UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17

NOAH'S ARK PROCESSORS, LLC d/b/a WR RESERVE	Cases 14-CA-217400
	14-CA-224183
and	14-CA-226096
	14-CA-231643
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 293	14-CA-235111

RESPONDENT NOAH'S ARK PROCESSOR, LLC'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION[1]

These cases were tried on March 11-15, 2019, in Hastings, Nebraska, based on a complaint alleging that Noah's Ark Processors, LLC d/b/a WR Reserve ("Respondent") violated Section 8(a)(1), and (5) of the National Labor Relations Act ("Act") between November 6, 2017, to present. GC Exh. 1-EEE, 17, and 18.

Respondent is a limited liability company with an office and place of business in Hastings, Nebraska, and is engaged in the slaughter, processing, packaging, and non-retail sale of meat products. GC Exh. 1-EEE (¶ 2(a)) and GC Exh. 1-GGG (p. 4). About January 1, 2015, Respondent purchased the business of Nebraska Prime Group and since then has continued to operate the business of Nebraska Prime Group in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Nebraska Prime Group, and adopted the collective-bargaining agreement between Nebraska Prime Group and the United Food and Commercial Workers' Union Local No. 293 ("Union"), dated January 28, 2013, to January 28, 2018. GC Exh. 1-EEE (¶ 2(b)) and GC Exh. 1-GGG (p. 4).

General Counsel contends Respondent (1) failed to provide the Union with presumptively relative information; (2) failed to cloak its bargaining representatives with the authority to enter into bargaining agreements; (3) cancelled bargaining sessions at the last moment; (4) failed to make bargaining proposals; (5) failed to provide explanation for the rejection of the Union's bargaining proposals; (6) through Paul Hernandez and Lidia Acosta denigrated the Union in the eyes of its employees by telling employees that they were not represented by Union at the facility, that Respondent was going to remove the Union from the facility, that moving forward there would be no Union at the facility, and that they would not receive a raise because of the Union;

[1] Abbreviations in this brief are as follows: "Tr" for transcript; "Jt Exh." for Joint Exhibits; "GC Exh." for General Counsel's Exhibits; and "R Exh." for Respondent's Exhibits.

(7) through Lidia Acosta, Denora Murillo, and/or Jose Madrigal denigrated the Union in the eyes of unit employees by soliciting employees to resign from the Union, to cease paying Union dues, and providing employees with pre-printed forms to resign from the Union and to revoke their dues checkoff authorizations; (8) through Lidia Acosta and/or Jose Madrigal denigrated the Union in the eyes of the unit employees by interrogating employees about their support for the Union; (9) by coercing employees into signing pre-printed forms prohibiting Respondent's disclosure of employees' employment information without the employees' written consent; (10) directly dealt with employees about mandatory terms and conditions of employment; (11) unilaterally changed employee terms and conditions of employment without providing the Union with notice and opportunity to bargain and change the terms without the Union's approval; (12) failed to deduct and remit Union dues pursuant to valid, unexpired and unrevoked employee dues checkoff authorizations; and (13) implement its last, best and final offer before reaching a valid impasse. GC Exh. 17. General Counsel further contends Respondent, through Paul Hernandez and Lidia Acosta, made coercive statements to employees concerning Union representation. GC Exh. 18 (first paragraph).

II. STATEMENT OF THE CASE

On March 29, 2018, the Union filed an unfair labor practice charge against Respondent in Case 14-CA-217400. GC Exh. 1-A. On July 23, 2018, the Union filed an unfair labor practice charge against Respondent in Case 14-CA-224183 (GC Exh. 1-E) and later amended that charge on August 22, 2018 (GC Exh. 1-I), September 20, 2018 (GC Exh. 1-Q), and December 19, 2018, (GC Exh. 1-CC). On August 22, 2018, the Union filed an unfair labor practice charge against Respondent in Case 14-CA-226096 (GC Exh. 1-M), and later amended that charge on September 2018 (GC Exh. 1-U), and December 19, 2018 (GC Exh. 1-GG). On November 26, 2018, the Union

filed an unfair labor practice charge against Respondent in Case 14-CA-231643 (GC Exh. 1-Y), and later amended that charge on December 19, 2018, (GC Exh. 1-KK). On February 1, 2019, the Union filed an unfair labor practice charge against Respondent in Case 14-CA-235111 (GC Exh. 1-UU), and later amended that charge on February 11, 2019 (GC Exh. 1-AAA).

On December 28, 2018, the Regional Director for Region 14, on behalf of General Counsel issued a consolidated complaint and notice of hearing in Cases 14-CA-217400, 14-CA-224183, 14-CA-226096, and 14-CA-231643. (GC Exh. 1-OO). Respondent filed its Answer to on January 11, 2019 (GC Exh. 1-QQ). On January 17, 2019, the Regional Director for Region 14, on behalf of General Counsel issued an Order rescheduling the hearing from April 16, 2019, to March 11, 2019. (GC Exh. 1-RR). On February 8, 2019, the Regional Director for Region 14, on behalf of General Counsel, issued an Order rescheduling the hearing from March 11, 2019, to March 18, 2019. (GC Exh. 1-YY).

On February 22, 2019, the Regional Director for Region 14, on behalf of the General Counsel, issued an Order further consolidating cases, second consolidated complaint, and notice of hearing added allegations from Case 14-CA-235111 ("Complaint"). (GC Exh. 1-EEE). Respondent filed its Answer to on March 8, 2019, denying the alleged violations and raising various defenses. (GC Exh. 1-GGG).

III. FACTS

A. Jurisdiction and Labor Organization Status.

Respondent is a limited liability company with an office and place of business in Hastings, Nebraska, and has been engaged in the slaughter, processing, packaging, and non-retail sale of meat products. GC Exh. 1-EEE. During the 12-month period ending November 30, 2018, Respondent sold and shipped from its Hastings, Nebraska, facility goods valued in excess of

$50,000 directly to points outside the state of Nebraska. Id. At all material times, Respondent admits it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. GC Exh. 1-GGG. Respondent further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. Id.

B. Alleged Unfair Labor Practices.

1. March 2018 Statements by Paul Hernandez and Lidia Acosta

Paul Hernandez, Operations Manager, testified that he did not tell any employee that they were not represented by a Union. Tr 205:19-23 and 778:18-20. Hernandez never heard any supervisor or manager make such a comment to an employee. Tr 778:21-23. Karen Mendoza, Strip Line Supervisor, testified that she has not been present at any meeting where a supervisor told employees that they were not represented by a Union at the facility. Tr 350:21-11 and 723:24-724:11.

Hernandez testified that he did not tell employees that the Company was going to remove the Union from the facility. Tr 778:24-779:1. Hernandez never heard any supervisor or manager make such a comment to an employee. Tr 779:2-4. Mendoza testified that she has not been present at any meeting where a supervisor said the Company was going to remove the Union from the facility. Tr 724:12-16.

Hernandez testified that he did not tell employees that there would be no Union at the facility. Tr 779:5-7. Hernandez testified he never had any supervisor or manager make such a comment to employees. Tr 779:8-10. Mendoza testified that she has not been present at any meeting where a supervisor mentioned to employees there would be no Union at the facility. Tr 724:17-20.

Hernandez testified that he did not tell employees that they would not receive a raise because of the Union. Tr 779:11-13. Hernandez testified he never heard any supervisor or manager make such a comment to employees. Tr 779:14-16. Mendoza testified that she has not been present at any meeting where a supervisor told employees that they were not receiving a raise because of the Union. Tr 724:21-24.

2. March 27, 2018, Statements by Paul Hernandez and Mike Helzer

Hernandez on March 27, 2018, testified that he was notified by Joel Murrillo, Packing Supervisor, that a number of packaging employees were in the cafeteria and not in their work area. Tr 207:4-10. Hernandez went up to the cafeteria to see what was going on. Tr 207:13-14. The packing employees were to have started their shift at 6:00 a.m. and twenty of them were in the cafeteria still at 6:30 a.m. Tr 207:24-208:6. Hernandez was told by the workers in the cafeteria that they didn't want to go to work because they had some issues. Tr 212:10-11. Hernandez told the workers that what they were doing was not the way to do things and that this would cause them to lose their job. Tr 213:9-19. Hernandez told them that they could file a grievance and the proper steps would be taken. Id. Hernandez told them that they needed to go to work or they would lose their jobs, but some did not go back to work. Tr 213:25-214:6. When the same employees started talking to employees from the kill floor on why they were leaving, Hernandez asked them to leave the property. Tr 214:14-20. At this time, maybe seven employees left the property. Tr 214:21-23. After Hernandez checked the floor, Hernandez went outside and talked to them to see if they wanted to come back in a discuss things before they left - - giving them one more opportunity to return to work. Tr 214:24-215:3. When the workers decided not to come back, Hernandez asked for their ids so he could present them to Lidia Acosta, HR Manager, and the proper procedure steps could be taken. Tr 214:4-9; GC Exh. 16.

Plant Manager Mike Helzer told these same employees who walked off the job that "You can either come back to work or you are going to have to leave the premises." Tr 736:6-23. Helzer testified that he did not terminate any of these employees. Tr 754:18-19. This disruption by the employees affected production. Tr 737:10-11.

Chris Kitch, Fabrication Superintendent, did not hear supervisors during the work stoppage on March 26, 2018, threaten to terminate any employees. Tr 768:6-8.

Hernandez never told the employees engaged in the work stoppage that they would lose their jobs because they were complaining about a wage increase. Tr 785:1-3. Hernandez told every employee who was exiting the facility that they had the opportunity to go back to work. Tr 785:22-796:4. However, the employees voluntarily left on their own. Tr 786:5-9.

Hernandez did not have any part in the decision making regarding the employees' employment. Tr 219:20-22. Acosta testified that employees were separated for job abandonment under voluntary termination and involuntarily terminated for violating the Company policy, which was for walking out/job abandonment. Tr 569:4-7; 569:16-21. It is Company policy, if you walk out, you will be terminated. Tr 574:23-25.

Helzer did not termination the employees for complaining in the cafeteria about wanting higher wages. Tr 737:20-22.

Kitch did not tell employees that they would be terminated for complaining about their wages. Tr 768:18-21.

Hernandez was not involved in the decision regarding the employees' separation. Tr 788:17-19.

Helzer's threat to call the police did not have anything to do with the employees complaining about receiving higher wages. Tr 738:7-9. In fact, Helzer testified that the police were never called and the police never did show up. Tr 738:12-15.

3. Statements/Actions by Other Supervisors

Hernandez testified that he was not involved in whether dues are deducted from employees' paychecks. Aramis Hernandez Acosta testified that he went to see Lidia Acosta to sign a document to get out of the Union and told Acosta he wanted to sign the document and then he signed the document. Tr 361:19-24; Jt Exh. 12 (p. 1).

Celesta Sanchez testified that no one from the Company talked to her about resigning from the Union. Tr 380:14-16; 393:14-16.

Sanchez stated in her sworn statement to the Board's agents that two employees, Richard and Veronica, who had signed a statement from Lidia Acosta, did so because these two employees had gone to the Human Resources to resign from the Union, and Lidia Acosta then brought them the paperwork for them to sign. Tr 393:4-13.

Kyle Anzualdo testified in a statement to the Board's agents that "no supervisor spoke with me to see if I wanted to leave the Union." Tr 465:22-467:14.

Mendoza testified that she did not ask employees to resign from the Union. Tr 716:22-24. Mendoza testified that she did not ask employees to cease paying Union dues. Tr 716:25-717:2.

Helzer testified that employees went to his managers asking to revoke their authorization to pay Union dues. Tr 741:8-13. Helzer did not ask any employee to withdraw from the Union. Tr 741:14-17. Helzer testified that employees have not asked him if there is a way for them to get out of the Union. Tr 779:17-19. Helzer did not know anything about employees being asked to revoke their permission to have their Union dues withheld. Tr 794:7-10.

Murrillo has not witnessed another supervisor or manager asking employees to resign from the Union. Tr 799:23-25. Murrillo has not approached employees asking them to resign from the Union. Tr 799:20-22. Murrillo never asked employees, "If the Union is not in the plant, why would they want to be a member or pay union dues?" Tr 800:4-7. Employees have not approached Murrillo to ask about resigning from the Union. Tr 800:8-10.

Javenceo Eusebeu Ramirez Delacruz signed a document resigning from the Union. Tr 396:1-14; Jt Exh. 12 (p. 31). Delacruz went to Acosta and told her he wanted to withdraw from the Union so they would stop taking out money from his paycheck and Acosta gave him a document to sign. Tr 399:8-25. After Delacruz signed the form, the Company stopped deducting Union dues from his paycheck in the next paycheck or the paycheck after that one. Tr 400:1-8.

Steve Catalan filled out a form that Acosta gave him after he asked to stop being a Union dues member and paying fees. Tr 438:6-24. Marcial Torres Santiago went to the Human Resources to ask if he had the right to leave the Union and Acosta gave him a form to sign. Tr 448:11-449:1; Jt Exh. 12 (p. 42). Luz Esther Ledezma spoke to Acosta about why the Company was taking $6.00 from her paycheck and Acosta gave her a document to sign so the Company would stop taking it out. Tr 514:2-515:1.

Mendoza never provided employees a form for them to sign to resign from the Union. Tr 717:6-9. Mendoza never provided employees a form for them to revoke their Union dues check-off authorization. Tr 717:6-9. Hernandez has not distributed forms for employees to resign from the Union. Tr 779:20-22. Hernandez has not received forms from employees to resign from the Union. Tr 779:23-25. Hernandez did not distribute forms for employees to revoke their Union dues check-off authorization. Tr 780:1-3.

Murrillo has not seen a form from Human Resources for employees to sign if they want to resign from the Union. Tr 800:1-3.

Mendoza never asked employees about their support for the Union. Tr 717:13-15.

Acosta asked employees if they gave the Company permission to share their personal information. Tr 558:2-14; 559:19-23; Jt Exh. 13. If the employees said "no," then she would have them sign the form. Employees would come to her office and sign the form. Tr 560:1-10. Acosta testified that she did not mention to the employees that the Union has asked for information. Tr 560:20-21.

After Delacruz signed the form to not have Union dues withheld from his paycheck, he was given another document to sign. Tr 400:12-404:8; Jt Exh. 13 (p. 32). Mendoza testified that she never requested employees to sign a form which would prohibit disclosure of their personal information. Tr 717:16-19. Hernandez testified that he has not received forms from employees to bar the release of personal information to others. Tr 780:4-6. Murrillo testified he never asked employees to sign a form that did not allow for disclosure of their employment information. Tr 800:11-13.

4. Interrogating Employees

Mary Junker, Administrative Clerk/prior HR Manager, testified that she learned employees had received a subpoena in the mail during the NLRB's investigation of the charges against the Company. Tr 139:17-23. Junker asked an employee (Otis Simmons who came up to her and told her he had received a letter) to bring in the subpoena and he brought in the cover letter, which said it was for an NLRB interview. Tr 139:24-140:22; GC Exh. 7; Tr 141:7-12. Kitch testified that he did not know the content of the letter one or two of his employees had received. Tr 286:6-20. Murrillo testified he was approached by an employee who received a letter in the mail, but he

never saw the letter sent to the employee. Tr 301:3-302:2. Murrillo testified that he did not know who it was from. Tr 302:3-4. Mendoza testified that an employee Rafael Cruz came to her about a letter he received that he did not know what it said because of his English. Tr 351:24-352:10. Mendoza testified that she did not see the letter. Tr 352:11-12. Allejandro Torres testified that nobody from the Company asked him about meeting with the NLRB agents at the church. Tr 507:22-24. Ledezma testified that no one talked to her about her conversation with the government official. Tr 520:24-521:2. Mendoza testified that she never questioned employees about any activity that they had with the NLRB involving its investigation of the Company. Tr 717:20-24. Mendoza testified she never saw the letter that employee Jonel Cruz received. Tr 718:11-12.

Kitch did not ask any employee about their meeting with the NLRB agents. Tr 763:9-12. Kitch testified he never saw a letter that was sent to any employee from the NLRB. Tr 763:21-23. Kitch testified he never told supervisors to ask employees if they got a letter from the NLRB. Tr 763:24-764:1.

Hernandez testified that one employee asked him about receiving a letter to visit with an NLRB agent. Tr 789:21-23. Hernandez testified he told the employee he would have to attend the meeting when asked by the employee. Tr 789:24-790:4.

Hernandez testified that he did not ask any of his employees if they had received letters from the NLRB. Tr 790:5-7. Hernandez testified he never saw the letter the employee was asking about. Tr 790:8-10; 792:9-11. Murrillo testified he did not talk to any employee about meeting with NLRB agents. Tr 805:5-8. Murrillo testified one of his employees told him he had received a letter from the NLRB, but he never saw the letter. Tr 805:20-24. Murrillo testified that no

supervisor or manager talked to him about employees receiving letters from the NLRB. Tr 805:25-806:2.

5. Employees' Meeting with Attorneys

Junker testified that the Company made a decision to provide legal representation for employees that had been subpoenaed by the NLRB. Tr 141:24-142:2. Junker testified that the Company would pay for the attorneys. Tr 142:24-143:1. Junker testified that the Company retained three outside attorneys to represent employees who had been subpoenaed. Tr 143:5-8.

Junker testified that the Company posted notices to employees in English and Spanish at the Company and Junker and Acosta kept a copy of the notices to the employees at their desk. Tr 144:1-144:22; 145:3-6; Jt Exh. 15. Junker testified that she gave one of these notices to employee Robert Mavilingo. Tr 145:9-11.

Junker testified that the attorneys were present at the Company's facility the day before the affidavits were scheduled to be taken by the NLRB agents. Tr 146:3-6. Junker testified that Hernandez, Kitch, and she contacted employees that had signed off saying that they did not want to be a Union member anymore to see if they had received a subpoena and if they wanted to speak to an attorney. Tr 148:2-153:6; GC Exh. 8. Junker testified that she did not know anything that was discussed between the attorneys and employees. Tr 154:2-4. Josue Guerrero, former Fabrication Supervisor, testified that he told employees if they received a letter from the NLRB that they were free to go and talk with attorneys that were hired by the Company if they wanted to. Tr 163:17-23. Guerrero testified that there was no negative consequences for any of the employees who went up and talked to the attorneys about the letter that they had received. Tr 167:8-13. Guerrero testified he did not know who the letter was from. Tr 168:16-19. Guerrero testified he never saw any letter to determine who it came from or what it was asking about. Tr 169:12-17.

Hernandez testified that an employee came to him and let him know he had received a letter before the employees met with the NLRB. Tr 222:4-10. Hernandez testified he never saw the letter which the employee figured it concerned the Union. Tr 222:14-16. Hernandez testified he was not aware the Union had filed an unfair labor practice charge against the Company. Tr 222:25-223:16. Hernandez testified he learned later that the Union had filed unfair labor practice charges against the Company. Tr 225:12-15.

Hernandez testified he told employee Antonio Pregar who had received a letter that he needed to do whatever the letter said, but he did not know where the letter was from. Tr 226:5-25. The employee told Hernandez it was something about the Union and Hernandez told him he needed to go to the meeting. Tr 228:3-15.

Kitch testified that he was told to tell people that if they had any questions about the letters, that the Company would have attorneys available for them to talk to. Tr 288:25-289:2.

Murrillo told an employee that the Company would have a lawyer who could help her with the letter. Tr 306:20-23. Murrillo testified he told the employee it was voluntary to meet with the attorney. Tr 307:1-3; 308:14-15. Murrillo told the employee you are not going to be in trouble. Tr 307:17-22. Murrillo testified that if you do go to speak to an attorney, it's up to you. Tr 309:18-24. If you don't want to go, you don't have to go. Tr 309:18-24.

Fischel Ziegelheim, CEO of the Company, contacted the attorneys to represent employees in connection with an investigation being conducted by the NLRB. Tr 324:22-325:6. Ziegelheim testified that an employee had received a subpoena and he was nervous, and did not know what to do, and so he contacted attorneys at another firm to advise the employees. Tr 325:15-326:4; R Exh. 1. Ziegelheim testified he received a letter from the attorneys stating that the Company's employees would be the attorneys' clients, and an attorney-client relationship would exist between

Kutak Rock law firm and the Company's employees. Tr 326:24-327:4; R Exh. 1. Ziegelheim testified that the attorneys would have no attorney-client relationship with his Company. Tr 327:5-13; 331:2-4; R Exh. 1.

Ziegelheim testified that the attorneys would meet with the employees who chose them to have them as their representative. Tr 327:17-20; R Exh. 2.

Ziegelheim testified that the Company was informed that the NLRB Regional Office recognized that his employees had a right to have counsel present when they are being interviewed by the NLRB agents, but that the NLRB was objecting to the Company paying for the attorneys. Tr 329:17-24; 346:14-17.

Ziegelheim testified that his Company was not informed of any legal authority that the NLRB Regional Office had to prevent the Company from having these attorneys represent the employees. Tr 330:4-7.

Ziegelheim testified that his Company posted a notice to employees in Spanish and English to let the employees know that counsel are available for them. Jt. Exh. 15; Tr 330:11-331:1.

Mendoza testified that she told employee Cruz that if he had a question, he could go and talk to a woman about the letter. Tr 355:2-16. She did not know if the woman was a lawyer. Id.

Aramis Acosta testified that he was told the attorney would be paid by the Company. Tr 368:1-4. Delacruz testified that he was told by his supervisor he could meet with an attorney if he wanted regarding a subpoena he had received. Tr 413:11-25. Delacruz testified he was not told that he was required to meet with an attorney. Tr 417:1-3. Delacruz testified if he did not want an attorney he could elect not to have an attorney. Tr 418:25-419:2. Delacruz testified that when he met with the attorney, she explained why he was there, what she wanted to talk about, and that

he would not get in trouble. Tr 426:14-22. Delacruz understood after he spoke to his supervisor that speaking to the attorney retained by the Company was voluntary. Tr 428:17-20.

Torres was told to go talk with an attorney and the attorney asked if he wanted representation. Tr 508:3-20. Torres testified it was up to him to go talk to the attorney. Tr 508:21-23.

Mendoza testified that no employees asked her about the lawyers talking to employees. Tr 719:1-3. Mendoza testified she encouraged one of her employees to go talk to a lawyer if he had any questions regarding the letter he received. Tr 719:4-10. Mendoza testified she did not tell the employee he was required to meet with a lawyer. Tr 719:11-13. Mendoza testified she did not ask the employee what was said when he met with the lawyer. Tr 719:14-16. Mendoza testified it was not mandatory for the employee to go see an attorney and the employee would not have been disciplined if he failed to do so. Tr 719:23-25.

Helzer testified he knew there were attorneys present for the employees if they would like them to represent them. Tr 741:18-23. Helzer did not direct any supervisors to tell employees that this is a mandatory meeting. Tr 742:2-4. Helzer testified he was told by Ziegelheim that they were not to tell the employees to go talk to attorneys. Tr 758:3-7.

Kitch testified that no employees were disciplined for missing work when they met with the NLRB agent. Tr 764:2-4. Kitch testified that he did not have any discussions with employees about using an attorney when meeting with the NLRB agents. Tr 764:19-22. Kitch testified he was told to allow employees time off from work to go meet with an attorney in the office. Tr 764:23-25. Kitch did not take any action against any employee who met with the attorneys. Tr 770:16-25. Kitch testified that the employees were to be told that attorneys were available if they wanted to talk to them. Tr 771:1-8. Kitch testified he told his supervisors to tell the

employees it was not mandatory that they went, that it was voluntary for them to talk to them on what the letter meant. Tr 771:1-8; 773:4-9.

Murrillo testified he was told the Company had provided lawyers to meet with employees regarding their meeting with the NLRB and it was up to the employees if they wanted to meet with the attorneys. Tr 806:7-13; 806:20-24. Murrillo told employee Luz it was up to him if he wanted to go speak to an attorney - - it was voluntary on his part. Tr 806:25-807:9.

6. Paul Hernandez's Statements to Employees on Meeting with Attorneys when Meeting with Board's Agents

Hernandez testified he was not aware of the attorneys going to be there until the day they arrived. Tr 229:14-17. Hernandez testified that Antonio asked him if the attorneys were present and he told Antonio that they were available for him to utilize. Tr 230:22-231:3. Hernandez testified he did not tell Antonio what the attorneys would talk to him about because he did not know. Tr 231:3-7. Hernandez testified that he told an employee that there were attorneys present if he wanted to talk to them. Tr 790:16-22. Hernandez testified he did not tell employees that they needed to go talk to the attorneys. Tr 790:23-25.

Hernandez testified that employees were not penalized or disciplined for going to talk to the attorneys. Tr 791:16-18. Hernandez testified that the employees were paid for the time that they went and talked to the attorneys. Tr 791:19-22. Hernandez testified he did not tell employees that the Company does not want them talking about - - to the NLRB that they shouldn't be talking about or that they could not answer. Tr 791:22-792:2.

7. March 27, 2018, Walk Off the Job

Guadalupe Ortiz testified that employees were told if they did not want to work on the morning of March 27, 2018, that they could go home and a group of employees got up and walked out the door. Tr 269:3-11. Ortiz testified that employees who walked off the job were told that

what they were doing was against the Union contract. Tr 273:17-20. Ortiz testified that employees were told that a solution to the problem was to go back to the work station to discuss the problem later that day after work. Tr 274:5-10. Ortiz testified that if she did not show up to work when she was scheduled to work, then she could be fired. Tr 282:3-17. Ortiz testified that if you walk off the job before the job is done for the day, you can be terminated. Tr 282:18-20.

Murrillo testified that the packaging employees normally started work at 6:15 a.m. Tr 293:15-17. Murrillo testified that the packaging employees were refusing to work. Tr 293:21-294:16. That they were talking in the cafeteria. Id. Murrillo testified that Sandra told him that they were refusing to work because another employee was making more money than they were making. Tr 295:13-16. Murrillo testified he told them that they could wait and talk to Acosta when she came to work at 8:00 a.m. Tr 295:17-21. Murrillo told the ladies to go to work, wait for Acosta to come in, and then go with him and talk together with her. Tr 296:1-5. Murrillo filled out the separation notices for the employees who walked out of work on March 27. Tr 297:16-25; Jt Exh. 16. Under voluntary resignation, he marked job abandonment and in the next column under involuntary termination he marked violation of Company policy because they refused to go back to work. Tr 298:25-299:11; Jt Exh. 16.

Murrillo testified he would not rehire the employees because they walked off the job and may do it again if rehired. Tr 300:16-23.

Kitch prepared a summary of the employee work stoppage. Tr 765:15-23; R Exh. 10. Kitch testified that the work stoppage had slowed down production. Tr 766:9-13.

Murrillo signed the separation notices for the employees that didn't go back to work the morning of March 27, 2018. Tr 803:10-14. Murrillo separated them from their employment because they left their jobs, not because they complained about their wages. Tr 804:22-805:3.

8. Employees' Survey on Independence Day Holiday

Junker testified that the Company surveyed employees to determine whether they wanted to move the observance day from Wednesday, July 4, to Friday, July 6, 2018, so the employees could have a 3-day weekend. Tr 98:24-99:5; 99:15-22; Jt Exh. 18.

Marcial Torres Santiago testified that he was told by the supervisor that if he worked July 4, he would have off Friday, Saturday, and Sunday. Tr 446:15-25. Santiago testified that his supervisor asked other employees if they wanted to work the Fourth of July. Tr 447:15-22.

Kitch testified he may have been involved in asking employees about switching the Independence Day holiday from July 4 to July 6, 2018, to figure out whether they wanted a 3-day weekend instead. Tr 771:9-19.

Hernandez testified he talked to employees about their preference on working on July 4 and taking July 6 instead, so they could be off on the weekend. Tr 792:12-22.

Murrillo testified he asked employees if they would agree to the change of holiday from July 4 to July 6.

9. Collective Bargaining Negotiations

The Company's spokesperson at the negotiations table was Junker. Tr 62:23-25. Junker informed the Union that she had to bring the Union's proposals to Michael Koenig and Ziegelheim for their approval. Tr 66:18-24. Junker would communicate the Company answers from Koenig and Ziegelheim at the negotiations table in response to the Union's proposals. Tr 78:22-79:5.

The Union only agreed to one of the Company's proposals, which was to change the name from Nebraska Prime Group to Noah's Ark Processors. Tr 74:17-23; Jt Exh. 25. The Company agreed to Union proposal numbers 2, 3, 18, and 19. Tr 79:22-81:1.

Junker told the Union during negotiations that the current wage rates were in after the raises had been given by the Company on August 23, 2018, based on classification. Tr 95:8-11;

95:15-96:3; 115:9-16; and GC Exh. 4. The Union was aware that the Company had made wage increases, but had not agreed to them according to Mike Marty. Tr 686:23-25; 688:20-21; 696:24-697:2.

Junker presented the Company's last best offer to the Union on January 2, 2019, and met with the Union again on the Company's final offer on January 25, 2019. Tr 87:24-88:4; 92:13-93:17; Jt Exh. 7. At the clarification session on January 25, 2019, after the Company had presented its last, best and final proposal to the Union, the Union did not respond back to Junker with questions about the Company's proposal as this clarification or after, and did not make requests for additional bargaining sessions after this meeting. Tr 709:21-710:15. The Union's attorney contacted the Company in an attempt to have the Company rescind its decision to implement its last, best and final offer. Tr 711:12-15.

IV. ARGUMENT

A. Record Evidence Fails to Support that Noah's Ark Violated Section 8(a)(1) of the Act

1. Ten Employees Engaged in Unauthorized Work Stoppage on March 27, 2018, and Abandoned Their Jobs

While an employer is ordinarily free to discharge an at will employee for any or no reason, the NLRA provides protections to workers who seek to form a union or otherwise engage in concerted labor activities. 29 U.S.C. § 158(a). In evaluating an employee's termination allegedly caused by protected labor activity, the question is whether the employee's termination was motivated by the protected activity. N.L.R.B. v. RELCO Locomotives, Inc., 734 F.3d 764, 780 (8th Cir. 2013). The Board uses the Wright Line analysis when an employer articulates a facially legitimate reason for its termination decision, but that motive is disputed. Id.; see also Wright Line, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Under this analysis, the initial burden is on General Counsel to establish that the employee's

protected activity "was a motivating factor" in the termination decision. Id. The elements of this prima facie case are "(1) the employee was engaged in protected activity; (2) . . . the employer knew of the employee's protected activity; and (3) . . . the employer acted as it did on the basis of anti-union animus." Id. (quoting N.L.R.B. v. Rockline Indus., 412 F.3d 962, 966 (8th Cir. 2005)).

If the General Counsel can meet this burden, "the conduct is unlawful unless the employer proves it would have taken the same action absent the protected activity." Id. (quoting N.L.R.B. v. MDI Commercial Services, 175 F.3d 621, 625 (8th Cir. 1999)). The employer's rationale cannot only be a potential or partial reason for the termination, it must be "the justification." Id. (quoting Rockline, 412 F.3d at 970 (emphasis in original)).

First, the employees at issue were not engaged in protected activity. Normally, employees have the right to strike for the purpose of demanding concessions from their employers. 29 U.S.C. § 157. However, when employees designate and join a union, the union is given the exclusive right to collectively bargain with their employer concerning the terms and conditions of work. 29 U.S.C. § 159(a). Therefore, when employees go on strike without union authorization, they are engaging in an illegal, unauthorized work stoppage under the NLRA. See Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) (holding that wildcat strikers are bargaining separately and are therefore not protected by the NLRA). This unauthorized work stoppage is often referred to as a "wildcat strike." Federal courts have held that employees may be discharged by their employers for participating in such wildcat strikes. Id. Ordinarily, a wildcat strike occurs when unionized employees engage in a strike, stoppage, slowdown, or suspension of work in violation of an existing collective bargaining contract, or otherwise fail to obtain the support and ratification of the whole union.

Under Article 1 of the Collective Bargaining Agreement, Noah's Ark, as the successor to the agreement, agreed to recognize the Union "as the sole collective bargaining agent for all production, maintenance, shag drivers and distributions employees" and agreed "to deal only with the duly authorized representatives of the Union on all matters relating to grievances, wages, hours and other conditions of employment. Moreover, Article 16 of the Collective Bargaining Agreement states that: "During the term of this Agreement, there shall be no strike, stoppage, slowdown, or suspension of work or sympathy strikes or boycotts on the part of the Union or its members[.]"

On March 27, 2018, a group of ten employees participated in a wildcat strike in violation of the Collective Bargaining Agreement. While the employees were informed that the activity was against the Collective Bargaining Agreement, they refused to return to work. Tr 273. Therefore, Noah's Ark's supervisors asked the employees to leave the facility if they did not want to return to work.

In accordance with company policy, Noah's Ark considers the employees' decision to abandonment their positions as a form of resignation. However, even if the Court finds that Noah's Ark terminated these individuals' employment, this would not constitute a violation of § 8(a)(1) of the NLRA because the employees were engaging in an unprotected wildcat strike. See Emporium, 420 U.S. 50.

Even if the work stoppage is considered protected concerted activity, Noah's Ark did not act "on the basis of anti-union animus." RELCO Locomotives, Inc., 734 F.3d at 780 (quoting N.L.R.B. v. Rockline Indus., 412 F.3d 962, 966 (8th Cir. 2005)). The record demonstrates that both union and non-union employees were part of the group that left the facility on March 27, 2018. Noah's Ark treated each of these employees equally regardless of their union affiliations.

Therefore, the decision cannot be said to be motivated by the employees engaging in allegedly protected activity.

Further yet, even if General Counsel could meet its prima facie case, Noah's Ark would have taken the same action absent the protected activity. Id. (quoting N.L.R.B. v. MDI Commercial Services, 175 F.3d 621, 625 (8th Cir. 1999)). That is, regardless of the underlying reason for the employees' decision to stop work and leave the facility, Noah's Ark neutral policy regarding job abandonment serves as "the justification" for the termination of the employees. Therefore, the decision cannot be considered impermissible under § 8(a)(1) of the Act.

2. Noah's Ark Provided Ministerial Aid for Employees Seeking to Resign from the Union

General Counsel may argue that Noah's Ark went beyond providing "ministerial aid" to employees who sought to resign from the Union and revoke valid dues deduction authorizations. Employers do not violate the Act by rendering ministerial aid to employees if their action occur in a "situational context free from context free of coercive conduct." See Narricot Indus., L.P. v. N.L.R.B., 587 F.3d 654, 662–63 (4th Cir. 2009), abrogated on other grounds by New Process Steel, L.P. v. N.L.R.B., 560 U.S. 674, 130 S. Ct. 2635, 177 L. Ed. 2d 162 (2010); see also E. States Optical Co., 275 N.L.R.B. 371, 372 (1985). That is, whether conduct constitutes more than ministerial aid turns on whether "the preparation, circulation, and signing of the [document] constituted the free and uncoerced act of the employees concerned." Mickeys Linen & Towel Supply, Inc., 349 NLRB 790, 791 (2007) (internal quotation marks omitted). Whether the employer's conduct was actually coercive, however, is immaterial, if the particular conduct would have a "reasonable tendency in the totality of the circumstances to intimidate." N.L.R.B. v. Transpersonnel, Inc., 349 F.3d 175, 180 (4th Cir. 2003) (internal quotation marks omitted); see also Bridgestone/Firestone, Inc. & Auto. Chauffeurs, Parts & Garage Employees, Teamsters Local

Union 926 a/w Int'l Bhd. of Teamsters, AFL-CIO, 335 NLRB 941, 943 (2001) (citing 275 NLRB at 372). The key is that the employer cannot interfere, by its assistance to the employees who are seeking to disconnect from the union, with the employee's free choice. Vic Koenig Chevrolet, Inc. v. N.L.R.B., 126 F.3d 947, 950 (7th Cir. 1997); see also Manhattan Hospital, 280 NLRB 113, 115 (1986) (finding solicitation of employees who were on strike to leave the union and come back to work and offering to help the employees to write the letter to withdraw from the union was more than ministerial support); Narricot Industries, 353 NLRB 775 (2009) (repeatedly instructing an employee to solicit more signatures to decertify the union and incentivizing this decertification by promising to increase wages constituted more than ministerial support).

Here, Noah's Ark did not actively encourage or solicit employees to revoke their dues check-off authorizations. Rather, the record demonstrates that employees exercised their free choice regarding Union representation, approached Noah's Ark's Human Resources Department personnel, and sought—on their own initiative—to revoke their dues check-off authorizations. While Noah's Ark prepared the document to assist employee in the revocation of their dues check-off authorization, Noah's Ark did not solicit or circulate this document to its entire workforce. These pre-made forms were reserved for those individuals who approached Noah's Ark and inquired about withdrawing from the Union. Therefore, Noah's Ark's actions clearly demonstrate a "situational context free from context free of coercive conduct" and its limited assistance does not have a "reasonable tendency in the totality of the circumstances to intimidate." See Narricot, 587 F.3d at 662–63; N.L.R.B. v. Transpersonnel, Inc., 349 F.3d at 180; see also E. States Optical Co., 275 N.L.R.B. 371, 372 (1985). Such conduct, without more, does not constitute a violation of Section 8(a)(1) of the Act. See Ernst Home Centers, Inc., 308 NLRB 848 (1992) (citing Eastern States Optical Co., 275 NLRB 371 (1985)).

3. Noah's Ark Did Not Interfere with the Board's Investigation by Providing Employees with Independent Legal Representation

The General Counsel alleges that Noah's Ark interfered with the Board's investigation of the issues raised in this matter by retaining outside legal counsel to represent employees when subpoenaed by the NLRB. However, General Counsel failed to cite any legal precedent indicating that the provision of legal counsel to employees who are subject to NLRB subpoenas constitutes unlawful interference into the investigation. Likewise, General Counsel fails to demonstrate how the employees' representation by legal counsel retained by Noah's Ark had any impact on its ability to conduct a full and thorough investigation or constituted a restraint of the employees' rights guaranteed by § 7 of the NLRA.

Employees have a fundamental right to have an attorney present before making any statement to an investigative agent of the government. Florida Steel Corp. v. N.L.R.B., 587 F.2d 735, 751 (5th Cir. 1979). An employer may offer its employees assistance in securing legal counsel, so long as the assistance is offered to "all employees, regardless of the position they take with respect to the Union and regardless of the position they take with respect to talking to the Board's agent." Id. There must not be any "coercion, threat of reprisal, or force" in offering such assistance. Id.

Furthermore, under Nebraska law and Rules of Professional Conduct, "a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent." Ross, Schroeder & George, LLC v. Artz, 875 N.W.2d 457, 467 (Neb. Ct. App. 2016) (quoting Neb. Ct. R. of Prof['l] Cond. § 3-501.8(f)); see also In the Matter of the State Grand Jury Investigation, 200 N.J. 481, 485, 983 A.2d 1097, 1099 (N.J. 2009) (denying State's motion to disqualify counsel retained by and paid for by employer to represent its employees during grand jury proceedings investigating

employer for alleged fraud) ("Regardless of the setting—whether administrative, criminal or civil, either as part of an investigation, during grand jury proceedings, or before, during and after trial—whether an attorney may be compensated for his services by someone other than his client is governed in large measure by [the Rules of Professional Conduct]."). Additionally, Neb. Ct. R. of Prof'l Cond. § 3-505.4(c) "prohibits a lawyer from permitting someone who pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Id.

In this case, several employees approached Noah's Ark's supervisors because they received a "letter" or "subpoena" from the NLRB. As many of the employees at Noah's Ark do not speak or read English, they sought assistance from their supervisors in understanding their obligations. In light of this language barrier, Noah's Ark decided to provide legal counsel to these employees as a benefit of employment because it understood that the employees had a legal right to be represented by counsel during these NLRB interviews but the employees would not otherwise be able to afford such protections. Accordingly, Noah's Ark posted a Notice to Employees to inform employees that: (1) they have the right to have legal counsel, if they desire, prior to and when talking to the NLRB agent; (2) they were *not* required or compelled to report to or consult with Noah's Ark regarding obtaining legal counsel or speaking with the NLRB agent; (3) the employees could speak with legal counsel and be represented by legal counsel to serve as their attorney, if they so desired; (4) Noah's Ark would pay for the services as a benefit to the employees; and (5) Noah's Ark does not have an attorney-client relationship with these attorneys. Jt Exh. 15.

The Notice to Employees makes clear that the attorneys would be provided to employees, "regardless of the position they [took] with respect to the Union and regardless of the position they

[took] with respect to talking to the Board's agent," as the employees were in no way required to report to or consult with Noah's Ark regarding these matters. Florida Steel Corp. v. N.L.R.B., 587 F.2d at 751. While Noah's Ark procured and paid for the attorneys, it had no influence on the independent professional judgement of these attorneys. Employees knew that they had the exclusive discretion to determine whether or not they wanted to be represented by counsel and, if so, that the attorney-client relationship existed solely between the employee and the attorney—not Noah's Ark. This offer was truly a voluntary and free benefit—detached of any "coercion, threat of reprisal, or force" —that was provided to employees to ensure the preservation of their legal rights during the NLRB investigation.

B. Record Evidence Fails to Establish that Noah's Ark Violated Section 8(a)(5) of the Act

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). "Mandatory areas of collective bargaining include 'wages, hours, and other terms and conditions of employment.'" N.L.R.B. v. Whitesell Corp., 638 F.3d 883, 890 (8th Cir. 2011) (quoting TruServ Corp. v. N.L.R.B., 254 F.3d 1105, 1113 (D.C. Cir. 2001) and 29 U.S.C. § 158(d)). An employer violates sections 8(a)(1) and (a)(5) of the NLRA when the employer makes a unilateral change in a term or condition of employment without first bargaining to an impasse on that term. NLRB v. Katz, 369 U.S. 736, 743 (1962). An impasse occurs when "good faith negotiations have exhausted the prospects of concluding an agreement, leading both parties to believe that they are at the end of their rope." N.L.R.B. v. Whitesell Corp., 638 F.3d at 890 (quoting TruServ, 254 F.3d at 1114) (quotations and citation omitted). "[T]here is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations." Id. Rather, whether the parties have reached impasse is a case-specific inquiry[.]" Id. Factors that the Board considers in

evaluating whether valid impasse has been reached includes "the bargaining history, the good faith of the parties in negotiation, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." N.L.R.B. v. Whitesell Corp., 638 F.3d at 890 (quoting TruServ, 254 F.3d at 1114).

As recognized by General Counsel, Noah's Ark and the Union met for negotiations approximately twenty times between March 22, 2018 and January 25, 2019. While the parties were able to reach minor tentative agreements related to (1) the change in Noah's Ark's legal name, (2) updating anti-discrimination language, and (3) moving certain language from one article to another, the parties were unable come to an agreement on any of the important issues involving mandatory areas of collective bargaining for seven and a half months. Compare, e.g., N.L.R.B. v. Whitesell Corp., 638 F.3d at 890 (finding invalid impasse when parties came to an agreement on 30 issues and were continuing to come to agreement on important issues up until the final meeting). Moreover, after Noah's Ark gave the Union its last, best, and final offer, the Union failed to accept, reject, or present any counter-proposal to Noah's Ark for four weeks. See Tr 706; Jt Exhs. 3-10. Consequently, Noah's Ark declared an impasse and implemented the last, best, and final offer in light of the "contemporaneous understanding of the parties as to the state of negotiations" that the parties were "at the end of their rope." Id.

V. CONCLUSION

Noah's Ark Processors respectfully requests the Complaint be dismissed.

DATED this 29th day of April, 2019.

NOAH'S ARK PROCESSORS, LLC d/b/a WR RESERVE, Respondent

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CERTIFICATE OF SERVICE

I certify that on the 29th day of April, 2019, I electronically filed the foregoing and served the following individual and parties by electronic mail:

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