after you met with John Tolliver,
6 do you remember that?
7 A I don't recall having a -- I remember meeting with John
8 Tolliver. I remember John Tolliver coming up to me, asking me
9 -- letting me know that hey, their supervisors and captains are
10 on my case. So what I did ask, I specifically remember, so
11 what's going on, tell me? He said, well, they're saying that
12 I'm not where I'm supposed to be. They say that I'm
13 disappearing.
14 I said, well, let's -- let's go in and talk to
15 Vandawalker, that's who your manager is, and find out what's
16 going on, and we can figure out what we're -- what we're doing.
17 John Tolliver said that, yeah there -- at the end of the day I
18 go, hey, listen, all you have to do is check out with -- check
19 out with the -- with captain, check out with the supervisor.
20 Let them know where you're going, so there's no confusion.
21 Hey, where's John Tolliver at? Where could he at? Because he
22 said, well, I am -- I was -- I was down there changing my
23 battery. I went to help this guy. I went here.
24 So it was just a conversation passing through. I said,
25 well, let's go sit with Devan Walker, he's right here. He

1 approached me as I -- as I was walking out. And I said, well,
2 let's go to Devon Walker, we're right there in the vicinity.
3 Let's go sit down with Devan Walker and let's see what's going
4 on. That was the extent of that conversation with him.
5 Q Maybe we're thinking about two different ones. Was there
6 ever a time when you met with him about the fact that he threw
7 some labels on the ground?
8 A I don't recall any meeting with him as far as throwing
9 labels on the ground. It might be the same meeting.
10 Q Where he disrespected a captain?
11 A Not necessarily disrespected the captain. I think it was
12 -- it was -- it might be the same -- the same issue as you're
13 talking about. The reason why they know that he was missing,
14 is because they have labels -- they have labels attached to his
15 name and he's not at that area.
16 So when he approached me, he says, hey, they're telling me
17 that I'm leaving my area, I'm not where I'm supposed to be. I
18 sat down with him and I go, hey, listen, to avoid all that all
19 you have to do is check out with the captain, check out with
20 the -- with the supervisor. That way there's no confusion
21 where you're at.
22 Q Did you ever tell employees that Duane Scott was -- walked
23 out because he disobeyed a captain?
24 A No, never did.
25 Q Okay. Captains sometimes give labels to order selectors

1 in the warehouse, right?
2 A Yes.
3 Q And just so we're all kind of the same page we're going to
4 do a little background on how the label system works. And
5 first could you refresh us, what does an order selector do in
6 the warehouse?
7 A Select cases.
8 Q Okay. And those are also -- order selectors are referred
9 to as pickers too --
10 A Yes, ma'am.
11 Q -- right? Okay. And so generally an order selector they
12 get work orders, right?
13 A Yes.
14 Q Okay. Those work orders have labels on them, right?
15 A Yes.
16 Q And for each label they have to go and put it on the
17 product that they select, right?
18 A Correct.
19 Q Okay. And that's what they do throughout the whole day,
20 right?
21 A Yes.
22 Q Is picking cases. And they actually go and get their own
23 work orders, right?
24 A Yes.
25 Q Okay. But sometimes the warehouse has what are called

1 e-picks; is that right?
2 A Yes.
3 Q And that stands for an emergency pick?
4 A Yes.
5 Q And that happens when maybe a truck is scheduled to leave,
6 but there's still product missing on the truck?
7 A No, not necessarily. There's many ways that you can get
8 an e-pick. The product is damaged, it's e-picked. We can't
9 locate a product, it's supposed to be on a different truck.
10 There's an emergency call out for a pick, make sure that he
11 gets to a truck.
12 Q But for some reason it's supposed to be on a truck and
13 it's not there?
14 A Yes. Or it's damaged.
15 Q Or damaged?
16 A Right.
17 Q Okay. And the reason why it's an emergency is because the
18 truck is scheduled to leave, right?
19 A Yes. Either the truck is leaving the captains, or the
20 truck is the leaving the door that it's at to be -- for
21 departure, ready for departure. So that's fairly within --
22 within the hour, within 30 minutes. Sometimes it leaves right
23 from the door. So it's -- it depends on the situation.
24 Q Okay. Now it's the captain's job to keep track of whether
25 the trucks are loaded with all the product before the truck

1 leaves, right?
2 A That's every -- everyone's job. Supervisors, pickers,
3 loaders, captains. Everybody kind of make sure that, hey, that
4 I'm picking for that truck is there. If something is missing,
5 you know, there's a call-out for, hey, where is that item? Can
6 we run and take a look at -- in the back of that truck, if it's
7 there. If it's not there there's a decision to be made.
8 That's -- did he pick it?
9 Q Well, get to that, yeah. But the captain, they do sit at
10 a computer and they track whether or not there's still items
11 that need to get on the truck, right?
12 A There's open tickets, yes.
13 Q Okay.
14 A They take a look at it, at any given time. There's
15 probably 40 trucks at any given time that's open.
16 Q And it's the captain who makes a decision to e-pick
17 product, right?
18 A A captain can make some of those decisions. Supervisors
19 make some of those decisions.
20 Q And there's a lot that goes into that decision, right?
21 A Yes.
22 Q Okay. And the decision, I mean, the decision that you
23 pick, right?
24 A Yes, ma'am.
25 Q And you've described it at somewhat of a decision tree

1 that happens; is that right?
2 A Yes.
3 Q But let's say the decision is made that you pick the
4 product. The captain prints out e-pick labels; is that right?
5 A Yes.
6 Q Okay. And then they either pick the product themselves --
7 A Yes.
8 Q -- or they assign the labels that get printed to a picker?
9 A The fashion is whoever comes first, right. First come,
10 first serve. As they -- as they come up, you know, we need
11 this right now. If I'm not able to do it, here you go, go grab
12 it. So what they do is, is they grab those labels. They scan
13 into it, verifying that, hey, I -- I have these labels under
14 me, I'm willing to pick it. It's going to be part of my
15 overall count as far how many cases that -- that I pick.
16 Q Okay. But they can either choose to do it themselves,
17 right?
18 A They -- it all depends if they have -- if they have the
19 capacity to do it at that time.
20 Q Because they have to figure out how to get it done as
21 quick as possible, right?
22 A As quick as possible.
23 Q Okay. And so in trying to figure out how it can get done
24 as quick as possible, they may not be the quickest person to do
25 it, right?

1 A Correct.
2 Q Okay. So let's say the captain knows that picker A is
3 working on a -- maybe a less pressing order, one's that not due
4 for a truck that's going out right away. And the captain may
5 opt to give those e-pick labels to that picker, right?
6 MR. DAWSON: Objection, Your Honor. I think that was
7 asked and answered. I believe that Mr. Vaivao already
8 testified that it's first come first serve, you're up, you get
9 the labels. If you're not up you don't get the labels. I
10 believe that was asked and answered.
11 JUDGE TRACY: Would you mind just clarifying the question,
12 or --
13 MS. DEMIROK: Sure.
14 Q BY MS. DEMIROK: Well, let me just follow-up where he left
15 off then. So first come, first serve. There is -- the
16 warehouse is a pretty big place, right?
17 A Yes, ma'am.
18 Q Okay. And it's like a million square feet, right?
19 A Yes.
20 Q Okay. And you have pickers working all over the
21 warehouse, correct?
22 A Yes.
23 Q And so when you say "first come, first serve" what exactly
24 does that mean?
25 A When -- when the selector comes up completing a batch, as

1 they come up you refer it as they pick it with a less pressing
2 order. Emergency fashion is, hey, before you grab that, grab
3 this -- grab these two e-picks. He'll bolt, and get it and
4 come back. It's whoever's there, because that's the -- that's
5 the -- how eminent it is, right. I want it right now.
6 So I can't afford for you to pick your next set of orders,
7 which is on the average is about 20 -- 20 minutes. And I'll
8 give you an emergency e-pick on top of that. Get it, you know,
9 while you're so -- that's kind of how it happens. Is when
10 somebody comes up, as he drives up, as they're complete, to
11 pick up another order. If it's available right there. I say,
12 hey, I've got two e-picks right here, I need to close out the
13 truck, can you go grab it?
14 Q And what if there's not someone waiting at the dock, or
15 dropping stuff off at the -- like, if there's no one there,
16 what do they do?
17 A Then he does it. Then he does it. I -- if it's one of
18 those things that, hey, I need to close out the truck in five
19 minutes, hey, I guess I'm dropping everything that I'm doing.
20 I'm bolting over there to get it. If I need to close this
21 truck within 20 minutes and he's sees somebody, he says, hey,
22 there you go, can you grab that -- grab that for me.
23 They scan into it. It creates a whole new header label.
24 They run and get it, it's -- it's on their account, it's on
25 their name, they grab it.

Q And whoever they give it to, they don't -- they have -- the order selector that a captain gives it to you, they have to pick that product then, right?

A Yes.

Q Okay.

A Yeah. Because their name is on it right. Because when an e-pick ticket is created, it's created with a header label, similar to a regular order. All the orders -- when orders are created --

Q Uh-huh.

A -- e-pick is -- we regenerate the -- so it changes the pick ticket number. It assigns it a new pick ticket number and a header label. So the header label comes across. The picker selects the scan to it, to tie it to his name. And then he goes and get it.

Q So when it's first come, first serve, there's already a first come before they print out the label then?

A Rephrase that?

Q If you said that the assignment based on first come, first serve, but they print the labels with the name already attached to it, there must already be someone there; is that right?

A They don't print it with the name attached to it. There's a header label of the route, the order. It creates a whole new order -- order number.

Q So it has this bar code --

1 A Right, so --
2 Q -- on it; is that right?
3 A Yeah. So first come -- when I said "first come, first
4 serve" it means whoever is there, the first available that
5 comes up, the first person that comes up. Whether it could be
6 you that walks up, the next guy. When -- when the call-out for
7 creating an emergency pick prints out it's the, hey, can I do
8 it? No. Picker, can you grab this? Nobody is there. Oh,
9 man, I guess I got to do it.
10 I call the supervisor. I've seen supervisors go grab it.
11 I've seen, you know, whoever is there available to grab it,
12 because it's an emergency it needs to go out to a truck, it
13 needs to be closed.
14 Q Okay. But it's the captain that has to figure out the
15 fastest way?
16 A Yes.
17 Q And e-picks do happen on almost a daily basis, right?
18 A Yes.
19 Q Okay. If fact, sometimes there could be over a hundred
20 labels you picked on any given day?
21 A Yes.
22 Q Okay. And I think you said one time that on a good day it
23 would be 200 cases that could be e-picked; is that right?
24 A Yeah. Ideally we have zero. But it doesn't work that
25 way, so 200. It's much better than -- I've seen it to where

1 it's 400. So any -- anything less than the day before, or the
2 next day it's a better scenario for us. But it's not -- it's
3 not -- e-pick is not something bad. E-pick is assurance to
4 make sure that customer gets it, gets their case.
5 Q And they're not uncommon, right?
6 A They're not uncommon, no.
7 Q Okay. And just so we're clear, for every e-pick label
8 that's one product or case that needs to make it onto the
9 truck, right?
10 A Yes.
11 Q Okay. So when we say 200, that means like 200 individual
12 pieces of product, right?
13 A Two hundred individual. Is it 200 different skews, no.
14 Or 200 different items, no. It could be -- when I say 200 pick
15 tickets --
16 Q Uh-huh.
17 A -- it's throughout a 19-hour day. All right. So across
18 140 different routes. So it's not 200 different items, it's
19 200 total.
20 Q But each one is a different product that needs to be
21 picked, right?
22 A Well, I'll just say it again --
23 Q Like --
24 A -- if it's 200 it's not 200 -- it's not 200 of the same
25 product. It's not 200 --

Q No, I think we're talking on different terms. So --
A Right. Because you're asking me something different.
Q So 200 refers to cases, like -- and there's one -- so a case could be like a box of so many items, right?
A A case could be a box of one item.
Q One item?
A Yes.
Q So one item per one case.
A I think you're confusing -- one item per one pick ticket. One label for one item, right. One item is one case. So it's -- I think it's terminology. An item, it's a case, a product, the label.
Q So just -- when we're talking 200 e-picks on any given day, you tell us what that means?
A It means 200 boxes.
Q Okay. Boxes that each have to be picked?
A Yes. That needs to be picked, yes.
Q Now Arthur Manning, he's a captain, right?
A Yes.
Q Okay. And we talked about that a little bit. But you've known him for a long time, right?
A I've known him since he's been working there at Shamrock.
Q Is that almost 20 years or something?
A On and off. I've been there for -- for 20 years. He hasn't been there the whole time I've been there.

1 Q Okay.
2 MS. DEMIROK: Your Honor, could I have a moment off the
3 record, just to make sure I'm covering everything?
4 JUDGE TRACY: Yeah. But before we do that, I mean, you
5 can go ahead, but I just need to ask one thing to clarify. I
6 think I -- you used an acronym that I wasn't sure what it was,
7 so let me find it. Oh, DSI, what is that?
8 THE WITNESS: It's delivery satisfaction index. It's the
9 index that measure our performance to our customers. And as
10 part of our -- as a component of our pay.
11 JUDGE TRACY: And the component of whose pay?
12 THE WITNESS: Order selectors. Receivers, forklifters,
13 runners, throwers.
14 JUDGE TRACY: Okay. Thank you.
15 MR. DAWSON: Your Honor, if I may, and obviously this up
16 to General Counsel, but I believe that the acronym CPDR has
17 been --
18 JUDGE TRACY: It has been.
19 MR. DAWSON: -- used a couple of times.
20 JUDGE TRACY: Well, we --
21 MR. DAWSON: Was that --
22 JUDGE TRACY: -- when you weren't here before --
23 MR. DAWSON: Okay. Understood.
24 JUDGE TRACY: -- we covered that in the other exhibit and
25 testimony. So, yes --

1 MR. DAWSON: Thank you.
2 JUDGE TRACY: -- that's covered, yeah.
3 MR. DAWSON: Okay.
4 JUDGE TRACY: Thank you. And then are you ready, or do
5 you want a few more minutes?
6 MS. DEMIROK: I need a few more minutes. The last topic I
7 have, I just want to make sure that I'm not asking too many
8 questions for -- for what you need.
9 JUDGE TRACY: Okay. So let's go off the record. And I'm
10 assuming that this will be the last witness for today?
11 MS. DEMIROK: Yes.
12 MR. DAWSON: Yes. And I have --
13 (Off the record at 5:12 p.m.)
14 JUDGE TRACY: Okay. Go ahead, please.
15 MS. DEMIROK: Okay.
16 Q BY MS. DEMIROK: So, Mr. Vaivao, you know that there's
17 been an injunction that's been ordered against the company --
18 A Yes.
19 Q -- is that right?
20 A Yes.
21 Q Okay. And that was related to prior charges brought by
22 the Bakers Union against the company; is that right?
23 A Yes.
24 Q And how were you made aware of the injunction?
25 MR. DAWSON: Your Honor, I'm going to object to this line

1 of questioning. And maybe it'll become clear in a moment, but
2 the relevance of the 10(j) is not at issue in this -- or I'm
3 sorry, compliance with the 10(j) is not at issue in this
4 proceeding. So --
5 JUDGE TRACY: So, go ahead. Let's see what the General
6 Counsel has to say about what's the relevance here?
7 MS. DEMIROK: So it is relevant to timing of when some of
8 the discriminatory acts are alleged to have taken place in the
9 warehouse. And also there's Union activity which we'll hear
10 about that took place inside the warehouse that was related to
11 the -- the injunction; both the order and the seeking of.
12 MR. DAWSON: Well, Your Honor, I mean, the decision on the
13 10(j) is issued by a federal court, so that's dated. So in
14 terms of when Mr. Vaivao became aware of it, and, you know, I'm
15 not sure where else the questioning is going to go. I mean,
16 there's not going to be any dispute as to when the -- when the
17 injunction was issued, there's a date.
18 So again, I mean, maybe if it's going to be a handful of
19 questions so be it. But if it's going to, you know, a lengthy
20 discussion that we would have to object on that ground.
21 MS. DEMIROK: Well, Your Honor, I would just also like to
22 add that there are 8(a)(4) allegations alleged here, and to the
23 filing of and the seeking of includes testimony from
24 individual, to the individual discriminates in this case.
25 JUDGE TRACY: So the 8(a)(4) is about that -- it was in

1 support of the injunction, or the prior hearings in this
2 matter?
3 MS. DEMIROK: Well, one of them is only with the -- if we
4 could talk about this maybe with the witness not here.
5 JUDGE TRACY: Yeah.
6 MS. DEMIROK: I would prefer.
7 JUDGE TRACY: Would you please step out of the room?
8 THE WITNESS: Sure.
9 JUDGE TRACY: At the moment, please. Okay. So go ahead.
10 MR. DAWSON: So there -- two of the discriminates, it's
11 Steve Phipps and Michael Meraz, they're both alleged
12 discriminates under Section 8(a)(4). One of them testified at
13 the prior hearing, the original one. Both of them we filed
14 affidavits in support of the injunction.
15 JUDGE TRACY: Okay. And that's what the -- when you look
16 at the complaint, and you've got the 8(a)(4), I wasn't sure
17 what --
18 MS. DEMIROK: Yeah, and --
19 JUDGE TRACY: -- activity that they participated in, that
20 you were specifically referring to.
21 MS. DEMIROK: And there may also be, and I think we've
22 already heard some of that testimony regarding Mr. Meraz, and
23 talking about outside agencies. So I think all of that is
24 going to come into play as well, but --
25 JUDGE TRACY: Out -- oh, okay, about -- okay. So I would

say that in terms of -- obviously he's not an attorney. Mr. Vaivao is not an attorney, so asking him specifics about what it means, I don't think is relevant.

MS. DEMIROK: Yeah.

JUDGE TRACY: However, I'm going to overrule the objection just to the point of you setting up the time period, the actions here, in the participation, and how much they knew about it.

MR. DAWSON: Thanks, Your Honor.

JUDGE TRACY: Okay. So if we can limit to that. Is there anything else that we should talk about before we bring him in?

MS. DEMIROK: I don't believe so. And I really only had a few questions on this --

JUDGE TRACY: Okay.

MS. DEMIROK: -- on this.

MR. DAWSON: That's fine. And it's not my intent to be --

JUDGE TRACY: No, you're just doing --

MR. DAWSON: -- difficult.

JUDGE TRACY: -- your job. It's all right.

So do you mind if you -- somebody go get him. All right. Thank you.

THE WITNESS: Okay.

JUDGE TRACY: So go ahead.

MS. DEMIROK: Okay.

JUDGE TRACY: I'm not sure if the last question was

1 answered.

2 MS. DEMIROK: Yeah. I 'm trying to figure out where I

3 left off.

4 Q BY MS. DEMIROK: I think that I had just asked you prior

5 to that, that you knew that there was an injunction that had

6 been ordered against the company, right?

7 A Yes.

8 Q Okay. And you knew that that was related to prior charges

9 that were brought by the Bakers Union against the company; is

10 that right?

11 A Yes.

12 Q Okay. And how were you made aware of that?

13 A We posted it in the warehouse as part of that result. It

14 was posted in the warehouse.

15 Q Okay.

16 A And it's still posted, I believe.

17 Q But before the posting you also knew that the NLRB was

18 seeking an injunction before that, right?

19 A Yes.

20 Q Okay. And did you learn about that when it was first

21 filed back in September of 2015?

22 A No. I didn't -- there was an injunction order. We

23 learned when I was here, I was part of that hearing.

24 Q Uh-huh.

25 A And then it was posted, the results, right. It was posted

1 in the warehouse. We were ordered to post the result in the
2 warehouse.
3 Q Okay. And that was in February, right, of this year?
4 A I don't remember the date, but, yeah, it's posted in the
5 warehouse.
6 Q Okay. And so you also -- you know that that order is
7 related to the hearing that you testified, the first one that
8 you testified at; is that right?
9 A Yes.
10 Q And that was -- that was in September of 2015, right?
11 A Yes.
12 Q Okay. And you knew that the two are related, right?
13 A Say again?
14 Q You know that the two are related, right?
15 A Yes.
16 Q Okay. What else did you learn about the filing, the
17 seeking of the injunction?
18 MR. DAWSON: Objection, Your Honor. I withdraw.
19 THE WITNESS: I'm not sure I understand what I knew about
20 -- about anything. I guess I was subpoenaed to come, and then
21 I mean that's kind of how I knew everything that was going on.
22 Q BY MS. DEMIROK: Okay.
23 A Yeah.
24 Q So when you say "subpoena to come", do you mean to testify
25 at the hearing back in September?

1 A Yes.
2 Q Okay. One other thing. Have you -- has there recently
3 been a contractor that has done work in the warehouse in the
4 deli area?
5 A Has there recently been a contractor? There's
6 contractors, I mean, every day, that works in the -- in the
7 warehouse. I'm not sure if there's anyone specific. I mean --
8 Q One that would have worked on the antennas, because
9 there's antennas in the warehouse, right?
10 A Yeah. I believe we do that internally. Our IS team are
11 the one that works on the antennas, Lynn Peters (phonetic).
12 But I'm not aware there's a contactor that was out there
13 working on it.
14 Q Okay.
15 MS. DEMIROK: Your Honor, if I could just have one second.
16 (Counsel confer)
17 MS. DEMIROK: I don't have any further questions.
18 JUDGE TRACY: All right. So it is 5:30. We'll take a ten
19 minute break. And so we'll start again at 5:40. Try to be on
20 time, so we can do this as quickly as possible. So were' going
21 to take -- and we'll go off the record. So we're going to take
22 a ten minute break. Please just don't discuss your testimony
23 with anyone else until after the close of the hearing.
24 THE WITNESS: Yes, ma'am
25 JUDGE TRACY: Okay.

(Off the record at 5:26 p.m.)

JUDGE TRACY: Okay. All right. Mr. Dawson, I understand that general -- the Respondent intends to go ahead and examine Mr. Vaivao; is that correct?

MR. DAWSON: Yes, Your Honor.

JUDGE TRACY: Okay.

MR. DAWSON: That's correct.

JUDGE TRACY: So, Mr. Vaivao, I just want to remind you that you're still going to be testifying under oath.

THE WITNESS: Yeah.

JUDGE TRACY: Okay. Thank you. Go ahead, Mr. Dawson.

MR. DAWSON: Thank you, Your Honor.

CROSS-EXAMINATION

Q BY MR. DAWSON: Ivan, I believe you testified that you -- you held your current position for four years?

A Yes, sir.

Q What other positions have you held?

A Picker, loader, forklifter, driver, supervisor.

Q Okay. Have you held positions on the inbound side?

A Yes, sir.

Q And have you held positions on the outbound side?

A Yes, sir.

Q I -- do you recall your testimony earlier about -- about the warehouse operation?

A Yes.

1 Q Okay. And I think you testified that there are a series
2 of belts and -- belts through the warehouse that items get
3 placed on, correct?
4 A Yes, sir.
5 MR. DAWSON: Your Honor, may I approach?
6 JUDGE TRACY: Yes. And you don't need to ask --
7 MR. DAWSON: Okay.
8 JUDGE TRACY: -- me after that.
9 MR. DAWSON: Oh. Thank you.
10 JUDGE TRACY: Yeah.
11 Q BY MR. DAWSON: Mr. Vaivao, I'm going hand you what I'll
12 mark as Respondent Exhibit 1.
13 **(Respondent Exhibit Number 1 Marked for Identification)**
14 JUDGE TRACY: She'll take the one from the witness.
15 MR. DAWSON: From the witness?
16 JUDGE TRACY: Yeah.
17 MR. DAWSON: Okay.
18 Q BY MR. DAWSON: I have you known, can you identify what
19 Respondent's Exhibit 1 is a -- is a diagram of?
20 A It's a diagram of our warehouse distribution center.
21 Q This is the Arizona Foods warehouse?
22 A Yes, sir.
23 Q Okay. Now, you had mentioned about the belts running --
24 well, let's start at the -- let's start logically. Where is
25 the receiving dock on Respondent's Exhibit 1?

A It's number ten. That entire area of number ten is the receiving docks.

Q Okay. Just below the center of the page on Respondent's Exhibit 1?

A Yes, sir.

Q Okay. Now, where is the reserve area with the put away team puts the pallets after the receiver is bringing them?

A Looking at this diagram, it's number six. Those are all the reserve areas. That area in, what is it, purple, that purple, light purple and dark purple area.

Q Okay. That's the reserve area?

A Yes.

Q So, again, that's maybe just a little bit to the left of the center of the page?

A A little bit to the left of the center of the page. Also, everything in yellow just left of the page, those are all reserves as well. The purple, the light purple, that's the cooler area. The one in the yellow where, I'd say, three, four, three in that area, that's the dry area.

Q Okay.

A All right.

Q Okay. And then the -- I think you testified that the -- the replenishment lifters will come to the reserve area to get pallets?

A The replenishment fork lifters, yes, they will go into the

1 reserve area to grab a pallet there and place it into the pick
2 according to task.
3 Q Okay. And where are the pick areas on Respondent's
4 exhibit --
5 A The pick areas are normally primarily the first, second,
6 sometimes third level on these areas.
7 Q Okay. And by "these areas" --
8 A Areas in number six.
9 Q Okay.
10 A There's belt -- a series of belts that come out of there
11 as well. The pick locations are there. There are three level
12 of pick mods there.
13 Q Okay.
14 A So as well in number six.
15 Q And the, for lack of a better term, the -- black, squiggly
16 lines, if you -- if you'll look kind of in -- in through --
17 kind of right where number 11 is pointing, these --
18 A Yeah.
19 Q -- black, squiggly lines here --
20 A Yes.
21 Q -- are those belts?
22 A Those are a series of belts from that cooler area and the
23 cross-dock areas.
24 Q Okay. Now, I think you testified then that the belts run
25 through a merge?

A The belts run a merge, which is the mezzanine above ten.
Q Above ten. Okay.
A There is a series of I guess more squiggly lines there, green and -- those lines are -- you can't see it from here, but the mezzanine is the second level of this area.
Q Is that sometimes called the spaghetti farm?
A Yes. That's where that's at.
Q And then the -- where is the -- and I think you said after they go through the merch they go through a sorter?
A As they go through the merch, it's released to a sorter and that sorter is where product are released from -- or sorts to go down to the corresponding door on the loading docks described as number nine.
Q Okay. And so number nine is -- is the loading docks and the black lines coming down, where -- where do those go?
A The black lines coming down goes to the doors. That's where the trucks are loaded.
Q Truck doors. Okay.
MR. DAWSON: Your Honor, we would move to admit Respondent Exhibit 1.
JUDGE TRACY: Any objections?
MS. DEMIROK: No objection.
JUDGE TRACY: All right. So Respondent's Exhibit 1 is admitted into evidence.
(Respondent Exhibit Number 1 Received into Evidence)

1 Q BY MR. DAWSON: I have you known, I'm going to also hand
2 you now what I'm marking as Respondent's Exhibit 2.
3 **(Respondent Exhibit Number 2 Marked for Identification)**
4 Q BY MR. DAWSON: Okay. Can you identify what Respondent's
5 Exhibit 2 is a photograph of?
6 A This is a photograph of what we call the merch. Also
7 known as the spaghetti farm. It's a series of 22 serviceable
8 lanes from different areas of the warehouse. It congregates
9 before it gets released to a sorter.
10 Q Okay. And I'm hand you what I'm marking now --
11 MR. DAWSON: I'm sorry, Your Honor. May we move to admit
12 Respondent's Exhibit 2?
13 JUDGE TRACY: Any objections?
14 MS. DEMIROK: No objection.
15 JUDGE TRACY: All right. So Respondent's Exhibit 2 is
16 admitted into evidence.
17 **(Respondent Exhibit Number 2 Received into Evidence)**
18 JUDGE TRACY: And I'm sure that you'll be having some
19 people testify to how it's relevant.
20 MR. DAWSON: Yeah. And -- and, Your Honor --
21 JUDGE TRACY: I mean we've had some --
22 MR. DAWSON: Yeah.
23 JUDGE TRACY: -- testimony about this but now you're just
24 adding the pictures, which is fine. But just how it's relevant
25 to the allegations.

1 MR. DAWSON: Your Honor, the what we're just trying to show
2 is the flow of the boxes from the -- from the reserve area
3 until they get to the trucks. Mr. Vaivao testified about that
4 on direct and -- and this is just exemplary evidence to show
5 kind of what all that looks like.
6 JUDGE TRACY: Okay. That's fine.
7 MR. DAWSON: Oh, I gave it to you. I'm sorry.
8 JUDGE TRACY: No. I didn't get --
9 MR. DAWSON: I didn't? Okay.
10 JUDGE TRACY: -- 3.
11 MR. DAWSON: 3?
12 JUDGE TRACY: Yeah.
13 MR. DAWSON: Okay.
14 Q BY MR. DAWSON: Ivan, I'm going to hand you what I've
15 marked as Respondent's Exhibit 3. Can you identify what that
16 is a photograph of?
17 A Yes, sir.
18 Q What is that a photograph of?
19 A This is a north or south shot of the sorter. It is about
20 a quarter mile in length. Boxes enter this area. We call it
21 the scanner tunnel. If you notice to the right there, bottom
22 right, there's two blue boxes there. Kind of red there.
23 There's a series of the eight scanners that scan the boxes
24 looking for a label, a pick label, and the information that's
25 on that pick label determines what corresponding door at what

1 sequence of way it needs to -- needs to be sorted down to -- to
2 the loading doors.
3 Q Okay. And last, but not least, I'm going to hand you what
4 I'm -- what I've marked as Respondent's Exhibit 4.
5 Do you know what that's a picture of, Ivan?
6 A Yes, sir.
7 Q What is that a picture of?
8 A It's a picture of the loading dock. Those blue I guess
9 diagonal lines there, they go top to bottom there, they -- they
10 call it a decline. Those are attached to the sorter. I mean
11 if you look at the other one that you had, the diagram, if you
12 look at the diagram --
13 Q Respondent's Exhibit 1?
14 A Yes.
15 Q Okay.
16 A -- number nine, those lines that -- that come down in
17 number nine, it goes all the way up. And so the dark -- the
18 dark black, thick line there, that is the sorter and those
19 lines represent all the blue conveyers are coming down.
20 MR. DAWSON: Your Honor, we would move to admit
21 Respondent's Exhibit 3 and 4.
22 JUDGE TRACY: Any objection.
23 MS. DEMIROK: No, Your Honor.
24 JUDGE TRACY: All right. So Respondent's Exhibit 3 and 4
25 are admitted into evidence.

1 **(Respondent Exhibit Numbers 3 and 4 Received into Evidence)**
2 Q BY MR. DAWSON: Now, Ivan I -- I think you had -- you had
3 testified on -- on direct about trans shorts and warehouse
4 shorts. Do you recall that testimony?
5 A Yes, sir.
6 Q Okay. And I think you -- there was some questioning from
7 General Counsel as to whether a picker would be disciplined for
8 a trans short?
9 A Yes.
10 Q Okay. Is mispick the only way that a trans short can
11 occur?
12 A No.
13 Q Okay. There are other --
14 A There are other --
15 Q -- ways that a --
16 A -- ways.
17 Q Okay. What are some other ways that a trans short could
18 occur?
19 A It could occur -- they place it on the wrong part of the
20 truck when they get --
21 Q I'm sorry. I don't mean to interrupt you. But by,
22 "they", that would be -- who would place it on the wrong part
23 of the truck?
24 A Either a loader through sequence not catching it or it's
25 been brought to the door on a different sequence. They're

1 supposed to place it on the -- the specific part of the truck.
2 So when it gets to stop, customer number two, if that box is
3 buried in with customer number seven, he'll never get the
4 opportunity to get that until probably five hours later into
5 the route.
6 There's runners that run -- that run it to a different
7 door, pickers that -- that might take it to a different door,
8 the item is mispicked, it doesn't get to the -- to the
9 customer.
10 Q So a trans short is not always going to resolve in a
11 discipline for a picker?
12 A Not always. Not always.
13 Q I think there -- there was also some testimony you had
14 mentioned about inventory control mapping an area. Do you
15 recall that?
16 A Yes, sir.
17 Q Okay. And what does that mean, for inventory control to
18 map an area?
19 A Mapping an area is a full audit of that area. If -- if a
20 pallet is missing, what they do, they pull a report of what's
21 logically in the system and they verify it physically. Every
22 location, every pallet ID should match up.
23 Q Okay. And that's -- and that would be considered mapping
24 an area?
25 A Yes, sir.

Q How many -- how many pallets would that involve?
A In a total, I think -- we have 17 different skews. On the low end, there's three pallets per skew. So over 50,000 different pallets.
Q Now, that would be in the total warehouse or just --
A Total warehouse.
Q Okay. And if they were mapping an area, would that involve the entire warehouse?
A If they're looking for cooler, they would specifically look in the cooler area.
Q Okay.
A There's probably 20,000 pallets in the cooler area.
Q Okay. Now, you had also mentioned DSI. Is -- is there a target error that -- that the Company is -- that Shamrock tries to hit?
A Yes. There's a goal that -- that we -- we set for ourselves in comparison to our competitors as far as our service level.
Q Uh-huh. What is the target error rate?
A It's .150 percent of errors versus total cases shipped.
Q Okay. So .15 percent. So less than one percent?
A Yes.
Q .15 --
A Yeah.
Q -- percent?

1 A 15 percent. Yes.
2 Q Ivan, I think you had also mentioned about that the -- the
3 put-away -- and just so that record's clear, what would -- is
4 there another name for the inbound forklifters?
5 A A put-away forklifter.
6 Q Put-away forklifter?
7 A Yeah.
8 Q And then how about the outbound forklifters?
9 A They're called replenishment forked lifters, replenishers.
10 Q Okay. So I'm going to hand you what I'm going to mark as
11 Respondent's Exhibit 5.
12 **(Respondent Exhibit Number 5 Marked for Identification)**
13 Q And, Ivan, if you can take a look at Respondent's
14 Exhibit 5. And -- and are you able to identify what that's a
15 photograph of?
16 A Yes.
17 Q What is that a photograph of?
18 A The photograph of a reserve location in the cooler. You
19 can make out the CL. So it's in the cooler. Yes.
20 Q Okay. And is this location related to the incident with
21 Mr. Meraz?
22 A Yes.
23 Q Okay. And we'll come back to that portion of it. But
24 how -- so we're seeing kind of a row of -- of slots. How high
25 is the replenishment area?

1 A How high is the replenishment area? Anything over the
2 second level is the replenishment. I believe in this --
3 Q I'm sorry. I'm sorry, Ivan. How high are the bays in the
4 reserve area. I said replenishment. I meant reserve. How
5 high are these bays?
6 A Where this is at?
7 Q Uh-huh.
8 A Yeah. About 30 -- it's -- it's six levels. So this is
9 about 30 feet up in the air.
10 Q Okay. Okay. And you're referring again to Respondent
11 Exhibit 5?
12 A Yes.
13 MR. DAWSON: Okay. Your Honor, we would ask to admit
14 Respondent's Exhibit 5.
15 JUDGE TRACY: Any objections?
16 MS. DEMIROK: And I'm sorry. Maybe -- maybe I missed this,
17 Your Honor, but if I could just get some clarification. Is
18 this being offered to show the two pick -- or the two locations
19 that were at issue with Mr. Meraz?
20 MR. DAWSON: It will be, Your Honor. And if it would be
21 easier, I can wait until we get to the -- the issue with
22 Mr. Meraz to move for admission. I was putting in it kind of,
23 first of all, to show what the -- the reserve location looks
24 like, and then it will obviously be relevant to Mr. Meraz. I
25 can -- I can hold on the --

1 MS. DEMIROK: If that's what it's for, I have no objection.
2 JUDGE TRACY: Okay. So we'll just go ahead and admit
3 Respondent's Exhibit 5 into evidence.
4 **(Respondent Exhibit Number 5 Received into Evidence)**
5 MR. DAWSON: Thank you, Your Honor.
6 Q BY MR. DAWSON: Now, Ivan, you had mentioned that the --
7 the put-away forklifter is to -- it's supposed to scan a
8 barcode of the location where he or she puts a pallet away?
9 A Yes, sir.
10 Q Are those barcodes shown on Respondent's Exhibit 5?
11 A Yes. Those are barcodes directly under the -- underneath
12 those pallets.
13 Q Okay.
14 A So there's -- there's a series of barcodes that correspond
15 to the -- the actual label of the CL -- the correspondence of
16 CL, you know, whatever that is.
17 Q And I apologize for jumping around. I'm trying not to be
18 redundant with prior testimony. But I'm -- I'm going to hand
19 you what I'm marking as Respondent's Exhibit 6.
20 **(Respondent Exhibit Number 6 Marked for Identification)**
21 Q BY MR. DAWSON: And I'm going to ask you if you are able
22 to identify what Respondent's Exhibit 6 is a photograph of?
23 A Yes. This is a -- a picture of a pick label.
24 Q Okay. So earlier when you were testifying about the
25 labels that are -- are used to put on cases, would this be an

1 example of such a label?
2 A Yes, sir.
3 Q Okay. And I believe your testimony was that orders that
4 are picked by the -- the order selectors are sheets of labels?
5 A Yes, sir.
6 Q And that -- so that would be depicted in Respondent's
7 Exhibit 6?
8 A Yes, sir.
9 Q Is there anything -- is the -- is the picker able to tell
10 where the item is from the label --
11 A Yes, sir --
12 Q -- before he -- before he picks it or she picks it?
13 A They can tell by looking at the label of where to go --
14 Q Okay.
15 A -- yes.
16 Q And where is that?
17 A Upper left-hand corner. AF, the first two letters, it's
18 where the area is. This zero seven is the aisle. The three
19 digits there in the middle, 084, that's the bay or the
20 location. And the 05 is the level of where the product's at.
21 Q Okay. All right. And so -- and I think this was your
22 testimony earlier: That 05, there would be three slots in that
23 particular row, right?
24 A It depends on where.
25 Q Okay.

A It depends on where. It could be a big -- big location where it could be two pallets, it could be three pallets --

Q Okay.

A -- in that area. This pick label, AF is automated freezer, so it would be up in a high-rise. And O would be a big -- a big pallet --

Q Okay.

A -- in a high-rise. So --

Q Got you.

A -- by looking at it, you can't determine whether it's a big board or a small board.

Q Got you.

MR. DAWSON: Your Honor, we would move for admission of Respondent's Exhibit 6.

JUDGE TRACY: Any objections?

MS. DEMIROK: No objection.

JUDGE TRACY: So Respondent's Exhibit 6 is admitted into evidence.

(Respondent Exhibit Number 6 Received into Evidence)

JUDGE TRACY: Mr. Vaivao, let me just ask you, how do you spell pick? Is it P-I-C-K?

THE WITNESS: Yes, ma'am.

JUDGE TRACY: Okay. Go ahead.

MR. DAWSON: Thank you, Your Honor.

Q BY MR. DAWSON: Now, if -- if the picker goes to the

1 location listed on the ticket and -- and there's nothing --
2 there's no product there, what does the picker do?
3 A They have the capability on their R-F gun to create a
4 replenishment that creates a task for a replenishment
5 forklifter to get it. When it's zero quantity in the pick
6 location, it -- it goes into a priority four, which is our
7 number one emergency; "Go get it now." It will come up. It
8 will come up on a forklifter in that area. That forklifter
9 will then go retrieve the -- the pallet needed.
10 Q Ivan, I'm going to hand you a copy of what has previously
11 been admitted as General Counsel -- or let me see --
12 MR. DAWSON: Do we have a copy the --
13 JUDGE TRACY: Well, he'll have the -- the ones that are
14 already up there.
15 MR. DAWSON: Oh, okay.
16 JUDGE TRACY: He has that. Yeah.
17 Q BY MR. DAWSON: If you could take a look at the
18 consolidated complaint --
19 JUDGE TRACY: Oh, he might not have that.
20 MR. DAWSON: I better --
21 JUDGE TRACY: But there is an extra one right there.
22 Those are not marked up or anything, right?
23 THE COURT REPORTER: No.
24 JUDGE TRACY: Okay.
25 MR. DAWSON: All right.

1 Q BY MR. DAWSON: So if you can turn to General Counsel's
2 Exhibit 1(j), which is the consolidated complaint in this case.
3 A Okay.
4 Q Okay. And if you can go to page 4 and look at paragraph
5 6-F.
6 A Yes.
7 Q Okay. And that mentions a verbal warning issued to
8 Michael Meraz, correct?
9 A Yes, sir.
10 Q Okay. Was that the verbal warning that you were
11 discussing in your testimony when -- when examined by General
12 Counsel?
13 MS. DEMIROK: Objection; foundation, Your Honor. I'm not
14 sure if we --
15 MR. DAWSON: Well --
16 MS. DEMIROK: -- know -- if he even knows what he's looking
17 at.
18 MR. DAWSON: Your Honor, this is more so that -- that it's
19 easier to connect the -- the testimony to the allegations.
20 Sometimes it's a little unclear with the way the complaint's
21 written. I don't think there's any dispute that that's what he
22 was testifying to. But I think sometimes it helps in the
23 record to have something identified in the particular complaint
24 allegation that's being discussed.
25 JUDGE TRACY: So I'm going to overrule the objection. I

1 mean we're not -- you're not asking him for any legal obviously
2 analysis --
3 MR. DAWSON: Correct, Your Honor.
4 JUDGE TRACY: -- of what this means; it's just -- and
5 obviously if you disagree if there's some other warning -- I
6 would agree though with -- and this complaint's pretty
7 straightforward, but with a lot -- all -- a lot of these
8 allegations, it is helpful to connect the dots for the Judge.
9 MR. DAWSON: Yes, Your Honor.
10 JUDGE TRACY: So go ahead and you can answer the question
11 if you remember what the question was.
12 THE WITNESS: I don't remember what the question was.
13 JUDGE TRACY: Yes. That happens.
14 Q BY MR. DAWSON: This -- this mentions a verbal warning
15 that was issued to Michael Meraz on February 1st of 2016?
16 A Yes, sir.
17 Q Okay. Was that the verbal warning that you were
18 discussing in your testimony when examined by General Counsel?
19 A Yes, sir.
20 Q Okay. Now, just a few questions about that. And, again,
21 I won't ask you to repeat your testimony, but I think you
22 mentioned that the pallet was a special order pallet?
23 A Yes, sir.
24 Q Can you explain what that -- what that is?
25 A It's a special order going to a catering company. So a

1 catering company has an event, request to -- request an item,
2 shamrock purchases that item for that event for that customer.
3 So when it comes in, we call it a special order product. It
4 comes in, it gets put away. It normally ships out the entire
5 pallet. It doesn't -- it doesn't come in and then it ships out
6 one case or two cases. Normally how a special order item
7 happens is I order a pallet for a specific customer, it comes
8 in, we put it up, it calls for it and we -- we ship it.
9 Q Okay. And in regard to the pallet that Mr. Meraz
10 misplaced, when did that arrive at the facility?
11 A By looking at the record, it arrived the same day they --
12 it arrived that same day they outed it.
13 Q Okay.
14 A Earlier that day. So normally this time would probably be
15 after midnight. So it arrived at that same shipping shift. It
16 goes across -- the shipping shift starts at 9 a.m. in the
17 morning or 10 a.m. in the morning and then it goes until about
18 3 a.m. the --
19 Q The following day?
20 A -- following day.
21 Q Okay. Now, if you can look at General Counsel's
22 Exhibit 5. Do you have that in front of you?
23 A Yes.
24 Q And this was the verbal warning that was issued to
25 Mr. Meraz?

1 A Yes, sir.
2 Q Okay. The language under verbal warning, "Associate
3 failed to follow proper put-away procedures," did you actually
4 draft that language?
5 A I actually -- I didn't draft the language --
6 Q Okay.
7 A -- the "proper put-away procedure, failure to put (sic)
8 proper put-away procedure," yes.
9 Q Okay. You did not draft that language?
10 A No.
11 Q Okay. Now, how about the inventory control person, can
12 you explain why the inventory control person was not
13 disciplined?
14 A Because they didn't do anything. The inventory control
15 person didn't do anything wrong. It's not their responsibility
16 to hunt down a pallet. It is -- their primary responsibility
17 is to verify that there's no pallet in the location that is --
18 is asked to be. So then it -- from that, they start looking,
19 doing the research of where those pallets are at. They could -
20 - normally they do it on that same night, sometimes they do it
21 the next morning. And the reason being is that the customer
22 still hasn't been disserviced. Normally the customer --
23 typically the customer hasn't been disserviced.
24 There's an additional pallet with that same product there.
25 So they skip over that pallet; they lock it for future sales.

1 They grab another pallet of the same product and put it into
2 the pick or -- for picking. Then they have time to kind of go
3 through and -- and research it. If they can't find it that
4 next -- that next night, the report comes out the next morning.
5 Inventory control then determines, "Hey, we've got to go map
6 and look for this pallet."
7 Q Okay. Now, you had talked a little bit about, you know,
8 some of the evidence that you considered in deciding to
9 authorize the CPDR for Mr. Meraz. Did you see Mr. Meraz' case
10 as unusual in any regard?
11 A It is. It's normally -- we won't see this, the -- we
12 won't -- normally we would find that pallet that same night,
13 depending on timing. This is an unusual situation. It was a -
14 - it was a special order pallet to a specific customer. It had
15 to ship out that same day. We received it that same day, we
16 put it away that same day and then we lost it that same day.
17 So when it was discovered to be shipped out on that same day,
18 it wasn't there. The timing of that, when they discovered it,
19 the truck had to leave. So it's always a decision, "hey, do we
20 wait, look for the 30 cases or do we send a truck? That way we
21 don't disservice the other customers that are on that same
22 truck. And then we put it on the outs report and say we missed
23 it.
24 Q Okay.
25 MR. DAWSON: Your Honor, maybe instead of showing the

1 witness the complaint, if I can just -- my questioning is now
2 moving to paragraph 6-D, E, H and I.
3 JUDGE TRACY: Okay.
4 Q BY MR. DAWSON: Ivan, let's -- let's go back to the
5 testimony about the inbound and -- and shipping crews. Are
6 employees required to take breaks with the rest of their crew?
7 A Yes.
8 Q Okay. And why is that?
9 A It's -- there is a reason why, because it's -- their
10 process is contingent on the next person's project -- on -- on
11 process. So their process is contingent on the next. Put-away
12 forklifters services receivers. So if a put-away forklifter
13 is -- is on his break, the receivers are replenishing and then
14 he -- they clog up our docks. If a receiver is not receiving
15 and -- if the receiver is on break and our forklifters are out
16 there putting away, there's nothing to put away. The same
17 thing for the inbound process. Pickers can't just go -- go off
18 and go take break while loaders are still working, because then
19 there's nothing come down those belts. So vice versa. Or
20 loaders can't just go take their break. That's a reason why
21 everybody takes a break at the same time.
22 With this group right here, they have to line themselves
23 up -- forklifters have to line themselves up with receivers,
24 receivers with our third-party unloading group. There's no
25 need for them to unload and clog our dock when nobody's there

1 to receive it or put it away.
2 Q Okay. Now, Ivan, I think you had mentioned that -- that
3 the break times for outbound would be reflected on an EOD, or
4 end of day reports?
5 A Yes, sir.
6 MR. DAWSON: Your Honor -- or I'm sorry.
7 JUDGE TRACY: You can go ahead.
8 MR. DAWSON: Okay. Thanks.
9 Q BY MR. DAWSON: Ivan, I'm going to hand you what I marked
10 as Respondent's Exhibit 7(a) and 7(b).
11 Are you able to identify these documents?
12 A Yes, sir.
13 Q Okay. What are these documents?
14 A These are shipping reports, end of day shipping reports
15 that come out at the end of every shift. So I receive these
16 reports every morning when I come in. This right here
17 signifies how our night went, how many cases that we shipped
18 out that night, how long it took us, what time -- when a sorter
19 was done. So if you look down on the bottom half of the
20 paragraph, there's a scorecard there. It says, "Hours, actual
21 cases, hours sorted, minimum flotation." That right there is
22 the performance of our sorter. It's an automated report that
23 comes out saying that at the 11:00 hour, if you look there, we
24 sorted 65 -- 6500 cases at that -- at that 11:00 hour.
25 It's also important too that if there's a downtime, that we

1 recorded there. So that 11:00 hour, there was a doorjamb
2 waiting for -- for a freezer, we can identify ask address.
3 Also on this right here, it -- it tells me on the 1400 hour --
4 and normally I would ask, "Hey, what happened on the 1400 hour?
5 How come we only sorted 1500 cases?" Well, there's a reason
6 why. From 2:00 to 2:14 -- or 2:45, there's a -- there's a
7 lunch. There's supposed to be a lunch. And off to the side
8 there was a duration of how long the lunches were, or breaks.
9 So this is snapshot of the entire shipping -- shipping day.
10 So you'll notice there's two lunches in there, there's --
11 there's two breaks -- breaks in there. So it's a first shift
12 shipping and the second shift shipping.
13 Q And 7(b) would be read the same way?
14 A 7(b) would be the same way.
15 Q Is that just from another day?
16 A That -- that's Tuesday and this was Monday. Yes.
17 MR. DAWSON: All right. Your Honor, we would ask for
18 admission of Respondent's Exhibit 7(a) and 7(b).
19 JUDGE TRACY: Any objections?
20 MS. DEMIROK: If I could voir dire?
21 JUDGE TRACY: Go ahead.
22 **VOIR DIRE**
23 Q BY MS. DEMIROK: So, Mr. Vaivao, just so -- so this
24 shipping report, does it include both inbound and outbound
25 information, do you know?

A No. This is just shipping. Shipping report.

Q Okay. So this would -- okay.

MS. DEMIROK: No further questions on that.

JUDGE TRACY: Any objections?

MS. DEMIROK: No.

JUDGE TRACY: Okay. All right. So I'm going to admit Respondent's Exhibit 7(a) and 7(b).

(Respondent Exhibit Numbers 7(a) and 7(b) Received into Evidence)

JUDGE TRACY: I'm assuming that it's just to show what the day looks like, because that was the day -- actually, it's from last week, the two --

MR. DAWSON: Well, just --

JUDGE TRACY: -- days?

MR. DAWSON: -- just to show that the crews do, in fact, take their breaks together and the downtime reflects that, you know, the shipping crew -- and I'll be handing something out about inbound here in a moment, but that the outbound crew was on break from, you know, this time to this time, and then they were on break from this time to this time. So just to confirm that the inbound and outbound crews do, in fact, take their breaks together as a crew.

JUDGE TRACY: Okay. So, you know, I will say this: That, you know, I'll accept it -- or admit it, Respondent's Exhibit 7(a) and 7(b). I would just say though as the Judge

1 I'm not so sure how it helps me to determine the issues that
2 are presented in this complaint, because those go back to
3 January.
4 MR. DAWSON: Okay. If I may?
5 **CROSS-EXAMINATION CONTINUED**
6 Q BY MR. DAWSON: Ivan, would -- would those end of day
7 reports reflect -- have the end of day reports changed in any
8 regard?
9 A No. This is -- every night this comes out every day. It
10 hasn't changed. This reflects that everybody goes a break at
11 the same time. We shut down the sorter. Everybody goes to
12 break at the same time.
13 Q Okay. So in -- in January, it would have been the same
14 process?
15 A It would be the same process, yes.
16 JUDGE TRACY: And of 2016?
17 THE WITNESS: 2016. It goes back to the first day I -- I
18 was there. We started the automation, the automation piece,
19 which -- 2001.
20 JUDGE TRACY: Okay.
21 Q BY MR. DAWSON: And do you recall your testimony when --
22 when examined by General Counsel about the break times for
23 outbound -- I'm sorry -- for inbound being listed on the
24 schedule?
25 A Yes, sir.

1 Q Okay. And I'll hand you what I marked as exhibit --
2 Respondent's Exhibit 8.
3 JUDGE TRACY: And, before you do that, let's go off the
4 record for a minute.
5 (Off the record at 6:10 p.m.)
6 JUDGE TRACY: Okay. Go ahead.
7 MR. DAWSON: Thank you, Your Honor.
8 Q BY MR. DAWSON: Ivan, I handed you what we've marked as
9 Respondent's Exhibit 8. Is this an example of an inbound
10 schedule?
11 A Yes, sir.
12 Q Okay. And where are the break times listed?
13 A Break times are listed on the bottom half of each column.
14 Each column represents each shift. So first to the left is
15 first shift, second -- there in the middle is the second shift
16 and then to the right is third shift. And their breaks times
17 are listed on the bottom left.
18 Q Okay. And is this consistent with how the schedules had
19 been printed since the change -- since the -- the -- since the
20 rebid of 2016?
21 A This is consistent since 2015. You know, even if it was
22 not on the schedule, this is the same time that they went to
23 break.
24 Q But just -- and -- and, you know, I apologize. My
25 question wasn't clear. In terms of the breaks being printed on

1 the schedule, is that consistent with how it's been done since
2 the rebid in 2016?
3 A Yes, sir.
4 Q Okay.
5 MR. DAWSON: Your Honor, we would move for admission of
6 Respondent's Exhibit 8.
7 JUDGE TRACY: Any objections?
8 MS. DEMIROK: No objection.
9 JUDGE TRACY: Okay. All right. So Respondent's Exhibit 8
10 is admitted into evidence.
11 **(Respondent Exhibit Number 8 Received into Evidence)**
12 Q BY MR. DAWSON: Now, Ivan, have the -- we talked a little
13 bit about the replenishment and put-away teams. Have those
14 teams always been separate?
15 A They were separate up to 2015.
16 Q Uh-huh?
17 A February 8th of 2015, when we changed our operation to a
18 24-hour operation, at that time the need was at that time to
19 make sure that we have enough capacity to receive all the
20 product that we needed to service our customers. At that time
21 we didn't feel that they were receiving all the necessary items
22 for that shipping date. So the call-out was to create a 24-
23 hour shipping operation. We've never done that before.
24 Normally, historically, we come in this the morning, receive
25 everything and then we go home by like 6:00, 5 p.m., 5:00 to

1 6 p.m., but this was a call-out to make schedule changes. We
2 ended up creating three shifts, expanding our operation to a
3 24-hour operation. There was a lot of stress on, "Hey, let's
4 get everything? Hurry and put it away." It was more a -- we
5 called the project inbound value stream. It comes in, we make
6 sure it's -- it's there, make sure we account for it, make sure
7 we put it away. So --
8 Q So was it -- and, I'm sorry, I don't mean to interrupt.
9 So it -- was it a time issue that caused us to go to the
10 24-hour operation?
11 A There is. There's a time issue, there's a service issue
12 with --
13 Q There just wasn't enough room to the docks to get things
14 in?
15 A Not necessarily enough room on the dock, it just wasn't
16 even feasible to bring in 160,000 cases in a ten-hour -- ten-
17 hour period of --
18 Q Oh, I get you. Okay. So at the time that we started the
19 24-hour inbound operation, what did that -- so I'm talking
20 about in 2015 -- how did that impact schedules?
21 A It impacted schedules, we then created three shifts. We
22 went to 24-hour operation almost -- it's 24 hour,
23 six-and-a-half days of operation. At that time replenishment
24 forklifters -- prior to that change, replenishment forklifters
25 reported to shipping and put-away forklifters reported to

1 inbound. When we made the change in February of -- February of
2 2015, we merged all the -- the forklifting operations. When we
3 expanded that, we -- it looked good on paper. I -- I actually
4 endorsed it. It looked good on paper saying that, "Hey, we'll
5 have capacity to conduct replenishments, and since this is not
6 a constraint now, it's stretched out, we could do put-away
7 functions as well."
8 On our automated side, the crane manages that in
9 priorities. It puts away a couple pallets, it -- do a couple
10 replenishment, comes back. So there's a systematic way of
11 doing that. So that was kind of like the -- the train of
12 thought, methodology of on, "Hey, if we can do it that way as
13 well and be efficient at it." But I mean --
14 Q Did it work out that way?
15 A It didn't work out that way. On paper it looked good.
16 Initially we started, "Hey, guys, it's a new thing. We've
17 never done it this way." Then summertime hit, which is our
18 normal downtime, slow. I think we -- we managed through it
19 much better. And then --
20 MR. DAWSON: If --
21 MS. DEMIROK: Your Honor --
22 MR. DAWSON: Can we go off the record for one moment?
23 JUDGE TRACY: Okay.
24 (Off the record at 6:17 p.m.)
25 JUDGE TRACY: All right. Go ahead and go back on the

1 record.
2 Q BY MR. DAWSON: So it -- I think my question was did it --
3 did it end up working out the way that -- that you expected?
4 A It didn't work out as it was drawn out on paper.
5 So mid-September, October of 2015, I then spoke with my
6 boss at the time, which is Jerry Kropman. Kind of proposed to
7 him, "Hey, let's take a look at this. There's some
8 deficiencies here. We thought it would work out. It didn't
9 work out. Can we take a look at" -- and he suggested that,
10 "Hey, let's hold off. We communicated that we're going to
11 rebid after a year's time. Maybe we can relook at that then."
12 Q Okay. So for the one year that replenishment and -- and
13 put-away were combined, were they under inbound or outbound?
14 A They were all under inbound, reporting to Brian Nicklin.
15 Q So in terms of -- of breaks, would all of forklifters have
16 been taking their breaks together?
17 A All the forklifters and receivers, they all took their
18 breaks together.
19 Q And I think you had testified earlier that Mr. Kropman is
20 no longer with -- with Shamrock --
21 A Yes, sir.
22 Q -- correct? Okay. And Tim O'Meara is in his position
23 now?
24 A Yes, sir.
25 Q Okay. Have you spoken to Mr. O'Meara about re-splitting

1 the forklift teams into put-away and replenishment?
2 A That was my first objective when he walked in. I wanted
3 to explain to him what we're looking at. And he concurred. He
4 confirmed that, "Hey, that's some of the needs that we have out
5 there." So he said, "Hey, that's okay. I put together a" --
6 "a presentation for Tim O'Meara and his boss, Mark Ingold, to
7 put their blessings over it and to kind of look over what I had
8 suggested. And I listed some" -- "some gains and efficiencies
9 in what we're looking at."
10 Q Okay. And I'm going to hand you what I've marked as
11 Respondent's Exhibit 9. Can you identify that document?
12 A Yes, sir.
13 Q What -- what is that document?
14 A This is the presentation that I put together for Tim
15 O'Meara and Mark Ingold requesting splitting the crews back to
16 specific designated job responsibilities.
17 Q Okay. And by speculating the crews back, which crew were
18 you referring to?
19 A I was referring to the -- the shipping, the outbound crew.
20 Q Okay.
21 A So the inbound schedule stayed the same but we -- we
22 created two shipping schedules reporting to shipping teams to
23 service shipping needs.
24 Q Okay. And where are those schedule is reflected in
25 Respondent's Exhibit 9?

1 A On page -- so can I walk -- well, I guess I will look for
2 the page. So 1, 2, 3, 4, 5, 6, 7. So page 7?
3 Q This is --
4 A It says --
5 Q It's in the bottom right-hand corner, it says, Shamrock
6 Prod, 3-000026." Is that the page --
7 A Yes, sir.
8 Q -- that you're on?
9 A Yeah. So that -- that page right there, I put there, "Two
10 outbound shift reporting to shipping managers. Schedules" --
11 you know, the time. "Designated replenishment teams." And
12 then I list out, "Reduction of replenishment tasks. Eliminate
13 shorts during selection, affecting the wave completion." And
14 that's important because it -- every wave -- it's a sequence.
15 So if it's incomplete, it will come on a different wave. Well,
16 then it will eventually be placed on a different area of the
17 truck. "Reduction of e-picks and damages, late cases on the
18 tail end of the trucks affecting delivery sequence."
19 Q And just briefly about the waves. Are the trucks loaded
20 in order of stops?
21 A The truck is loaded in order of stops, from high to low
22 and in sequence of waves that the -- the entire work planner is
23 scheduled.
24 Q Okay.
25 MR. DAWSON: Your Honor, we would -- oh, one more question.

1 I'm sorry.
2 Q BY MR. DAWSON: Ivan, you had mentioned that you -- you
3 listed out what you thought would be the benefits of
4 re-splitting the replenishment and put-away teams. Would that
5 be the one, two, three and four?
6 A Yeah, the one, two, three and four. And I listed out by
7 shift, by operation where we're at.
8 When we were put together -- when we were together, inbound
9 and outbound operations, there's a -- there was a lot of misses
10 on servicing our operations. When put-away -- when they're
11 required to go put away, they're too busy replenishing because
12 then -- and then vice versa. As they're replenishing, they're
13 supposed to be put away; they're putting away when they're
14 supposed to be replenishing. There's no systematic, you know,
15 approach for us to -- to do that. It was a -- it was a
16 management nightmare to say, "Hey, guys, let's" -- it's like a
17 fire drill. "Hey, go put away because the dock is -- it's
18 congested and there's compliance issue. The pallet's been
19 sitting there for" -- our goal is over a half an hour. If a
20 pallet's sitting there, we need to put it in the reserve and
21 the right temperature or vice versa.
22 There was service issues that -- that we managed it -- we
23 managed it well when we had all the bodies, we had -- it was
24 low case count. But in our busy season, that kind of came
25 unglued.

1 Q Okay.
2 MR. DAWSON: Your Honor, we would move to admit
3 Respondent's Exhibit 9.
4 JUDGE TRACY: Any objections?
5 MS. DEMIROK: No, Your Honor.
6 JUDGE TRACY: So Respondent's Exhibit 9 is admitted into
7 evidence.
8 **(Respondent Exhibit Number 9 Received into Evidence)**
9 Q BY MR. DAWSON: Ivan, did Mr. O'Meara agree that re-
10 splitting the teams was the right approach?
11 A Yes, sir.
12 Q Okay. So did the teams, in fact, get split?
13 A Yes, sir.
14 Q Okay. Now, I think you had mentioned that Mr. Kropman
15 said, "We'll put it off until the rebid." Was another bid
16 conducted?
17 A Yes, sir.
18 Q And when -- when was that bid conducted?
19 A We communicated out in December, mid-December, sometimes
20 in mid-December. We -- we conducted it the beginning of
21 January and the new -- new schedules were effective January
22 24th of 2016. Yes.
23 Q Okay. And I'm going to hand you what I'll mark as
24 Respondent's Exhibit 10.
25 **(Respondent Exhibit Number 10 Marked for Identification)**

Q BY MR. DAWSON: Ivan, can you identify Respondent's Exhibit 10?
A Yes, sir.
Q What -- what is Respondent's Exhibit 10?
A This is the -- the bid sheets by shifts.
Q And the -- the handwritten names and signatures that are -- are in the left hand two columns, what -- what are -- what do those signify?
A Those signify that the name and the signature to the shifts, they agreed that, "Hey, this is the shift I want. I put my name down and signed off. This is the shift that I choose."
Q So for the -- the first name on page 1, Bob Washman, by signing on that line he was expressing that he wanted that shift?
A Yes. He -- he's expressing that he wanted that shift Monday to Friday 2 p.m. to 10:30 p.m., off Saturday and Sunday.
MR. DAWSON: Your Honor, we would move for admission of Respondent's Exhibit 10.
JUDGE TRACY: Any objections?
MS. DEMIROK: No, Your Honor.
JUDGE TRACY: Okay. So Respondent's Exhibit 10 is admitted into evidence.
(Respondent Exhibit Number 10 Received into Evidence)
Q BY MR. DAWSON: Ivan, when -- when put-away and replen.

1 were split, split back up in 2016, did replenishment go back
2 under outbound?
3 A Yes. Replenishment -- the two shifts, the first
4 replenishment team reported to the day shift day shipping, the
5 second replenishment team reported to the second shift
6 shipping, the night shipping.
7 Q And did that also occur on January 24th?
8 A Yes, sir.
9 Q How -- how did that impact the forklifters' breaks?
10 A On the inbound team, it didn't impact any -- any breaks in
11 the -- the -- on the inbound team because those shifts were --
12 were already established in 2015. So they -- they -- it didn't
13 impact their breaks. It impacted the -- the two teams that
14 went to outbound, because now they're taking their breaks with
15 outbound -- outbound. And that was designed that way. It was
16 designed that way because we wanted to make sure that
17 it's designated job responsibilities to service outbound.
18 Q Okay. And -- and just going back, if I could, to 2014 or
19 pre-2015 when the teams were split, was that also the case?
20 Did the replenishment team go on break with outbound?
21 A Yes. Before the -- 2015, replenishment forklifters
22 reported to shipping. Put-away forklifters reported to inbound
23 or --
24 Q And then so --
25 A -- receiving.

1 Q -- during that period, they took breaks with those
2 respective crews?
3 A Yes. Everybody -- everybody takes breaks at the same time
4 with their crews --
5 Q Okay.
6 A -- with -- with that process. All right? So all
7 receiver -- receiving crew, they all took break together. All
8 shipping crews, they all took break together.
9 Q I think you may have already clarified this in your -- in
10 your direct, but just in case, when we say outbound and
11 shipping, are those referring to the same operation?
12 A Yes. Outbound and shipping are the same. Inbound and
13 receiving are the same.
14 Q Okay. So other than this period in 2015, have
15 replenishment and put-away because been separate?
16 A Other than that -- 2015, yes, they've always been
17 separate.
18 Q And have they always taken their break separately?
19 A They've always taken their break separately.
20 MR. DAWSON: Now, Your Honor, I'll be moving to paragraph
21 6-H and I of the complaint.
22 Q BY MR. DAWSON: You -- you testified earlier about
23 Mr. Phipps. Do you -- do you recall that testimony?
24 A Yes, sir.
25 Q Okay. Now, in regard to General Counsel exhibit -- let's

1 see -- yes, General Counsel Exhibit 2, it says -- when you have
2 a chance to get there, let me know.
3 A Yes, sir.
4 Q Step one is -- of the disciplinary process, according to
5 the policy, is counseling?
6 A Yes, sir.
7 Q Is every conversation with an associate counseling?
8 A No.
9 Q Okay. Is every instruction -- every instruction to an
10 associate considering counseling?
11 A No.
12 Q General Counsel asked you about Mr. Phipps saying that --
13 that he wanted to take his breaks when he wanted to because
14 of -- of Union business. Did it matter what his reason was?
15 A It didn't matter. I mean I recall, yeah, like -- yeah, I
16 had a statement here signed. My recollection was that was the
17 issue, "Hey, I'll take my break as I see fit."
18 Q Uh-huh?
19 A It didn't -- it didn't matter who it was. We just had to
20 make sure that everybody takes -- takes breaks at the same
21 time.
22 Q Okay. So the fact that he -- that he mentioned the Union,
23 that didn't factor into the equation at all?
24 A It didn't matter. What mattered was I said, "There's a
25 reason why we take breaks together. There's a reason why.

1 It's because your job is contingent on the next guy's -- the
2 next operation there of the job."
3 JUDGE TRACY: So, Mr. Dawson, let me just say this: That
4 this is actually the direct examination in a way, because --
5 MR. DAWSON: Yes.
6 JUDGE TRACY: -- you're not going to call him again? So
7 try to limit the leading questions.
8 MR. DAWSON: I will, Your Honor. I'm sorry.
9 JUDGE TRACY: Yeah.
10 MR. DAWSON: I apologize, Your Honor.
11 Q BY MR. DAWSON: Ivan, did the injunction play any part in
12 the conversation with Mr. Phipps?
13 A No, sir.
14 Q Okay. Did the handouts play any part in the conversation
15 with Mr. Phipps?
16 A No, sir.
17 Q Did you ever work on the shipping crew?
18 A Yes, sir.
19 Q Did you work on the outbound crew?
20 A I've worked on the outbound crew, I worked side by side
21 with Mr. Phipps for a long time on the outbound crew.
22 Q During the time that you worked on those crews, did the
23 employees take their breaks together?
24 A The crews, the outbound crew, the entire crew took breaks
25 together.

1 Q Okay. How about on the inbound side?
2 A Same as the inbound side.
3 Q Okay.
4 MR. DAWSON: Your Honor, may we go off the record for a
5 moment? I just want to bring something to your attention --
6 actually, I guess we don't need to go off the record.
7 Because this is in the nature of direct, there is one topic
8 that I would like to cover with Mr. Vaivao that was not
9 addressed in -- in General Counsel's case. So, technically, I
10 will be exceeding the scope. With leave from Your Honor, I'd
11 like to do that so we don't have to re-call Mr. Vaivao.
12 JUDGE TRACY: That's fine with me.
13 MS. DEMIROK: No, Your Honor. That -- I mean that's fine.
14 JUDGE TRACY: Okay.
15 MS. DEMIROK: Yeah.
16 MR. DAWSON: Thank you, Your Honor.
17 And, Your Honor, this -- this testimony will be going to
18 paragraph 5-A(1) and (2) of the complaint.
19 Q BY MR. DAWSON: Ivan, does Shamrock have any policy
20 concerning apparel?
21 A We have a -- a safety Hi-Viz apparel policy.
22 Q Okay. Are you -- are you familiar with that policy?
23 A Yes, sir.
24 Q And I'll hand you what's being marked as Respondent's
25 Exhibit 11(a) and 11(b).

1 **(Respondent Exhibit Numbers 11(a) and 11(b) Marked for**
2 **Identification)**
3 MS. DEMIROK: I'm sorry to interrupt, but could we take a
4 moment off the record?
5 MR. DAWSON: Sure.
6 JUDGE TRACY: Sure. Let's go off the record.
7 MS. DEMIROK: Okay.
8 (Off the record at 6:32 p.m.)
9 Q BY MR. DAWSON: I'm going to hand you what I've marked as
10 Respondent's Exhibit 11(a) and (b). Are you able to identify
11 this document?
12 A Yes, sir.
13 Q What is this document?
14 A It's our high visibility safety apparel policy.
15 Q Okay. Now, do you know when this policy was implemented
16 at Arizona Foods, at the Phoenix warehouse?
17 A I believe in early 2015.
18 Q Early 2015. Was any presentation given to employees
19 concerning the policy?
20 A Yeah, there was. Our safety coordinator Joe Remblance
21 (phonetic), he had presented a power point to all the
22 associates explaining the policy.
23 Q And I'm going to hand you what I'll mark as Respondent's
24 Exhibit 12. And are you able to identify Respondent's Exhibit
25 12?

1 **(Respondent Exhibit Number 12 Marked for Identification)**
2 A Yes, sir.
3 Q What is Respondent's Exhibit 12?
4 A It's the presentation to the associates and opportunity
5 for questions about the safety -- the high visibility safety
6 apparel policy.
7 Q And do you know in terms of the order of locations where
8 the high vis policy was rolled out, do you know where the
9 Phoenix distribution facility fell in that order?
10 A I think it was --
11 MS. DEMIROK: Objection. Relevance.
12 MR. DAWSON: It's explanatory, Your Honor, the
13 presentation says 2014 but if I can -- I don't know if we need
14 to excuse the witness, but just to clarify the --
15 MS. DEMIROK: I wouldn't mind stipulating to a date if you
16 have a date that this was --
17 MR. DAWSON: Okay.
18 MS. DEMIROK: -- that this was -- yeah.
19 MR. DAWSON: Okay.
20 JUDGE TRACY: So let's go ahead and just stipulate to the
21 date. What's the date?
22 MR. DAWSON: January 2015.
23 MS. DEMIROK: Yes.
24 MR. DAWSON: Okay.
25 JUDGE TRACY: So we're stipulating to what, that that's

1 when it was implemented?
2 MR. DAWSON: In the Phoenix warehouse.
3 JUDGE TRACY: Okay. January 2015?
4 MR. DAWSON: January 2015. Thank you.
5 JUDGE TRACY: And you both agree?
6 MS. DEMIROK: Yes, Your Honor.
7 JUDGE TRACY: Okay. Thank you.
8 MR. DAWSON: Yes, Your Honor.
9 Q BY MR. DAWSON: Now, do you recall some orange T-shirts
10 that were -- that had the slogan "We are Shamrock". Do you
11 recall those being handed out to Phoenix employees?
12 A Yes, sir.
13 Q Why were those shirts given out?
14 A Two things, our end of year -- we wanted to commemorate
15 our best year ever at Shamrock foods and then to support our
16 high vis policy.
17 Q Okay. Were the shirts only given to warehouse employees?
18 A No.
19 Q Who else received the shirts?
20 A They were given to transportation, clerical, anybody that
21 walks through our warehouse is required a safety, high vis
22 apparel, whether it's a vest or a shirt, jacket.
23 Q You may recall from the last proceeding General Counsel
24 had asked you about some loaders that wore orange shirts, do
25 you recall that?

1 A Yes, sir.
2 Q Okay. Did you know about the loaders wearing the orange
3 shirts at the time that the "We are Shamrock" orange shirts
4 were ordered?
5 MS. DEMIROK: Objection. Leading.
6 MR. DAWSON: I don't think that's leading. I asked him if
7 he knew about the loaders when he -- when these shirts were
8 ordered.
9 JUDGE TRACY: Well, so I'm going to overrule the
10 objection.
11 MR. DAWSON: I mean, to some extent, Your Honor, this is a
12 little bit difficult, because in essence we're taking the
13 witness out of order. I'm anticipating that there will be
14 testimony on what all that means.
15 JUDGE TRACY: Just -- okay.
16 MR. DAWSON: But because Mr. Vaivao is testifying earlier
17 and we're doing his direct out of order, that evidence isn't in
18 the record yet. But these would be the T-shirts that are
19 referred to in paragraph 5.
20 JUDGE TRACY: Okay. So go ahead. Is this just getting us
21 forward to the point of this.
22 MR. DAWSON: This is it, yes. Exactly.
23 JUDGE TRACY: Go ahead and answer the question.
24 THE WITNESS: Could you ask the question again?
25 Q BY MR. DAWSON: So from the prior proceeding, do you

1 recall General Counsel asking you questions about loaders
2 wearing orange shirts?
3 A Yes, sir.
4 Q Okay. Did you know of the loaders wearing the orange
5 shirts at the time that the orange, "We are Shamrock" shirts
6 were ordered?
7 A I didn't know of the specific loaders. I didn't know --
8 anything that I've heard as far as orange shirts were hearsay
9 that loaders were wearing them, but everybody at the time after
10 we passed out these shirts, everybody was wearing orange.
11 Q Was this the first time that -- and by this, I mean the
12 orange, "We are Shamrock" T-shirts, were those the first
13 T-shirts that Shamrock ever gave to associates in your
14 knowledge?
15 A No.
16 Q That was not the first time?
17 A That wasn't the first time.
18 Q I'm going to hand you what I'll marked as Respondent's
19 Exhibit 12.
20 JUDGE TRACY: You already have 12, I think.
21 MR. DAWSON: I'm sorry, Your Honor, 13. And I should move
22 for admission of Respondent's Exhibits 11 and 12.
23 **(Respondent Exhibit Number 13(a) through 13(e) Marked for**
24 **Identification)**
25 JUDGE TRACY: Any objection?

1 MS. DEMIROK: If I could just get some clarification as to
2 the relevance.
3 JUDGE TRACY: Yes.
4 MR. DAWSON: Your Honor, it's a little difficult for me to
5 answer because I don't know the exact nature of the claim that
6 General Counsel is seeking to assert, but there is a claim
7 about the orange, "We are Shamrock" T-shirts. Mr. Vaivao
8 testified that the orange, "We are Shamrock" T-shirts and then
9 furtherance of the high visibility policy Respondent's Exhibit
10 11 and 12, Exhibits 11 and 12 both refer to the high visibility
11 policy. Ultimately, obviously I don't have knowledge of the
12 claim that they intend to assert, so ultimately these documents
13 may turn out not to be relevant, but at this point, we don't
14 have any information about what the claim is specifically and
15 so given that Mr. Vaivao is unavailable later this week, we'd
16 ask to put those in the record.
17 MS. DEMIROK: No objection then, Your Honor.
18 JUDGE TRACY: Okay. So Respondent's Exhibits 11(a) and
19 (b) and 12 will be admitted into evidence.
20 **(Respondent Exhibit Numbers 11(a), 11(b), and 12 Received into**
21 **Evidence)**
22 And certainly if at some point you feel that it's not
23 relevant, you can certainly ask to withdraw it.
24 MR. DAWSON: Withdraw the exhibits. Thank you, Your
25 Honor.

Q BY MR. DAWSON: Ivan, I'm going to hand you what is marked as Respondent's Exhibits 13(a) through (e). Are you able to identify these photographs?

A Yes, sir.

Q What are these photographs?

A These are shirts that we passed out to our associates throughout the years.

Q Okay. Do any of these shirts have the "We are Shamrock" logo on it?

A Yes.

Q And can you identify those shirts?

A There's one right here on the front page, top right-hand corner.

Q Top left-hand corner?

A As you're looking at it, well yeah.

Q Oh, I'm sorry. Top left, yeah. Sorry, okay.

A Well, so it's this way it's on the left-hand corner, all right. There's another one right here on the -- I believe it's the fourth page.

Q That'd be (d).

A It's be (d). Right there in the bottom left-hand corner. And it looks like that's it. These shirts were passed out throughout the years. I've been with Shamrock for -- I probably have a bunch of these shirts.

Q And were associates required to pay for any of these

1 shirts?
2 A No. These shirts are commemorating it's an event,
3 something we're celebrating, they didn't pay for this, nor as
4 the other orange shirts.
5 Q Now the orange, "We are Shamrock" T-shirts, were they
6 distributed in the same fashion as the T-shirts shown in
7 Respondent's Exhibit 13(a) through (e)?
8 A Yes.
9 Q Did the orange "We are Shamrock" T-shirts have anything to
10 do with the union?
11 A Has nothing to do with the union.
12 Q Would you equate wearing an orange shirt with opposition
13 to the union or support for the company?
14 A No. No.
15 MR. DAWSON: Nothing further, Your Honor.
16 JUDGE TRACY: Well, do you want to admit --
17 MR. DAWSON: I'm sorry. Do you have anything to --
18 JUDGE TRACY: Well, do you want to introduce this into
19 evidence?
20 MR. DAWSON: Oh, yes. May I move for admission of
21 Respondent's Exhibit 13.
22 JUDGE TRACY: (a) through (e)?
23 MR. DAWSON: Yes, Your Honor.
24 JUDGE TRACY: Any objections?
25 MS. DEMIROK: No objections.

1 JUDGE TRACY: Okay. So I'll admit Respondent's Exhibits
2 13(a) through (e).
3 **(Respondent Exhibit Number 13(a) through 13(e) Received into**
4 **Evidence)**
5 JUDGE TRACY: Again knowing that I think that if at some
6 point you find that it's not relevant to your defense, based
7 upon hearing the further testimony, then you can certainly ask
8 to withdraw the exhibits.
9 MR. DAWSON: Thank you, Your Honor.
10 JUDGE TRACY: And do you want to go off the record for a
11 minute?
12 MR. DAWSON: I do, if we could just for -- if I could have
13 two minutes. Actually maybe even one minute.
14 JUDGE TRACY: Okay. Let's just go off the record for a
15 minute then.
16 (Off the record at 6:44 p.m.)
17 Q BY MR. DAWSON: Ivan, you had talked a little bit about
18 the captains, the dock captains and other area captains if you
19 recall that?
20 A Yes, sir.
21 Q Do those captains have the authority to discipline?
22 A No.
23 Q Do they have the authority to promote?
24 A No.
25 Q How about demote?

1 A No.
2 Q Okay. Hire?
3 A No.
4 Q Fire?
5 A No.
6 Q Do they adjust grievances?
7 A No.
8 Q Do they assign work with discretion?
9 A No.
10 Q Would they suspend?
11 A No.
12 MR. DAWSON: Nothing further, Your Honor. Thank you.
13 JUDGE TRACY: Okay.
14 MR. DAWSON: Thank you.
15 JUDGE TRACY: All right. So what we'll do is we'll start
16 again in the morning and certainly because it has been kind of
17 rushed, if there's anything that you think of that you need to
18 ask, unless the General Counsel has some sort of opposition to
19 that, but our plan is to start with the General Counsel to do
20 the cross-examination, the redirect, the recross, and then
21 that'll be it for this witness. Okay.
22 So let's go ahead and go off the record and I'll just
23 remind you unfortunately you have to come back tomorrow.
24 THE WITNESS: Yes.
25 JUDGE TRACY: In the morning. Hopefully --

(Off the record at 6:46 p.m.)

JUDGE TRACY: And please apologize, it's me who asked for the door to be open so nobody gets in trouble. I figured somebody would do that.

(Whereupon, the hearing in the above-entitled matter was recessed at 6:48 p.m. until Wednesday, May 25, 2016 at 9:03 a.m.)

1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board (NLRB), Region 28, Case Numbers
4 28-CA-167910 and 28-CA-169970, Shamrock Foods Company and
5 Bakery, Confectionary, Tobacco Workers' and Grain Millers
6 International Union, Local Union No. 232, AFL-CIO-CLC and at
7 the National Labor Relations Board, Region 28, 2600 North
8 Central Avenue, Suite 1400, Phoenix, Arizona 85004, on Tuesday,
9 May 24, 2016, at 11:15 a.m. was held according to the record,
10 and that this is the original, complete, and true and accurate
11 transcript that has been compared to the reporting or
12 recording, accomplished at the hearing, that the exhibit files
13 have been checked for completeness and no exhibits received in
14 evidence or in the rejected exhibit files are missing.
15
16
17 Tina Irhig
18 TINA IRHIG
19 Official Reporter
20
21
22
23
24
25

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 28

In the Matter of:

Shamrock Foods Company **Case Nos. 28-CA-167910**
28-CA-169970

and

Bakery, Confectionery,
Tobacco Workers' and Grain
Millers International Union,
Local Union No. 232,
AFL-CIO-CLC

_____

_____

Place: Phoenix, Arizona

Dates: May 25, 2016

Pages: 247 through 428

Volume: 2

OFFICIAL REPORTERS

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7227 North 16th Street, Suite 207
Phoenix, AZ 85020
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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 28

In the Matter of: SHAMROCK FOODS COMPANY and BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC	Case Nos. 28-CA-167910 28-CA-169970

The above-entitled matter came on for hearing, pursuant to notice, before **AMITA BAMEAN TRACY,** Administrative Law Judge, at the National Labor Relations Board, Region 28, 2600 N. Central Avenue, Suite 1400, Phoenix, Arizona 85004, on **Wednesday, May 25, 2016, at 9:03 a.m.**

A P P E A R A N C E S

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Ivan Vaivao		258	261	327	
David Garcia	329				
Richard Gomez	359				
Leonardo Baez	410				
Tim O'Meara	415				

E X H I B I T S

EXHIBIT	IDENTIFIED	IN EVIDENCE
General Counsel:		
GC-10	266	266
GC-11(a) and GC-11(b)	269	270
GC-12 and GC-13	285	286
GC-14	293	293
GC-15	303	303
GC-16	328	328
GC-17	400	400
GC-18	404	404

1 **P R O C E E D I N G S**

2 JUDGE TRACY: Okay. So before we continue with
3 Mr. Vaivao's cross-examination, Ms. Demirok, you wanted to
4 address something?
5 MS. DEMIROK: Yes, Your Honor.
6 So after reviewing the documents that were produced via
7 the subpoena, and they were documents we had seen for the first
8 time even though it had been requested by the Region during the
9 investigation of this particular -- these allegations, after
10 speaking with the Charging Party, the Union's attorney, they've
11 requested withdrawal of certain allegations.
12 In the consolidated complaint, which is 1(j) in the formal
13 papers, which is GC Exhibit 1(j), and specifically the Union
14 has requested withdrawal of the allegations in paragraphs 5-B
15 and the two subparts, 5-C and the two subparts, 6-A, 6-B, 6-C
16 and 6-G. And we are asking Your Honor to -- we are asking to
17 withdrawal those allegations and that you remand those
18 allegations to the Regional Director in anticipate that he
19 would approve the Charging Party's request for withdrawal.
20 JUDGE TRACY: Okay. So -- all right. So -- and I'm
21 assuming Respondent doesn't really have an opinion on this
22 or --
23 MR. DAWSON: That's --
24 JUDGE TRACY: -- or oppose it?
25 MR. DAWSON: That's correct, Your Honor.

1 JUDGE TRACY: All right. So what I'll do is I'll go ahead
2 -- taking a look at General Counsel's Exhibit 1(j), I will
3 remanded back to the Regional Director complaint paragraph
4 allegations in 5(b) one and two, 5(c), one and two, 6 A, B, C
5 and G.
6 All right. And then obviously that would affect the
7 paragraphs like 6-J, K and L slightly. I mean it -- just in
8 terms of -- since the allegations are withdrawn, the connection
9 to which violations of the Act are also withdrawn -- or remand
10 back so that way they'll be withdrawn. Okay.
11 MS. DEMIROK: And Your Honor, we also -- we addressed a
12 notice of intent to amend on the first day, yesterday.
13 JUDGE TRACY: Yeah.
14 MS. DEMIROK: And that involved an amendment to paragraph
15 4, which was to include Arthur Manning as a supervisor agent.
16 JUDGE TRACY: Yeah.
17 MS. DEMIROK: And because that isn't necessary, he was only
18 an actor in -- I believe it was in the allegation in paragraph
19 5-C, we no longer need to have that in the allegation -- or in
20 the complaint. So I suppose --
21 JUDGE TRACY: Okay.
22 MS. DEMIROK: -- it might be a moot point at this -- at
23 this time.
24 JUDGE TRACY: All right. So I guess would you also be
25 withdrawing that notice to amend the complaint for --

1 MS. DEMIROK: I --
2 JUDGE TRACY: Because the only one -- yeah, the only one
3 mentioned here is Arthur Manning for captain. It's not really
4 a charge; it's just part of the complaint. So --
5 MS. DEMIROK: Okay.
6 JUDGE TRACY: -- you, in essence, are -- his issue of
7 whether he's a supervisor is not at issue anymore; is that
8 correct?
9 MS. DEMIROK: That's correct, Your Honor.
10 JUDGE TRACY: Okay. However, Bob Washman is now the only
11 one that is in dispute?
12 MS. DEMIROK: He is, Your Honor. And at this point, after
13 reviewing what -- what we will be putting on, I don't believe
14 that that's a material issue.
15 JUDGE TRACY: Okay.
16 MS. DEMIROK: So I -- I don't think that we'll be hearing
17 much more on that.
18 MR. DAWSON: And I apologize. I was going to ask with Your
19 Honor's leave, I was last night been trying to finish up and
20 there were a couple more questions that I wanted to ask
21 Mr. Vaivao --
22 JUDGE TRACY: Oh, yeah.
23 MR. DAWSON: -- about the captains, but if we don't -- and
24 I'm not asking that this was --
25 JUDGE TRACY: So how about --

1 MR. DAWSON: -- anything to --
2 JUDGE TRACY: -- this: So in terms of -- so, Ms. Demirok,
3 you're saying that the issue of whether Mr. Washman is an agent
4 or supervisor is not pertinent anymore to this case? So
5 you're --
6 MS. DEMIROK: Yes. And that is unless we hear some
7 testimony that's unexpected as far as his -- maybe he has more
8 involvement in some of the allegations that are still at issue.
9 JUDGE TRACY: Okay.
10 MS. DEMIROK: But at this time I'm unsure as to -- and
11 fairly doubtful that he's going to come into play so that that
12 issue would be -- would be an issue that we had -- had to put
13 before you. So while it's unexpected, it could happen because
14 a lot of times we do hear thing that we don't expect. So I
15 can't say it won't be an issue, but --
16 JUDGE TRACY: So -- and so then what we'll do is we'll go
17 off the record before we call Mr. -- Mr. Vaivao. You guys
18 discuss what additional questions you are planning to ask
19 him --
20 MR. DAWSON: And it's just going to be the 211. So I'm --
21 JUDGE TRACY: Yeah.
22 MR. DAWSON: -- anticipating probably three minutes.
23 JUDGE TRACY: Okay.
24 MR. DAWSON: So it's not going to be --
25 JUDGE TRACY: And you may --

1 MR. DAWSON: -- that much.

2 JUDGE TRACY: -- just want to do it just in case, in case

3 something --

4 MR. DAWSON: I think it's -- with Your Honor -- with Your

5 Honor's leave, I think I would --

6 JUDGE TRACY: Yeah.

7 MR. DAWSON: -- like to do that.

8 JUDGE TRACY: But I would appreciate, again, kind of what I

9 said I think yesterday -- it was a long, but -- yeah, I do say

10 this with regard to, for example, the motion to dismiss, that

11 if at the end of this in your both hearing briefs you determine

12 that Mr. Washman's status isn't relevant, then perhaps at the

13 close of the hearing you can do that or in the post-hearing

14 brief, just drop a footnote that -- if he does even come up in

15 the events -- I don't know --

16 Right?

17 MS. DEMIROK: Uh-huh.

18 JUDGE TRACY: And you don't know quite yet?

19 MS. DEMIROK: Yeah.

20 JUDGE TRACY: -- you could drop a footnote just saying

21 that, you know, the General Counsel is not -- it's not an issue

22 that needs to be resolved, or something like that.

23 MS. DEMIROK: Okay.

24 JUDGE TRACY: I mean I may very well do that on my own. It

25 just would make it easier to know that that's not something to

1 deal with just as the motion to dismiss, if you guys decide,
2 "you know what, we're just -- we're going to drop it because it
3 is different" --
4 MR. DAWSON: Yeah.
5 JUDGE TRACY: -- then that would be helpful --
6 MR. DAWSON: Sure. Sure.
7 JUDGE TRACY: -- for me to not spin the wheels --
8 MR. DAWSON: Sure.
9 JUDGE TRACY: -- on something that nobody's really fighting
10 about.
11 MR. DAWSON: And if Your Honor -- if Your Honor wouldn't
12 mind, if we could, at the end the hearing get an idea of
13 whether Mr. Washman's supervisory status is at issue. That
14 way -- if we wait until post-hearing briefs, we'll probably --
15 we would have to brief the issue.
16 JUDGE TRACY: Yeah. So what I would suggest about that is
17 that once we -- she may know, they may not know. I mean --
18 MR. DAWSON: Sure.
19 JUDGE TRACY: -- because you've kind of --
20 MR. DAWSON: True. Yeah.
21 THE WITNESS: -- had to digest all of this --
22 MR. DAWSON: Absolutely.
23 JUDGE TRACY: -- I certainly wouldn't have a problem, I
24 don't think, you guys talking about it at the end to let each
25 other know. I do agree that the briefs -- sometimes I wish the

1 system were a little bit different with, you know, cross-
2 briefing or something because, honestly, they're often ships
3 passing in the night where it's like, "Whew," you know, because
4 you have to anticipate.
5 MR. DAWSON: Sure. Yeah. Yeah.
6 JUDGE TRACY: But that's just the way that this -- just as
7 much as the litigation of this case is the same way of kind of
8 figuring out what's going to happen.
9 MR. DAWSON: Okay.
10 JUDGE TRACY: It's not a typical way of things being done.
11 But it is what it is.
12 So if -- I can appreciate that you're going to have to deal
13 with it not knowing if they're going to drop it. So, you know,
14 just -- I would suggest you talk about it. You don't have to
15 tell me.
16 MR. DAWSON: Thank you, Your Honor.
17 JUDGE TRACY: I don't care. I'll deal with it if I need to
18 deal with it. But I can appreciate your concern.
19 MR. DAWSON: Thank you.
20 JUDGE TRACY: Okay. So let's go ahead and call -- anything
21 else?
22 MS. DEMIROK: Not from me, Your Honor.
23 JUDGE TRACY: Okay. So we'll call Mr. Vaivao back.
24 You've not a few more questions to ask him on direct and
25 then we'll take it over to Ms. Demirok.

1 MR. DAWSON: Thank you, Your Honor.

2 JUDGE TRACY: Okay.

3 Whereupon,

4 **IVAN VAIVAO**

5 having been previously sworn, was called as a witness herein

6 and was examined and testified as follows:

7 JUDGE TRACY: So, Mr. Vaivao, I just want to remind you

8 that you're still be testifying under oath that was

9 administered yesterday.

10 THE WITNESS: Okay.

11 JUDGE TRACY: Okay?

12 THE WITNESS: Thank you.

13 JUDGE TRACY: And I believe that you've got a few more

14 questions on direct examination before we turn it over to the

15 General Counsel.

16 THE WITNESS: Okay.

17 JUDGE TRACY: Okay. Go ahead, please.

18 MR. DAWSON: Thank you, Your Honor.

19 **CROSS-EXAMINATION CONTINUED**

20 Q BY MR. DAWSON: Ivan just a couple of follow-up questions

21 on the -- the duties of the dock captains. And -- and I

22 apologize to the extent any of these are redundant, but just to

23 make sure that the record is clear.

24 Dock -- I'm sorry. Captains, do they have the ability to

25 hire?

1 A No. No, sir.
2 Q How about transfer?
3 A No.
4 Q Suspending?
5 A No.
6 Q Layoff?
7 A No.
8 Q Recall?
9 A No.
10 Q Promote?
11 A No.
12 Q Discharge?
13 A No.
14 Q Reward?
15 A No.
16 Q Discipline?
17 A No.
18 Q Direct employees with discretion?
19 A No.
20 Q Adjust the grievances?
21 A No.
22 Q Do they have the ability -- or the authority to determine
23 the work that needs to be done?
24 A No.
25 Q Do they have authority to determine the number of

1 employees that need -- that will be used to complete the work?
2 A No.
3 Q An employee who declines a direction from a floor captain
4 or dock captain, would they be considered insubordinate?
5 A They would be considered insubordinate. They would be
6 referred to a supervisor.
7 Q Okay.
8 A Not necessarily insubordinate at that point; it's more
9 when they tell them, "Hey, this is -- can you do this?"
10 "No, I'm not going to do it."
11 "Okay, I'm going to refer you to a supervisor."
12 Q Okay.
13 A So -- yeah.
14 Q And then if the employee gives the supervisor let's say a
15 valid reason for refusing to do the work, what would -- will
16 the supervisor discipline or is it up to the supervisor at that
17 point?
18 A It's up to the supervisor at that point.
19 Q Okay. And are floor captains or dock captains held
20 responsible for the performance of other employees' work?
21 A They're held responsible for the entire DSI, which --
22 which comprises of certain -- of everyone's performance.
23 Q Okay. That's their compensation?
24 A That's their compensation, yeah.
25 Q Okay. And would they get disciplined if somebody else

1 does their job incorrectly?
2 A No.
3 MR. DAWSON: Nothing further, Your Honor.
4 JUDGE TRACY: Okay. All right. Ms. --
5 MS. DEMIROK: Okay.
6 JUDGE TRACY: -- Demirok?
7 MS. DEMIROK: Thank you.
8 **REDIRECT EXAMINATION**
9 Q BY MS. DEMIROK: Now, Mr. Vaivao, do dock captains have to
10 check the trucks before they leave to make sure they're loaded
11 properly?
12 A They -- they check the trucks -- there's -- there's many
13 ways that they check the trucks. All right? So other --
14 everything is in there, they're looking for missing pallets,
15 they're looking for missing cases. There's certain things
16 that -- that they look for, right? So -- and then they -- they
17 make the determination whether, "Hey, there's another truck
18 that comes behind it. I need to make sure that the door's
19 available." So there's a bunch of things on their duties or
20 responsibilities or -- that they -- they kind of check for.
21 Q So the answer is yes then; they do have to check the
22 trucks to make sure they're loaded properly?
23 A Not all the dock captains, right? So depending on -- dock
24 captains. Okay. Their responsibility is to make sure that the
25 truck is loaded up to the wave. Right? Their responsibility

is to make sure that the truck is pulled out of the door. Their responsibility is to make sure that the loader is done with -- with the truck and pulled out. Do they check if the dock is loaded -- I think it's everybody's responsibility. So, yes, supervisors do, they facilitate that process.

So I -- I guess to answer your question, yes, they look in the back of truck to make sure that -- you know, everything -- everything's correct before they pull the truck out.

Q And what do they do if they find something that's -- that's not in the truck properly?

A It's either e-picked -- they call out to an e-pick, or whatever area. Normally that's what they look for. Right? They -- they look for -- the majority of the time it's -- it's -- when they start looking at it is, "Hey, I'm missing -- I'm missing this. Hey, this is not there. Can you run back there and take a look at it." And that's a call from another captain from another area. But they're monitoring the screen and says, "Hey, the -- that truck loaded at door five, it's missing four of these cases. I already talked to my guy over here. He said he put it on the belt. Can you double-check in the back of the truck, is it there or not, so we can make a determination whether we e-pick or not?"

Q Okay.

A So that's kind of their role.

Q Do they also check to see if the pallets are wrapped

1 properly?
2 A Yes.
3 Q Okay. And what if a pallet's not wrapped correctly?
4 A You know, they address it. They tell them, "Hey, wrap
5 it," or they wrap it or, "Hey, wrap it." Most of the time
6 loaders do wrap it. They assist in wrapping that pallet. Our
7 system, it's very fast-paced. So either loaders wrap it or
8 they tell them, "Hey, make sure you wrap those pallets," or
9 they help wrap. So they -- they're like floaters. They help
10 everybody out. Okay?
11 Q So just like with e-picks, they'll either do it themselves
12 or they'll have the other -- the loader do it; is that right?
13 A No. They -- loaders don't e-pick anything.
14 Q Oh. Maybe --
15 A Right.
16 Q -- my question was confusing. So with e-picks, the
17 captain will either pick it themselves or they have a picker do
18 it, right?
19 A Correct.
20 Q So with wrapping pallets, they'll either help out with
21 wrapping or they'll tell the loader they need to rewrap it; is
22 that right?
23 A Right.
24 Q Okay. How do you know if a -- if a pallet's not wrapped
25 properly?

1 A It's a -- it's an experience thing. All right? It's --
2 it's a -- it's an experience thing. You get a -- it's kind of
3 like -- kind of like wrapping your presents for Christmas --
4 Q Uh-huh.
5 A -- type of deal and you can tell, you know, if it's nicely
6 done or you can tell it's just kind of put together type, it's
7 kind of loose. You kind of want it nice and wrapped and
8 tight. You know, that type of thing. You can tell by the --
9 the ability of the -- of the pallet.
10 Q Okay. So I'm not sure if you have those up there still,
11 but I'd like you to look at Respondent's Exhibit Number 5.
12 A Okay.
13 Q Okay. And you said this is a picture of --
14 A Oh. I'm --
15 JUDGE TRACY: Sir, you're looking at the --
16 MS. DEMIROK: Oh.
17 JUDGE TRACY: -- wrong one. I think we probably should
18 have put them back in order today.
19 THE WITNESS: Well, I'm -- it's all over.
20 Which picture are we looking --
21 MS. DEMIROK: It looks like this.
22 THE WITNESS: Okay. Yeah. Okay. There you go. All
23 right.
24 Q BY MS. DEMIROK: Okay. So with Respondent's Exhibit 5, I
25 think you testified that this was the -- the two locations that

1 were at issue with Mr. Meraz --
2 A Right.
3 Q -- is that right? And you said that was in aisle 20,
4 right?
5 A Yes, aisle 20.
6 Q Okay. So I'm handing you what's been marked as General
7 Counsel's Exhibit Number 10. And do you know what this is a
8 picture of?
9 A A picture of a -- of a cooler aisle. Yes.
10 Q Okay.
11 A Aisle 20.
12 Q Aisle 20. So it's the same aisle that this picture was --
13 that Respondent's Exhibit 5 is taken?
14 A Yes.
15 Q Okay. Just that you can see the floor in this picture,
16 right?
17 A Yes.
18 Q Okay. And with Mr. Meraz, he -- his missing pallet was in
19 location -- there was a five, right? It was at fifth level?
20 A Fifth level.
21 Q Is that right?
22 A Yeah. Yeah.
23 Q So when you're counting levels, does the first -- is the
24 first level that -- the one that we see bottom of the picture
25 of GC Exhibit Number 10?

1 A Yes.
2 Q Okay. And then the next level would be the -- the next
3 slot above that I suppose?
4 A Correct.
5 Q Okay. And each one of these slots would be a level,
6 right?
7 A Right.
8 Q Okay.
9 MS. DEMIROK: So, Your Honor, I'd move to admit what's been
10 marked as GC Exhibit Number 10.
11 JUDGE TRACY: Any objections?
12 MR. DAWSON: No objection, Your Honor.
13 JUDGE TRACY: All right. So GC Exhibit 10 is admitted into
14 evidence.
15 **(General Counsel Exhibit Number 10 Received into Evidence)**
16 MS. DEMIROK: Okay.
17 Q BY MS. DEMIROK: I think you also had some testimony about
18 how you met with Mr. Meraz before he met with Daniel
19 Santamaria; is that --
20 A He --
21 Q -- right?
22 A He came to see me, yes. He came --
23 Q Okay.
24 A -- to see me as far as the dispute. I says, "Hey, listen,
25 we'll meet -- we will meet with Daniel. Daniel is -- schedule

1 him to meet with you. And then we'll sit down and discuss
2 everything."
3 Q Okay.
4 A Yeah.
5 Q Was that before you knew that Daniel had been kind of
6 looking into it?
7 A Was that before I knew -- at that point I already knew
8 Daniel was looking at it. It was the same day Daniel asked me,
9 he says, "Hey, are we going to -- I'm going to sit down with
10 Meraz." It was -- Meraz came in at 2:00. He came straight to
11 me around that time. And I said, "Hey, Daniel's going to meet
12 with you here shortly, so let's go over there and let's talk to
13 Daniel."
14 Q Oh, okay. I just wanted --
15 A Yeah.
16 Q -- to get some clarity on that. So that was the same day
17 that Mr. Meraz signed the written form?
18 A Yes.
19 Q Okay. Had you met with Mr. Meraz prior to that?
20 A I haven't met with Mr. Meraz regarding this prior --
21 Q Okay.
22 A -- to that, no.
23 Q Now, when you first saw your report on that on your screen
24 with the 30 shorts --
25 A Yeah.

1 Q -- I think you had testified that you asked for Richard
2 Gomez to go look into it; is that right?
3 A Yeah. I asked Richard Gomez. I think I followed up again
4 with Brian Nicklin.
5 Q Okay.
6 A Right.
7 Q And how did you learn that it was Mr. -- one of Mr. Meraz'
8 tasks?
9 A From Richard Gomez and information that -- that was
10 provided by Mr. Richard Gomez and Brian Nicklin.
11 Q Okay. And was that before you decided to issue the
12 discipline?
13 A Say that again.
14 Q That was -- so that was before you decided to issue the
15 discipline?
16 A At that point I didn't know. It was Mr. Meraz. So after
17 I found out that Mr. Meraz was the operator, I wanted to make
18 sure they -- I look a look at all the scans to understand,
19 "Yeah, that is Mr. Meraz." But --
20 Q Okay.
21 A -- leading up to that, I didn't know -- from the report,
22 you don't know who did it. All right? You don't know who was
23 involved.
24 Q Right. But when you saw the report, you had Richard Gomez
25 look into it, right?

1 A Right.
2 Q And at that point you didn't know that you were -- there
3 was going to be any discipline issued, right?
4 A Well, at that point we didn't know if there was evidence
5 of anybody doing anything at that point. Right? So sometimes
6 this comes up, we can't find who -- who's tied into, who's tied
7 too. Right? So --
8 Q Right. But if you didn't -- but you hadn't looked into it
9 so you didn't know if you were going to issue any discipline at
10 that point --
11 A Correct.
12 Q -- right? Okay. Now, I believed you testified on
13 cross-examination that the scheduled bid in 2016, that it had
14 no affect on the inbound breaks. Do you remember that?
15 A Yeah.
16 Q Okay. And is that because, as you also said, the breaks
17 had always been designated?
18 A Yes.
19 Q Okay. So I'm handing you two documents. One marked
20 11(a), GC Exhibit 11(a), and GC Exhibit 11(b).
21 A Okay.
22 Q Have you seen these before?
23 A Yes.
24 Q Okay. And these are -- these are the -- this is a copy of
25 one of the inbound schedules; is that right?

1 A Yes.
2 Q Okay. And 11(a) looks like the schedule for January 23rd;
3 is that right?
4 A Yes.
5 Q Okay. And then the next one is for January 24th; is that
6 correct?
7 A Yes.
8 Q Okay. And now the January 23rd one, it doesn't have any
9 posted break times like 11(b) does, right?
10 A Correct.
11 Q But, as you said, they've always been designated, right?
12 A Correct.
13 Q Okay. They just weren't posted on the schedule?
14 A Yes.
15 Q Okay. And now these schedules are posted daily, right?
16 A Once a week. I know -- I think it's once a week. I know
17 it's once a week. They post up the entire week. Ideally,
18 Friday or Thursday before the week starts, they post these
19 schedules up for the following week.
20 Q Okay. I got you.
21 MS. DEMIROK: All right. Your Honor, I would move to admit
22 GC Exhibit 11(a) and 11(b).
23 JUDGE TRACY: Any objections?
24 MR. DAWSON: No objection, Your Honor.
25 JUDGE TRACY: So GC Exhibits 11(a) and 11(b) are admitted

1 into evidence.

2 **(General Counsel Exhibit Numbers 11(a) and 11(b) Received into**

3 **Evidence)**

4 Q BY MS. DEMIROK: Okay. Now, if you could also take a look

5 at Respondent's Exhibit -- I think it's 7(a) and 7(b). It's a

6 copy of some of your daily shipping reports.

7 A Uh-huh.

8 Q Okay. Now, you testified about this document. And it --

9 it shows on there when the breaks are taken on -- that

10 particular day, right?

11 A Yes.

12 Q Okay. And I think you testified that everyone takes their

13 breaks at the same time --

14 A Yes.

15 Q -- is that right? Okay. But --

16 A Everybody within that crew.

17 Q Within that crew. Right. So -- and this here, what we're

18 looking at, is for the -- the shipping crew, right?

19 A Yes, ma'am.

20 Q Same as the outbound, right?

21 A Yep.

22 Q Okay. And now the times on here -- you see these reports,

23 right?

24 A Yes.

25 Q Okay. And so you know when they take their breaks, right?

1 A Yes.
2 Q Okay. Or maybe you know when their breaks are designated,
3 right?
4 A Yes.
5 Q Okay. But you don't know if every employee took their
6 breaks at the designated time, do you?
7 A The machine shuts down. The entire -- the entire sorter
8 shuts down. We post it on the -- for this group, it covers
9 about 800,000 square feet --
10 Q Uh-huh.
11 A -- of the building. So we have these tickers' boards that
12 we post that. So, yes, everybody take a break at this time for
13 the shipping crew. Yes, everybody does.
14 Q But, for example, on May 17th, 2016, the date of this
15 report, Respondent's Exhibit 7(a), you weren't walking around
16 the warehouse at each of those times to see whether employees
17 were taking their breaks, right?
18 A No. I wasn't. But their supervisors would be on the
19 floor. At this time -- this time of the night -- this time of
20 the day, their supervisor would be on the floor. They -- you
21 know, they kind of walk around and make sure that, "Hey,
22 everybody's taking their breaks."
23 Q And you said you know they all take their breaks at the
24 same time because the -- did you say the conveyer -- or the
25 sorter, the sorter shuts --

1 A The sorter.
2 Q -- down?
3 A Right.
4 Q But the forklift operators, they're not putting pallets or
5 boxes on the sorter at that time or throughout the day, are
6 they?
7 A Right. That's -- on that -- on the replenishment side,
8 yes. They feed the pick locations, so the pickers will pick,
9 so when break is called, the -- wherever the -- wherever
10 they're at, they have to put something on the belt. All the
11 belts just stop. So they're not -- they're not going to --
12 they're not going to continue to work. Right? Forklifters,
13 they call break right at the same time. It's very important
14 because they can't have their break later than pickers.
15 Because when the pickers come back, they're going to need
16 something from those forklifters.
17 So when break gets called, you know, it's, "Hey, break is
18 called," everybody's at break, the supervisors walk the floors.
19 You know, they're always walking the floor.
20 Q Now, the conveyer, that's a separate thing from a pick
21 location, right?
22 A The conveyer is the mode of transportation of what's
23 picked out of the pick location.
24 Q Right. So it --
25 A Yes.

1 Q -- goes from the pick location to the conveyer, right?
2 A Yes.
3 Q Okay. And the forklifter takes it from like a
4 replenishment area to the pick slot, right?
5 A Correct.
6 Q Okay. So the forklifter, they're not putting things on
7 the -- on the conveyer, right?
8 A No, they're not putting --
9 Q No?
10 A -- anything on the conveyer, yes.
11 Q It's the -- it's the order selector that does that, right?
12 A Correct.
13 Q Okay. So, Mr. Vaivao, I'm handing you what's been marked
14 as GC Exhibit Number 12.
15 A Okay.
16 Q And this is the same type of report that's in Respondent's
17 Exhibit 7(a) and 7(b) --
18 A Yes.
19 Q -- is that right? Okay. And this one is from
20 January 3rd, 2014; is that correct?
21 A Yes.
22 Q Okay. And now if we compare Respondent's Exhibit 7 and
23 General Counsel's Exhibit 12, the break times are slightly
24 different, right?
25 A Yes. It appears so, yes.

1 Q Okay. And Mr. Vaivao, I'm handing you what's been marked
2 as GC Exhibit Number 13.
3 A Okay.
4 Q Is this another one of those reports?
5 A Yes.
6 Q Okay. And this is from January 6th of 2016; is that
7 right?
8 A Yes.
9 Q Okay. And -- or I'm sorry -- 2014?
10 A '14, yes.
11 Q But if we even compare GC Exhibit Number 13 (sic) to GC
12 Exhibit Number 13, those break times are also different, right?
13 A It appears so on this date, yes.
14 Q Okay.
15 A Yeah.
16 Q And you testified about that. I mean sometimes it can be
17 different based on what's going on with the sorter or the
18 conveyer or the trucks, right?
19 A Correct.
20 Q Okay. So that's not unusual to have different breaks
21 times, right?
22 A For the entire crew, yeah. Everybody takes break at the
23 same time. Like everybody takes a break at the same -- when we
24 call break or break is determined by a manager or a supervisor,
25 depending on -- I mean if you're looking at Exhibit 12 and

1 Exhibit 13 --
2 Q Yeah.
3 A -- they start at different times, right? And one started
4 at 12 -- at 12:00 noon. The other one starts at 10:00.
5 Q Uh-huh.
6 A So depending on -- depending on that time, this is -- if
7 you look at it, this is about 99 percent of the time.
8 Q Yeah.
9 A 99 percent of the time it's pretty much, hey, they start
10 at -- but, depending that, hey, a day is -- if you look at
11 Exhibit 13, the total amount of cases is 119,000 cases, right?
12 If you look at Exhibit 12, it's 104,000 cases on that Thursday.
13 So start times, when they -- the start time is going to -- is
14 going to change from -- depending on how cyclical our business
15 is from season to season.
16 Q Got you.
17 A But when it's determined that, "Hey, we need to take
18 breaks," the entire building shuts down --
19 Q Okay.
20 A -- for break.
21 Q So it's designated but it can -- the designated time can
22 just change, right?
23 A Yeah. But at very little -- the variation is very, very
24 little. For the most part, if you look at this, they
25 primarily -- within that season, they primarily take breaks

1 pretty much all at the same time. The amount of break, the 45
2 minutes, it's 15 minutes. The second part of the day, it
3 doesn't change very much. Nine -- 9 p.m. is when they go to
4 break at -- when you go to lunch, and, you know, I think it's
5 1:00 in the morning, they go -- a 15-minute break. But it
6 depends on the start of the day, it depends on -- for those
7 variations if you look at, it might change from season to
8 season, from busy season to summer. There's a slight variation
9 there.
10 But everybody, when it's -- when it's determined it's break
11 time, everybody pretty much takes break at the same time.
12 Q Okay. And again, these are for the outbound group, right?
13 A These are for the outbound group, yes.
14 Q Okay. Now, with the inbound group, is their schedule -- I
15 don't want to say volatile, but does it change as much as the
16 inbound group as far as like when the times --
17 A When we went to 24-hour schedules, it was pretty much set
18 at that time. Right?
19 Q Uh-huh.
20 A Before then, before 2015, we had one long schedule,
21 inbound schedule. It's kind of, "Hey, hurry up and get
22 everything in. Okay. Make sure everything's put away. Can we
23 ask a couple of guys to continue to put away?" We -- so we
24 standardized that in 2015. We said, "Hey, lets -- we need more
25 hours of the day, so let's make sure that we're doing the right

1 thing," and then we standardized their break -- their
2 schedules. We had three shifts, 24-hour days. It was
3 something that we never done.
4 So when we standardized the shifts, three eight-and-a-half-
5 hour shifts, we had to determine, "Hey, when is break?"
6 Because if they took their breaks at the same time they've
7 always taken their break, you're taking lunch an hour into your
8 shift or you're taking lunch seven hours into your shift over
9 an eight-and-a-half-hour shift.
10 So we wanted to make sure -- when we made this change in
11 2015 to go to a 24 hour, we wanted to make sure that, hey,
12 they're taking their breaks. We spaced it out accordingly
13 throughout the day. If you take your 15-minute breaks, you
14 know, the first third of the day, the second third of the day,
15 we take lunch in the middle of the day, that's kind of how that
16 was determined. And it was that way. Was it posted that first
17 year? No. You can -- you can see it right now.
18 But, you know, when we did the rebid, we wanted to make
19 sure that, "Hey, now the forklifters that were deemed
20 replenishers, make sure that you guys are on the same breaks
21 and break lunches as shipping as it's always been. And then if
22 you're in the inbound crew, make sure that you guys take your
23 breaks at the same time." And we aligned everybody in our
24 facility to take breaks at the same time.
25 Q Okay. And you said something about the replenisher

1 forklifters. You wanted to make sure that -- that they knew
2 that they should take their breaks with the shipping team,
3 right?
4 A Yes.
5 Q Okay. And there was a term that you used yesterday for --
6 oh, the put-away is the opposite of the replenisher --
7 A Yeah.
8 Q -- right? So had the put-away forklifters always been
9 taking their breaks with the -- with the receiving team?
10 A The put-away replenishers was receiving team. You've got
11 to understand like these forklifters, this group of forklifters
12 was -- is comprised of guys that used to -- associates that
13 used to be on the replenishment team and associates that used
14 to be on the -- on the put-away team.
15 Q Okay.
16 A So the bid, when the bid happened, depending on your
17 seniority, some of these guys that's always been replenisher
18 ended up on a put-away function. Right? So when we did the
19 rebid again in 2016, some of those associates that never did --
20 depending on the schedules and, you know, the time when they
21 went to go pick, "Oh, I like this schedule right here."
22 "It's a put-away." Well, I like the schedule more. I
23 guess I'm going to have to learn that function." And then they
24 put their names there.
25 So some of those guys have never taken breaks with the

1 inbound crew. Now they're going to have to take breaks with
2 the inbound crew.
3 Q Because it --
4 A So it was --
5 Q -- it's always been that they took their breaks with --
6 A Their own --
7 Q -- either the inbound or the outbound, whatever --
8 A Their respective --
9 Q -- group they were --
10 A -- crews, yes.
11 Q -- in, right?
12 A Uh-huh.
13 Q Okay. But I -- what I was getting at before though is
14 like with the inbound group, their breaks -- because we talked
15 about the outbound group and how their breaks can change,
16 right?
17 A Yes.
18 Q And that it's always designated but it -- the time itself
19 can change based on the operations, right?
20 A Correct.
21 Q The sorter's backed up or -- I don't know all the
22 terminology, but --
23 A Right.
24 Q -- you name it? But then you have the inbound group. And
25 I'm just curious, is their breaks times, do they fluctuate like

1 the -- like the outbound groups do?
2 A No. They don't --
3 Q Okay.
4 A -- they don't -- well, we try to keep it as consistent,
5 you know, because we have a -- we have schedules that come in
6 on --
7 Q Uh-huh.
8 A -- our vendors. We have a third party, a loader, that
9 unloads as well. So their process is contingent on what we do,
10 when we take breaks. So --
11 Q So it's not as unpredictable; is that right?
12 A Yeah, it's not as unpredictable. But if there's a -- if
13 there's a situation where, hey, we have a truck that needs to
14 get going, there's one offset way that we say, "Hey, guys,
15 we've got to get these four trucks in because we really, really
16 need it," I've seen that happen.
17 Q Uh-huh?
18 A But at the -- but at the same token, everybody takes
19 breaks at the same time. It's not like you -- "Hey, I've got
20 to go take my own break." No. It doesn't work that way.
21 Q Uh-huh. And it's always been that way, right?
22 A It's always been that way.
23 Q Okay.
24 A Is there one off? Yeah, sure, I've seen one-offs. But
25 ever since I've been at Shamrock, I've been on the floor, it's

1 always been that way.
2 Q Just to touch on something else real quick. The -- the
3 incident with Mr. Meraz, I think you described it as a -- with
4 his missing pallet as unusual? Is that how you described it?
5 A It's not -- it's not unusual. It's the perfect storm.
6 Right? It's one of those situations -- we have it all the
7 time; it's a special order item that comes in.
8 Q Uh-huh.
9 A This situation was the same, the same as that. It's a
10 special order pallet, and one pallet comes in and one pallet
11 goes out. 90 percent of items doesn't operate that way. There
12 is a truck load of that item comes in. Twenty pallets of that
13 item gets put away. These ones right here, these special order
14 product, it could be one case, it could be a pallet of 30.
15 Q Okay. You also testified that other forklift operators
16 have been disciplined for failing to follow put-away
17 procedures, right?
18 A Yes.
19 Q Okay. And so how did the fact that Mr. Meraz' incident
20 was like a perfect storm, as you put it, how did that factor
21 into your addition to issue the discipline to him?
22 A Well, it -- the fact -- it didn't -- A, it didn't --
23 didn't matter who it was, right, it didn't matter who it was.
24 It's the procedure. We -- it was very, very clear. When I
25 looked at it, "Is this an operator error?" Yes, it was an

1 operator error. Right? One of the -- one of the biggest
2 things is that he -- he scanned it. So it wasn't -- it wasn't
3 a systems' error that somebody did it. Mr. Meraz at that day,
4 he was responsible for that aisle. So when I looked footage,
5 he was the only one in that aisle. He's the only one doing
6 these aisles. When I looked at the scans, it's very, very
7 consistent.
8 Q And so when did you look at the footage?
9 A That -- when I -- when I called Richard, I -- I recall it
10 was Saturday, I called him from home because it was a Friday
11 night. Saturday, I says, "Hey, I know you're looking at some
12 other stuff. Take a look at this one as well." Because there
13 was a big hit from the night behalf. It's probably Monday or
14 Tuesday, Brian Nicklin, you know, came up with the footage.
15 He says, "Hey, there's footage in that area. Michael
16 Meraz is the only one in there." Do we have camera everywhere
17 in the building? No. Not every aisle has it.
18 So if we don't have any proof or any -- I can't sit down
19 with him and say, "Hey, dude, look at this." I want to make
20 sure that the scans are consistent. Did the matter that it had
21 footage? No, because I can pinpoint that, "Yeah, you scanned
22 it here and you put it here."
23 Q So did you look at the footage before or after you learned
24 that Daniel Santamaria was looking into the incident?
25 A It was before. Before Daniel Santamaria send it -- went

1 into it. So that's part of all the research that Brian Nicklin
2 and Richard Gomez did.
3 So when Mike Meraz -- when I made a determination, "Hey,
4 this is a CPDR, this is a" -- sit down with Michael Meraz, tell
5 him this is a verbal, I explained to Mr. Meraz what had
6 happened, how long the verbal is going to stay." Did it fall
7 off? Right now it fell off after seven -- after seven weeks,
8 right? "Sit down with him and explain."
9 So when that was administered, Michael Meraz' supervisor
10 administered that to Michael Meraz, Michael Meraz says, "I
11 refuse to sign." We have guys refuse to sign CPDRs all the
12 time. Right? Does it matter? No. We -- we file it away.
13 Mr. Meraz said, "Hey, I'm going to refuse to sign it. I
14 want to speak with Daniel." So that's kind of how I found out.
15 He says, "Oh, he wants to speak with. Daniel."
16 I said, "Okay. Get all the information that I had, you
17 guys had and send it up to Daniel."
18 That's kind of how it was, a request. Do we have guys
19 refuse to sign CPDR? "Oh, I don't think that's right. I was
20 here. I wasn't here." That type of thing.
21 I say, "Well, the record shows different. I'm sorry,
22 dude." And we file those.
23 This one was, "Hey, I'm -- I don't want to sign it. I want
24 to speak to Daniel. I want to speak to HR." And that's kind
25 of what it was.

1 Q Did you -- after looking at the video, did you send any e-
2 mails to anyone about what you saw in it?
3 A I don't know if I did, if I did or anything. I don't
4 think I did. I think I looked at the video. It was like,
5 "Well, yes, go ahead and administer a CPDR. It's consistent
6 with what I see."
7 Q How do you go about getting the video? Do you have to
8 speak with someone in like IT or something?
9 A I didn't -- I didn't get the video. I think Brian
10 Nicklin -- Brian Nicklin probably spoke with our maintenance
11 group to kind of capture that -- that timeframe and time date.
12 I know after a certain period of time, it doesn't archive.
13 Right? I have a certain period of time. It kind of -- it kind
14 of records over our DVRs. So he saved it and sent the clip. I
15 looked at it and says, "Hey, that's consistent."
16 But prior to that, I already looked at everything that I
17 had as far as where the pallet was located, where the pallet
18 was picked, who was responsible in inventory control to go down
19 and verify if the pallet was missing or not missing. Did we
20 research it the next day? Yes.
21 Q So you testified with Respondent's counsel about some
22 orange shirts. And --
23 MS. DEMIROK: And Your Honor, if I haven't already, I'd
24 like to move to admit GC Exhibit Numbers 12 and 13.
25 JUDGE TRACY: Any objections?

1 MR. DAWSON: No objection, Your Honor.

2 JUDGE TRACY: Okay. So GC Exhibits 12 and 13 are admitted

3 into evidence.

4 **(General Counsel Exhibit Numbers 12 and 13 Received into**

5 **Evidence)**

6 JUDGE TRACY: And again, I guess I would just note that

7 these are from 2014. And so I think it's --

8 MS. DEMIROK: I may ask him -- maybe I'll ask some follow-

9 up questions on that, Your Honor.

10 JUDGE TRACY: I mean just to show the -- I mean I sort of

11 get it, what you're trying to show, that things changed, the

12 breaks changed.

13 MS. DEMIROK: Yeah.

14 JUDGE TRACY: But you may want to explain a little bit more

15 or in the brief. Just it's 2014, so it's long before this

16 case.

17 MS. DEMIROK: Okay.

18 JUDGE TRACY: Okay.

19 Q BY MS. DEMIROK: And Mr. Vaivao, on that note, so -- and I

20 think you mentioned it, but when we were talking about how the

21 breaks changed as reflected in GC Exhibits Number 12 -- Numbers

22 12 and 13, from what I gather, from what you were saying, is

23 that, you know, changing like this, that's not even unusual

24 today, right? I mean the same kind of fluctuation; is that

25 right?

1 A Yes.
2 Q Okay. And that same kind of fluctuation, would that be
3 happening let's say throughout 2015?
4 A Yes. It would be -- it depends on how the -- how we're
5 running -- our system is running. If you look at Exhibit 13,
6 merch start release time at 10:10. We don't start at ten
7 minutes after. We normally start right on -- right on the
8 hour. Right? So there's something that happened there that,
9 "Hey, we couldn't start right away at 10:00." So those are the
10 type of calls. Right?
11 Q Okay.
12 A So --
13 Q So that kind of goes into the volatility of kind of the
14 operations on the outbound side, right?
15 A Yes.
16 Q Okay. And those same kind of conditions were -- happened
17 throughout 2015, right?
18 A It does happen. It's specific to -- some of them it's
19 case count. So it's -- it could be specific to seasons as
20 well. Right?
21 Q Okay.
22 A So --
23 Q And in -- since the beginning of 2016, do you see -- still
24 see those kind of fluctuations?
25 A You do. Like right now we're getting into -- for an

1 example, so that way you kind of understand some -- what I'm
2 trying to explain --
3 Q Uh-huh.
4 A -- like right now it's summertime. It's 40,000 cases less
5 on the front end of the -- which is the first shift.
6 Q Yeah.
7 A There's no schools. The schools are out: So the start
8 time changes. So we can't continue to have break -- if we
9 start at 1:00, we can't continue to have break at 2:00. So
10 that -- that adjusts. Right? So -- but within that -- that
11 same season, you know, we take break at the same time.
12 Everybody takes break at the same time.
13 Q Okay.
14 A But it doesn't -- I mean the fluctuation is still there,
15 depending on operation, yes.
16 Q Okay. So you did -- you did testify with Respondent's
17 counsel about some orange shirts in the warehouse, right?
18 A Yes.
19 Q Okay. And I'd like to show you what's been marked as GC
20 Exhibit Number 14. Now, do you know if there is a -- what this
21 picture depicts?
22 A Yes. It's a HiVis shirt that we passed out --
23 Q Okay.
24 A -- to our associates.
25 Q And -- now, I think what you -- you said was that this was

1 a commemorative shirt; is that right?
2 A Yeah. This is to celebrate -- there's two things around
3 that time. We had our best season ever --
4 Q Uh-huh.
5 A -- and then to support our HiVis, that was implemented
6 earlier that year.
7 Q Okay. And you passed out commemorative shirts to
8 employees in the past, right?
9 A Yes.
10 Q And when I say you, I mean company. Right?
11 A (No audible response)
12 JUDGE TRACY: Yes or no?
13 THE WITNESS: Yes.
14 MS. DEMIROK: Okay.
15 THE WITNESS: Yes.
16 Q BY MS. DEMIROK: And in fact, in Respondent's
17 Exhibit 13(a) through (e), and if you have that one -- yeah,
18 the one --
19 A Yes.
20 Q -- with all the different shirts. These are all examples
21 of those commemorative shirts that have been passed out in the
22 past, right?
23 A Yes.
24 Q Okay. And those are generally passed out at the end of
25 the season, right?

1 A Not necessarily end of the season. It's -- they're
2 different times of the year we pass things out. If you look at
3 Exhibit 13(a), there's a -- I believe there's a Halloween theme
4 that's in there. 2009, a Halloween theme. There's some
5 appreciation things that are in there. That -- there's a red,
6 white and blue shirt there for 4th of July that we passed out
7 with the American flag on there. So we pass out a number of
8 shirts with, you know different logos on there, different
9 slogans.
10 Q So if you could take a look at RX -- or Respondent's
11 Exhibit 13(d), it's like the fourth page of this one --
12 A Yes.
13 Q -- and I think you testified about that Shamrock pride T-
14 shirt in the upper left-hand corner?
15 A Yes.
16 Q Okay. And you said that was also one that was passed out
17 in 2015, right?
18 A Yes.
19 Q Okay. But you've -- that one's been passed out in other
20 years too, right?
21 A Correct.
22 Q Okay. I think at one point you described that as a --
23 A That was the most --
24 Q -- favorite?
25 A That's the most favorite shirt that we have. It's been

1 passed out once before.
2 Q Okay. And you talked a bit about the high visibility
3 program, right?
4 A Yes.
5 Q Okay. And so employees, they do have to swear some sort
6 of HiVis apparel on their outer most layer, right?
7 A Yes.
8 Q Okay. And HiVis meaning it has to be high visibility?
9 A Bright and loud. Yes.
10 Q Okay. And were employees -- they had been given vests
11 before, right, by company?
12 A Yes. Everybody was --
13 Q Okay.
14 A -- offered vests at the start-up of the program, yes.
15 Q Okay. And I think we -- I think we talked about the --
16 the start of that, and we stipulated to I think the first --
17 beginning of the year in 2015. So that was -- that was the
18 beginning of the time when employees had to start wearing
19 things on their outer most layer?
20 A Yes.
21 Q Okay. Now, the shirt in GC Exhibit Number 14, it's pretty
22 bright and loud, right?
23 A Yes.
24 Q Okay. So that conforms with the policy?
25 A Yes.

1 Q Now, I think you also testified a little bit about some
2 other orange shirts that were worn in the warehouse; is that
3 right?
4 A Other --
5 Q Not -- orange shirts that are not depicted in GC Exhibit
6 Number 14.
7 A Orange shirts. The associates started wearing their own
8 orange shirts, right, later. But at that -- at that time
9 everybody was wearing -- starting to wear orange shirts.
10 Everybody was wearing orange shirts left and right. Unless you
11 walk-up and say, "Ah, that's not a Shamrock orange shirt,
12 that's not a HiVis shirt, or whatever that is, but" --
13 Q So everyone was wearing orange; is that right?
14 A When I say everybody --
15 Q I --
16 A -- had a -- you know --
17 Q Yeah. Well, I won't hold you to that.
18 A -- everybody's wearing orange shirts. There's only --
19 there's only a handful of HiVis colors, right? There's
20 either -- there's orange, the high fluorescent green one that -
21 - that's most popular, pink, a fuchsia pink. Right? So -- but
22 that's the only -- there's only a handful of those colors.
23 Q Okay.
24 A So, yeah.
25 Q And -- but when you say when you say everyone -- and we

1 know not every single person was wearing orange. But when you
2 say everyone was wearing orange, are you referring to their own
3 orange shirts or these orange shirts in GC Exhibit Number 14?
4 A To my knowledge, it were these shirts. I see these shirts
5 all over the place. Right? I started noticing that, "Hey, the
6 guys are wearing orange shirts." Associates that -- that --
7 that are not in cold temps where -- but associates that -- that
8 are comfortable wearing just a shirt to come to work and do the
9 work, yeah, they were wearing orange shirts.
10 MS. DEMIROK: And Your Honor, if I haven't, I'd move to
11 admit GC Exhibit Number 14.
12 JUDGE TRACY: Any objections?
13 MR. DAWSON: No objection, Your Honor.
14 JUDGE TRACY: So General Counsel Exhibit 14 is admitted
15 into evidence.
16 **(General Counsel Exhibit Number 14 Received into Evidence)**
17 JUDGE TRACY: I just need to ask one question good this one
18 as well.
19 So GC Exhibit 14, when was that handed out to the
20 employees?
21 THE WITNESS: I believe it was in July timeframe.
22 JUDGE TRACY: Okay. Of --
23 THE WITNESS: Of --
24 JUDGE TRACY: -- what year?
25 THE WITNESS: -- 2015.

1 JUDGE TRACY: 2015?
2 THE WITNESS: Yeah.
3 JUDGE TRACY: So, just to clarify, this is the T-shirt that
4 we've been talking about in the complaint?
5 MS. DEMIROK: This is it.
6 JUDGE TRACY: Okay.
7 MR. DAWSON: I ran out of color on our printer last night
8 -- or the night before. So I couldn't print out a copy of
9 showed it was orange.
10 JUDGE TRACY: Okay.
11 MR. DAWSON: So my apologies.
12 MS. DEMIROK: Your Honor, if I could just have a moment to
13 review and make sure I've covered everything.
14 JUDGE TRACY: Yeah. While you do that, I just wanted to
15 ask Mr. Vaivao a question.
16 You have mentioned rebid?
17 THE WITNESS: Yes, ma'am.
18 JUDGE TRACY: Could you just explain for me what that
19 means?
20 THE WITNESS: It's a rebidding of all the schedules --
21 JUDGE TRACY: Okay.
22 THE WITNESS: -- within the inbound group. So what happens
23 is all the shifts and all the schedules are -- you are
24 presented to the team and then they start from top to bottom
25 from their seniorities and kind of go in there and bid for --

1 for a shift, desired shift.

2 JUDGE TRACY: And so inbound means -- what's another term

3 for that?

4 THE WITNESS: Receiving team.

5 JUDGE TRACY: Receiving?

6 THE WITNESS: Yes.

7 JUDGE TRACY: And so only the inbound crew does that?

8 THE WITNESS: Because of this -- before that, we only had -

9 - there was only one receiving schedule. This is because we

10 changed to a 24-hour shift -- 24-hour operation. So we created

11 three shifts that we've never done before at Shamrock --

12 JUDGE TRACY: Uh-huh.

13 THE WITNESS: -- so --

14 JUDGE TRACY: Okay. And so just to again clarify for me,

15 the testimony that you've been giving the past -- giving the

16 past two days here, when you've been talking about rebidding,

17 was that a one-time event, two time event?

18 THE WITNESS: It was a one-time -- well, the first time was

19 the first bid, the changeover to new schedules, it was 2015.

20 JUDGE TRACY: Uh-huh.

21 THE WITNESS: And then we had communicated to associates,

22 "Hey, we'll -- we'll take a look at this at a year's time and

23 do a rebid, do a rebid."

24 JUDGE TRACY: And so the first time was when in 2015?

25 THE WITNESS: 2015, it was --

1 JUDGE TRACY: Like the month.
2 THE WITNESS: I believe January 2015.
3 JUDGE TRACY: And so then in your testimony, you talk about
4 rebid, you've been talking about the second time?
5 THE WITNESS: The second time, yes. Yes, ma'am.
6 JUDGE TRACY: And when was that?
7 THE WITNESS: That was in January as well of 2016.
8 JUDGE TRACY: Okay. And that is what --
9 THE WITNESS: The -- there's a -- there's an exhibit.
10 JUDGE TRACY: Yeah, Respondent Exhibit 10. Okay. And so
11 at that time only the people who were in receiving were able
12 to -- or I guess anybody could put in for the bidding for -- to
13 work on the receiving shift. Is that what that means?
14 THE WITNESS: Everybody is in the receiving crew at the
15 time --
16 JUDGE TRACY: Yeah.
17 THE WITNESS: -- they would bid on all the shifts.
18 Everybody who was in the receiving crew reporting to the
19 receiving manager, they were able to bid in these shifts. And
20 there is only two job descriptions. Either you're a receiver
21 or you're a forklifter.
22 JUDGE TRACY: Okay.
23 THE WITNESS: So any -- anybody within that team.
24 JUDGE TRACY: And how many forklifters are there?
25 THE WITNESS: I can't -- that's -- probably over 50 --

1 JUDGE TRACY: Okay.
2 THE WITNESS: -- 50 forklifters. Yeah.
3 JUDGE TRACY: But they're -- but they're divided based upon
4 what type of work that they perform, which crew they're on?
5 THE WITNESS: Correct, now they did. Yeah, 2016, we
6 separated, yes.
7 JUDGE TRACY: Okay.
8 THE WITNESS: Yes.
9 JUDGE TRACY: Yes. Sorry. I don't usually ask lots of
10 questions but I -- you've been using that word a lot --
11 THE WITNESS: Okay.
12 JUDGE TRACY: -- and I thought, did I miss what that
13 means? So I just wanted to be clear.
14 Are you ready?
15 MS. DEMIROK: Yes, I am.
16 JUDGE TRACY: Okay.
17 Q BY MS. DEMIROK: So, Mr. Vaivao, I'm handing you what's
18 been marked as GC Exhibit Number 15. And this appears to be a
19 an email from you, is that right?
20 A Yes.
21 Q Okay. And you were sending it to Mark Engdahl (phonetic),
22 right?
23 A Yes.
24 Q And copy Tim O'Meara?
25 A Yes, correct.

1 Q And this is about the rebid, right?
2 A This is about the rebid, 2016 rebid yes.
3 Q The most recent one, right?
4 A Yeah.
5 Q Okay. And I think you did talk a bit about that
6 yesterday. You were talking about how you were advocating to
7 go to change the scheduling, right?
8 A Yes.
9 Q Okay. Because you wanted to change the number of shifts
10 that there were?
11 MR. DAWSON: Objection, Your Honor. I don't believe that
12 was Mr. Vaivao's testimony. I believe what Mr. Vaivao
13 testified to is that he wanted to change because of the issues
14 listed in the PowerPoint. He didn't just want to change
15 schedules. There were other issues that were a problem.
16 JUDGE TRACY: So what I'm going to do is I'm going to
17 sustain the objection, however, I think that the witness can
18 explain if he testified to that or not --
19 MR. DAWSON: Thank you, Your Honor.
20 MS. DEMIROK: Thank Your Honor.
21 JUDGE TRACY: -- rather than your own testimony about what
22 he said.
23 MR. DAWSON: Thank you, Your Honor.
24 JUDGE TRACY: So if you could just paraphrase the
25 question, or reask the question.

1 MS. DEMIROK: Yeah, no problem.
2 Q BY MS. DEMIROK: So -- well, let's just start at the
3 beginning. You, you were advocating for the rebid, right?
4 A Yes.
5 Q Okay. And why were you doing that?
6 A Because of some efficiencies, some improvements on a
7 process. If you look at the PowerPoint that I put together, I
8 listed some of the things that I saw on the floor, reduction in
9 unloading delays. You know, you can see outside there's a
10 bunch of trucks lined up out in the street trying to get in
11 because there was a bottleneck in there.
12 On the shipping side, there was a bottleneck on the
13 shipping side to get cases to the trucks, so like I said, when
14 we first went into this 24-hour operation, it was -- on paper,
15 it looked very, very nice and clean, but it didn't pan out that
16 way.
17 I approached my boss at the time to let him know, and he
18 advised that, hey, it's the middle of the season, let's look at
19 the rebid and take a look at it. Well, he wasn't there, so
20 when Tim O'Meara came in, I wanted to present to them there's
21 some operational successes here as far as some compliatory
22 (sic) stuff, the delays in our warehouse, and I wanted to
23 improve. I wanted to improve those services.
24 Q Okay. So you thought this plan would help the operations
25 with those notes, right?

1 A Yes, because I knew it would help, it worked out before,
2 because this is how we used to do it before, in a similar
3 fashion. We had designated forklifters, designated forklifters
4 for each operation, so there wasn't a delay. How we drew it up
5 is we felt that since we expanded the inbound schedules, a
6 forklifter is a forklifter, they could manage doing a put-away
7 and a replenishment task without no hiccoughs.
8 But it didn't happen that way. It turned out more of a,
9 hey, hurry up, let's go here. Hey, now we're falling behind
10 over here. Let's run over here type of thing. It was just
11 tough. It was just tough to -- so relooking at it, I advocated
12 for it and I presented it to Mark and hey, guys, this is what
13 I'm looking, what I'm seeing, you know. How can we do it?
14 Q Okay. And they ended up approving it, right?
15 A Yes.
16 Q Okay. But even before the rebid, so when the forklifters
17 were doing both put-away and some replenishment tasks, again,
18 their breaks were still designated, right?
19 A Yes, their breaks were designated. You've got to
20 remember, when they were doing the same -- they're all
21 reporting to inbound, so their breaks were the same. Everybody
22 took the same.
23 Q Okay.
24 A I --
25 Q And in this bid, if we could look at GC Exhibit Number 15,

1 and this is a communication about the rebid, and there's really
2 no mention about any of the breaks in here, right? Because it
3 didn't necessarily affect the breaks, is that right?
4 A Well, this was just a high-level communication to kind of
5 let them know, hey, this is what we really want to do.
6 Q Uh-huh.
7 A As far as breaks, I mean, breaks were designated.
8 Everybody knew when to take breaks. This was to inform them,
9 hey, this is what we'd like to do, initially, for us to sit
10 down and then I present this for them to take a look at it.
11 Q Okay. And you brought up the PowerPoint. I think that's,
12 let me see, what number is that PowerPoint? Respondent's
13 Exhibit Number --
14 A Nine?
15 Q -- Number 9. Thank you. I think I have it somewhere.
16 Oh, thanks. Okay. And this is the PowerPoint that you
17 presented and you made this when you were advocating for the
18 change, right?
19 A Yes.
20 Q Okay. You had all your reasons for making the change,
21 right?
22 A Right. Yes.
23 Q Okay. And you don't mention anything about the break
24 policy changing.
25 A No, nothing on here -- this is to illustrate the

1 efficiencies. This is to illustrate what our issues were. We
2 kind of wanted to address, hey, the reduction of unloading
3 delays, having a designated forklifters, but then breaks will
4 be addressed when they report to their operation. When they
5 report to shipping, their breaks will be -- so if you take a
6 look at this, the current, the first one, if you take a look at
7 the current -- for the second one, I illustrated this is what
8 we currently have right now. The first -- this is what we're
9 going to look at.
10 I wanted them to take a look at, hey, how are we going to
11 provide shipping with forklifters? How can we do that right
12 now? If you look at the third page and the fourth page, it
13 could be a total of 18 on the average day. Now we're down to
14 13.
15 So we took those extra forklifters, essentially, those are
16 the ones that are going to be moved to the shipping team, back
17 to the shipping team again. So no, this is -- right here, we
18 weren't talking about breaks at this time.
19 Q Okay.
20 A Schedules had to have been created at this time. This is
21 just a bid sheet for them to bid into the desired shift that
22 they wanted, according to their seniority.
23 Q Okay. But again, both before and after this change,
24 breaks were designated, right?
25 A Yes.

1 Q Okay.
2 A Breaks were always designated. I mean, like --
3 Q Yeah.
4 A -- I don't know, ever since I started there, breaks were
5 always designated. Even before we went automated, breaks were
6 always designated. We always took breaks together. Everybody
7 took breaks together.
8 Q So it's not a product of this change that breaks --
9 A No, it's not -- it's not. Whether we changed times that
10 we go, but the fact remains that we take breaks together.
11 Everybody takes -- because there's a reason why. I mean, I
12 kept on referring to that. There's a reason why we take those
13 breaks together, because, well, my work is contingent on what
14 the next guy do, you know?
15 MS. DEMIROK: Okay.
16 Your Honor, I would move to admit GC Exhibit Number 15.
17 JUDGE TRACY: Any objection?
18 MR. DAWSON: No objection. No objection, Your Honor.
19 JUDGE TRACY: Okay. So GC Exhibit 15 is admitted into
20 evidence.
21 **(General Counsel Exhibit Number 15 Received into Evidence)**
22 Q BY MS. DEMIROK: Okay, just a couple more things. So I'm
23 handing you what's been marked as GC Exhibit Number 16. And
24 you probably haven't seen the email at the top, but if you
25 could take a look at the second email at the bottom of the

1 first page of GC Exhibit Number 16.
2 A Yes.
3 Q And it runs into the second page. So looks like this is
4 an email that you got from Richard Gomez, is that right?
5 A Yes.
6 Q Okay. And this was on January 26th of 2016, is that
7 right?
8 A Yes.
9 Q Okay. Now, Richard is informing you that he noticed Steve
10 and another individual in the break room? Is that right?
11 A Yes.
12 Q Okay. And he's telling you what his conversation was with
13 Mr. Phipps and the other individual, right?
14 A Yes.
15 Q Okay. Now, Richard Gomez, he wasn't just telling -- he
16 didn't just send this email to you, right?
17 A No, he sent it to all the supervisors in the facility,
18 yeah. In the facility at that shift. Everybody was there, I
19 mean, everybody that's listed here, they're all inbound
20 supervisors and then Armando Gutierrez is the shipping
21 supervisor on days.
22 Q Okay. Now, Roy Aja, what does he do in the warehouse?
23 A He's a receiver.
24 Q Okay. So he works in receiving with the inbound team,
25 right?

A Yes, ma'am.
Q Okay. And when you mentioned Armando Gutierrez, I think you said he does shipping?
A Yes.
Q Okay. And Steve Phipps, he also does inbound, right?
A Yes.
Q Okay. So not shipping, right?
A Not shipping.
Q Okay. Have you ever received -- or is this typical, where you'll have all of the supervisors attached to an email, just letting someone know about an employee's whereabouts?
A Everybody that, you know, that's tied to it, all the inbound team is there, all the supervising inbound --
Q Uh-huh.
A -- Armando was there, so this is May 25th, I mean, this break right here. If you look at, well, I mean, well, if you look at the original email on that, we just changed the shifts, all right? Down -- on January 26th. All right, we just changed the shifts, so three days prior to this, Steve Phipps was doing -- everybody was combined. He was doing shipping and put away at the same time.
Q Uh-huh.
A All right? So the reason why Armando was attached to here, Armando had directed Steve, so everything is directed -- there's one offs directed by a supervisor, a manager, to go do.

1 This was right here, I remember this. It was one of those,
2 hey, guys, don't forget, we're now split. You know, if you're
3 going to direct somebody, hey, do me a favor, grab me that
4 pallet and put it here while it's break time, send a
5 communication and say, hey, Brian, Phipps, I just told him to
6 do something so he wasn't -- or whoever the forklifter is is
7 doing something, so that was two days after the schedule
8 change. All right?
9 And if you look here, Steve said, hey, Armando directed me
10 to go pull some bulk, so yes, that's the reason why.
11 Q Is Roy Aha a forklifter?
12 A No, he's a receiver.
13 Q Okay.
14 A Yeah.
15 Q I'm not sure if I got an answer to my question. I was
16 wondering if it's typical where you would receive a
17 communication where all the supervisors were attached just
18 informing you the whereabouts of an employee at a warehouse.
19 A It's typical. They report up, right? So everybody that's
20 there involved, you know, they report up to the -- it's
21 communication, to communicate to everybody. Through this
22 Armando says hey, guys, that was my bad. I did tell him to go
23 in and pull those pallets for me. I should have communicated
24 to you guys, all right?
25 So now everything -- two days before this, this wouldn't

1 be an issue that Richard would have to communicate to Armando,
2 because Armando, they reported to Richard and that group. So
3 now, two days after that, the new schedules came along. Steve
4 reports to Richard Gomez, Brian Nicklin and Dave Garcia and all
5 those guys. Armando's not in shipping. So Armando has his
6 crew of forklifters at the time.
7 Q Have you ever received a communication where all the
8 supervisors have been attached? Can you give us an example of
9 when that might have happened other than this?
10 A I have -- one of my managers are out. Hey, guys,
11 so-and-so is going to be out today. Make sure -- so shipping
12 and receiving, they're occupying the building at the same time.
13 Before I came in today, one of my main managers was out. I
14 called an inbound manager, one of my shipping manager's out. I
15 called my inbound manager, said hey, listen, my shipping
16 manager's not in. He has his supervisor running around. Can
17 you watch over the operation? I'm out, he's out, you're the
18 only manager on duty. If something blows up and I'm at court,
19 you know, make sure you copy Tim, Tim O'Meara, which is my
20 boss, to understand that hey, this is what's going on.
21 So it's a communication, it's a means of communication to
22 everybody.
23 Q So but breaks have always been designated, right?
24 A Yes.
25 Q Okay. And so if an employee -- have you ever had an email

1 where everyone's been attached prior to January 24th, where a
2 supervisor was just informing you that someone was taking their
3 break at the wrong time?
4 A I have. I've seen emails. Hey, so-and-so was in the
5 break after. Like I tell you, this is the most common one, is
6 seeing people not going back to work, so they address, hey,
7 your guy's there --
8 Q But would they attach all the working supervisors in the
9 warehouse at that time?
10 A Within that team who he reports to, that type of thing.
11 But like I said, it's a means of communication where
12 everybody's on the same page.
13 MS. DEMIROK: Your Honor, can I take a moment off the
14 record just to --
15 JUDGE TRACY: Sure. Let's go off the record.
16 MS. DEMIROK: Thank you.
17 (Off the record at 10:17 a.m.)
18 Q BY MS. DEMIROK: We were just talking about incidents in
19 where you may have received email communications regarding
20 employees not taking their breaks at the right time, is that
21 right?
22 A Yes.
23 Q Okay. And we were talking -- I had asked you if prior to
24 January 24th, if you had ever received an email communication
25 in which a supervisor was informing you of the whereabouts of

1 an employee when they were supposed to either be working or on
2 break, is that right?
3 A Yes.
4 Q And you said that that's happened, right?
5 A Yes.
6 Q Okay. And you said it's also happened where, in those
7 circumstances, where they'll copy many other supervisors,
8 right?
9 A Correct.
10 Q Okay. And you said you've had those email communications,
11 right?
12 A With everything. It didn't matter what it was. Whatever
13 issue that -- whoever applies -- it applies to is copied. It's
14 our form of communication. It doesn't matter what it is. If
15 it's a customer, you know --
16 MS. DEMIROK: Your Honor, those communications would be
17 responsive to subpoena request number 22, and at this time, you
18 know, I'm requesting that if there are any of those kind of
19 communications, that they be turned over.
20 MR. DAWSON: Your Honor, we would object on relevance
21 grounds. I'm scrolling to that 22, but to search for emails
22 about an employee being on break and searching for the email
23 based on how many supervisors were copied on it a year-and-a-
24 half ago, or more, to June of '14, I don't -- I can't even
25 conceive of the search terms that we would use to find those

1 emails. That's -- other than, you know, manually going through
2 -- in the last go-round, just to go back a year it took the
3 server 48 hours just to run the search, and those were when we
4 had good search terms.
5 To find an email about an employee, some unnamed employee,
6 we don't even know who, who was on break and there was an email
7 generated that was copied to several supervisors, that's
8 impossible.
9 JUDGE TRACY: Well --
10 MR. DAWSON: I shouldn't say it's impossible. It's just
11 -- it'll take a month.
12 JUDGE TRACY: Well, you know, part of the subpoena was
13 that you, you were served a subpoena, and until, you know,
14 there was a ruling on it, that you needed to gather all of the
15 information, so it's not as if you should have just started
16 looking now.
17 MR. DAWSON: Well, Your Honor, we did do a good faith
18 search and we did locate some emails. In fact, General Counsel
19 Exhibit 16 was an email that was just given to us this morning
20 that Richard Gomez found that had to do with breaks. So we did
21 conduct a good faith search for such documents, but as we
22 mentioned in our petition to revoke, there's no way for us to
23 certify that every single responsive document has been located.
24 And we did undertake a good faith effort. We asked the
25 supervisors to give us any emails that they could find that had

1 to do with breaks back to June of 2014. I'd also note that Mr.
2 Vaivao didn't testify as to a time frame for any of those, so
3 for all we know, those emails could have been pre-June of 2014
4 and would not be responsive to General Counsel's request.
5 So I don’t know that there are responsive documents that
6 we haven't turned over.
7 JUDGE TRACY: Which number is it, the subpoena?
8 MS. DEMIROK: Subpoena request 22. So maybe I'm not
9 reading it properly but for 22 I have documents including, but
10 not limited to emails dah, dah, dah, dah, but they're about the
11 tee shirts.
12 MR. DAWSON: That may be the prior subpoena duces tecum,
13 Your Honor, which -- what is the subpoena number on that?
14 JUDGE TRACY: B-I-QLUYJ1.
15 MR. DAWSON: That's the subpoena duces tecum from --
16 JUDGE TRACY: Oh --
17 MR. DAWSON: -- the prior case.
18 JUDGE TRACY: -- okay. I'm just looking at it. Well, I
19 believe, and I don't have my order, but I believe that I had
20 said that -- well, was that at issue at the time of the
21 petition to revoke --
22 MS. DEMIROK: There was --
23 JUDGE TRACY: -- number 22?
24 MS. DEMIROK: As far as I recall, there wasn't a specific
25 objection to number 22.

1 JUDGE TRACY: There wasn't a specific objection.
2 MR. DAWSON: No, there was the objection that we --
3 searching for Your Honor's order.
4 MS. DEMIROK: Yeah, so there wasn't one about number 22.
5 MR. DAWSON: But there was an objection as to over-
6 breadth, Your Honor. And again, there's been no showing that a
7 responsive document has been withheld. All Mr. Vaivao has said
8 is that at some point it's four years as of -- well, I don't
9 know how many years as a manager, that he's seen an email that
10 talks about break times, so there's been no date provided, and
11 the subpoena duces tecum only goes to June of 2014, so there's
12 been no showing at all that any responsive document hasn't been
13 produced. The testimony doesn't show that.
14 MS. DEMIROK: Your Honor, if we could continue this
15 outside the presence of the witness.
16 JUDGE TRACY: Sure. Thank you. So you know, part of the
17 issue here is that there was no petition to revoke about number
18 22, so obviously part of 22 is turning over all the documents.
19 He's testifying that there are emails that he has seen, and so
20 what I would say at this point is that, Mr. Dawson, that you
21 should go back and make sure that they have checked to ensure
22 that there are no documents, because then that just goes --
23 then his testimony is not -- he's not testifying accurately, I
24 suppose I would say at this point.
25 Because he's saying he's seen them, but if you can't find

1 any or perhaps there can be questioning about when he has seen
2 them, to limit the scope of what you would be looking for
3 again, you could do that.
4 But at this point, there's nothing that prevents the
5 General Counsel, especially if they come back and narrow the
6 time frame from June 2014 to the present, or really, I guess,
7 the relevance -- not the relevance, but it's going to be
8 sometime before this January 26th --
9 MS. DEMIROK: And that was the question that I asked,
10 prior to January 24th, 2016.
11 JUDGE TRACY: So I would say -- I mean, and the search
12 term, I mean, it's going to be break. I mean, look at the
13 subject line, it's break. And that's how -- and I understand
14 that it could be -- take a little time and that's just what we
15 have to do.
16 Ms. Demirok, if you could just kind of explain in terms of
17 the relevance, that doesn't go to the petition to revoke,
18 because the -- not the petition to revoke, the subpoena is
19 addressing reasonably relevant items, but now we're here at the
20 hearing and this often happens, but we want to focus on what's
21 relevant in proving either one of your cases.
22 So what is the relevance of this document that you're
23 looking for as an example?
24 MS. DEMIROK: So it would be comparative evidence that
25 would go towards the allegation that Mr. Phipps was placed

1 under closer supervision, and by showing that -- well, if there
2 were other documents, other emails as he says, it tends to show
3 that he was treated similarly, but if they're not there, which
4 we have not received, it would tend to show that he as being
5 treated differently.
6 MR. DAWSON: Your Honor, I mean, the email itself points
7 out that there was another individual, Roy Aha, who was told
8 you need to take your breaks at the appropriate time.
9 JUDGE TRACY: And so that's the argument that you would
10 make in your brief, right?
11 MR. DAWSON: Yes, that's correct, Your Honor.
12 JUDGE TRACY: And so that --
13 MR. DAWSON: Again, I'm not trying to reargue the petition
14 to revoke. All I'm saying is as Your Honor recognized in her
15 order, our obligation is to make a good faith effort to locate
16 and produce responsive documents. We went to every supervisor
17 and asked them, go through your email and find anything that
18 has to do with breaks.
19 We turned over what we found. Now, conducting a search on
20 the server for emails is, I think, to use the word break and do
21 a search on the server, we're going to turn up -- I mean, at
22 one point we did a search and came up with half a million hits,
23 not on breaks, this was on a different search term, but I
24 believe that goes well beyond the good faith effort to ask us
25 in nine business days to search half a million documents, I

1 think, is just unreasonable. And that's beyond what's required
2 to satisfy good faith.
3 JUDGE TRACY: Uh-huh.
4 MS. DEMIROK: But can we go off the record?
5 JUDGE TRACY: So why, Ms. Demirok, would you be willing to
6 narrow --
7 (Off the record at 10:30 a.m.)
8 JUDGE TRACY: Ms. Demirok, go ahead, please.
9 MS. DEMIROK: Okay. So first I'd like to -- I'm going to
10 pass out a new GC Exhibit Number 16 and replace it with the one
11 that I just handed out.
12 JUDGE TRACY: And so why do we need to replace this GC
13 Exhibit 16?
14 MS. DEMIROK: So the initial one that I passed out, it was
15 given to me via email this morning by respondent's counsel, and
16 now I have a Bates-numbered copy that was sent to me while we
17 were questioning Mr. Vaivao. So I would just like to -- there
18 was some irrelevant stuff on the other one and so just to clean
19 it up, here we have GC Exhibit Number 16 that's been replaced.
20 JUDGE TRACY: Okay. So can we go ahead and fold the old
21 GC-16 of the two copies that you have there and then we'll just
22 give them back to you.
23 MS. DEMIROK: Okay.
24 MR. DAWSON: Or mine.
25 JUDGE TRACY: That's fine. If it's okay, I kept mine

1 because I wrote notes on it. Okay.

2 **REDIRECT EXAMINATION CONTINUED**

3 Q BY MS. DEMIROK: So Mr. Vaivao, if you could take a look

4 at the new GC -- exhibit that's marked GC Exhibit 16, is this a

5 copy of the same email that we had been talking about

6 previously?

7 A Yes.

8 Q Okay. Because we were talking about what was on the lower

9 half of the first GC Exhibit 16 and this is a copy of that same

10 email, right?

11 A Okay.

12 Q Okay. We were also talking about how -- you had testified

13 that you have previously, prior to January 24th, you had

14 received email communications about employees who were either

15 not on break when they were supposed to, and you received

16 communication about that, is that right?

17 A I receive a lot of communications, all right?

18 Q Uh-huh.

19 A For everything. For everything that happens. I receive

20 communications -- it's just a form of communication that I'm

21 copied on some of it. It could be a communications of, hey,

22 this forklifter put this pallet away in the wrong area, make

23 sure we speak with him, address that type of thing. Hey, they

24 left this on the dock, you know, it's a --

25 Q Okay, but we were --

A -- day-to-day operations, it's every communication, everybody's related to is copied.

Q But we were talking specifically about communications regarding employees who were not on break when they were supposed to.

A If I misspoke, on three occasions, as far as, hey, keeping emails showing emails or sending emails of associates on break, most of the time, I'd say 99 percent of the time, is through, hey, make sure you tell you guys to get back.

Do I recall an email? Yeah, I saw an email, hey, when are your guys going to break, because I'm falling behind. You know, that type of thing. Copied to everybody. When is your team going on break, because that way I know, because we're falling behind? That type of thing. Hey, when are you guys coming back from break, so that way I know what to expect.

Q Well, I had specifically asked you if you had ever received an email where other supervisors were copied on it in which the email was informing you that an employee was either not taking the break when it was designated, or taking a break when they weren't supposed to.

A Maybe I misspoke, but I don't recall specific emails, but hey, this guy right here didn't take break. You know? This guy right here is taking too long of a break. Maybe too long of a break. I don't recall all the emails. I don't recall the emails I get, specific emails. Up to this morning, I didn't

1 remember this email until you presented it to me. I didn't
2 remember this email.
3 Q But you did say you do receive those types of emails,
4 right?
5 A I receive all sorts of kinds of emails for everything that
6 happens in the warehouse --
7 Q When I say these types of emails, I mean emails that are
8 similar in nature to the GC Exhibit Number 16, in which a
9 supervisor is informing you that an employee is not taking
10 their break when they're supposed to.
11 A Right. It's informing the supervisors that apply to, say,
12 the basis -- when I look at the email, trying to recall
13 everything that happened here, it's informing Armando, like
14 we're separated already, can you make sure you communicate to
15 us that you instructed one of my guys to do something? Because
16 I'm expecting him to be on break. You know? So that's what
17 this email is. It wasn't, hey, this guy right here is taking a
18 long break. This is copying Armando Gutierrez, who Steve was
19 instructed by Armando Gutierrez, hey, Steve, go do this.
20 Q How do you know that?
21 A Well, I know this. I know this for a fact because it
22 shows right here that, hey, Steve said hey, Armando told me to
23 hang out. The shipping -- in shipping bulk. That's Armando's
24 responsibility, is the shipping crew. So copied Armando, hey,
25 if you guys are instructing my guys to do something, make sure

1 you copy me, make sure you copy us.
2 Q But that's not what it says in the email, right?
3 A Not what it says in the email. That's what it is
4 intended. This is not a -- this is just a communication going
5 back to everybody. If you're instructing somebody to do
6 something that doesn't directly report to you, make sure you
7 communicate that out so the next go around, Armando would
8 address their team.
9 Maybe Armando did address this. Armando's ultimately in
10 charge of the shipping team. He addressed his group and says,
11 hey, if you guys are grabbing somebody from another area to do
12 something, make sure there's communication. All the
13 communications are that way.
14 Q So then how do you know that that's the intent of this
15 email?
16 A Looking back at it, this is what happened. I think I
17 spoke to Brian Nicklin, says, hey, make sure my three managers
18 -- make sure that if we're instructing people to do something
19 outside of your group, make sure that the communication goes
20 back and forth.
21 Q So you had that conversation after you got this email?
22 A I have that conversation all the time. Every Thursday I
23 have a meeting with my direct reports addressing these type of
24 service issues, making sure that we're communicating.
25 The last thing we want is, like, oh, may, I forgot to tell

1 you. It appears this is what was. I instructed one of your
2 guys and I forgot to send out an email letting you know. This
3 is after the fact, so every Thursday I have a staff meeting
4 with my team and most of it is based on communication. I just
5 copy, making sure everybody's communicated.
6 Especially now. This is two days after the new rebid.
7 They used to report all to Brian Nicklin. Now a group of those
8 forklifters now reporting to Armando.
9 Q So and just to be clear here, prior to January 24th, 2016,
10 have you ever received any kind of email communication in which
11 there were other supervisors attached? Period.
12 A Email communication, other supervisor attached, yes.
13 Q Have you ever received any email communications where
14 supervisors were attached in which they were informing you the
15 whereabouts of an employee when they were supposed to be on
16 break?
17 A Not necessarily the whereabouts of anybody. I don't
18 recall those specific types, if you ask me if there is a
19 specific email that I remember.
20 Q Has it ever happened?
21 A (No audible response)
22 Q Prior to January 24th, 2016.
23 A It's ever happened that somebody sent out an email that
24 somebody's here, there?
25 Q Yeah.

A I can't speak -- you know what? I don't recall specific emails. I know there's communication going out, says hey, this is what's going on. That type of thing, but a specific email, hey, this guy is over here --

Q And what --

A -- not supposed to be there. That type of thing.

Q And what about communications specifically about an employee not taking their break when they're supposed to.

A Not taking a break when they're supposed to? I'm not sure I've seen an email of an employee, hey, he's not taking break.

Q Okay. Or what about a communication where they were taking -- they are taking their break, it's just not at the designated time?

A I probably haven't seen an email that somebody just arbitrarily took their own break by themselves.

Q Okay.

A Yeah.

Q Because from my understanding of your testimony prior to taking that quick break, is that you have received those kind of emails and they happened often.

A Now, maybe I said it that way, what I did say, the question was, do you receive emails copied to everybody else, and I said it's a form of communication. We could receive email copied to everybody all the time. Everybody that applies. So I've received emails about communication, yes.

1 Have I -- maybe I misspoke and told you that hey, I had a bunch
2 of emails coming through --
3 Q Well, it seemed pretty clear to me at the time, but if
4 your testimony is --
5 MR. DAWSON: Your Honor, objection --
6 Q BY MS. DEMIROK: -- right now --
7 MR. DAWSON: Objection to "seemed pretty clear".
8 Ms. Demirok's not testifying, the witness is, so the testimony
9 is what it is. I don't think there's any need to be
10 argumentative with the witness.
11 JUDGE TRACY: Well, I'm going to overrule the objection.
12 This is cross-examination. She also didn't quite finish her
13 question there.
14 So Ms. Demirok, go ahead, please.
15 MS. DEMIROK: Okay.
16 Q BY MS. DEMIROK: So it seemed pretty clear to me that we
17 were talking about communications regarding break times and
18 when -- if employees were following the break times.
19 A Yes.
20 Q So is it your testimony now that you were not testifying
21 about that before?
22 A The series of questions is, I receive emails copying other
23 supervisors, yes. I've received emails copying other
24 supervisors. Now that it changed to have you received specific
25 emails about breaks copying other supervisors, right? So

1 that's the two questions that I --
2 Q So you're saying this is the first time that I've asked
3 you -- so before the break, we weren't talking about
4 communications about break times? Sorry.
5 A No. We were talking about break times, yes. You asked me
6 if there was specific emails that shows, hey employees are not
7 taking their breaks or employees are taking extended breaks. I
8 receive a bunch of different emails about the different things.
9 Are there specific emails? I don't know. I don't know if
10 there's specific emails, but in nature, as far as breaks, like,
11 hey, we took break at this time instead of this time. Hey, why
12 are you guys taking break at that time? You know, why is my
13 guy -- why did you instruct my guy to not take break, or that
14 type of thing.
15 So in that fashion, breaks, in that fashion is very, very
16 critical to us to communicate out because our whole thing is to
17 take breaks together. So if somebody alters, hey, this guy's
18 not taking break -- when somebody's missing from a work area at
19 Shamrock Foods, you know. Because it's a series of --
20 everything is sequential in the way they task.
21 When somebody's not there, hey, where is that guy that's
22 supposed to be there, because we're falling behind in that
23 area. So it's very important that everybody takes break at the
24 same time.
25 So I mean these type of communications, yes.

1 Q So these type of communications, yes?
2 A Yeah, these type of communications, as far as hey, break
3 time. Did you instruct my guy to go to break time? What time
4 are you guys going to break versus our guys?
5 Q So yes or no, have you ever received, prior to January
6 24th, 2016, have you received email communication in which a
7 supervisor is notifying you of a specific employee --
8 A I don't recall. My testimony earlier, I'm saying right
9 now, I don't recall a specific email saying that, hey, John
10 didn't go take a break. John refuses to go take break. No, I
11 haven't seen an email that specific. But if we're targeting
12 around breaks, there's different breaks. Hey, we're taking
13 break because the sorter broke down. Hey, we're taking break
14 early or we're taking break at this different time. Yes,
15 that's what most of these emails are.
16 Q So again, yes or no --
17 MR. DAWSON: Objection, Your Honor. He said he couldn't
18 recall. I mean --
19 JUDGE TRACY: So here -- I'm going to again overrule the
20 objection, but here is what was unclear to me of that last
21 exchange. You need to let her finish the question before you
22 answer it.
23 THE WITNESS: I think -- I thought I was.
24 JUDGE TRACY: She didn't finish the question.
25 THE WITNESS: Okay.

1 JUDGE TRACY: So wait -- this is important, so please just
2 wait for the ending of her to speak. So you know, we've kind
3 of covered this quite a bit, but I'm going to give you one more
4 chance here.
5 MS. DEMIROK: Thank you, Your Honor.
6 JUDGE TRACY: And then we'll move on.
7 MS. DEMIROK: Yes.
8 Q BY MS. DEMIROK: So yes or no, have you received
9 communication --
10 MS. DEMIROK: And let the record reflect that the witness
11 is looking at respondent's counsel.
12 MR. DAWSON: Your Honor, objection. Come on. I mean,
13 first of all, she can't tell the witness how to answer a
14 question. It's not yes or no. If he doesn't recall, he
15 doesn't recall. She can't tell him to say yes or no. Number
16 two, Ivan's looking all around the room. That's silly. I
17 mean, come on.
18 JUDGE TRACY: So Ms. Demirok, just please just go ahead
19 and ask the question. I mean, again, the credibility of all of
20 this is going to be on me and I can see. I don't need that to
21 be part of the record, per se.
22 Q BY MS. DEMIROK: So Mr. Vaivao, prior to January 24th,
23 2016, have you received email communications in which all the
24 supervisors who were working at the time were copied on that
25 communication and in that communication a supervisor's

1 informing you that an employee is not taking a break at the
2 designated time?
3 A I don't recall. Nothing specific. Have I seen emails,
4 hey, nothing specific as far as a name.
5 Q Do you know if it's ever happened?
6 A I don't recall. At this point, I don't -- you've asked me
7 a bunch of different versions of the question. Have I ever
8 received an email copying every supervisor about an employee
9 not taking a break? Prior to this? At this point right now, I
10 don't recall to know. Maybe -- I don't recall, all right?
11 If I misspoke -- what I was -- when you asked about breaks
12 and lunches, if there's anything relating to breaks and
13 lunches, yes, I've seen emails that, hey, you guys are taking a
14 break. Can you tell me what time are you guys taking break, so
15 that way I can align my group? So that's regarding breaks and
16 lunches.
17 Have I seen emails that way? Yes. Copying everybody in
18 the team? Yes. Have I received -- do I recall an email
19 specifically saying, hey, John didn't go take a break. John
20 refuses to take a break? No.
21 MS. DEMIROK: Okay. No further questions.
22 JUDGE TRACY: Thank you.
23 Ms. Dawson -- Mr. Dawson, I'm sorry.
24 MR. DAWSON: Thank Your Honor.
25 **RECROSS-EXAMINATION**

1 Q BY MR. DAWSON: Ivan, you testified about some
2 circumstances under which break times can fluctuate. Do you
3 recall that testimony?
4 A Yes, sir.
5 Q Okay. If either crew, inbound or outbound, if they take a
6 break other than the normal time, who -- well, let me retract
7 that. Who decides whether to take a break at a time other than
8 a normal time?
9 A Their manager. It would be inbound manager, shipping
10 manager. They would decide, depending on the day-to-day
11 operation, what time the entire crew is going to go to break.
12 Q And when that happens, when the shipping manager or the
13 inbound manager says we're going to take a break at a different
14 time, at that point, are employees permitted to take breaks
15 whenever they want?
16 A No.
17 Q Okay. Are they required to follow the direction of the
18 supervisor?
19 A Yes, sir.
20 MR. DAWSON: Okay, nothing further, Your Honor.
21 JUDGE TRACY: Okay.
22 MS. DEMIROK: No follow-up.
23 JUDGE TRACY: Okay.
24 MS. DEMIROK: Oh, I'm sorry, Your Honor, I'm not sure -- I
25 didn't move to admit GC Exhibit Number 16, but I'd like to do

that.

MR. DAWSON: No objection.

JUDGE TRACY: Okay. So GC Exhibit 16 is admitted into evidence.

(General Counsel Exhibit Number 16 Received into Evidence)

JUDGE TRACY: Mr. Vaivao, thank you. Please don't discuss your testimony with anyone else until your attorney tells you that the hearing has concluded.

THE WITNESS: Okay.

JUDGE TRACY: Okay, thank you.

THE WITNESS: Thank you. I'm good to go?

JUDGE TRACY: Yes.

THE WITNESS: Okay, thanks.

JUDGE TRACY: All right. Let's go off the record for a moment.

(Off the record at 11:10 a.m.)

JUDGE TRACY: We need to go on the record.

Whereupon,

DAVID GARCIA

having been duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE TRACY: Okay. Go ahead. Have a seat. State your name and job title for the record.

THE WITNESS: David Garcia.

JUDGE TRACY: Oh, have a seat first.

1 THE WITNESS: Okay. David Garcia, inbound second shift
2 supervisor.
3 JUDGE TRACY: All right. Ms. Demirok, go ahead, please.
4 MS. DEMIROK: Okay.
5 **DIRECT EXAMINATION**
6 Q BY MS. DEMIROK: Hi, Mr. Garcia.
7 A Hi.
8 Q So I'm an attorney for the Federal Government. I'm just
9 going to be asking you some questions today.
10 A Okay.
11 Q Okay? Have you reviewed any documents in preparation of
12 your testimony?
13 A Yes, I have.
14 Q Okay. Were any of those statements that were provided to
15 you?
16 A Pardon me?
17 Q Were any of them statements based on what you would be
18 testifying about?
19 A Yep.
20 MS. INESTA: Your Honor, I'm just going to object to the
21 extent it invades the attorney-client privilege and to the
22 extent it invades the attorney work product doctrine. Again,
23 Mr. -- we have no objection to Mr. Garcia testifying as to any
24 documents that he independently reviewed in preparation for his
25 testimony, but anything that he reviewed because I had prepared

1 or showed to him, then that would be attorney work product.
2 MS. DEMIROK: If I may?
3 JUDGE TRACY: Uh-huh.
4 MS. DEMIROK: So I was asking him specifically about
5 statements that he reviewed in preparation of his testimony and
6 I think that would be covered under -- who be a Jencks
7 statement, that if there was any, we should be allowed to ask
8 questions about it, if there were, they should be produced. I
9 don't think we've gotten there yet, but I think the question
10 was specifically tailored at statements.
11 MS. INESTA: Your Honor, it's so overbroad. I mean,
12 statements that he prepared? Statements prepared by others?
13 Again, to the extent that I went through a document production
14 and selected documents that I thought he should or shouldn't
15 see, those are my impressions of the case, and my impressions
16 of the Defense, and that is absolutely protected by the work
17 product doctrine.
18 JUDGE TRACY: All right. So what I'm going to do is I'm
19 going to sustain the objection, but limit it to basically,
20 Mr. Garcia, if there were any documents that you reviewed along
21 with, and I'm assuming that he is -- you've admitted that he's
22 a supervisor, with an attorney for Shamrock, that you don't
23 have to -- you can -- you don't have to -- you can say that
24 that was with my counsel and leave it at that.
25 THE WITNESS: Yes.

1 JUDGE TRACY: However, there is this issue about a
2 statement and I'm going to assume that Ms. Demirok is going to
3 narrow her questioning as it goes along to specifically talk
4 about what statement if he -- I don't know if he's answered
5 that yet, if he reviewed any statements, and then you'll go
6 further with that, depending upon his answer.
7 MS. DEMIROK: Okay. Thank you, Your Honor. I do suspect
8 that any questions, I'm going to get the same objection, so as
9 far as -- I think their position, as I understood it, was that
10 any questions about anything that he reviewed is going to be
11 covered under work product, and so I just want clarification
12 that if I'm questioning about statements, that those can --
13 that I can question about that.
14 MR. DAWSON: Your Honor, I may be able to quickly -- we
15 don't have any statements that weren't produced, so anything
16 that we've shown Mr. Garcia is in the production that we gave
17 to General Counsel.
18 JUDGE TRACY: Yeah, it sounded also from what Ms. Inesta
19 was saying was it was documents, not statements, so you might
20 get your answer right now.
21 MS. DEMIROK: Okay, thank you, Your Honor.
22 Q BY MS. DEMIROK: So Mr. Garcia, did you review any
23 statements in preparation of your testimony today?
24 A No. No statements.
25 MR. DAWSON: Your Honor, I'm not sure the witness will --

1 JUDGE TRACY: So let me -- is that an objection?
2 MR. DAWSON: Yeah, I'm sorry, Your Honor. I'm not sure
3 that the witness will know a statement --
4 JUDGE TRACY: Yes.
5 MR. DAWSON: -- versus a document.
6 JUDGE TRACY: So I'm going to sustain the objection, yeah.
7 So if you could just --
8 MS. DEMIROK: So --
9 JUDGE TRACY: -- clarify your question by defining what
10 you mean by a statement. Okay?
11 Q BY MS. DEMIROK: So Mr. Garcia, what I mean by statement
12 is something that is drafted related to what you would be
13 testifying about today.
14 A I'm sorry. Can you repeat that please?
15 Q So when I asked you if you'd reviewed any statements in
16 preparation of your testimony. Just for clarification, I was
17 referring to any statement that may have been drafted based on
18 what you are expected -- the words you're expected to be
19 testifying about.
20 A With my attorneys? Yes.
21 Q Okay.
22 MS. INESTA: Your Honor, I still think there's some
23 confusion here. Because like can you -- can I get the question
24 read back? Because the question was -- how it was phrased.
25 JUDGE TRACY: I don't know if you can do that.

1 THE COURT REPORTER: I can play it back for you.
2 MS. INESTA: If you could, please.
3 THE COURT REPORTER: Give me a second.
4 (Audio played back, not transcribed)
5 MS. INESTA: I mean, that conceivably could be any doc --
6 conceivably be any document we produce. Because the potential
7 that he could testify regarding any of the topics or the
8 subject matters related to the documents or in connection with
9 the claims. I mean, I still think it doesn't clarify what a
10 statement is. A statement drafted by an employee? A statement
11 he drafted? A statement we drafted? I think there does need
12 to be some clarification in the question because I suspect that
13 there seems to be some confusion as to what that is. I'm not
14 even sure what the question or answer really suggests or means.
15 MS. DEMIROK: If I could, maybe define it better?
16 JUDGE TRACY: Yes.
17 MS. DEMIROK: Okay.
18 Q BY MS. DEMIROK: So, Mr. Garcia, when I was referring to a
19 statement, I meant any written statement made by you, signed by
20 you, or otherwise approved by you.
21 A Have I come across any of those statements or documents?
22 Q In preparation for testifying today, did you review any
23 statements in which they were either written by you, the
24 statements were something that you had said, maybe someone else
25 wrote it out, or a statement that you signed or otherwise

1 approved of?
2 A No, not to my knowledge, no.
3 Q Okay. And have you spoken with anyone in regard to your
4 testimony today?
5 A Just Counsel, my Counsel.
6 Q Okay. So, no one other than Counsel? And --
7 JUDGE TRACY: Sir, I need you to answer "yes" or "no".
8 THE WITNESS: I'm sorry what was the -- Yes, just Counsel.
9 Q BY MS. DEMIROK: Okay. And are you currently employed?
10 A Yes.
11 Q And what position do you work?
12 A I'm employed with Shamrock Foods. I'm the Second Shift
13 Inbound Supervisor.
14 Q Okay. And how long have you been in that position?
15 A I've been in that position for a little over a year.
16 Q And how long have you worked for the company?
17 A Almost 28 years.
18 Q Oh, wow. What did you do before you moved into this
19 Inbound Supervisor position?
20 A I was the Outbound Supervisor.
21 JUDGE TRACY: Okay. So, let me just say, I'm sorry,
22 Mr. Garcia. So what's going to happen after this hearing is
23 that what the person sitting next to you is doing is she's
24 going to, or somebody is going to be transcribing this, putting
25 it all in a document.

1 THE WITNESS: Okay.
2 JUDGE TRACY: And what happens when -- a couple of things,
3 if you don't allow the attorneys, either side, finish asking
4 you're their question --
5 THE WITNESS: I see.
6 JUDGE TRACY: Is that, one, you might be answering the
7 wrong question.
8 THE WITNESS: Right.
9 JUDGE TRACY: And two, the recording will cut off -- or
10 the transcript, the written will be cutting -- cut off.
11 THE WITNESS: Okay.
12 JUDGE TRACY: And then, frankly, the most important person
13 in the room, me, will not know what exactly you were answering,
14 and what your answer was.
15 THE WITNESS: Okay.
16 JUDGE TRACY: So, it needs to be clear.
17 THE WITNESS: I get it.
18 JUDGE TRACY: Okay?
19 THE WITNESS: All right.
20 JUDGE TRACY: So, let's -- Ms. Demirok, if you could just
21 ask the question -- finish asking the question for Mr. Garcia.
22 MS. DEMIROK: Sure.
23 Q BY MS. DEMIROK: So, what position did you work in prior
24 to becoming an inbound supervisor?
25 A I was an outbound supervisor.

1 Q Okay. And how long did you work in that position?
2 A Roughly 25 years.
3 Q Okay. And for your current position, could you briefly
4 describe for us your duties?
5 A Yes. Basically our duties, my duties, are to back in
6 trailers, trucks that haul product, back them in, receive them,
7 and have them put away.
8 Q Okay. And do you oversee -- what group of employees do
9 you oversee?
10 A I oversee receivers and forklifters.
11 Q Okay. And do you have the authority to discipline any of
12 them?
13 A Yes, I do.
14 Q Okay.
15 MS. DEMIROK: Your Honor, at this time I'm requesting to
16 continue my questioning, where appropriate, under Rule 611(c)
17 of the Federal Rules of Evidence.
18 JUDGE TRACY: Go ahead, please.
19 MS. DEMIROK: Okay. Thank you.
20 Q BY MS. DEMIROK: So, you supervise a group of inbound
21 forklift operators, right?
22 A Yes.
23 Q Okay. And Mike Meraz is one of those forklift operators.
24 Is that right?
25 A Yes.

1 Q And you met with him on January 18th of this year. Is
2 that right?
3 A Correct.
4 Q And were you in your office at the warehouse when that
5 happened?
6 A No.
7 Q Were you in Richard Gomez' office?
8 A Richard Gomez' office, yes.
9 Q Okay. And Richard Gomez, he's another inbound supervisor,
10 right?
11 A Yes, he is.
12 Q Okay. You guys are at the same level, he just is with a
13 different shift. Is that right?
14 A That's correct.
15 Q Okay. So, why did you meet with Mr. Meraz that day?
16 A Mr. Meraz had a CPDR, which is a write up.
17 Q Okay.
18 A And Richard and I were presenting it to him to sign off,
19 and that's why we met with him.
20 Q Okay. And why was he getting written up?
21 A Mr. Meraz failed to follow proper forklift procedures.
22 Q And what procedures were those?
23 A He placed a pallet physically in a location, but logically
24 in the computer in a different location.
25 Q Okay. And tell me if I have this right. So, to logically

1 place an item, that refers to where, what location they scan
2 with their scanner, right?
3 A Correct.
4 Q Okay. And to physically place it somewhere, that is what
5 it sounds like, you physically place a pallet somewhere?
6 A Correct.
7 Q Okay. And those two locations were different?
8 A Yes.
9 Q Okay. Now, when were you informed -- or let me -- How
10 were you informed about this incident with Mr. Meraz?
11 A I was informed by, via email. I had the CPR sent to me.
12 Q And who sent it to you?
13 A Melanie Grazie, I believe is her name.
14 Q She's like a safety supervisor, right?
15 A She's a safety supervisor, exactly, yes.
16 Q Okay. But, did you know about the incident before you
17 received the CPDR attached?
18 A No, I did not know about it.
19 Q Okay. Now, after you received the email with the CPDR
20 attached, who did you speak with next about the incident?
21 A Well, Richard Gomez and I spoke about it, discussed it.
22 Q Okay. And how did that conversation come about?
23 A That conversation came about as "It appears Mr. Meraz
24 physically put a pallet of product in the wrong location. The
25 product was special ordered. The customer did not get his

1 special order due to the fact that it was not where it was
2 scanned to be." At that point we looked at Mr. Meraz' work, I
3 can't think of the word. His worksheet for the day, basically,
4 or for that evening. And he was the last person to touch that
5 pallet. We don't want to give a CPDR without any facts. So,
6 to print that paperwork up to go with the CPDR, that's what we
7 decided to do, and then present it to Mr. Meraz.
8 Q Okay. And so, did, when you spoke with Richard Gomez for
9 the first time about this incident, did he already know about
10 the incident?
11 A I don't know.
12 Q Did you approach him or did he approach you?
13 A We were both in the office at the same time.
14 Q Okay.
15 A So, I asked him -- normally what we do is, we have two
16 people in the room when we're presenting CPDRs that way there's
17 no, you know, "he said, she said", you know.
18 Q Uh-huh.
19 A So, two supervisors talking to Mr. Meraz, presenting the
20 CPDR, and presenting the facts on him handling the pallet.
21 Q Okay. And who authorized to issue the CPDR?
22 A Who authorized that?
23 Q Do you know?
24 A I do not know.
25 Q Okay. Did you ever speak with Ivan Vaivao prior to when

1 you received the CPDR?
2 A Prior to? No.
3 Q Okay. Had Mr. Gomez ever mentioned that he had spoken
4 with Ivan Vaivao prior to when you received the CPDR?
5 A That I don't know.
6 Q Okay. So, aside from Mr. Gomez, did you speak with anyone
7 else regarding the missing pallet before you met with Mr.
8 Meraz?
9 A No.
10 Q And could you -- why did you decide to speak with Mr.
11 Meraz?
12 A Why did I decide to speak with him? Because he had a
13 CPDR, he didn't follow proper forklift procedures.
14 Q And you mentioned pulling up the report with his -- I
15 think it's like the tasks?
16 A Yes.
17 Q Okay. So, aside from pulling up that report, did you do
18 anything else in terms of investigating this incident?
19 A No.
20 Q Okay. And so, you didn't speak with Mr. Meraz prior to
21 the time when you met with to give him the CPDR?
22 A No.
23 Q Okay. And when you met with him, Mr. Meraz, he didn't
24 sign the write up that day, did he?
25 A He did not sign the write up.

1 Q Okay. And instead he insisted on talking with Daniel
2 Santa-Marina, is that right?
3 A Yes.
4 Q Okay. And if we could, I'm going to have you take a look
5 at -- Do you see Exhibit Number 5? You should have that up
6 there in front of you.
7 A This it?
8 Q Does it look like a CPDR?
9 A Yes.
10 Q Yeah. So, now this one has a signature on it, but is
11 there anything, aside from the signature, is this the CPDR that
12 you presented to Mr. Meraz?
13 A I believe so, it's a verbal warning, yes, for forklift
14 procedures. Yes.
15 Q Okay. Now, "failed to follow proper put away procedures."
16 Have you -- You've issued discipline to other employees, too,
17 right? Just any kind of discipline?
18 A Verbals in the past? Yes.
19 Q Yeah.
20 A This sort of CPDR, I don't think so because, like I said,
21 I was on the other shift.
22 Q Other shift, you mean, because you used to be --
23 A The shipping shift, not the receiving shift.
24 Q So, you used to be outbound.
25 A Yes.

1 Q And now you're inbound.
2 A Correct.
3 Q So, when you were in outbound, you wouldn't have had a
4 write up of this nature, right?
5 A I would've had a verbal for other associates that have
6 done something because of -- the verbals -- it starts a
7 progressive write up procedure for us.
8 Q Uh-huh.
9 A But, as far as a "following of proper forklift
10 procedures", no I wouldn't have.
11 Q Okay. Because the outbound, they don't do put away,
12 right?
13 A Yes.
14 Q Okay. But, since you've been in your position as the
15 inbound supervisor, have you written anyone, another forklift
16 operator up for failing to put, follow put away procedures like
17 this?
18 A I don't think so.
19 Q Okay. Now, when Mr. Meraz, he said he was going to go
20 talk to Daniel Santamaria, right?
21 A Uh-huh.
22 Q Did you learn, at any point, that he had actually gone to
23 speak with Daniel Santamaria?
24 A Well, he asked if Daniel was available and I said, "I
25 think so." So, he left. I called Daniel, gave him the

1 information, he is our HR go to person, and told him that Mr.
2 Meraz was going up there to see him and that I was going to
3 scan over the documents that Mr. Meraz was going to discuss
4 with him. And at that point he said, "Okay. I'm here at my
5 desk. I'll see him when he gets here."
6 Q Okay. So, you sent Mr. Santamaria the information he
7 would need to look into it?
8 A Yes. Yes.
9 Q Okay. Did you explain the situation to Daniel Santamaria,
10 as far as the -- where the pallet was found and where it was
11 scanned to?
12 A I don't really -- I don't really remember that. I just
13 told him that he was going to go up there and discuss a CPDR
14 with him, and that I was forwarding over the information to
15 him.
16 Q Okay. And then, did you go ahead and forward the
17 information to him?
18 A Yes, I did.
19 Q What kind of information did you forward to him?
20 A I forwarded the CPDR and the Task sheet that you spoke of
21 earlier.
22 Q Okay. Now, after you forwarded that information to Mr.
23 Santamaria, did you ever speak with him again regarding the
24 incident?
25 A I don't recall. I don't recall.

1 Q Okay.
2 A I mean, at that point, HR handles it, and then it's pretty
3 much their -- they pretty much take care of it from there.
4 Q Out of your hands at that point?
5 A Pretty much.
6 Q Okay. Now, are you aware that Mr. Meraz was -- that he
7 eventually did sign the CPDR?
8 A After I saw copies of it, yes.
9 Q Okay. After you -- after you met with Mr. Meraz the first
10 time, did you ever speak with Ivan Vaivao specifically about
11 the incident?
12 A I don't recall.
13 Q Okay. Do you recall if anyone had you, like, gather more
14 information about the incident?
15 A No, that was basically it. I mean, as soon as Daniel got
16 involved, I was out of it.
17 Q Okay. At any point in time, did you ever watch a video
18 footage of the incident?
19 A Yes.
20 Q Okay, when was that?
21 A That was, again, before we were gathering information.
22 Q Before you issued the CPDR to him --
23 A Yes.
24 Q The first time?
25 A Yes.

1 Q Okay.
2 A You don't want to just say, "Here's a CPR, sign it." I
3 mean, you want to make sure that you have information to
4 present it, and say, you know, "This is the CPDR, and this is
5 the reason why, and yada, yada, yada."
6 Q Okay. And was it your idea to look at the video?
7 A Pardon me?
8 Q Was it your idea to track down the video?
9 A I believe it was Mr. Gomez'. I don't -- we don't -- I
10 really don't know how to work the videos.
11 Q Uh-huh.
12 A Yeah. So, he --
13 Q Okay. Could you describe for us what a "short" is?
14 A What a what is?
15 Q A short. Do you know what that is?
16 A Yes.
17 Q Could you describe that for us?
18 A Sure. A short is basically a case that a customer ordered
19 that he didn't receive.
20 Q Okay. So, something that should've been, should've went
21 out on a delivery truck --
22 A It should've went out on a delivery.
23 Q Never made it.
24 A But it didn't.
25 Q Okay. And are you familiar with the terms, "warehouse

1 short" or "trans-short"?
2 A Yes.
3 Q Okay. And which one of those is kind of what you just
4 described to us, if any?
5 A Warehouse short.
6 Q That's a warehouse short?
7 A Yes.
8 Q Okay.
9 A Because it never did get to transportation.
10 Q Okay. And regarding that kind of short, when was the last
11 time that you, if that -- well, have you ever written an
12 inbound forklift operator, since you've been in your position,
13 for a warehouse short?
14 A No.
15 Q Okay. Now, forklift operators, they use scanners, right?
16 A Yes.
17 Q And that's where they have to scan the location --
18 A Right.
19 Q To where they're going to place a product, right?
20 A Correct.
21 Q Okay. And they have to scan, anytime they move a product,
22 they have to scan the product, too, right?
23 A That's correct.
24 Q Okay. And then, after scanning the product, then they
25 scan the location where they put it, right?

1 A Correct.
2 Q Okay. And with inbound forklift operators, they're not
3 told exactly where they have to place the product, right?
4 A No.
5 Q There may be a location in the warehouse where it has,
6 like a general location, right?
7 A Rule of thumb is you want to put a pallet away in that
8 aisle that the product actually goes.
9 Q Okay.
10 A Yeah.
11 Q So, it's kind of within the aisle?
12 A Within the aisle.
13 Q Okay. And what they'll do then, is they'll go to the
14 aisle and find an empty overstock slot. Is that right?
15 A Overstock, an empty, an empty slot.
16 Q Okay.
17 A Yes.
18 Q And now, when they place a product, they, like we said,
19 they scan the product and the location, right?
20 A Correct.
21 Q And then the scanner, is that what transmits it to the
22 central computer system? Is that right?
23 A It takes care of our invoicing, yes.
24 Q Okay. And there's antennas up in the warehouse, right?
25 A Correct.

1 Q And those antennas help transmit what goes from the
2 scanner to the computer?
3 A Correct.
4 Q Okay. When was the last time you noticed any work being
5 done on those antennas?
6 A Probably a couple of months ago.
7 Q Okay. How often has it happened since you've been in that
8 position?
9 A Probably about four or five times, maybe six.
10 Q Okay. And do you know why they were doing work on those
11 antennas?
12 A To get better reception.
13 Q Okay. Is that because some of the forklift operators,
14 were they complaining that their scans were dropping?
15 A That they were losing signals, yes.
16 Q Okay. It was -- When they lose signal, that kind of kicks
17 them out of the system. Is that right?
18 A It kind of freezes the system, freezes their information,
19 yes.
20 Q Okay. Now, inbound forklift operators, sometimes they'll
21 condense pallets, right?
22 A Can you repeat that, please?
23 Q Condensing pallets, is that -- is that a phrase that you
24 would use?
25 A What do you mean by "condense"?

Q Like, let's say you're in an aisle and you've got one pallet in this slot that could hold three, and then you've got one bay over, and you just have one, would they take those two and combine them into one? Is that something they could do?

A Yeah, I don't -- that's -- I don't think that's something we should do because of the fact that that same product, one of the pallets might have been received a week ago, and then one of them might've been received yesterday. So you really need to keep track of, you know the days that it comes in, that way you don't have spoilage.

Q Yeah.

A Yeah.

Q But, to conserve space, does that ever happen, where they'll kind of take pallets out of each bay to make a hole, like to open up a bay for maybe a three stack of pallets?

A They've done that before, but, again, if they do put product into the slot, and condense, as you said, they have to remove the older stuff and put it on top.

Q Got you.

A Yeah.

Q So, they can do it, they just have to be careful about how they do it. Is that right?

A I'm sorry?

Q They can do it, but they'll have to be careful about how they do it. Is that right?

1 A Absolutely.
2 Q Okay. Alright. If I could have you look at Respondent's
3 Exhibit Number 1.
4 A Okay.
5 Q Now, have you ever seen anything like this?
6 A Yes.
7 Q Okay. And so, you work in receiving, and I think if you
8 look at number 10 on there, it's kind of like on the bottom of
9 the page, is that where, like the product gets received from
10 the trucks?
11 A See what number two is, offices.
12 Q So, look at this location, right at the bottom.
13 A Yeah, I see that. Yes.
14 Q Okay. And --
15 A That looks like it, yes.
16 Q Where Mr. Meraz' -- where that pallet was found, and where
17 it was supposed to be, can you identify on this map, like what,
18 lo -- like where that part of the warehouse is?
19 A Yes, it's right in that purple area in the middle of the
20 page.
21 Q Okay. Just so I've got you right, would that be kind of
22 where the "V" comes down to the number 6?
23 A No, actually right in here.
24 Q Right in here? Oh.
25 A Not the lavender, the purple.

1 Q The dark purple?
2 A Yes.
3 Q Okay. And that area, is that for overstock?
4 A Every aisle holds overstock.
5 Q Every aisle holds overstock? Okay.
6 A Yes.
7 Q Because there are what, I think what you call, like,
8 reserve slots, and then pick slots, right?
9 A Correct.
10 Q And then the pick slots are where, well, the order
11 selectors, they go to the pick slots and pick out the product,
12 right?
13 A Correct.
14 Q But, if it's in a reserve slot, isn't it, it would be an
15 outbound forklift operator that, that has to go to that reserve
16 slot to get the product?
17 A If the order selector goes to the slot and it's empty, an
18 outbound guy, or an inbound guy, because the priority is we
19 service our customers.
20 Q Uh-huh.
21 A So, if you're inbound or outbound guy and order an order
22 selector needs a case, you go get that case.
23 Q Okay. But, that's when an order selector goes to an
24 actual pick slot, right, and it's not there?
25 A Right.

1 Q Okay.
2 A Then he asks for replenishment.
3 Q So, I want to just get a little clarification about kind
4 of the order of things, like, how the product moves from
5 receiving to the shipping side.
6 A Uh-huh.
7 Q So, with -- In receiving, you have, like the receivers who
8 get the product off the truck, right?
9 A Correct.
10 Q Okay. And then, is that where the forklift -- the inbound
11 forklift operator will take over?
12 A For stuff that is manually put away, yes.
13 Q Okay. And so then they'll take maybe a pallet, and then
14 they'll go put it in a reserve slot. Is that right?
15 A Yes.
16 Q Okay. And then, when it's time for that product to go out
17 to a truck, is that when an outbound forklift operator will go
18 and get the product or pallet from the reserve slot?
19 A It doesn't matter, a forklifter will get the product if it
20 needs to be shipped.
21 Q If it needs to be, but, I mean, typically, though, the
22 outbound forklift operators, that's what their daily tasks are,
23 though, right? They're going from a reserve slot to a pick
24 slot, right?
25 A Yes. But, you also have to see that sometimes inbound

1 forklifters do outbound duties.
2 Q Because there might be like an emergency pick or you never
3 know why, but you may need help on one end or the other, right?
4 A Yes.
5 Q Okay. But, as far as the way that the product flows, it
6 goes from a reserve slot to a pick slot, right?
7 A From a reserve -- yes.
8 Q And most often, that's going to be an outbound forklift
9 operator that takes it from the reserve slot to the pick slot,
10 right?
11 A That's correct.
12 Q Okay. So, if a pallet was missing, it would generally be
13 the outbound forklift operator who would go to that reserve
14 slot and say, "Oh, there's not the product I was expecting",
15 right?
16 A Yes. But, then again, I believe this happened on a Friday
17 night.
18 Q Uh-huh.
19 A We basically share forklifters. The inbound guys share
20 our forklifters with the outbound guys due to covering aisles.
21 So, although Mr. Meraz is an inbound forklifter --
22 Q Uh-huh.
23 A He was probably doing outbound duties at that -- that
24 night. Or, he was doing outbound duties that night.
25 Q But, with this incident, he was putting the product into a

1 reserve slot, right?
2 A I don't remember when he put it in, put it in a reserve
3 slot.
4 Q Uh-huh.
5 A I mean, the task sheet --
6 Q Yeah.
7 A That you have, will say when he put it away. So, I don't
8 know.
9 Q But, he got written up for failing to follow proper put
10 away procedures, right?
11 A Right.
12 Q Okay, and that's, that's inbound work, right?
13 A Yes.
14 Q Because outbound work doesn't include put-aways.
15 A It does.
16 Q Well, if they're crossing over into the inbound side.
17 A Yes.
18 Q Okay. So, do you know who first noticed that the pallet
19 was not where it was supposed to be?
20 A It had to have been Inventory Control.
21 Q Okay. Why not the forklift operator who was going to move
22 it? Because it was a full pallet pull, right?
23 A I believe so, yes.
24 Q Okay. And with full pallet pulls, you take a pallet, they
25 don't -- it may not go to a pick slot, they'll take it right up

1 to the loading dock, right?
2 A Sometimes they put it on a cart and leave it on the dock,
3 and somebody will drag it to the dock.
4 Q Okay.
5 A The shipping dock.
6 Q So, it kind of bypasses the order selector process?
7 A The special -- the spec -- most of the special, special
8 orders do, yes.
9 Q okay. And so, then it would typically be an outbound
10 forklift operator who would do a full pallet pull, right?
11 A Your question's a little confusing because I've already
12 stated that inbound guys do outbound -- that -- and when the
13 pallet couldn't be found, Inventory Control got involved. A
14 forklifter must've told Inventory Control.
15 Q Right. That's what I'm getting at. So, a forklift
16 operator must --
17 A Yeah. I don't know, I don't know which forklifter --
18 Q Okay.
19 A Whether it was inbound or outbound at the time, notified
20 Inventory Control.
21 Q But, just the way the process works, it had -- a forklift
22 operator would be the one who would notice it missing, right?
23 A If he couldn't find it, yes.
24 Q Okay. And then he would call Inventory Control, and they
25 would go look, right?

A Someone would call Inventory Control, yes.
Q Okay.
A If it's not where it is logically in the computer --
Q Uh-huh.
A Yes.
Q Okay. And that's part of their, the Inventory Control's job, they go around look for missing product.
A Is try to locate stuff that can't be found, yes.
Q Okay. Did you know that Mike Meraz, before he came to work for Shamrock, did you know that he was a Teamster before that?
A No, I did not.
Q Okay. And regarding breaks, so you've worked on both the outbound and the inbound group, right? Well, okay, I know --
A My forklifters do outbound duties, but as far as breaks?
Q Yeah.
A They take it as posted for inbound.
Q For inbound?
A Yes.
Q And that's how it is since what, January 24th, is that right?
A I believe that's when bids were made, and people fell into wherever they -- whatever they picked, due to seniority.
Q Okay. But even prior to that, breaks were designated. There was always a designated break time, right? For either

1 group.
2 A A posted designated break time?
3 Q Not posted, just designated, in general.
4 A It's pretty much posted.
5 Q Oh, it was posted before that, too?
6 A Yes.
7 Q Okay.
8 A Yeah.
9 Q And that would be for both groups?
10 A Pardon me?
11 Q For both groups, inbound and outbound?
12 A Yes. For inbound and outbound, yes.
13 Q Okay. So. Okay.
14 MS. DEMIROK: I don't have any other questions.
15 JUDGE TRACY: Mr. Dawson?
16 MR. DAWSON: Actually, Ms. Inesta is going to be --
17 JUDGE TRACY: Okay. So, one of the things that we
18 discussed was, I mean, at this point, I understand that you're
19 planning to call him back on your direct case. Is that
20 correct?
21 MS. INESTA: Yes.
22 JUDGE TRACY: So, I mean, if you anything at this point
23 about his testimony as a 611(c), please feel free. Or you can
24 wait until your case in chief.
25 MS. INESTA: Your Honor, we'll wait until our case in

chief.

JUDGE TRACY: Okay. All right. So, thank you very much. You're going to be called again.

THE WITNESS: Okay.

JUDGE TRACY: So, please don't discuss your testimony until after the close of the hearing.

THE WITNESS: Absolutely.

JUDGE TRACY: Okay. Thank you.

THE WITNESS: All right. Thanks.

JUDGE TRACY: Okay. So, at this point, shall we take a lunch break?

UNID MALE SPEAKER: I think so.

MR. DAWSON: No objection, here, Your Honor.

MS. INESTA: No objection here, either.

JUDGE TRACY: Okay. So, let's take a one hour lunch break. And then, we'll start back at, let's say 1:05. And that's what we can do.

How many more witnesses today?

MS. DEMIROK: I believe we'll probably get through three more witnesses.

JUDGE TRACY: Okay. All right. So, we'll start again at 1:05.

MS. DEMIROK: Okay.

JUDGE TRACY: Anything else before we take a break?

MR. DAWSON: Not from Respondent, Your Honor.

1 JUDGE TRACY: Okay.
2 MS. DEMIROK: No, Your Honor. Thank you.
3 JUDGE TRACY: Okay.
4 MR. DAWSON: Thank you.
5 JUDGE TRACY: Okay. Thank you. All right. We'll go off
6 the record.
7 (Off the record at 12:00 p.m.)
8 JUDGE TRACY: You can come up here. And you can remain
9 standing.
10 MR. GOMEZ: Okay.
11 Whereupon,
12 **RICHARD GOMEZ**
13 having been duly sworn, was called as a witness herein and was
14 examined and testified as follows:
15 JUDGE TRACY: Okay. Go ahead. Have a seat and state your
16 name and job title for the record.
17 THE WITNESS: I am Richard Gomez. I'm a warehouse
18 supervisor, my job title.
19 JUDGE TRACY: Go ahead, Ms. Demirok.
20 MS. DEMIROK: Okay. Thank you, Your Honor.
21 **DIRECT EXAMINATION**
22 Q BY MS. DEMIROK: Okay. Mr. Gomez, so I'm an attorney with
23 the federal government. I'm just going to ask you some
24 questions today, okay?
25 A Okay.

1 Q Now, have you reviewed any documents in preparation of
2 your testimony?
3 A Only with my counsel.
4 Q Okay. And have you spoken with anyone other than counsel
5 in preparation of your testimony?
6 A No.
7 Q Okay. Are you currently employed?
8 A Yes.
9 Q Okay. And where do you work?
10 A Shamrock Foods Company.
11 Q And how long have you worked there?
12 A This August will be 22 years.
13 Q Okay. And in what position do you work?
14 A I'm in the inbound receiving crew.
15 Q Okay. And how long have you been in the inbound receiving
16 crew?
17 A I've been a supervisor at the company since I believe the
18 end of 2000 --
19 Q Okay.
20 A -- with inbound, I want to say it's been maybe the end of
21 2006, 2007, somewhere around there that I was on that crew.
22 Q Okay. So it's been a while, right?
23 A Yes.
24 Q Okay. And could you briefly describe what your duties are
25 in that position?

1 A Incoming trucks coming in the building. Keeping the flow
2 going. Working with purchasing. Any discrepancies on the POs,
3 working with sales, making sure we don't take any outs on any
4 of the product. Systems business is a BK subway, so on, they
5 got a really, really cold chain that has to be followed.
6 Q Okay. So kind oversee what's going on in the receiving
7 area?
8 A Yes.
9 Q Okay. And about -- do you supervise like a group of
10 inbound forklift operators?
11 A Yes.
12 Q Okay. And do you have the authority to discipline them?
13 A Yes.
14 Q Okay.
15 MS. DEMIROK: And Your Honor, at this time I'm requesting
16 to continue my question where appropriate under Rule 611(c) of
17 the Federal Rules of evidence.
18 JUDGE TRACY: Go ahead.
19 MS. DEMIROK: Okay.
20 Q BY MS. DEMIROK: And so we just covered this, but you
21 supervise a group of inbound forklift operators. Is that
22 right?
23 A Yes.
24 Q Okay. And you don't directly supervise Mr. Mike Meraz, do
25 you?

1 A No.
2 Q Okay. So he's not on your team?
3 A He's on another shift.
4 Q Okay. And I think that would be David Garcia who is over
5 him. Is that right?
6 A Yes.
7 Q Okay. And -- but you know who Michael Meraz is, right?
8 A Yes.
9 Q Okay. And just so we're clear. Your position is the same
10 as David Garcia's, right?
11 A Yes.
12 Q It's just you work on different shifts. Is that right?
13 A Yes.
14 JUDGE TRACY: And so, let me just tell you, as I've told
15 the other witnesses. Just be sure to wait for the attorneys to
16 finish asking their question before you answer it, just to make
17 sure that you answer the right question.
18 THE WITNESS: Okay.
19 JUDGE TRACY: And also for the recording for the
20 transcript that we have later.
21 THE WITNESS: Okay.
22 JUDGE TRACY: Okay.
23 MS. DEMIROK: Okay. Thank you.
24 Q BY MS. DEMIROK: So you met with Mr. Meraz on January 18th
25 of this year. Is that right?

1 A Is the exact date in front of me?
2 Q Well, do you know when you met with him to -- it -- when
3 you -- you may have met with him more than once. But regarding
4 the incident with a missing pallet. Do you know when you met
5 with him then?
6 A I don't know if the exact date was the 18th.
7 Q Okay.
8 A Without looking at it.
9 Q But you met with him in your office, right?
10 A Dave Garcia's office.
11 Q It was in Dave --
12 A Yes.
13 Q -- Garcia's office? Okay. And so Dave Garcia was also
14 there, right?
15 A Yes.
16 Q Okay. And so why did you meet with Mr. Meraz on that day?
17 A For -- this is about the CPDR?
18 Q The CPDR, that's right.
19 A Okay. To serve him the CPDR.
20 Q Okay. And why were you going to serve him a CPDR?
21 A There was a pallet that was put away wrong location. We
22 ended up taking, I believe 30 outs on it.
23 Q Okay. When you say outs, do you mean shorts? Is that the
24 same in your mind?
25 A Yeah.

1 Q Okay. Now, what did you learn about that incident before
2 you met with Mr. Meraz?
3 A That he put it in -- he was the last one. He physically
4 put the pallet in one location and was not there. It was in
5 another location.
6 Q Okay. And did you have any role in investigating what had
7 happened with that missing pallet?
8 A Yes.
9 Q Okay. Can you tell us about that?
10 A I saw that we had a missing pallet. Took 30 outs on it.
11 I looked at it. Basically he put it away in one location --
12 Q Uh-huh.
13 A -- and it was a couple bays over in another location.
14 Logically here, physically here.
15 Q Okay. Now, you said that you saw the -- that there were
16 30 outs?
17 A Yes.
18 Q Okay. How did you -- what were you looking at? How did
19 you see that?
20 A Inventory control.
21 Q Okay.
22 A On their report then sent out the end of the night. It
23 was on a Friday night.
24 Q Uh-huh.
25 A They had shot out the report that we took a large number

1 of outs, 30 outs, due to a missing pallet they couldn't find.
2 Q Okay.
3 A I worked Saturday morning.
4 Q And when you saw it, was the first time you learned that
5 that had happened?
6 A About the outs?
7 Q Yeah.
8 A Yes.
9 Q Okay. And then who, if anyone, did you notify about that?
10 A At what point?
11 Q Well, once you learned about it, what was your next step?
12 A Well, it -- when I got to work Saturday, I did some
13 looking around, some investigating. And I ended up finding the
14 pallet, did some research, who put it away where it was
15 supposed to be versus where it was found.
16 Q Okay. And did you do -- so you went and did that before
17 you went and talked with anyone else about the incident. Is
18 that --
19 A Yes.
20 Q -- right? Okay. And on the report that you looked at in
21 learning, first learning about the 30 outs, what did that --
22 did that report tell you who had last touched those 30 cases?
23 A I don't recall. I just remember -- you know, I wake up
24 Saturday morning --
25 Q Uh-huh.

A -- 4:30 in the morning. Look at my phone.
Q Yeah.
A See what I'm walking into. And I saw 30 outs. Was supposed to be in a location. Wasn't there. Couldn't find it.
Q Okay.
A I don't really remember after that. Can't say. But I got to work and did some research and found the pallet.
Q Got you. And when you said did some research and then found the palette, the research that you're talking about, what -- like what kind of research did you do?
A The -- every palette that's received has an LPN on it.
Q Uh-huh.
A License plate number. I punched that up to see who put it away, where they say they put it away and start from there.
Q Okay. And so when you looked, could you tell who -- what forklift operator it was that was supposed to put it away?
A Yes.
Q Okay. And who was that?
A Mike Meraz.
Q Okay. And then when you went to go look for the missing palette --
A Uh-huh.
Q -- how long did it take you to find it?
A I don't recall. If I had to guess -- because I'm the only guy in there Saturday morning. I'm running around doing my

1 crew. But in the meantime that morning, every time I get a
2 chance, I'm driving down an aisle just looking for a palette.
3 Q Uh-huh. But it was in the next bay over, wasn't it?
4 A Yes.
5 Q Okay. So did you first go to where it was logically
6 placed?
7 A I went to where it was supposed to be.
8 Q Yeah.
9 A And looked around there. It was an empty hole.
10 Q Okay. And then did you just look over and there it was?
11 A I want to say it -- I don't know off the top of my head.
12 Q Yeah.
13 A Maybe I drove the aisle a couple times, but then I did
14 find it. If I had to guess, I would say maybe I found it an
15 hour.
16 Q Okay. But before you learning about it, inventory control
17 already knew about it, right?
18 A Yes.
19 Q Okay. And the process for when a palette goes missing,
20 when it's a missing palette that's in an overstock slot like
21 this --
22 A Uh-huh.
23 Q -- what kind of employee in the warehouse would first
24 notice that it goes missing?
25 A The forklifter would be the first one to notice that it's

1 missing.
2 Q The outbound forklifter?
3 A Yes.
4 Q Okay. And then let's say it's an outbound forklifter and
5 then they notice there's a missing palette --
6 A Uh-huh.
7 Q -- what are they supposed to do?
8 A They would notify inventory control.
9 Q Okay. And in this scenario, did you learn that that's
10 what happened?
11 A I would -- no, I wasn't there Friday night.
12 Q Okay, but in your research, did you learn that that
13 happened?
14 A That a forklifter --
15 Q Contact inventory control?
16 A No.
17 Q Okay. Did you learn how inventory control found out about
18 the missing palette?
19 A I'm --
20 Q So --
21 A -- getting a little confused.
22 Q Sure.
23 A If there's --
24 Q Yeah, I don't --
25 A -- if there's a -- let me try and understand you. Here's

1 pick slot.
2 Q Uh-huh.
3 A Picker has a pick label. He goes there. It's not there.
4 He tells the forklifter. "Forklifter, I need this pick slot
5 right here replenished." Forklifter goes, punches it up,
6 drives there. There's nothing there. He has a radio call to
7 inventory control. "Inventory control, I got a lot palette."
8 So I mean, that's -- there's -- I guess to answer your
9 question, there's -- I don't know another way that somebody
10 would find out that there is a lost palette.
11 Q Okay. So that would be the only way.
12 A Does that make sense?
13 Q Yeah. Okay. So maybe it seemed -- it was an obvious
14 question to you. Is that -- so a fork -- the forklift operator
15 -- no one else would have contacted inventory control, other
16 than an outbound forklift operator. Is that what you're
17 saying?
18 MS. INESTA: Your Honor, I'm going to object to the extent
19 it calls for speculation.
20 JUDGE TRACY: Well, I'm going to overrule the objection,
21 because I think, you know, Ms. Demirok, if you could just
22 clarify your question about, you know, "So you just testified,"
23 -- because I think that's what's happening is that --
24 MS. INESTA: It's like generally or in this situation,
25 there seems to be kind of a conflating of --

1 JUDGE TRACY: Okay. And I -- and so I think, though, that
2 -- it seems as though in this situation, but just to be
3 clear --
4 MS. DEMIROK: Uh-huh.
5 JUDGE TRACY: -- start your question with what you're
6 intending, whether generally or in this situation.
7 MS. DEMIROK: Okay. Thank you, Your Honor.
8 Q BY MS. DEMIROK: So generally speaking, an inventory
9 control personnel, they get notified by a forklift operator
10 when there's a missing palette, right?
11 A Correct.
12 Q Okay. And we're talking about missing palettes in reserve
13 slots, right?
14 A Correct.
15 Q Okay. And when I say reserve slot, you know that I mean
16 like an overstock slot, right?
17 A Correct.
18 Q So we're not talking about a pick slot, are we?
19 A You could have a missing palette in a pick slot.
20 Q You could. You could, because order selectors also -- I
21 mean, they move palettes around too, right? Not as --
22 A No.
23 Q Not really, but -- okay. But in this situation with
24 Michael Meraz' missing palette, that was in a reserve slot,
25 right?

1 A Yes.
2 Q Okay. And that was also a full palette pull, right?
3 A That I don't know.
4 Q You don't know that. Okay. So when you investigated this
5 situation, you didn't learn about whether or not it was a full
6 palette pull?
7 A I don't recall.
8 Q Okay.
9 A The only difference -- a full palette pull is -- a
10 forklifter has a bulk label. He's going to take it to the
11 door, versus a picker has 30 labels, he's going to pick it all
12 and take it. So there the --
13 Q Right.
14 A Yeah.
15 Q So when it's a full palette pull, it bypasses the order
16 selector, right?
17 A It would -- the forklifter would grab it.
18 Q Okay.
19 A So --
20 Q Now, in this situation, did you learn how inventory
21 control -- how did they find out about it? How were they
22 notified? Did you learn that?
23 A Shipping. Needed it for shipping. Shipping needed it to
24 go on a truck, I guess.
25 Q And when you say shipping, was that someone in particular?

1 A I don't know who it was.
2 Q Okay. Do you know what position that person in shipping
3 worked in?
4 A I don't know.
5 Q Did you learn when this product first arrived at the
6 warehouse?
7 A I don't recall.
8 Q Okay. So you learned about when you -- on your report.
9 And then you said you investigated it, right?
10 A Yes.
11 Q Okay. And what are all the things you did during your
12 investigation?
13 A I looked at -- started off with the basic here's the LPN
14 number that went missing. Looked to see who put that LPN away.
15 I look at -- I try and find -- I try and go to the pick slot,
16 see if there's something there, so I know what I'm looking for.
17 In this case, pick slot was empty. I didn't know what I was
18 looking for. It's easy to distinguish -- I know what that box
19 looks like, so I can -- at least I know when I'm looking. It's
20 like a needle in a haystack.
21 Q Uh-huh.
22 A I didn't have anything that -- didn't know what the case
23 looks like. I think we carry 19,000 items, so --
24 Q Okay.
25 A I looked at the pack size. It kind of gives me -- you

1 know, I kind of think I know what it looks like. I mean, I
2 know -- maybe I'm guessing how the packing comes. So now I'm
3 just driving the aisles looking for -- I look at the -- I put
4 the information on the palette. I try -- when you're looking,
5 you know, 30, 40 feet up in the air, it's hard to read the --
6 you know, all the numbers, so I'll look at the -- I'll get the
7 information that we have in the system, like manufacturer
8 number on the box. Sometimes --
9 Q Uh-huh.
10 A -- those are real big, versus a nine digit number, you
11 know, that that's that big and you're looking -- you know.
12 I'll do all that and then I just start -- it's finding a needle
13 in a haystack basically. And I just start driving and looking.
14 Looking and looking.
15 Q Okay.
16 A You get lucky and you find it.
17 Q And then this time you did find it. And what did you do
18 after you found it?
19 A It got with inventory control, had them reinstate it, put
20 in the pick slot. And I let the sales person know. I believe
21 that they keyed it on a special order that morning and it got
22 shipped to the customer.
23 Q Okay.
24 A I believe.
25 Q And who else -- any supervisors or managers in the inbound

1 team? Did you talk with any of them about this incident while
2 -- before you had done all this?
3 A Before I had done it all?
4 Q Yeah.
5 A No.
6 Q Okay.
7 A I'm the only person there Saturday. I'm the only
8 management in the building Saturday.
9 Q And so after you did that, you go the product out, then
10 what did you next regarding this incident?
11 A I let Ivan know about it.
12 Q Okay.
13 A My manager.
14 Q Ivan Vaivao, right?
15 A Yes.
16 Q Okay. And how did you let him know about that?
17 A I don't recall. Probably over the phone, but I do not
18 recall.
19 Q Okay. And so what did Ivan have to say about it?
20 A I gave him the information that I found, explained him the
21 -- explained to him.
22 Q Like what you had done?
23 A Yeah.
24 Q Okay.
25 A He said go ahead and proceed with the CPDR, so I did a

1 CPDR.
2 Q Did you recommend to him that you should issue a CPDR or
3 were you just giving him information?
4 A I gave him information.
5 Q Okay. And so after he authorized the CPDR, what did you
6 do next?
7 A I called for a CPDR.
8 Q Okay. So he -- but he told you you should do that, right?
9 A Yes.
10 Q Okay. And then you called for a CPDR. Does that mean --
11 what does that mean?
12 A The person that issues CPDRs.
13 Q Okay.
14 A Told her I need a CPDR. Here's what happened. And gave
15 her the information so she can issue a CPDR.
16 Q Okay. And eventually you did present that CPDR to Mr.
17 Meraz, right?
18 A Yes.
19 Q Okay. And -- but he didn't want to sign it. Is that
20 right?
21 A Correct.
22 Q Okay. He insisted that he wanted to speak with Daniel
23 Santa Maria. Is that right?
24 A Correct.
25 Q Okay. Now, in your conversation with Ivan that we just

1 spoke about --
2 A Uh-huh.
3 Q -- when he told you to do the CPDR, did he tell you what
4 it should say?
5 A No.
6 Q Okay. Did he tell you what it would be -- what the
7 violation was?
8 A I don't recall my exact conversation.
9 Q Okay.
10 A I don't recall my exact conversation.
11 Q Okay.
12 A Because the -- on the CPDR -- if you look at the CPDR,
13 it's -- are you saying did he tell me what to write on the
14 CPDR? That's just what -- this LPN was put away here.
15 Q Uh-huh.
16 A It was found here. And that's --
17 Q Just like what happened?
18 A That's me -- my words, what I type up a CPDR (sic).
19 Q Okay.
20 A And the girls just copy it.
21 Q Did you talk with Ivan about what the put away procedures
22 were?
23 A I don't recall.
24 Q Okay. Could you just -- do you know what a short is?
25 A Yes.

1 Q Okay. And we kind of talked -- you called it an out
2 earlier, right?
3 A Uh-huh.
4 JUDGE TRACY: Sir, can you say yes or no, please?
5 THE WITNESS: Yes.
6 Q BY MS. DEMIROK: And could you describe for us, what is a
7 short?
8 A Doesn't make the truck.
9 Q Okay. So something that should have been on a truck that
10 never gets there, right?
11 A Correct.
12 Q Okay. And are you familiar -- and that's -- are you
13 familiar with the terms warehouse short and trans short?
14 A Yes.
15 Q Okay. Now what you just described, the not making it on
16 the truck, what -- which one of those two is that?
17 A A warehouse short or a trans short?
18 Q Yeah.
19 A This would be warehouse.
20 Q Okay. Have you ever written up an employee for a trans
21 short?
22 A Not that I can remember.
23 Q No. Okay. Now, prior to this incident with Mr. Meraz,
24 when was the last time that you wrote someone up for failing to
25 follow put away procedures?

1 A I don't know off the top of my head.
2 Q Okay. And have you ever written anyone -- like an inbound
3 forklift operator for a short?
4 A I don't know off the top of my head --
5 Q Okay.
6 A -- over all the years that I've been a supervisor.
7 Q So you couldn't think of an example then?
8 A Not off the top of my head.
9 Q Okay. Has it ever happened?
10 A You mean doing write-ups?
11 Q For inbound forklift operators that -- for shorts.
12 A I can't give a specific without -- I don't know want to
13 say -- I'd really have to go back and look. I --
14 Q Okay. Were you asked to go back and look prior to coming
15 and testifying here today.
16 A No.
17 MS. INESTA: Objection to the extent it invade the
18 attorney client privilege. I mean, asked by whom?
19 JUDGE TRACY: Well, was this part of the subpoena request?
20 MS. DEMIROK: Yes, it was, Your Honor.
21 JUDGE TRACY: So I mean, I respect the objection here, but
22 there was the subpoena. And I'm not so sure it matters who
23 asked, but that there was documents that needed to be turned
24 over. So I would say, Mr. Gomez, if there's any sort of
25 attorney conversations, you're not to reveal those in your

1 testimony. So --

2 MS. INESTA: I'm going to also object as to foundation,

3 because the -- a write-up would be a CPDR, which would be in

4 the custody of the company. And to the extent that this

5 witness isn't going to know what was done to search all of the

6 CPDRs I guess is also -- so -- okay.

7 JUDGE TRACY: Well, so --

8 MS. INESTA: And then there's -- but then -- but I'm also

9 worried about the revealing of con -- of the conversations

10 themselves about --

11 JUDGE TRACY: So what I would say is that please don't

12 reveal any conversations that you had with any of the attorneys

13 for Shamrock. I think this is a pretty simple question, but I

14 can understand that it goes beyond that of searching for

15 documents is --

16 MS. INESTA: Yeah.

17 JUDGE TRACY: -- you know --

18 MS. INESTA: Yeah.

19 JUDGE TRACY: So go ahead and repeat your question.

20 MS. DEMIROK: Okay.

21 JUDGE TRACY: Add the -- add in something about attorney

22 client, though, to your question.

23 MS. DEMIROK: Okay.

24 Q BY MS. DEMIROK: Without revealing any conversations you

25 may have had with the company's attorneys, were you asked to

1 find any -- were you asked to locate any past CPDRs relating to
2 failing to follow put away procedures?
3 A I'm sorry. I don't understand.
4 Q Well, let me start here. So do you have access to write-
5 ups, prior write-ups?
6 A No.
7 Q Okay.
8 JUDGE TRACY: How many years have you been a supervisor?
9 THE WITNESS: Since 2000, end of 2000.
10 JUDGE TRACY: Same position?
11 THE WITNESS: Different departments.
12 JUDGE TRACY: So --
13 THE WITNESS: But I've been a warehouse supervisor, but
14 shipping, receiving.
15 JUDGE TRACY: So this inbound receiving crew -- and I'm
16 sorry. You might have discussed this before. But how long
17 have you been inbound receiving crew supervisor?
18 THE WITNESS: I believe it was end of 2006.
19 JUDGE TRACY: Okay.
20 THE WITNESS: Maybe 2007, I believe, that I came on.
21 JUDGE TRACY: So you've held this, your current position
22 since 2006 or seven.
23 THE WITNESS: Yes.
24 JUDGE TRACY: Okay. Thank you.
25 Q BY MS. DEMIROK: And so, just to be clear -- and we can

1 move along. But so you can't recall first any specific
2 examples of times when you issued a CPDR to an inbound forklift
3 operator for failing to follow put away procedures?
4 A That's a broad term. I guess that's where I'm not
5 understanding. Put away procedures could be -- you could put a
6 palette of cilantro or whatever it might be -- marshmallows
7 that's not tall and put a palette of six tens -- the pineapple,
8 whatever. Green beans. Whatever it might be --
9 Q Uh-huh.
10 A -- but they're 60 pound. You know, a case of them.
11 Q Yeah.
12 A That's that tall a ways, you know. And the -- he stacks
13 it on top and then and puts it into a slot and it falls,
14 crushes. That's a put away procedure. That's why -- that's
15 why I'm getting confused. That's such a broad term.
16 Q Okay.
17 A There can be a hundred, you know, put away procedures.
18 And I -- over the course of my years, I'm sure I have. Is it
19 specifically what you're saying? I'd have to wrap my mind up.
20 Q Okay.
21 A I may have, but I may not. I don't want to say I did --
22 and I didn't. But have -- for put away procedures, have I done
23 a CPDR? I'm sure I did. But it's such a broad term. Is it
24 specifically what you're saying?
25 Q Okay. I see what you mean. So --

1 A Yeah, there -- it's such a broad term. It could --
2 there's put away procedure could -- doesn't pertain to one
3 thing. It's -- I got a palette of tomatoes and it belongs in
4 this temp zone.
5 Q Uh-huh.
6 A I put it in this temp zone and now it sits there and it
7 gets too chilled or too warm.
8 Q Yeah.
9 A We throw it away. It's a loss.
10 Q Uh-huh.
11 A Have I done a CPDR for that? You know, like I -- yeah,
12 but is it what you're -- that's -- I'm not sure what you're --
13 Q Okay.
14 A -- pertaining to. You know what I mean?
15 Q So --
16 A I don't to say yeah. But it's such a broad term.
17 Q Put away procedures then, it -- they are a lot more to the
18 put away procedures than just placing an item in a location and
19 scanning that location. Is that what you're saying?
20 A The term improperly put away procedure --
21 Q Yeah.
22 A -- like I said, it could be -- does it mean that? Yeah,
23 absolutely. Can it mean --
24 Q Other things?
25 A -- another situation? Absolutely.

Q Okay.
A And that's why I'm -- in my head, I'm -- I don't -- I'm --
Q Got you.
A Specifically for that one that you're asking, I'd really have to look.
Q So --
A I really would.
Q -- then with Mr. Meraz, was his more about the fact that it resulted in 30 shorts? Is that why he was written up?
A It was -- it was a lost palette that resulted in 30 shorts.
Q Okay.
A Ultimately hitting the customer.
Q And we talked about this a little bit, but I don't think you could recall a specific example when an inbound forklift operator -- when you have written up an inbound forklift operator for shorts. Is that right?
A Again -- and it's a -- it's such a broad thing. I have a -- it's the -- we order one case. We were at -- we have one case that'll come in and that's a palette. It's -- has a license plate. It's on a palette.
Q Uh-huh.
A That one case, it's a special order. Apple cider. Customer really wants it. Special ordered it. Whatever it is. The forklifter drops it. Breaks it. Now it's a customer out.

1 And it could be -- there could so many different -- not
2 necessarily -- you know, I lost that. That one case was never
3 lost. It was right there. It's all over the ground broken.
4 Q Yeah.
5 A You know, glass everywhere. So that's --
6 Q But damages, isn't that a different category of
7 discipline?
8 A It's such a broad -- it kind of -- how did I break that
9 case?
10 Q Because I mean, there are different categories of
11 discipline in the warehouse. You know what I mean by that,
12 right? Like there's certain policies. Like there's a policy
13 for shorts. There's a policy for mispicks. I think there's a
14 policy for damages, too, right?
15 A That I put it away wrong? That I -- I know what you're
16 saying.
17 Q Okay. And I -- and that is correct, right? There's
18 different categories. And damages is a separate category from
19 shorts, right?
20 A I think you're -- I believe you're referring on the
21 shipping end.
22 Q Okay. Because -- and usually it's the shipping end that
23 you'll see shorts more common on the shipping end, right?
24 A Not necessarily.
25 Q So when was the last time that you wrote someone up on the

1 receiving side for a short?
2 A I believe it would be Michael Meraz.
3 Q Okay. And prior to that?
4 A I'd have to go back and look.
5 Q Okay. Now forklift operators, they use scanners, right?
6 A Yes.
7 Q Okay. And each time they move a product, they have to
8 scan the product, right?
9 A Yes.
10 Q And then they have to scan the location that they put it
11 in, right?
12 A Yes.
13 Q Okay. And that's -- the scanners then, they send -- they
14 transmit the signal to like a computer system. Is that
15 correct?
16 A Yes.
17 Q Okay. And that's why there's antennas up in the
18 warehouse, right?
19 A Yes.
20 Q Okay. And have you ever -- has a forklift driver
21 complained to you about the system kicking him out?
22 A Yes.
23 Q Okay. And have you ever -- has there ever been a
24 contractor or someone doing work up on the antennas in the --
25 A Yes.

1 Q -- in the receiving side? When was the last time you saw
2 that?
3 A Contractor doing work?
4 Q Yeah, or anyone doing work on the antenna system.
5 A Don't recall top of my head. I'd be -- if -- I'd be
6 guessing. I'd say maybe a month.
7 Q Okay. After February?
8 A Well -- oh, I'm sorry. A month. Maybe a month ago
9 from --
10 Q Maybe a month ago?
11 A -- from -- yeah, from --
12 Q Okay. So it was sometime after February though, right?
13 Because last month would be April. February is before April.
14 A I'm sorry. Can you -- I was watching him walk out the
15 door.
16 Q Oh, sure.
17 A Sorry.
18 Q So you think it was about a month ago, right? That they
19 did work on the antennas?
20 A Yeah, I believe, yeah.
21 Q Okay. Is it safe to say that they did the work sometime
22 after Mr. Meraz was written up?
23 A Yes.
24 Q Okay. And do you know the reason why they were working on
25 the antennas?

A Trying to get a better signal.
Q Okay. Would that be relate to the complaints that the forklift operators had that we talked about?
A Losing signal?
Q Yeah.
A Yes.
Q Okay. When you were talking about how you investigated this incident with the missing palette --
A Uh-huh.
Q -- you talked about how you went around looking for the palette. Have you had to look for palettes in the past?
A Yes.
Q Okay. How often does that happen?
A Pretty often.
Q Pretty often. Okay. Why would that ha -- why would you have to go look for one?
A It could be -- the list goes on and on. Palettes missing from the picks lot. There's supposed to be five cases.
Q Uh-huh.
A They're not there. Picker could have drove by, instead of picking this slot, they picked that slot. Now they're gone.
Q Okay.
A We have no record of what happened to them, until they come back however many days later returned as a mispick.
Q Okay.

1 A It can just go on.
2 Q So you know that the warehouse employees are trying to
3 organize, right?
4 A Yes.
5 Q Okay. And a few of the employees are pretty open about
6 their support, aren't they?
7 A I hear hearsay, but I don't -- I know something's going
8 on.
9 Q Uh-huh.
10 A I'm not involved in the he said she said.
11 Q Yeah. With any of the things you've heard, have you heard
12 that Steven Phipps, you know, that he's part of it, right?
13 A I've heard that he said she said. Has Steve ever came and
14 told me, "I'm part of this," I've never heard that. I hear
15 that he said she said.
16 Q Okay. So he --
17 A But I've never --
18 Q -- didn't --
19 A I've never --
20 Q -- come right up to you and say, "Hey" --
21 A Me and Steve --
22 Q -- "I'm organizing."
23 A Me and Steve have never had that conversation.
24 Q Okay.
25 A You hear the he said she said in the warehouse.

1 Q But have you heard it about him?
2 A I heard about him.
3 Q Okay. Did you ever hear about Michael Meraz?
4 A Never Michael Meraz.
5 Q But he's pretty open about -- he's been a long time union
6 member, hasn't he?
7 A It's news to me.
8 MS. DEMIROK: Your Honor, could I just have one moment? A
9 couple minutes?
10 JUDGE TRACY: Sure. Let's go off the record.
11 (Off the record at 2:11 p.m.)
12 Q BY MS. DEMIROK: Okay. So Mr. Gomez, the break times for
13 the shipping or the receiving team, those have always -- you've
14 always had a designated break time, right?
15 A Correct.
16 Q Okay. And so on January 24th, I think that's when the new
17 -- when the rebid started, or the rebid was a -- came about.
18 A Don't know the exact date, but it was somewhere around
19 there.
20 Q Okay. But after that happened, they started posting break
21 times on the work schedules. Is that right?
22 A Correct.
23 Q Okay. But they had been designated prior to that, right?
24 A Correct.
25 Q Okay. Okay. Now, I'd like to show you and I think you

1 have it up there what's been marked as GC Exhibit Number 16.
2 A Okay.
3 Q It should be a copy of an email.
4 A Okay.
5 Q Okay. And in this is an email from you to several people,
6 right?
7 A Yes.
8 Q Okay. And if you look at the body of an email, it looks
9 like you're informing the recipients that Steve Phipps and Roy
10 Aja were in the break room when they weren't supposed to be.
11 Is that right?
12 A Yes.
13 Q Okay. And you gave the explanations as to why Roy and
14 Steve told you they were in there at that time, right?
15 A Yes.
16 Q Okay. Now, looking at who you sent his email to, are
17 those all supervisors at Shamrock?
18 A And managers.
19 Q And managers, too. Okay. All the way up to Ivan Vaivao.
20 Is that right?
21 A Yes.
22 Q Okay. So why did you send that?
23 A To communicate to everybody -- to communicate everybody
24 (sic) the information in here.
25 Q Okay. Just the information that's in there?

1 A Yeah. I don't know the exact date that that rebid
2 started.
3 Q Uh-huh.
4 A But it was -- without me looking back and saying this
5 exact date.
6 Q Uh-huh.
7 A This was at the beginning of it. We had split the crews.
8 We -- forklifters used to be shipping --
9 Q Uh-huh.
10 A -- reporting to shipping supervisor, shipping management.
11 Q Yeah.
12 A The forklifters, inbound forklifters reported to receiving
13 crew. Back before -- going back a year or so, we said hey,
14 let's combine the forklifters. Now I'm not a shipping, not a
15 receiving. Now I'm a forklifter and I do both jobs. I do
16 shipping. I come on the dock. I put away. I go in the house.
17 I replenish for the forklifters. So no, I'm no longer shipping
18 and receiving. I'm just a forklifter. And we -- a big group
19 of them report to inbound. Didn't work out as well as we liked
20 it to.
21 Q Uh-huh.
22 A So we did it for maybe a year or so. And then that's when
23 we said, okay, let's change this. Let's go back the way it
24 was. So that's why we did the rebid. Okay. So now you have
25 the shipping forklifters reporting to shipping again. The rec

1 -- inbound forklifter put away guys reporting to us again.
2 This was right at the beginning. And that's what I wanted to
3 make sure, because I have -- like I say, I have Ivan, because
4 Ivan's in charge of shipping. And --
5 Q And both.
6 A Yeah, both.
7 Q Receiving, right?
8 A And I got Armando on here. Here's the shipping manager.
9 I want him to know what's going on, too. You know, what I
10 don't want them to come down on these guys. Hey -- well Roy
11 was another issue with the truck. But like with Steve, I don't
12 want somebody from shipping crew -- hey, we asked Steve to get
13 his forks on. He told me he was going to lunch. I want
14 Armando in the loop. Hey, Armando, here. This is what we did.
15 Remember, we split our guys.
16 I just want to make -- I'm keeping everybody in the loop.
17 He's part of our crew now. He's -- if you do need him, we got
18 to communicate. If you're in that bad -- you know, a bind, you
19 know -- but that's -- it's just a communication.
20 Q But you didn't actually put that in your email, did you?
21 I mean, you didn't tell them the reason why you were sending
22 the email as you've explained it, right?
23 A Let's see. Well, at the end here, I told -- you know --
24 because when I approached Steve and told him hey, you know,
25 what's going on? You should -- lunch is over. Oh, I came up.

1 I was helping shipping. I'm letting him know, hey, you don't
2 dictate -- you don't make -- you don't create your own break
3 when you want to go. We set them. We said well should I just
4 -- I just -- what did I put here?
5 I think I put exact words. So I just drop everything and
6 just go. Well communicate. Let the guys know. The shipping
7 guy. If the shipping guy asks you, "Hey, can you help us out?"
8 don't just walk away. But it's your lunchtime. Hey, I'm going
9 to lunch. And that's why I'm copying Armando on here. So he's
10 clear. He can let his team know. If we do -- if we need to
11 adjust, if we -- so they jump all over him. So they can get
12 their guys in there. Make whatever kind of coverage changes
13 they need to. It's just the communication. Letting everybody
14 know.
15 Q Okay. Now, Roy Aja, he's not a forklift operator, right?
16 A He's a receiver.
17 Q Okay. And so he never -- when this whole change occurred,
18 prior to this, Roy Aja wasn't affected by the change, was he?
19 A As far as the lunches? His set time?
20 Q No, just as far as who he were -- you talked about how
21 with forklifters, they would sometimes do shipping and
22 receiving report to -- you know, they all report to shipping.
23 You know, you were telling us that as explanation about why you
24 sent this email, right?
25 A Yeah.

1 Q Because now it -- when you sent this email, it wasn't like
2 that anymore. It was either -- like Steve. He was on the
3 receiving team, right?
4 A Correct.
5 Q Okay. But Roy, he didn't go through that change in
6 supervision, did he?
7 A No. He's always stayed receiving reporting to inbound
8 through that change.
9 Q Okay. And Jonny Banda, does he work in the same position
10 that you do?
11 A Yes.
12 Q Okay. Just a different shift?
13 A Same shift.
14 Q Same shift?
15 A Yes.
16 Q Okay. Now, did you ever meet with employees to tell them
17 -- after this whole change with the rebid, did you meet with
18 them and talk to them about their breaks?
19 A I believe we had a crew meeting --
20 Q Okay.
21 A -- at the rollout of all this.
22 Q And who -- did anyone tell you to have that meeting?
23 A No. I believe my manager had it. I was there.
24 Q Okay.
25 A I believe -- that's what --

1 Q And I'm sorry --
2 A -- at beginning of all these.
3 Q -- who's above you?
4 A Ernie Nicklin.
5 Q Is that the same as Brian Nicklin?
6 A Yeah.
7 Q Okay. And then Brian reports to Ivan. Is that how it
8 works?
9 A Correct.
10 Q Okay. So Brian told you to have a meeting with employees?
11 A No.
12 Q No.
13 A I didn't have a meeting with them.
14 Q You didn't meet with the crew?
15 A No, I didn't meet with -- I believe -- I said I believe
16 Ernie had a meeting. I believe there was a meeting --
17 Q Uh-huh.
18 A -- where we told the guys about their breaks and lunches.
19 Q Okay.
20 A But not me giving a meeting.
21 Q Were you there?
22 A I believe I was.
23 Q Okay. And was the meeting just about breaks and lunch?
24 A Probably not, but I can't say for sure.
25 Q Okay. You said it was at the rollout of this --

1 A Yeah.
2 Q -- the shift of the bids?
3 A I'd be guessing, unless if it was a day that I was off.
4 It was a long time ago. If it was a day that I was off, I
5 wasn't there.
6 Q Okay.
7 A But I want to say they would be covering everything. Pay.
8 Making sure everybody has the right gear, if they're changing,
9 going to new zones. Making sure everybody's squared away on
10 start times, know who they're reporting to, making sure
11 vacations, because now we're changing. Hey, make sure -- it's
12 the beginning of the year. We're bidding vacations. All that.
13 Your vacation's now go to this -- it -- I'm sure there was a
14 lot of information covered in there. But I just can't remember
15 off the top of my head. I know we would have had a meeting. I
16 just can't remember specifically --
17 Q So --
18 A -- because it's so long ago.
19 Q Now, we talked about this email, the GC Exhibit Number 16.
20 A Uh-huh.
21 Q Have you ever sent an email notifying other supervisors in
22 the warehouse that employees weren't taking their breaks when
23 they were supposed to?
24 A Yes.
25 Q Okay. And is that because breaks have always been

1 designated?
2 A On -- I'm just keeping -- if you look, I'm sending -- I
3 guess -- you're asking who I'm sending it to, right?
4 Q Yeah or just any supervisor. Have you --
5 A These are guys on my team. Johnny, Dave, Roy. They're on
6 my team. I'm just -- I'm keeping them in the loop. I'm
7 letting Armando know what's going on. I want the other guys
8 all in the loop. Even though Dave works second shift, Roy
9 works third. That's how we communicate with each other.
10 Otherwise I'll never see them and I won't talk to them. So I'm
11 just trying to keep my fellow supervisors in the loop, the rest
12 of my team.
13 And I sent every -- sent it to my boss, Ernie. And you
14 know -- and going back on Roy, I'm letting him know -- how do I
15 say this. It's -- I guess it's hard, because you don't -- you
16 don't work there. You don't need. Specialties of special
17 produce like special produce truck that comes in.
18 Q Uh-huh.
19 A It's about a hundred items. It's one of this. One of
20 this. It's the weirdest produce from all over the world that
21 you don't see.
22 Q Yeah.
23 A The buyers want it closed. Hey, we got to have it closed.
24 We got to have it closed. And that's where Roy's saying, "Hey,
25 the buyers are telling me, you know, they need specialty." No,

1 I'm your direct supervisor. I'm telling you go when you're
2 supposed to. I'm copying Ernie and Ivan on that, too, because
3 you know, given them a heads up. The produce guys are calling,
4 "Hey, how come you closed my truck ten minutes late? My PO."
5 Q Uh-huh.
6 A So that's -- you know what I mean? It's --
7 Q So were you --
8 A -- just information.
9 Q -- kind of looking out for Roy, because he did that at
10 your direction? Is that --
11 A No. No. I --
12 Q -- what you're trying to say? I --
13 A -- was telling Roy he needs to stick to the schedule.
14 Q Okay.
15 A I was telling him don't worry about specialty. Don't
16 worry about -- I'll deal with -- our inbound management will
17 deal with purchasing.
18 Q Uh-huh.
19 A If they tell you they need you to work through, or
20 whatever. You don't report to them. But I'm keeping everybody
21 in the loop on that, too.
22 Q Okay.
23 A So they know what's going on.
24 Q So this isn't the only time that you've informed other
25 supervisors about employees taking their breaks outside the

1 designated time. Is that right?
2 A Correct.
3 Q Okay. So I'm giving you what's been marked as GC Exhibit
4 Number 17. And this is a series of two emails. And what I'd
5 -- I'd like to draw your attention to the bottom of the first
6 page and onto the second page. This was sent from you to Brian
7 and Johnny Banda. Is that right?
8 A Correct.
9 Q Okay. And this is one of those other instances where you
10 were informing other supervisors about employees taking their
11 breaks at a different time. Is that right?
12 A Let's see here.
13 Q Or maybe breaking the break policy by two minutes.
14 A Actually, it was 20 minutes over.
15 Q Twenty minutes over.
16 A Not two.
17 Q So the first line, when you say just documentation with
18 three dots, what do you mean by that?
19 A Well, I'm just giving my manager a heads up that I talked
20 to these guys.
21 Q Uh-huh. And again, this was after the rollout of the bid,
22 right? Because it's in February.
23 A Yes.
24 Q Of this year, right?
25 A Yep.

1 Q So after the bid, were breaks kind of a higher priority
2 for you?
3 A No, same priority. What changed in a sense is that
4 shipping has their own forklifters out there now, so we have
5 our set -- we have our set times and they needed to be
6 followed.
7 Q Now, if we keep looking at GC Exhibit Number 17, at the
8 top there it's a message from Brian Nicklin, and it goes to you
9 and several other supervisors, right?
10 A Yes.
11 Q Okay. And this was on that same day. I'm sorry, this is
12 a few days later.
13 MS. DEMIROK: Well, Your Honor, I would move to admit GC
14 Exhibit 17.
15 JUDGE TRACY: Any objections?
16 MS. INESTA: No objection, Your Honor.
17 JUDGE TRACY: GC Exhibit 17 is admitted into evidence.
18 **(General Counsel Exhibit Number 17 Received into Evidence)**
19 Q BY MS. DEMIROK: So, Mr. Gomez, I'm handing you what has
20 been marked as GC Number 18.
21 A Okay.
22 Q Now, it looks like this is an email from you to Armando
23 Gutierrez; is that right?
24 A Yes.
25 Q Okay. And tell us about this. Why did you send this

1 email?
2 A Well, Armando sent it to me and Johnny at the bottom.
3 Armando is the shipping manager.
4 Q Okay. So there's two emails, one from you on the top and
5 one from Armando on the bottom?
6 A Yeah. Look at time stamp on it, 8:43.
7 Q Got you.
8 A This is just -- this is just communication.
9 Q Okay.
10 A We take our break 8:45 to 9:00.
11 Q Uh-huh.
12 A They must have had -- I don't remember back on January
13 27th, but it must have been a big day and we're separate crews
14 but if we got to lean on -- if they have call-ins or whatever,
15 we got to help, you know, I mean I'm not going to help you.
16 Q Sure, yeah.
17 A So you see the time stamp? What rings a bell looking at
18 this, 8:43, we go to break 8:45 to 9:00. Armando is shooting
19 it to me and Johnny saying, "Hey, can we get help back there on
20 non-conveyable?"
21 Q Uh-huh.
22 A I'm telling him, yeah, we have Matt back there, but I'm
23 letting him know he's at break right now. So, you know, yeah,
24 he's back there but he'll, you know, it's going to be probably
25 20 minutes before you see him. You know, he takes -- he's

1 going on break right now, by the time he comes back from the
2 break room.
3 Q Uh-huh.
4 A I'm just letting him -- I could have just put, yeah, not
5 back there, but then he's going to call me. I haven't seen
6 him. I haven't seen him. Where's he at? I'm letting him know
7 that, hey, he's at break.
8 Q Okay. Now, it says in here.
9 A That he's going to --
10 Q Sorry. It says in here that you also had told him, I
11 think you are referring to Matt, to take schedule breaks and
12 lunch. What is that about?
13 A That's what I just explained. I'm letting Armando know,
14 I'm telling Armando. See? Look at the time stamp on there
15 from Armando, 8:43.
16 Q Uh-huh.
17 A He's asking for help. Matt takes his break, his first
18 break, 8:45 to 9:00. I'm letting him know, yeah, we do have
19 somebody back there. He can help you out, but he's at break
20 right now.
21 Q What I'm asking you is did you have a conversation? And
22 I'll just be more clear about it. Did you have a conversation
23 -- by the way, who is Matt?
24 A Matt Schaefer (phonetic).
25 Q Okay. Did have you a conversation with him about whether

1 or not he had to take his scheduled breaks and lunch?
2 A I don't recall an individual with the rest of the crew,
3 the rest of everybody.
4 Q Okay.
5 A But that's what I'm telling Armando here. Hey, he's back
6 there. We told him to take his scheduled breaks and lunch.
7 Armando knows when our break is, he knows. Okay, they're on
8 break right now.
9 Q Just like that second line says, "We told him take
10 scheduled breaks and lunch."
11 A I could have wrote it different. Armando, but he's at
12 break right now from 8:45 to 9:00. So Armando knows what I'm
13 talking about because he works there. He knows, okay, they're
14 on break right now.
15 Q So you weren't referring to a conversation you had with
16 Matt Schaefer?
17 A No. I mean this is -- I could have just put, yeah, we
18 have Matt back there, but then Armando is going to call me 15,
19 20 minutes -- where's he at? You told me you had help. I'm
20 falling behind. I'm letting him know, hey, we got him, but
21 remember taking -- because this is still fairly new into it.
22 January 27. I'm letting him know, hey, he's back there but
23 he's taking his breaks and lunches.
24 Q Okay.
25 A So cover that.

1 Q Not referring to a conversation with Matt?
2 A Correct, correct.
3 MS. DEMIROK: Okay. Your Honor, I'd like to move to admit
4 GC Exhibit Number 18.
5 JUDGE TRACY: Any objection?
6 MS. INESTA: No objection, Your Honor.
7 JUDGE TRACY: All right. General Counsel Exhibit 18 is
8 admitted into evidence.
9 **(General Counsel Exhibit Number 18 Received into Evidence)**
10 JUDGE TRACY: Could you just -- you made a reference to
11 NG. What does that stand for?
12 THE WITNESS: Non conveyable. Should be NC. The list
13 goes on. I can tell you lots of stuff.
14 JUDGE TRACY: Okay.
15 THE WITNESS: Non-conveyable with a C.
16 JUDGE TRACY: Non-conveyable. That's just some sort of --
17 THE WITNESS: It's a section of --
18 JUDGE TRACY: It's part of --
19 THE WITNESS: The section of the warehouse back --
20 JUDGE TRACY: You are referring to section what?
21 THE WITNESS: This. It's not on here. It's back in this
22 area. It's off the shipping dock, way back in the corner of
23 the warehouse, separated from the rest of the warehouse. Big
24 250-pound bags of onions, flour, stuff that can't travel the
25 belt. It's close to the dock. The pickers pick it, and take

1 it directly to the door.
2 JUDGE TRACY: Okay.
3 THE WITNESS: Non-conveyable.
4 JUDGE TRACY: Okay.
5 Q BY MS. DEMIROK: Could you take a look for me at GC
6 Exhibit Number 10.
7 A Okay.
8 Q Can you tell what aisle this is?
9 A Aisle 20.
10 Q Is that the same aisle that Michael Meraz's missing pallet
11 was found?
12 A Yes.
13 Q Okay. And I think you testified that his pallet was found
14 like 30 or 40 feet up; is that right?
15 A I believe the fifth level.
16 Q Fifth level. Okay. Would the fifth level be about 30 to
17 40 feet then?
18 A I'm guesstimating, going by my -- without specific
19 measurements, that's what it seems like to me.
20 Q Okay. Now, February 11th, you ran into Steve Phipps with
21 Brian Nicklin, right?
22 A This is the break?
23 Q Another break issue.
24 A If that's the date on there. I don't want to say if it's
25 the wrong date. If that's the date, then yeah.

1 Q Okay. But it's someday that you went and you saw Steve
2 and you were with Brian Nicklin, right?
3 A Yes.
4 Q And you two approached Steve Phipps, right?
5 A Correct.
6 Q And you approached him in aisle 22; is that right?
7 A Yes.
8 Q And either you or Brian asked him why he wasn't on break,
9 right?
10 A Correct.
11 Q Okay. And he said he takes his breaks to talk about the
12 union with associates, right?
13 A Correct.
14 Q He said that to you, right?
15 A To me and Ernie.
16 Q Okay. After this incident with Mr. Phipps, you went and
17 had a conversation with Ivan Vaivao and Tim O'Meara; is that
18 correct?
19 A Correct.
20 Q Okay. And did you go --
21 A I don't remember -- I don't remember if Tim was in there.
22 I remember Ivan. I don't remember if Tim was there.
23 Q Were you in Tim's office?
24 A I do not believe so. I believe I was in Ivan's office.
25 Q Okay. So either way, you at least went to speak with Ivan

1 Vaivao; is that right?
2 A Correct.
3 Q And did Brian Nicklin come with you?
4 A Yes.
5 Q Okay. Did you and Brian go immediately to Mr. Ivan's
6 office?
7 A I believe so.
8 Q Okay. And was Brian doing the talking or were you?
9 A Brian did all the talking. I was just with him.
10 Q What did Brian tell Ivan?
11 A Walking through the deli, Steve was out there. Ernie did
12 the talking when we went to Steve. I was just walking with
13 them. But he basically told Ivan the incident. I told him,
14 hey, it's break time. What are you doing out here? Steve told
15 him, it's not my break time. I take my breaks as I see fit so
16 I can go talk to other departments.
17 Q Sorry, I just want to be clear. Are you talking about the
18 conversation that Brian had --
19 A Yeah, yeah.
20 Q Brian is telling Ivan this?
21 A With Ernie and Steve and they went up and that's what he
22 was telling Ivan.
23 Q Okay.
24 A Just the conversation.
25 Q Okay. I just want to know, what did -- I just want to

1 make sure we are on the same page here. Could you tell me what
2 did Brian tell Ivan?
3 A What Steve told him.
4 Q What was that?
5 A It's not my break time. I take my breaks when I see fit
6 so I can talk to other guys, other departments about the union.
7 They take different breaks, not set with us.
8 Q Did Brian say anything else?
9 A Ernie told him, well, Steve, I'm asking you to take your
10 break with the inbound team. Steve told Ernie, you can't
11 enforce me to take my breaks, something along those lines.
12 Can't enforce me when to take my break. I'll take them as I
13 see fit. And again, I believe Ernie asked him, look, Steve,
14 I'm asking you to take your break with the rest of our inbound
15 crew at our break times. And that's when he went up and he let
16 Ivan know.
17 Q So when he let Ivan know, did all the things that you just
18 said, did he actually tell Ivan all that?
19 A Yeah. Whatever they had talked about, he told Ivan.
20 Q Okay. And then what was Ivan's response when it was all
21 said?
22 A I believe Ivan told me to grab Steve, send him up, and
23 then I never returned back up there. I just went back. Hey,
24 Steve, Ivan needs to see you.
25 Q Okay. Do you remember why you were walking around with

1 Brian Nicklin that day?
2 A That's what I do. I log seven miles a day with my shift.
3 I wear my Fitbit. We walk from one end to the -- it's nonstop
4 walking all day long.
5 MS. DEMIROK: No further questions, Your Honor.
6 JUDGE TRACY: So Ms. Inesta, do you want to ask -- are you
7 planning to ask any questions now or on your direct case?
8 MS. INESTA: We will wait until my direct.
9 JUDGE TRACY: All right. Thank you, very much. You may
10 be called to testify again. Regardless, please don't discuss
11 your testimony with anyone until after the close of this
12 hearing.
13 THE WITNESS: Yes, ma'am.
14 JUDGE TRACY: Okay. Thank you.
15 THE WITNESS: Thank you.
16 JUDGE TRACY: Yes. Go ahead. Okay. Let's go off the
17 record.
18 (Off the record at 2:47 p.m.)
19 Whereupon,
20 **LEONARDO BAEZA**
21 having been duly sworn, was called as a witness herein and was
22 examined and testified as follows:
23 JUDGE TRACY: Go ahead and have a seat. State your name
24 and job title for the record.
25 THE WITNESS: Leonardo Baez, I'm general warehouse.

1 JUDGE TRACY: And do you mind if you please spell your
2 last name.
3 THE WITNESS: B-A-E-Z-A.
4 JUDGE TRACY: Okay. Ms. Demirok, go ahead, please.
5 **DIRECT EXAMINATION**
6 Q BY MS. DEMIROK: Okay. So thank you for coming Leo. So I
7 know that you testified in the prior hearing as well, and we
8 are not going to cover everything that we did at that time. I
9 really just want to talk to you about -- well, let me start at
10 the beginning. So what do you do at the warehouse?
11 A I load trucks.
12 Q How long have you been in that position?
13 A Roughly four years.
14 Q And is that on the shipping side of the warehouse?
15 A Yeah, on the shipping.
16 Q Okay. Now, at some point in time did you ever start to
17 wear an orange-colored shirt to work?
18 A Yes, I did.
19 Q Okay. And is there a reason why you started to do that?
20 A Yes, there was.
21 Q Can you tell us what that was?
22 A It was kind of -- trying to stop the harassment from the
23 union guys that were pro union, to kind of bring awareness,
24 okay, I'm not for it, leave me alone.
25 Q And were you the only one that did that?

1 A No. There was a lot of us.
2 Q Okay. When did you start to do that?
3 A I don't remember an exact date, but it was shortly after
4 all this union stuff started coming about.
5 Q I guess when you say "shortly after when the union stuff
6 started coming about," do you mean by shortly, shortly after
7 you learned that the employees were organizing?
8 A No, shortly after I was constantly being approached to
9 join.
10 Q Was that in 2015?
11 A That sounds about right. Maybe end of '14.
12 Q End of '14.
13 A '14, '15.
14 Q Okay. Do you remember, did you ever attend a town hall
15 meeting where Mark Engdahl talked?
16 A I think he speaks at most of our town hall meetings.
17 Q Did you attend one where he played any videos?
18 MR. DAWSON: Your Honor, I'm going to object. There's no
19 crime related to videos or meetings, so it seems like this line
20 of questioning isn't really relevant to the allegations in the
21 complaint.
22 MS. DEMIROK: Your Honor, I'm only going there to try to
23 get a timeframe for us, because I think when certain meetings
24 happened I would expect wouldn't be in dispute, and it seems as
25 though he's got a wide open timeframe here, so I would just

1 like to see if it was either before or after, because that was
2 right at the beginning of 2015.
3 MR. DAWSON: He gave a timeframe, Your Honor. He said end
4 of 2014, beginning of 2015.
5 JUDGE TRACY: What I'm going to do is I'm going to
6 overrule the objection. However, I'm doing so because I am,
7 Ms. Demirok, assuming that you are establishing some background
8 here for me to understand. I'm not sure if we're going there
9 with the claim that is the one that is sort of in dispute here.
10 Is that what this is going towards?
11 MS. DEMIROK: No, you're right, Your Honor, this is
12 background information, but it's going towards that allegation.
13 JUDGE TRACY: All right. So I'm going to allow it for
14 that to set me up to get to the point of where I need to
15 decide.
16 MS. DEMIROK: Thank you, Your Honor.
17 Q BY MS. DEMIROK: So Mr. Baeza, did you attend any meetings
18 where Mr. Engdahl showed a video in a town hall meeting?
19 A To be honest with you, I don't recall.
20 Q Okay.
21 A I mean, I wouldn't be able to give you really any
22 information on it because I don't remember. It's been so long
23 ago.
24 Q But would it be fair to say that it was either towards the
25 end of 2014 or the beginning of 2015?

1 A I really don't know, to be honest with you. I don't want
2 to say yes. I mean, I don't remember.
3 Q Sure. One more question just regarding timing, did you
4 ever hear about Mr. Phipps making an announcement in the
5 warehouse?
6 A Yes, I did.
7 Q And was that -- did you start wearing the shirt before or
8 after that?
9 A I don't really remember, but I do know that he made
10 multiple announcements at work and I'm pretty sure it was after
11 all that stuff because, I mean, I wouldn't really have a reason
12 to if he wasn't making all these announcements and encouraging
13 these guys to pester us and all that.
14 Q Because before that he wasn't -- at least he wasn't so
15 open about it?
16 A He's on a separate shift so, I mean, I really don't deal
17 with the guy. So this is all just hearsay throughout the
18 warehouse.
19 Q Got you. Okay. Now, when you were wearing the shirts and
20 you did say you weren't the only one who was doing that, right?
21 A No, I was not.
22 Q Did you tell any of your coworkers about why you were
23 wearing it?
24 A Why I personally was wearing it? Yes.
25 Q Okay. And did any of the other employees that you said

1 wore the orange shirt, did they tell you why they were wearing
2 it?
3 A They felt the same way.
4 Q Okay. How long did you -- do you still wear that shirt?
5 A No, I don't.
6 Q How long did you continue to wear it?
7 A It was no more than a month. It stirred up a lot of stuff
8 at work, so I felt it was better not to wear it.
9 Q Before coming here today or to the prior one, did you seek
10 me or anyone else out with the National Labor Relations Board
11 to provide this information?
12 A What information?
13 Q The information about the shirts that you testified about.
14 A No, I didn't.
15 MS. DEMIROK: No further questions.
16 MR. DAWSON: No questions, Your Honor.
17 JUDGE TRACY: Okay. Thank you.
18 Please, don't discuss your testimony until after the close
19 of the hearing.
20 THE WITNESS: Okay.
21 JUDGE TRACY: Okay. Thank you.
22 Off the record.
23 (Off the record at 2:58 p.m.)
24 JUDGE TRACY: Let's go ahead and go back on the record.
25 Go ahead and raise your right hand.

1 Whereupon,

2 **TIM O'MEARA**

3 having been first duly sworn, was called as a witness herein

4 and was examined and testified as follows:

5 JUDGE TRACY: Have a seat. State your name and job title

6 for the record.

7 THE WITNESS: Tim O'Meara, operations manager for Shamrock

8 Foods.

9 **DIRECT EXAMINATION**

10 Q BY MS. DEMIROK: Okay. Thanks for being here,

11 Mr. O'Meara. I'm an attorney for the federal government. I'm

12 just going to be asking you some questions today. Have you

13 reviewed any documents in preparation for your testimony?

14 A No, ma'am.

15 Q Have you spoken with anyone about your testimony today?

16 A Just counsel.

17 Q Okay. And you mentioned you work for Shamrock Foods

18 Company, right?

19 A Yes, ma'am.

20 Q Again, what's your title?

21 A Operations manager.

22 Q And how long have you worked in that position?

23 A I have been with Shamrock for 39 years, so the last -- I

24 want to say nine years in that position, but here and in New

25 Mexico.

1 Q So you were in New Mexico in that position until like
2 December; is that right?
3 A January.
4 Q January. Okay. Could you just briefly describe for us
5 your duties in that position?
6 A To basically oversee all the operations, warehouse and
7 transportation, maintenance, security.
8 Q Okay.
9 A Inventory control.
10 MS. DEMIROK: Your Honor, at this time I'm requesting to
11 continue under Rule 611C of the Federal Rules of Evidence.
12 JUDGE TRACY: Go ahead, please.
13 MS. DEMIROK: Okay.
14 Q BY MS. DEMIROK: So what would you say are your primary
15 responsibilities?
16 A The people.
17 Q The people?
18 A Yeah, the people that work for Shamrock Foods.
19 Q What do you do on a daily basis in regard to that
20 responsibility?
21 A Work with my team, the managers and supervisors, talk to
22 the associates on the floor, spend time with them, spend time
23 in their jobs, what they do, spend time in transportation, ride
24 on routes, talk to drivers, you know, those type of things.
25 Hold team meetings with everybody. I like to communicate with

1 all the associates. So pretty much that's about it. Plan.
2 Q Plan? Like plan what?
3 A A plan could be like a three-year plan, maybe different
4 things like that for the business.
5 Q So you do like strategic planning for the business?
6 A Yes, ma'am, or expenses, like that, yes, ma'am.
7 Q You have an office at the warehouse, right?
8 A Yes, ma'am.
9 Q Okay. And Mr. Ivan Vaivao, he reports to you; is that
10 right?
11 A Yes, ma'am.
12 Q Okay. He's over at the -- he's one of the warehouse
13 managers, but you talked about there are other departments that
14 you oversee too, right?
15 A Yes, ma'am. So basically through all of the
16 transportation rolls up through the trans manager through me,
17 and then you have all of the warehouse team, which rolls up
18 through me, yes, ma'am.
19 JUDGE TRACY: So Mr. O'Meara, if you -- it's not a normal
20 way to have a conversation, however, today for this testimony
21 if you could just be sure that the attorneys, if they ask you
22 any questions, to just wait to make sure that they are finished
23 before you start answering just for our transcript to be clear,
24 as well as to make that you're answering the question that
25 they're asking.

1 THE WITNESS: Okay.
2 JUDGE TRACY: Okay.
3 Q BY MS. DEMIROK: So under Mr. Vaivao there's at least two
4 other levels of supervision over the employees, right?
5 A If you're counting managers and supervisors, that's
6 correct.
7 Q Okay. So you mentioned other departments and you
8 mentioned transportation. So you oversee that department,
9 right?
10 A Yes, ma'am.
11 Q Okay. And about how many employees work in
12 transportation?
13 A Roughly, 300.
14 Q And then with the warehouse employees, about how many are
15 there of those?
16 A Roughly, 250.
17 Q And is there any kind of department that just handles like
18 administrative tasks?
19 A I'm not sure what you mean.
20 Q Like maybe employees who process invoices, order supplies
21 for the company, is there a group that you oversee like that?
22 A I'm not sure what you mean. So we have Mary Lee that
23 works with us, as far as an admin assistant. I don't know what
24 else you mean by that.
25 Q Well, there's like a human resource department that's

1 attached to the warehouse, right?
2 A Yes, ma'am.
3 Q Do you oversee that as well?
4 A No, ma'am.
5 Q But there is a meat plant, right?
6 A Yes, ma'am
7 Q Do you oversee that?
8 A No, ma'am.
9 Q And the fish plant, do you oversee that?
10 A No, ma'am.
11 Q So it's basically inventory control, transportation and
12 warehouse; is that right?
13 A Yeah, maintenance and security.
14 Q And those two. So overall, how many employees would you
15 say you oversee?
16 A Maybe -- I don't know. Around 800 or something.
17 Q Now, you do know about an ongoing union campaign at the
18 warehouse, right?
19 A I've heard, yes.
20 Q I'm sure you know that the company is under an injunctive
21 order right now; is that right?
22 A No, ma'am, I do not know.
23 Q So you've been walking -- you said your primary
24 responsibility is talking with employees, right?
25 A Yes, ma'am.

1 Q And I would imagine that involves walking around the
2 warehouse quite a bit, right?
3 A Yes, ma'am.
4 Q Okay. So you've never seen the order that's been posted
5 in the warehouse?
6 A There's all kinds of stuff posted by the break rooms, time
7 clocks and all that kind of stuff. If you're asking me if I
8 read it, no, I do not.
9 Q Do you know that there is an order posted from the
10 District Court?
11 A Yes. I know there is stuff posted where everyone can see
12 stuff, yes, but --
13 Q I'm not sure -- do you know specifically that there is an
14 order that was posted from the District Court?
15 MR. DAWSON: Your Honor, I'm going to object on the
16 grounds that I don't know that this witness is qualified to
17 testify about what a District Court is or an injunction. I
18 don't think there's any dispute that -- in fact, I know there
19 isn't any dispute that the order has been posted because the
20 Board Agent came out to verify that it's been posted.
21 JUDGE TRACY: If you could just qualify the question with
22 "if you know." I mean, the posting, let's say, where it's
23 from.
24 Q BY MS. DEMIROK: Do you know if there has been an order
25 from the District Court posted in the warehouse?

1 A I know there's been stuff like that posted in the
2 warehouse. What exactly it is, I don't know because I didn't
3 read it.
4 Q Okay. But you're saying at your level in management you
5 don't know if the company is under an injunctive order right
6 now?
7 A Ma'am, I came back to Arizona in January. Okay? So
8 there's a lot going on that I'm learning and a lot of people to
9 talk to. I don't know how to answer that. I'm just telling
10 you the truth.
11 Q Do you know or do you not know?
12 A In talking counsel yes, I know some things are going on.
13 I don't know exactly what they are. I didn't read stuff. I
14 know stuff is posted. I don't know what else to tell you. I'm
15 trying to do the best I can.
16 Q Okay. Now, in walking around the warehouse when you go
17 around and chat with employees, have you ever seen any union
18 flyers around?
19 A I have seen stuff that's been thrown in the break room,
20 yes.
21 Q By "stuff," do you know if those are union flyers?
22 A If that's what you call them.
23 Q Okay. Now, I want to draw your attention to February 11,
24 2016. You had a meeting with Mr. Steven Phipps on that day; is
25 that right?

1 A Yes, ma'am.
2 Q And Mr. Ivan Vaivao was also there; is that right?
3 A Yes, ma'am.
4 Q And immediately prior to meeting with Mr. Phipps you met
5 with Brian Nicklin; is that right?
6 A Yes, ma'am.
7 Q Now, when you met with Mr. Phipps, why did you decide to
8 do that?
9 A Why did I decide to do that? Because it was brought to my
10 attention that Brian and Richard Gomez caught him at a time
11 where he wasn't supposed to be. Right? He was supposed to be
12 at break with everybody else. He wasn't. They asked him why.
13 He gave them a comment that basically told them it was none of
14 their business. Right? I can do whatever I want. And so they
15 brought that to my attention, so I decided I needed to speak to
16 Mr. Phipps.
17 Q But you learned that Mr. Phipps told Brian and Richard
18 more than just he could take his breaks whenever wanted; isn't
19 that right?
20 A Please repeat the question. I'm not sure what you're
21 saying here.
22 Q So you learned from Brian -- let's say you learned from
23 Brian that Mr. Phipps told him not just that he could take his
24 breaks whenever he wanted; is that right?
25 A Take your breaks and something about you need to ask your

1 counsel or something like that. I don't know word for word.
2 But that's pretty much the gist of it.
3 Q Okay. But he also mentioned talking to employees about
4 the union, right?
5 A I do not have any knowledge about that.
6 Q Now, tell us from the beginning, what did tell Mr. Phipps
7 when you met with him?
8 A As he came up, he saw myself, Ivan and Brian, and he said,
9 "Oh, I'm speaking to three of you?"
10 And I said, "No, just two of us." And then he sat down
11 pulled out a notepad, took his phone out, put it right here.
12 And I asked him, "Do you know why you're here? I
13 understand that you're having a hard time understanding when
14 your break is."
15 And the first thing out of his mouth is he said, "You
16 changed the policies."
17 And I told him, "I don't know what you're talking about.
18 I'm talking about a schedule."
19 And again he said, "You changed the policies."
20 And again I told him, "I do not know what you're talking
21 about. There is a schedule and it needs to be followed. Do
22 you know where it's posted?"
23 And he said yes. And again I think -- a third time he
24 asked me, "You've changed the policies?"
25 And I said, "Steven, I don't know what you're talking

1 about. I'm talking about a schedule. Do you know where it's
2 posted? We expect you to follow it like everybody else does."
3 And that was pretty much the conversation. I mean, it was
4 basic. Do you know where the schedule is? You are know how to
5 read it, you know how to tell time. I mean, it's pretty
6 simple.
7 Q But you did tell him that it was a counseling session,
8 right?
9 A No, ma'am. I took that opportunity to have a conversation
10 with Steven, just so he understood -- I wanted to give him the
11 benefit the doubt. I mean, everybody deserves that. So I just
12 wanted to talk to him and see where he was coming from. So I
13 just had a conversation with him.
14 Q So you never told him it was a counseling session?
15 A No, ma'am. No, I think maybe the term I used was coaching
16 or something like that.
17 Q Are you familiar with the discipline policy at Shamrock?
18 A Yes. As far as I know, it starts with a verbal.
19 Q As far as you know, it starts with a verbal?
20 A Uh-huh.
21 JUDGE TRACY: You need to say yes or no, please, for the
22 record.
23 THE WITNESS: Yes, ma'am.
24 Q BY MS. DEMIROK: I'd like you to take a look at GC Exhibit
25 Number 2. Should be in that stack in front of you.

A If you're going to ask me to read something, it's going to be difficult because I didn't know I was going to have to read. I didn't bring my reading glasses, but I'll give it a whack, if you want me to.

Q Can you see? Are you -- does that say 2 on there?

A I'm good. Yeah.

Q Okay. Have you ever seen the handbook before?

A Yes, ma'am.

Q Okay. And now you did work in New Mexico, right?

A Yes, ma'am.

Q Okay. Do they have a similar handbook in New Mexico?

A Yes, ma'am.

Q Is it the same handbook?

A Yes, ma'am.

Q Okay. Now, if you could turn to the second page. Can you read what is in that box?

A Step 1?

Q Yeah.

A Counseling.

Q What does that mean?

A You know what? Until now, to me, nothing.

Q What do you think that means?

A I don't know how to answer that. I can give you my point of view. I coach high school softball, and so I coach. So when I work with people, I try to do what I can to help them be

1 better.
2 Q Counseling is kind of like coaching?
3 A No, ma'am.
4 Q Okay. So what were you referring to with coaching
5 softball?
6 A Teach someone how to field a groundball. Right? You
7 encourage them to be better.
8 Q So is that what you think of when you think of counseling?
9 A No, I don't put the two together at all.
10 Q Okay. So prior to Mr. Phipps, when was the last time that
11 you called an employee to your office to talk with them?
12 A If you're asking me for a date, I don't know. It's an
13 open-door policy. So people come up and talk to me a lot.
14 Q My question was: When was the last time that you called
15 someone to your office?
16 A I don't know.
17 Q When was the last time you met with an employee in your
18 office where Mr. Vaivao was there as well?
19 A When was the last time?
20 Q Yeah.
21 A I don't know.
22 Q Was it yesterday?
23 A I don't think so.
24 Q Can you give us any kind of specific example of when was
25 another time when you called an employee to your office?

A Can I give you an example?

Q Yeah.

A No.

Q Just to be clear, when you met with Mr. Phipps you never said anything about it being a counseling?

A No, ma'am.

MS. DEMIROK: Okay. No further questions.

JUDGE TRACY: Mr. Dawson, Ms. Inesta, are you planning to ask this witness any questions or wait?

MR. DAWSON: We'll wait for the presentation of our case. Thank you.

JUDGE TRACY: Thank you, very much. You may be called again, but regardless, please don't discuss your testimony until after the close of the hearing.

THE WITNESS: So is that today?

JUDGE TRACY: Your attorneys will let you know when the hearing is closed.

THE WITNESS: Thank you.

JUDGE TRACY: Thank you, very much.

Let's go off the record to talk about what's next.

(Whereupon, the hearing in the above-entitled matter was recessed at 3:29 p.m. until Thursday, May 26, 2016)

1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board (NLRB), Region 28, Case Numbers
4 28-CA-167910 and 28-CA-169970, Shamrock Foods Company and
5 Bakery, Confectionary, Tobacco Workers' and Grain Millers
6 International Union, Local Union No. 232, AFL-CIO-CLC and at
7 the National Labor Relations Board, Region 28, 2600 North
8 Central Avenue, Suite 1400, Phoenix, Arizona 85004, on
9 Wednesday, May 25, 2016, at 9:03 a.m. was held according to the
10 record, and that this is the original, complete, and true and
11 accurate transcript that has been compared to the reporting or
12 recording, accomplished at the hearing, that the exhibit files
13 have been checked for completeness and no exhibits received in
14 evidence or in the rejected exhibit files are missing.
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17 Tina Irhig
18 TINA IRHIG
19 Official Reporter
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