

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

S & S ENTERPRISES, LLC D/B/A APPALACHIAN HEATING

Respondent – Charged Party

v.

SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS,
LOCAL UNION NO. 33

Charging Party

Case Nos.	09-CA-235304; 09-CA-235307; 09-CA-235314; 09-CA-236905; 09-CA-237847; 09-CA-237851; 09-CA-237858; 09-CA-238621; 09-CA-238930; 09-CA-239148; 09-CA-239170; 09-CA-241292; 09-CA-242230; 09-CA-242235; 09-CA-242238
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RESPONDENT'S POST-HEARING BRIEF

JAMES P. ALLEN, JR.
Managing Partner

NATHAN E. SWEET
Attorney

National Labor Relations Advocates
312 Walnut Street, STE 1600
Cincinnati, OH 45202
(513) 646-3600

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S&S ENTERPRISES, LLC, D/B/A APPALACHIAN HEATING (“Appalachian”)

submits the following post-hearing brief of law and argument in the above-captioned case(s).

I. ISSUES

The Complaint in this case consists of fifteen consolidated unfair labor practice charges. The issues raised in general are: 1) did various conversations between Appalachian and certain employees violate Section 8(a)(1) of the Act; 2) did Appalachian engage in unlawful surveillance of employees engaged in protected activity in violation of Section 8(a)(1) of the Act; 3) did Appalachian isolate or otherwise discriminate against employees because of their support of a union in violation of Section 8(a)(1) of the Act; 4) did Appalachian fail or refuse to recall Brandon Armstrong (“Armstrong”) from layoff because of his support of a union in violation of Section 8(a)(1) and 8(a)(3) of the Act; 5) did Appalachian fail or refuse to promote Eric Faubel (“Faubel”) because of his support of a union in violation of Section 8(a)(1) and 8(a)(3) of the Act; and 6) did Appalachian fail to reinstate or terminate Faubel following his unconditional offer to return from strike in violation of Section 8(a)(1) and 8(a)(3) of the Act?

II. STATEMENT OF THE CASE

A. Statement of the Facts

S&S Enterprises, LLC d/b/a Appalachian Heating was founded in 2014 by Dan Akers (“Dan”). [Tr. 628:1-20¹] after Dan purchased the naming rights from Thompson Gas who owned the name. The Akers family has worked in the heating and air conditioning business for over seventy (70) years.

¹ References to the Hearing Transcript shall be labeled Tr. (page number):(line number(s)).

Appalachian hired Armstrong and Faubel on November 19, 2018, and November 26, 2018 respectively. [JX 14²] Both men were assigned to work at Appalachian's newly started worksite at the Crossings, a retirement community under construction. [Tr. 10:7-10; Tr. 422:8-10].

On or about early January 2019, Appalachian became aware that it was subject to a union organizing campaign. [Tr. 42:18-23]. On or about January 9, 2019, Daniel Akers ("Daniel"), son of Dan and Operations Manager of S&S Enterprises, approached Faubel by phone seeking his interest level in becoming a working foreman. [GCX 8; Tr. 143:25-144:1; GCX 9: RT 28: final paragraph³]. On or about January 10, 2019, Dan met with Faubel to discuss the foreman position. [GCX 10]. The conversation contains three important and inseparable facts: 1) Dan made an initial offer to Faubel for the position [GCX 10:RT 11:17], 2) Appalachian needed Faubel's references before making the offer final [GCX 10:RT 1:7 – 2:8], and 3) the assignment that day was trial period. [GCX 10: RT 16:1].

On or about January 10, 2019, following a safety meeting in Charleston, an unknown person gave Daniel a copy of a union flyer that had been placed on the cars around the office. [Tr. 77:13 – 78:14; GCX 2]. Faubel was present when the flyer was given to Daniel [GCX 9]. Daniel did not address Faubel in any way that indicated he had knowledge of Faubel's position as union organizer. [GCX 9: RT 27:16 – 28:1]. Faubel does not at this time reveal his union affiliation or support and expressly asks "What is it?" [GCX 9: RT 27:18]. Daniel expressly states upon receiving the flyer that he "knows nothing about it [unions]." [GCX 9: RT 27:21].

² The brief shall refer to the various exhibits as follows: Joint Exhibits shall be labeled JX; General Counsel exhibits shall be labeled GCX, Charging Part exhibits shall be labeled CPX; and Respondent exhibits shall be labeled RX.

³ There were several recording transcripts amended to the record. To provide the highest level of clarity when referring to the recordings the labeling shall be as follows: [(exhibit number):RT (page number):(paragraph number)]

On or about January 14, 2019, Dan and Faubel had a telephone meeting to follow up on their meeting from January 10. [Tr. 190:2-6]. During that call Dan asked if Faubel was a member of the union. [Tr. 192:10-11]. Faubel said no, sir. [Tr. 192:12]. Dan expressly states that he trusted Faubel. [Tr. 192:17]. After that exchange, Dan reaffirmed the initial trial offer for the foreman position. [Tr. 192:21-22]. He also reaffirmed that the promotion was a trial period and not a final decision. [Tr. 192:22-24].

On or about January 15, 2019, the first of several YouTube videos made by the union was posted and relayed to Daniel. [Tr. 81:10-13]. Daniel's response to the video was to file a copyright claim with YouTube. [Tr. 81:17-82:2]. On or about January 17, 2019, Daniel became aware of another YouTube video featuring Eli Baccus ("Baccus"), the union's general counsel. [Tr. 82:3-6].

On January 18, 2019, Dan, Tim McGuffin ("McGuffin"), and Faubel met at the Crossings Jobsite [Tr. 199:1-4; CPX 1]. Faubel got angry and insubordinate during the meeting. [Tr. 649:15-651:10; 287:3-7]. Dan had no knowledge of any union affiliation or support by Faubel on January 18, 2019. [Tr. 55:21-22]. McGuffin had no knowledge of any union affiliation or support by Faubel on January 18, 2019. [Tr. 651:11-13].

On January 20, 2019, Dan sent a text message to Faubel discussing his insubordinate attitude. [GCX 21: page 1-2]. On January 21, Faubel sent Dan a text apologizing for his insubordination and acknowledging that he understood the job was no longer his and that he hoped in the near future they could try again." [GCX 21: page 3].

On or about January 21, 2019, Daniel became aware of another video featuring Baccus. [Tr. 82:10-14]. On or about January 25, 2019, Daniel became aware of yet another video featuring Baccus. [Tr. 82:15-18]. On or about January 30, 2019, Daniel became aware of a YouTube video

featuring Faubel in which he *introduced* himself as Union Organizer Eric. [Tr. 82:19-24] (emphasis added).

On or about January 24, 2019, Appalachian distributed its handbook to Charleston market employees who had yet to receive one, including but not limited to Faubel. [Tr. 211:25-212:4]. The Appalachian handbook has not been revised, amended, or otherwise changed since November 28, 2014. [JX 1: page 1; Tr. 615:10-617:10]. Appalachian has maintained a handbook rule since November 28, 2014, that reads as follows:

On February 4, 2019, Appalachian held two safety meetings, one in Bradley and one in Charleston. [Tr. 58:5-12; 82:25-83:5]. Appalachian's safety meetings are not mandatory. [Tr. 59:2-7; 97:25-98:16; 515:8-14; 566:19-20; 588:20-24]. Unrefuted testimony from the General Counsel established that safety meetings were held monthly. [Tr. 57:17-20; Tr. 97:13-24].

On or about February 14, 2019, Jonathan Tierson ("Tierson"), foreman at the Crossings, distributed a copy of the Appalachian Employee Handbook [JX 1] to workers who had not yet received a copy. [Tr. 392:8 – 393:17]. This testimony from Paul Castle ("Castle") and JX 1 was the only evidence solicited by the General Counsel concerning Tierson's alleged threats regarding distribution of the Employee Handbook.

Tierson's clear testimony, supported by numerous witnesses, establishes that at no time did he ever indicate anyone would be fired for speaking to an employee who supported the union or threaten anyone with discharge for engaging in union activity or supporting the union. [Tr. 577:24-578:1; 554:2-5; 567:10-13]. Tierson harbored no anti-union animus and in fact considered joining the union at the start of the organizing campaign. [Tr. 573:24-574:5].

On or about February 28, 2019, Tierson took pictures of union picket lines as he drove his truck by them. [Tr. 106:10-17]. The pictures were taken in response to perceived threatening

activity during picketing the previous day. [Tr. 110:1-20; 111:2-12]. Tierson treated all workers equally in job assignments, discipline and all other employment terms and conditions. [Tr. 577:15-578:1].

On March 1, 2019, Daniel sent employees who drove company vehicles a text informing them of their rights and recourse to ensure their safety should union picketers act unlawfully. [GCX 12; Tr. 87:24-88:15]. The plain language of the text clearly instructs the drivers to record *illegal* activity solely. [GCX 12] (emphasis added). No testimony or evidence provided established that Appalachian instructed its employees to provide it with information on the union activities of other employees. [Tr. 546:20-547:5].

At no time relevant to the instant case has Appalachian promulgated, changed, or amended any rule or portion of its handbook or policies. [JX 1; Tr. 615:16-616:17; 617:15-18]. Appalachian's handbook has remained unchanged since 2014. [Tr. 616:11-13].

The union notified Appalachian that Faubel, Steven Marlof ("Marlof"), and Jarod Smith ("Smith") would be on strike beginning February 27, 2019. [JX 4]. The union proffered an unconditional offer to return for all strikers to begin on March 13, 2019. [JX 6]. All strikers returned to work on the stated date. [Tr. 231:20-233:12].

The union notified Appalachian that Faubel and Castle would be on strike beginning March 18, 2019. [JX 9]. The union notified Appalachian that Castle was unconditionally offering to return to his job beginning March 27, 2019. [JX 11]. Castle returned to work on or about March 27, 2019. [Tr. 404:3-6]. The union notified Appalachian that Faubel was unconditionally offering to return to his job beginning May 28, 2019. [JX 13]. Faubel returned to work on May 28, 2019. [Tr. 240:19-21].

Appalachian laid off Armstrong on or about March 27, 2019 due to lack of work. [JX 12; Tr. 656:18-25]. Many more experienced HVAC employees were returning from other jobs that were winding up. [Tr. 416:19-24; 581:5-16; 620:8-17; 647:17-648:5]. At all times relevant to the instant matter, following Armstrong's layoff, no new HVAC employees were hired for the Crossings. [Tr. 367:5-21; 381:8-11]. Appalachian did hire a new plumber for the Crossings. [Tr. 367:19-21; 381:8-11]. Armstrong was not qualified to do the work of a plumber. [Tr. 449:16-21].

Appalachian terminated Faubel on May 28, 2019. [JX 15]. Faubel was terminated because he improperly installed a large number of fire dampers at the Crossings posing a serious safety hazard to the project. [JX 15]. At the time that the fire dampers on the fourth floor were installed Faubel was tasked with the installation because he was the only one licensed. [Tr. 583:20-584:4]. West Virginia has two levels of fire damper licenses and Faubel held the highest level. [Tr. 584:6-17]. Faubel was the only one on the Crossings site to hold the highest level of licensing. [Tr. 584:6-17].

Faubel installed thirteen (13) out of sixteen (16) dampers on the fourth floor incorrectly. [Tr. 584:20-25]. The dampers were installed upside down. [Tr. 585:1-7]. The fire dampers have a clearly marked arrow and label that indicates "this side up." [Tr. 585:9-14; 295:12-14; 516:7-12; 537:8-12; 537:21-538:12]. Newly licensed Roger Hight, who holds the lowest level of license, installed every fire damper on the third floor correctly. [Tr. 602:24-604:1].

Faubel testified to the seriousness of improperly installed dampers at length. [Tr. 299:20-300:9]. Faubel's testimony on whether he installed the incorrect dampers is extremely contradictory with claims of none of the dampers on the fourth floor being attributable to six or eight. [Tr. 300:13-301:1; 291:16-22]. The General Counsel's other witness testimony is consistent with Respondent's witnesses that Faubel was the only licensed installer and exclusively installed

all the dampers on the fourth floor. [Tr. 411:16-22; 452:15-18; 454:3-6; 583:20-584:4; 597:12-598:2; 643:14-23].

At an undisclosed time during the time relevant to the instant matter, Faubel sent a text to all Appalachian employees, including Tierson, instructing them to engage in a work slowdown. [RX 5; Tr. 298:20-299:4; 299:9-19; 311:13-19]. Several employees voluntarily forwarded this text to Daniel. [Tr. 623:16-19; 631:1-6].

B. Procedural Posture

The instant matter is a consolidation of fifteen (15) separate charges filed by the union against Respondent. The Region issued complaint on or about May 13, 2019. The hearing was held on consecutive days August 12, 2019 through August 14, 2019 at the West Virginia State Capitol Complex in front of an Administrative Law Judge, the Honorable David I. Goldman. At the completion of the hearing, Judge Goldman held the record open pending the production of and agreement on transcripts of certain audio recordings placed into evidence. On or about September 19, 2019 upon Joint Motion to admit said transcripts, Judge Goldman closed the record and requested post-hearing briefs from the parties.

III. SUMMARY OF THE ARGUMENT

The allegations in the instant matter fall into three main categories. There are several allegations of various behavior to coerce, threaten, or restrain employees in the exercise of their Section 7 rights in violation of Section 8(a)(1). The complaint alleges a subset violation of 8(a)(1) that Appalachian maintained unlawful rules. Finally, the complaint alleges three discriminatory treatment of employees in violation of Section 8(a)(3).

A. 8(a)(1) Allegations

The General Counsel alleges several incidents of communication violative of Section 8(a)(1) of the Act. An employer is free to communicate his views on unionism or a particular union so long as the communication does not contain a threat of reprisal or force or promise of benefit.

Fortunately for the Respondent, the only corroborated communications alleged by the General Counsel are memorialized in recordings proffered as evidence at hearing. Not one instance of any threat of reprisal force or benefit existed in any of the proffered evidence. Interrogation of employees is not illegal per se. The Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employees' Section 7 rights. The words themselves, or the context in which they are used, must suggest an element of coercion or interference. If the alleged interrogation does not carry an implied threat of reprisal or in any other way interfere with, restrain, or coerce the employees in the exercise of the rights guaranteed in Section 7 of the Act, the conduct is not violative of the Act.

The General Counsel's case theory asks the ALJ to look past the obvious to find a violation of 8(a)(1). Each and every instance of alleged interrogation of Faubel precedes extensive praise and even discussion of offers of promotion. The alleged interrogation(s) of Faubel were conducted in a casual manner, not coercive, and in no way affected either the terms and conditions of Faubel's employment or his willingness to continue his union support. Because no other employees were present there can be no attribution to coercion or infringement upon the rights of other, so the "chilling effect" argument fails.

The General Counsel also makes much of the alleged surveillance of picketers by Tierson. The Board has long held that absent proper justification, photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate.

Tierson's clear testimony, supported and corroborated by others, was that the picketers on the first day of their strike, February 27, 2019, engaged in behavior perceived by other employees as threatening and unlawful. Tierson testified that his vehicle was nearly attacked, and the employer received numerous call of concern for employees who chose not to participate in the pickets. One employee's wife even asked to have dash cams installed to protect her husband. The Board has addressed similar concerns where traffic was impeded and where the employer had a legitimate safety concern finding no violation when proper justification has been established.

The General Counsel alleges in the Complaint that Daniel solicited surveillance and videotaping by text of employee protected activity in an effort to coerce or infringe employees' Section 7 rights. But such an inference ignores the plain language of the text which clearly instructs the employees to video record "their illegal activity" and the start of the instruction indicates contains a conditional trigger – only "if the actions you encountered yesterday continue." The Board has also allowed an employer to photograph where it plausibly sought to make a record of unlawful conduct.

General Counsel also attempts to attribute coercion or intimidation to an informational flyer distributed by the employer in response to several employee concerns. Again, the plain text of the flyer cannot be ignored. The flyer is simply informational in nature reminding employees of Appalachian's existing policies on harassment and their rights under the Act to be free from harassment in their support of, or opposition to, a union. The flyer does not contain any language that could reasonably be construed as a threat of reprisal or force or promise of benefit and therefore is lawful under existing Board case law.

The General Counsel alleges that the May 28, 2019 termination letter to Faubel contained unlawful threats. General Counsel misinterprets the Act in this instance. A threat to file a lawsuit

against an employee engaged in protected activity is certainly a violation of the Act. However, at the moment the letter was delivered, Faubel was no longer an employee specifically because he engaged in extremely negligent if not unlawful activity. The threat of legal action contained in the letter is specific to the possibly illegal activity in which he was alleged to have engaged. The letter, like the flyer, contains conditional trigger language. The company would seek legal recourse *only* upon the determination of purposeful action on Faubel's part by a third-party governmental investigation.

It stretches the bands of reality to the breaking point to believe that an experienced HVAC installer, possessing the highest level of licensing in the state, could have installed so many fire dampers incorrectly. Everyone who was present in the courtroom for the hearing in the instant matter now understands that the arrow on the label points "up" to install a fire damper properly. This concept is comprehensible to even those of us who have no HVAC experience. Faubel's insincere and uncorroborated claim that it does not matter what direction a damper is installed also lacks credibility. The manufacturer, the multiple experienced installers who testified including witnesses for the General Counsel, and the West Virginia Fire Marshall's Office all disagree with his statement. It cannot be lost on the process here that it was not Appalachian, but the West Virginia Fire Marshall that required the dampers be removed and reinstalled correctly. A professional tradesman possessing the highest level of licensing in the installation of a product should know the correct orientation for an installation for the equipment for which he is certified.

Faubel provided ample testimony on the ill effects to the company that would result from improper installation of fire dampers. It is the Respondent's strongly held belief that his actions were the result of purposeful industrial sabotage, and that his thorough testimony at hearing about

the ill effects were his motivating factor. While nothing short of an admission could definitively prove that assertion, the circumstantial case is extremely persuasive.

Even if Faubel's actions were not purposeful sabotage as Appalachian believes, they were certainly grossly negligent and resulted in all of the ill effects Faubel testified to. The company suffered loss of time, money, and reputation to correct eighty-one percent (81%) of the fire dampers Faubel installed. The negligence itself is justification enough to terminate.

However, if an investigative agency, more forensically astute than Appalachian, determined that the acts were purposeful sabotage, it was well within Appalachian's rights to seek remedy in the judicial system. The threat of legal action in the letter was clearly conditional with the trigger being the determination of purposeful action on Faubel's part.

Quite simply, the bulk of the 8(a)(1) allegations in the Complaint are the result of a union, unsuccessful in its attempt to organize Appalachian properly, resorting to abuse of the Board's processes in an effort to bring Appalachian to bear. Steve Hancock ("Hancock"), union organizer, indicated this was the plan. Combined with other admitted unlawful activity by Faubel, it is apparent that this union local in this particular instance is the very reason Congress, in a bi-partisan veto override, enacted the Taft-Hartley Act. The purpose of the Taft- Hartley was *inter alia* "...to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for ***preventing the interference by either with the legitimate rights of the other...***"

B. Alleged Maintenance of Unlawful Rules

The General Counsel alleges in the Complaint that the employer has maintained unlawful rules in violation of the Act. The Respondent believes all three rules cited fall within the confines of the Board's standard under *Boeing* and will thoroughly discuss the same in this brief.

Additionally, the General Counsel alleges that some of the rules were promulgated in response to protected activity. This is simply not true, and the unrefuted testimony on the record demonstrated the lack of merit in the allegation.

C. Alleged 8(a)(3) Violations

There are three allegations which fall under Section 8(a)(3) of the Act: 1) the alleged failure to recall Armstrong, 2) the alleged failure to promote Faubel, and 3) the alleged failure to reinstate/termination of Faubel. All three fail in the establishment of a *prima facie* case under *Wright Line*. Even in the unlikely instance the Board would determine the *prima facie* threshold has been met, the legitimate business reasons of the employer rebut the presumption of unlawful action for all three. The analysis will be laid out in detail below.

IV. LAW & ARGUMENT

A. Allegations Appalachian Violated Section 8(a)(1) of the Act

An employer is free to communicate views on unionism or a particular union so long as the communication does not contain a “threat of reprisal or force or promise of benefit.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). It has been long established that interrogation of employees is not illegal *per se*. *Rossmore House*, 269 NLRB 1176, 1177 (1984). In order to constitute a violation “the words themselves or the context in which they are used must suggest an element of coercion or interference.” *Id.* Absent an implied threat of reprisal or any other interference, restraint, or coercion against an employee’s exercise of their Section 7 rights, the conduct does not violate the Act. *Blue Flash Express, Inc.*, 109 NLRB 591, 595 (1954).

The Board relied upon the test established by the Second Circuit in *Bourne v. NLRB*, 332 F.2d 47, 56 (2nd Cir. 1964) in *Rossmore*. The test is based on a totality of the circumstances including: “(1) The background, i.e. is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e. how high was he in the company hierarchy? (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of ‘unnatural formality’? [and] (5) Truthfulness of the reply.” *Bourne v. N. L. R. B.*, 332 F.2d at 48.

1. Dan Akers

The Complaint alleges several instances of interrogation and threats against Dan. These shall be discussed individually below. The allegations have been ordered in this brief to reflect the chronology of events. The Complaint was amended several times and the chronological syntax became jumbled.

a) January 9, 2019 – Alleged Telephone Interrogation

(1) The General Counsel Improperly Plead the Allegation as Attributable to the Wrong Individual

The Complaint alleges in paragraph 5(d) that Daniel M. Akers, owner as plead in paragraph 4 of the Complaint and admitted in paragraph 4 of Respondent’s Answer, “by telephone interrogated its employee about the employee’s union activity.” [GCX 1]. The paragraph was amended into the Complaint at the opening of the hearing over the objection of the Respondent. General Counsel proffered no testimony or documentary evidence that Dan, as he was referred to during hearing [Tr. 69:2-12], had a phone conversation, or any conversation, with any employee January 9. Based on the foregoing the Respondent respectfully requests the Board dismiss the allegation of paragraph 5(d) of the Complaint.

Respondent recognizes that the requirements of a complaint are governed by the Board’s Rules rather than the Federal Rules of Civil Procedure. *See Nissan North America, Inc.*, Case 10-CA-198732, unpub. Board order issued Nov. 16, 2017 (2017 WL 5516533), at n. 2; and

Component Bar Products, Inc., 364 NLRB No. 140, slip op. at 10 (2016). Rule 102.15 states that a Complaint must include "... a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

The General Counsel unmistakably knew that it was not Dan that had the phone conversation because it had a recording of the conversation. [GCX 8]. The Board's rule leaves open the door for complaints to be valid in the face of incomplete or missed information. In this instance, the information was glaringly present, and the General Counsel should be held to a pleading standard consistent with American Jurisprudence, namely accurate and carefully plead complaints.

In the event the judge chooses not to dismiss the allegation as improperly plead and unproven, the Respondent proffers the following argument. General Counsel presented evidence of an alleged telephone interrogation by Daniel (Daniel R. Akers in the Complaint) in the form of testimony and an audio recording. [GCX 8].

(2) Daniel's Conversation with Faubel January 9, 2019

The conversation was played at hearing and is memorialized in the transcript. [Tr. 141:7-151:17]. The gist of the conversation was to gauge Faubel's interest in assuming the foreman role at the Crossing. [Tr. 142:9-12]. The conversation turns to the recent union activity and solicitation. [Tr. 143:4-24]. Daniel is simply expressing his opinion about the activities and his words nor the context of his words suggest any element of coercion. He makes no threats overt or implied. As of this date, the very first days he became aware of any union organizing effort, there has been no opportunity to make any claims of a history of hostility or discrimination toward union supporters. He did not seek any information to be used against any individual employee. He is the Operations Manager and son of the owner, so he is high up in the company hierarchy. The place and method were by telephone.

The inquiry is a totality of the circumstances test. *Novato Healthcare Ctr. v. Nat'l Labor Relations Bd.*, 916 F.3d 1095 (D.C. Cir. 2019). In the five *Bourne* elements the portion of the conversation discussed does not meet the threshold established by the courts and Board of being an unlawful interrogation. There had been little to no history of hostility as the entire concept was brand new, Daniel did not ask for any information about any individual which could remotely be actionable, and the conversation was by telephone and not in the office or other unnaturally formal setting. All those factors weigh in favor of a legal communication. The only factor weighing against is Daniel's position in the company. The portion of the conversation cited was lawful.

This portion is followed by more discussion of Faubel's interest in the potential promotion. [Tr. 143:25-144:25]. Then Daniel directly asks Faubel if he has been solicited "by the union guy." [Tr. 145:1-10]. Faubel answers. No. [Tr. 145:4]. And then Daniel is about to move on with the conversation about the promotion. [Tr. 145:11]. It is Faubel that then brings the discussion back to the union. [Tr. 145:12-14]. Even in his response to Faubel's baiting, Daniel's communication still does not rise to the threshold defined in *Bourne* or *Rossmore*. The conversation ends with more small talk and discussion about the potential promotion and ends with Daniel indicating they would discuss further the next day after the safety meeting. [Tr. 150:24-151:4].

The conversation in its subparts does not meet the threshold requirements under *Bourne*, nor is there any threat of reprisals or force or promises of benefit under *Gissel*, and neither the words nor the context suggest any elements of coercion under *Blue Flash*. The aggregation of the subparts also does not cross any of those proscribed thresholds. The conversation of January 9, 2019 between Daniel and Faubel was lawful.

b) January 10, 2019 – Alleged Interrogation & Promises of Benefit

(1) The General Counsel Improperly Plead the Allegation as Attributable to the Wrong Individual

The Complaint alleges in paragraph 5(e) & 5(f) that Daniel M. Akers, owner as plead in paragraph 4 of the Complaint and admitted in paragraph 4 of Respondent’s Answer, “at the Crossings jobsite interrogated an employee about the employee’s union activity, solicited complaints and grievances and promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity.” [GCX 1]. The paragraphs were amended into the Complaint at the opening of the hearing over the objection of the Respondent. General Counsel proffered no testimony or documentary evidence that Dan, as he was referred to during hearing [Tr. 69:2-12], engaged in any activity at the Crossings jobsite. Based on the foregoing the Respondent respectfully requests the Board dismiss the allegations of paragraph 5(e) & 5(f) of the Complaint.

Respondent again recognizes that the requirements of a complaint are governed by the Board’s Rules rather than the Federal Rules of Civil Procedure. *See Nissan North America, Inc.*, Case 10-CA-198732, unpub. Board order issued Nov. 16, 2017 (2017 WL 5516533), at n. 2; and *Component Bar Products, Inc.*, 364 NLRB No. 140, slip op. at 10 (2016). Rule 102.15 states that a Complaint must include “... a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed.”

The General Counsel, again, unmistakably knew that it was not Dan that was on-site at the Crossings on January 10, 2019. [GCX 9]. The Board’s rule leaves open the door for complaints to be valid in the face of incomplete or missed information. In this instance, the information was glaringly

present, and the General Counsel should be held to a pleading standard consistent with American Jurisprudence, namely accurate and carefully plead complaints.

In the event the judge chooses not to dismiss the allegation as improperly plead and unproven, the Respondent proffers the following argument. General Counsel presented evidence of alleged interrogation, solicitation of grievances, promises of benefits, and improved terms and conditions as inducement to refrain from union organizational activity by Daniel in the form of testimony and an audio recording. [GCX 9].

c) January 14, 2019 – Alleged Interrogation at The Crossings Jobsite

Daniel held a safety meeting at the Charleston warehouse (not the jobsite as indicated in the Complaint) on January 10, 2019. [Tr. 77:15-78:3]. The meeting was recorded, and a transcript was moved into the record on Joint Motion. [GCX 9].

The first half of the recording is a standard safety meeting where topics relevant to jobsite safety are discussed. [GCX 9: RT 1: 1-18: 20]. Following the safety portion of the meeting, Daniel addresses the recently discovered union organizing campaign. [GCX 9: RT 18:21-19:1].

Daniel begins by simply relaying what he has heard. [GCX 9: RT 18:21-19:1]. Daniel says “So, the union guys, is what I’ve heard, is calling everybody. Is that true?” [GCX 9: RT 18:21-19:1]. When you listen to the actual recording, there is no pause by Daniel waiting for an answer. It is presented as a rhetorical question, or perhaps a foregone conclusion. [GCX 9: timestamp 38:46-39:30]. Then Daniel says “You know we are at at-will employer, I don’t want anybody to think ah... Obviously, *you can do whatever you want to...*” [GCX 9: RT 19:1; GCX 9: timestamp 29:30-39:44] (emphasis added).

It is fortunate in this instance that Faubel clandestinely recorded the meeting. It is that actual audio footage that established the lawfulness of the comments. When viewed in black and

white on the page, there is no voice inflexion and one must rely on the verbiage and word choice alone to gauge the tone and demeanor of the speaker and the context of the message. Listening to the actual footage shows without question that there is no threat of reprisal or force or promise in Daniel's tone in compliance with the standard given by the Supreme Court in *Gissel*.

The emphasized portion shows that Daniel is not trying to coerce anyone. The recording provides context in a way that a writing simply cannot. It allows you to be present with the speaker at time of the message. The words Daniel used were not coercive and the context made plain by the recording demonstrates no coerciveness under the standard established by the Board in *Rossmore*. Daniel's voice is actually soft and tentative. He is aware that this is important.

Analyzing the speech under *Bourne* produces a similar finding of lawfulness. The totality of the circumstances overwhelmingly favors a finding of lawful speech. The context clearly demonstrates that this union activity is new to the company and an unknown factor in their operation. Because it is new there is no history of hostility or discrimination. Only one question was asked and no time for answers was provided. The context gleaned from the audio itself shows that Daniel was simply trying to assess what level of concern to give this union issue. He was not seeking any information to use against any individual employee in any fashion. The place and method were a meeting at the warehouse, that by any assessment can only be described as loose and friendly. There is banter, the employees regularly interrupt and interject. This is not an unnaturally formal setting. Just as before the only factor weighing in favor of a finding of unlawful communication is Daniel's position in the hierarchy of the company. All other factors weigh in favor of lawful speech.

d) January 24, 2019 – Alleged Threats at the Vet Clinic Jobsite

General Counsel alleges in its Complaint that Dan threatened its employees with discharge by distributing its employee handbook which contained at-will language. [GCX 1]. This allegation simply does not hold up under long-standing Board precedent.

It was testified to by witnesses for both respondent and general counsel that the workers at the newly opened Charleston office did not receive their handbooks upon hire. [Tr. 213:25-214:4; 393:1-4; 616:22-617:18; 678:6-16]. Daniel testified that once he realized many newer employees had not received the handbook that he instituted efforts to get them one so they would know the policies. [Tr. 616:21-617:10].

The General Counsel elicited a great deal of testimony concerning the distribution of these handbooks but failed to get even their own witnesses to indicate there was anything coercive about the process. In fact, no witness even testified that the at-will policy was even mentioned by any of the individuals Daniel enlisted to distribute the handbooks. The only witness the General Counsel was able to get to touch on the at-will policy gave contradictory statements in the span of just a few minutes. Castle testified that when he was given his handbook that Tierson gave him the handbook to read and sign. [Tr. 393:1-4]. Moments later he testified that Tierson read something to them and told them to read it and sign it. [Tr. 393:15-17]. One is left to ask which was it? Did Tierson give them something to read and sign or did Tierson read something to them and then told them to read it again and sign?

Even looking at the conflicting testimony in a light most favorable to the General Counsel's case theory, there was no testimony demonstrating and violation of the Act. The Board addressed a similar situation where the discharge aspect of the employment at-will policy was emphasized. *Belle of Sioux City, L.P. & Workers Have Rights Too (Fair Deal Unit)*, 333 NLRB 98 (2001). In

Belle of Sioux City, the Board’s reasoning focused on the supervisor’s repeated discussion that he could fire anyone for any reason or no reason. No such conduct was alleged in the instant matter.

This was simply an administrative task that had gotten overlooked in the company’s expansion outside its home office are. The distribution of the handbooks was not the promulgation of any new rules. The employees receiving the books were already employed by Appalachian and were already functioning under the rules and policies contained therein. The Board held in *Belle*, that “Greco's *remarks* about being able to discharge at-will employees were threats, not mere expressions of opinion or mere statements of an existing employment situation, which violated Section 8(a)(1) of the Act.” *Belle of Sioux City* at 106 (emphasis added). The operative language in the citation is “not... mere statements of an existing employment situation.” Mere statements of an existing employment situation, as was the case in the instant matter, absent any threats are lawful and not violative of the Act.

e) May 28, 2019 – Alleged Threats at the Crossings Jobsite

The General Counsel alleges that Dan threatened Faubel on May 28, 2019, when he presented him with his termination letter [JX 15]. The threat of lawsuits against an employee engaged in protected activity is certainly a violation of the Act. *Clyde Taylor Co.*, 127 NLRB 103 (1960). The letter speaks for itself. The threat of legal action contained therein is specific to and only triggered by a finding of unlawful action by Faubel. Appalachian defers any determination on the lawfulness of Faubel’s actions to the proper regulatory agencies should they choose to investigate. Absent such an investigation and determination, despite Appalachian’s strong belief that the conduct of Faubel was purposeful unlawful industrial sabotage, there will be no legal action.

Perhaps the General Counsel is relying upon the alleged unlawfulness of the termination and Faubel's protected activity in engaging in a strike as the motivating factor for the threat allegation. While the lawfulness of the termination will be discussed in detail later in this brief, the lawfulness or unlawfulness of the company's actions have no effect on the trigger language of the letter. Absent a determination that Faubel's conduct violated some law, there exists no threat of legal action against him by Appalachian.

2. Jonathan Tierson

a) February 14, 2019 – Alleged Threats at the Crossings Jobsite

General Counsel alleged in paragraph 6(a) of the Complaint "Respondent, by Jonathan Tierson, at the Crossings jobsite: about February 14, 2019, by giving employees a document emphasizing that they were "at-will" employees, threatened its employees with discharge because they formed the union." This allegation is unsupported by the evidence on the record.

General Counsel only solicited testimony from one individual concerning this allegation, and that was Castle. [Tr. Starting at 392:6 et seq.]. Castle testified, "we was [sic] called to a room where we kept our tools at that time to gather everybody up and we was given a handbook by Jonathan Tierson to read and sign." [Tr. 393:1-4].

The Appalachian employee handbook consists of forty-two (42) pages of text and approximately 17,000 words. [JX 1]. The at-will section of the handbook is on page 6. [JX 1]. The section consists of approximately 155 words, or nine tenths of one percent (.9%) of the text of the handbook. [JX 1]. Castle initially testified that Tierson simply gave them the handbook to "read and sign." [TR. 393:1-4]. Even when General Counsel made a second attempt to elicit the testimony necessary to prove the allegation, Castle did not oblige. [Tr. 393:14-17]. Nothing in

Castle's testimony indicated that Tierson in any way emphasized anything about the handbook, including but not limited to the at-will policy. [Tr. 392:6-393:19].

The facts in the General Counsel's allegation run opposite of the facts in *Belle of Sioux City*. The Board's holding in that case relied upon the emphasis of termination for any reason and the surrounding conduct of the supervisor. *Belle of Sioux City* at 20. The instant allegation simply does not have the attendant circumstances necessary to make a lawful administrative task – the distribution of handbooks to new employees – a violation of the Act. Passive distribution absent other conduct is simply not enough.

b) February 25, 2019, March 13, 2019, and March Generally Alleged Threats at the Crossings Jobsite

General Counsel elicited testimony from Faubel, the union's paid organizer, and Marolf that on the morning of February 25th, Tierson stated that "anybody talking to Eric is – will get fired." [Tr. 332:15-17]. This assertion was refuted by several witnesses including Tierson [Tr. 577:15-578:1], Jimmy Ruff ("Ruff") [Tr. 554:2-8], Earl Lehman ("Lehman") [Tr. 567:10-16]. All three witnesses expressly deny Tierson ever threatening any one with termination. McGuffin testified at length about Tierson's character, demeanor, and work ethic lending more credibility to the claim that Jonathan did not threaten anyone. [Tr. 637:3-638:24].

In situations where the only evidence presented is conflicting testimony, an ALJ is tasked with ascertaining the credibility of the witnesses and the testimony each provided. Respondent argues that the Tierson's, Ruff's, and Lehman's testimony concerning threats should be credited over Faubel and Marolf for many reasons.

Tierson testified with a credible and easy-going demeanor. He did not exaggerate his answers and was honest even about his consideration of becoming a union member himself and remaining friends with Mike Doughton, Appalachian's former supervisor who left to work for the

union. [Tr. 573:19-574:11]. General Counsel made no attempt to refute Tierson's testimony about his consideration of the union, the measured way he considered it as an option for his career, or that he remains friends with Doughton. It must also be pointed out that he remained friends and respected Doughton despite the clear knowledge that Daniel felt betrayed by Doughton's manner of departure. [Tr. 167:16-168:9; GCX 9: RT 7:14-8:1]. There is a clear honesty and sincerity in his testimony.

Tierson also freely admitted his confusion with dates and timeline in places. This confusion concerning dates, however, is not dispositive in a finding that a witness is not credible. To the contrary, "Dates, and even sequence, are notoriously the subject of testimonial confusion... without substantially affecting credibility determinations." *L.D. Brinkman Se.*, 261 NLRB 204, 209 fn. 5 (1982).

It must also be noted that despite Tierson being called first in their case in chief and again in Respondent's case in chief that neither the General Counsel nor the union attempted to elicit any testimony from Tierson that would demonstrate he leveled any threats at any time. Stylistic choices aside, there is no better way to ascertain a witness's credibility than to observe their demeanor when confronted with a direct accusation of their alleged unlawful conduct. Tierson's testimony was honest and credible and, in all ways pertinent to the allegation of threatening conduct, largely unrefuted.

The testimony of Ruff and Lehman can also only be described as extremely credible lacking in exaggeration, artifice, and delivered in a calm and relaxed demeanor. It is notable that in the case of both Ruff and Lehman that their cross examinations were extremely short and neither the General Counsel, nor the union, was able to discredit or contradict any of their direct testimony.

c) **February 28, 2019, March 6, 2019, – Alleged Surveillance & Impression of Surveillance at the Crossings Jobsite**

The Complaint alleges that on or about February 28, 2019, that Tierson engaged in surveillance or the impression of surveillance by photographing picketers at the Crossings jobsite in violation of Section 8(a)(1) of the Act. [GCX 1]. Tierson admitted to taking photographs, and Respondent provided those photographs pursuant to subpoena. [GCX 14; Tr. 106:10-17]. However, Respondent argues that the conduct does not violate Section 8(a)(1).

“An employer's videotaping or photographing of employees engaged in union or protected concerted activity, without proper justification, violates the Act, as it has a tendency to intimidate employees.” *Advancepierre Foods, Inc.*, 366 NLRB No. 133 (July 19, 2018). The Board presumes photographing of peaceful protected activity violates the Act, but an employer may rebut that presumption. *In Re Saia Motor Freight Line, Inc.*, 333 NLRB 784 (2001) (employer established proper justification for photographing handbilling where traffic was impeded, employer had legitimate safety concern because of the potential for accidents). Photographing in the mere “belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity.” *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997), review denied, 156 F.3d 1268 (D.C. Cir. 1998).

In this instance there were several concerns raised after the first day of picketing to Respondent from its workers. [Tr. 110:1-5; 110:14-20; 114:3-21; 591:15-592:4; 88:16-24; 626:24-627:7; 559:9-560:23]. Daniel instructed employees that the picketers were not permitted to block the road and that they should proceed with caution and *if* any illegal activity occurred again that they should memorialize it. [GCX 12]. Tierson testified that he only wished to make a record of any unlawful behavior. [Tr. 114:3-21]. Tierson also testified that he only took the photos

after the complaints and his own experience with the picketers the day before. [Id.]. Most importantly, he only photographed the picketers that day and did not engage in extended surveillance.

There is a clear justification present for the isolated photographing which occurred under the standard established in *Saia Motor Freight Line, Inc.* The isolated incident of surveillance was lawful under the narrow permissible parameters laid out by the Board.

3. Daniel Akers - Alleged Threat to Call the Police, Interrogation, Solicitation of Surveillance, and Impression of Surveillance Via Text Message

The General Counsel alleged in the Complaint and at hearing that Daniel threatened to call the police on employees engaged in protected activity. The clear evidence presented does not support this allegation.

The text in question was admitted at hearing. [GCX 12]. The Board has a long-standing precedent on looking to the plain language of a document for its interpretation. *Lucile Salter Packard Children's Hosp. at Stanford*, 318 NLRB 433 (1995); *Douglas Foods Corp. & Local 876, United Food & Commercial Workers Union, Afl-Cio-Clc*, 330 NLRB 821 (2000). The plain language of the text clearly shows that Daniel would “call the police... to report any and all **wrongdoing** by the union.” [GCX 12] (emphasis added).

The colloquial term “wrongdoing” used in the text must be read in the context of the document itself. The document begins by laying out the parameters of what is wrong conduct i.e. blocking the road, gate, access to jobsite, or preventing them from going to work. This is the conduct, in context, to which the term wrongdoing refers.

There exists no threat to call the police for picketing that does not block the road, gate, access to the jobsite, or prevent people from going to work. This allegation is unproven on the record before the court.

There is also no interrogation or solicitation or impression of surveillance present in the text. Again, there is no restriction, discussion, or mention of any protected activity being of any concern. The text was sent in response to the complaints and reports detailed above of alleged unlawful conduct by the picketers the day before. The text itself refers to the same. The Respondent, based on the reports of the previous day, possessed a legitimate safety concern for its vehicles. The text was only sent to those employees who drove company vehicles. [Tr. 92:9-12].

B. ALLEGED UNLAWFUL DISCIPLINE OF MAROLF

The Complaint alleges violations surrounding written warnings given to Marolf. On March 15, 2019, Marolf was involved in an altercation on-site at the Crossings with Hight. [Tr. 346:3-348:7; 527:20-531:4]. General Counsel and the union claim the two employees were treated differently because of Marolf's open support of the union. [GCX 1]. This is unsupported by the facts. The evidence shows that both men were treated exactly the same. [Tr. 355:25-356:1; 531:12-14]. The evidence also shows that despite Hight's declaration of the events of the previous day, that no discipline was handed down to Steven. Tierson simply moved Hight to a different part of the jobsite to try to diffuse the situation.

There is no credible evidence of a violation of the Act in this allegation. Both men were treated equally and based on their mutual involvement in a workplace altercation. Union activity or sympathies played no role in the discipline.

C. ALLEGED UNLAWFUL RULES

The Board clarified the standard for evaluating lawfulness of a facially neutral rule in *Boeing Company*, 365 NLRB No. 154 (2017). *Boeing* held that when evaluating a facially neutral rule the Board will evaluate two criteria. *Id.* at 3. Those criteria are “(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Id.* *Boeing* further indicated rules would be grouped into one of three categories.

“Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.” *Id.* at 3-4.

“Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.” *Id.*

“Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.” *Id.*

1. Alleged Unlawful Confidentiality Rule

The General Counsel alleges Appalachian’s rule on confidentiality was unlawfully maintained in violation of 8(a)(1) of the Act. The text of the rule is as follows:

Idle gossip or dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.

“It is the General Counsel's initial burden in all cases to prove that a facially neutral rule would in context be interpreted by a reasonable employee... to potentially interfere with the exercise of

Section 7 rights.” *La Specialty Produce Co. & Teamsters Local 70, Int’l Bhd. of Teamsters*, 368 NLRB No. 93, *4 (Oct. 10, 2019). A rule may not be found unlawful because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity. *Id.* at fn. 3. “If that burden is not met, then there is no need for the Board to take the next step in Boeing of addressing any general or specific legitimate interests justifying the rule. The rule is lawful and fits within Boeing Category 1(a).” *Id.* at *4.

As a threshold matter, the General Counsel has not met its burden to prove that the confidentiality rule would in context be interpreted by a reasonable employee to potentially interfere with the exercise of Section 7 rights. In fact, the General Counsel proffered no evidence to support how any of the challenged rules might be interpreted by a reasonable employee. Accordingly, under *La Specialty Produce Co.* there need be no further inquiry and the rule should be ruled lawful.

In the event the judge does not agree that the General Counsel has failed in its burden, even under a full analysis of *Boeing* the rule is lawful. The rule does not reference any protected activity under Section 7 of the Act, and thus meets the facially neutral standard. Next it must be determined if the rule when, reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights. In this case that answer is in the affirmative.

The rule does not interfere with any rights under the Act. There is no prohibition for sharing information with others outside the company such as a labor organization. At the heart of Section 7 rights is the freedom of employees to seek out and receive support and help for the mutual aid and protection of others and this rule does not inhibit that right in the least. The General Counsel provided no evidence that any employee interpreted or would interpret the rule to be restrictive of their rights under the Act.

2. Alleged Unlawful No Solicitation Rule

After careful review of the Board's standard regarding no-solicitation rules, the Respondent proffers no defense to this allegation. Had there been time prior to filing of this brief the Respondent would have moved to amend its answer regarding this allegation to admit the rule is overbroad in that its blanket prohibition of all solicitation "on company property" may reasonably be interpreted to prevent solicitation during non-working hours which has been consistently held to be violative of Section 8(a)(1).

3. Alleged Unlawful Anti-Harassment Rule

a) Promulgation Allegation

The General Counsel alleged that the Respondent promulgated a new allegedly unlawful anti-harassment rule in response to union activity. The allegation is not born out by the facts.

As a threshold matter the Respondent has not promulgated any new rules since well before it had knowledge of the union organizing effort. The handbook, which memorializes the company's rules and policies, was last revised on November 28, 2014. [Tr. 615:16-616:17].

General Counsel points to a flyer distributed by the Respondent as evidence of the promulgation of a new rule on harassment. [JX 5]. The flyer simply reprints the existing rule from the handbook, which is also in evidence. [JX 1]. The language of the third bullet point on JX 5 was taken verbatim from the handbook [JX 1] on page 6. It has already been established that the policy was not new because the handbook remained unchanged since 2014. [Tr. 615:16-616:17].

The Complaint alleged that the language of the final bullet point amounted to the promulgation of a new rule. It did not. The bullet simply stated what had already been a known fact about the anti-harassment policy – that unlawful harassment shall not be tolerated. The

handbook details that reporting and investigation process and clearly indicates that an individual who believes they have been a victim of unlawful harassment may choose to seek remedy through other complaint procedures, which would encompass criminal complaints if such were appropriate. The flyer did not create a change or new policy regarding harassment, it simply reiterated the existing policy and Appalachian's commitment to maintain a workplace safe and free of harassment of any kind. The General Counsel's allegation concerning promulgation of a new anti-harassment policy, or any policy, is not supported by the record.

b) Validity of Rule under *Boeing*

The General Counsel alleges Appalachian's anti-harassment policy was unlawfully maintained in violation of 8(a)(1) of the Act. The text of the rule is as follows:

That anyone who violates the anti-harassment policy or is caught threatening employees or otherwise violating their rights will be subject to criminal prosecution to the fullest extent of the law..

"It is the General Counsel's initial burden in all cases to prove that a facially neutral rule would in context be interpreted by a reasonable employee... to potentially interfere with the exercise of Section 7 rights." *La Specialty Produce Co. & Teamsters Local 70, Int'l Bhd. of Teamsters*, 368 NLRB No. 93, *4 (Oct. 10, 2019). A rule may not be found unlawful because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity. *Id.* at fn. 3. "If that burden is not met, then there is no need for the Board to take the next step in Boeing of addressing any general or specific legitimate interests justifying the rule. The rule is lawful and fits within Boeing Category 1(a)." *Id.* at *4.

The General Counsel has not met its burden to prove that the cited language would in context be interpreted by a reasonable employee to potentially interfere with the exercise of Section 7 rights. In fact, the rule is more likely to be interpreted by a reasonable employee as affirmative

protection of their rights under Section 7 of the Act. Since the passage of Taft-Hartley, Section 7 forbids coercion, restraint, or interference by either the employer or the union. A strong anti-harassment policy protects the employee from both. Because the General Counsel failed to meet its burden, there need be no further inquiry under *Boeing* and the rule should be ruled lawful.

In the event the judge does not agree that the General Counsel has failed in its burden, even under a full analysis of *Boeing* the rule is lawful. The rule does not reference any protected activity under Section 7 of the Act, and thus meets the facially neutral standard. Next it must be determined if the rule when, reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights. In this case that answer is in the affirmative.

The rule does not interfere with any rights under the Act. The General Counsel provided no evidence that any employee interpreted or would interpret the rule to be restrictive of their rights under the Act.

D. ALLEGED ISOLATION OF UNION SUPPORTERS

The complaint alleges that Tierson isolated and threatened to isolate employees based on their union activity. This is not consistent with the facts on the record.

Castle gave uncorroborated testimony that he overheard Tierson tell McGuffin that they needed to isolate the union guys. [Tr. 399:12-400:4]. Castle did not however give any corroborated examples of isolation of union supporters. Castle had a number of difficulties during his testimony which brings into question the accuracy of his testimony.

He appeared confused about what type of work he did, whether it was residential or commercial. [Tr. 385:20-386:9]. He was asked very clearly if he did any other work than install duct to which he responded “no.” [Tr. 386:11-13]. Yet a few moments later he claimed he did almost all the types of work that were conducted at the Crossings. [Tr. 387:19-388:1]. Then there

was the previously mentioned confusion on whether Tierson gave the employees the handbook and instructed them to read it and sign the acknowledgment or whether Tierson read the handbook to them then told them to read it and get it back to him. [Tr. 392:11-393:17]. Finally, there is the admission that he was being paid by the union for his testimony. [Tr. 414:13-17].

Faubel claimed that he was isolated upon his return from strike, but on cross examination admitted that he was not in fact isolated. [Tr. 289:4-291:7]. Faubel's admission supports the testimony of Tierson who denied isolating any union supporter specifically because he considered the union and therefore, he possessed no animus concerning the union. [Tr. 577:11-22].

E. ALLEGED FAILURE TO RECALL ARMSTRONG

Appalachian laid off Armstrong on March 27, 2019, for lack of without expectation of recall. [JX 12]. Brandon was the last employee hired in at the Crossings. [Tr. 595:15-18; 619:10-15; 656:18-25]. There was extensive testimony of the long-term experienced employees that were returning from jobs that were completing, and those employees were being sent to the Crossings. [Tr. 647:22-648:5; 416:19-24; 571:12-15; 581:5-16; 619:19-620:17]. The only employee hired for the Crossings since Armstrong's layoff was a plumber. [Tr. 367:5-23; 381:8-15]. Armstrong is not trained as a plumber. [Tr. 449:16-21].

Armstrong was laid off for lack of work. He was laid off without expectation of recall not because of any union sympathies, but because Appalachian had three large jobs that had just concluded and many experienced installers who needed placement. [Tr. 619:19-25]. Daniel testified that as of the hearing date on or about August 12, 2019, the workers who returned from the three big jobs remained at the Crossing. [Tr. 620:11-17]. Other known union supporters continued to work at the Crossings after Armstrong's layoff because they had longer tenure with

the company, including Castle and Marolf. Armstrong was laid off because he was the last man hired and no other factor played any role.

F. ALLEGED FAILURE TO PROMOTE FAUBEL

General Counsel alleged in its Complaint that Appalachian violate 8(a)(3) of the Act by failing to promote Faubel. A careful review of the timeline and the facts on the record demonstrate that the allegation is not supportable.

The Board established in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982) that in order to establish discrimination regarding the terms and conditions of employment in violation of the Act, the General Counsel must establish a *prima facie* case for such alleged discrimination. General Counsel must show (1) the existence of protected activity, (2) knowledge of that activity by the employer, (3) or union animus, and (4) that such protected activity or union animus was a factor in the adverse employment action. *Id.* The employer may rebut the *prima facie* case by showing that prohibited motivations played no part in its actions. *Id.* If the employer cannot rebut the *prima facie* case, it can show that the same personnel action would have taken place for legitimate reasons regardless of the employee's protected activity. *Id.*

Employers that proffer a facially nondiscriminatory reason for termination must overcome the allegation that the reason was in fact pretext and that the real reason was an employee's protected activity or based on union animus. *Murd Indus.*, 287 NLRB 864 (1987) (citing *Keller Mfg. Co.*, 237 NLRB 712, 717 (1978) ("A pretextual reason, of course, supports an inference of an unlawful one"). The Board will look at circumstantial evidence of motivation to determine if the employer acted unlawfully. *Wright Line*, 251 NLRB 1083 (1980).

Prior to reviewing the elements of the General Counsels *prima facia* burden, it is important to have an accurate timeline in mind as it relates to the elements.

- November 12 or 13, 2018 - Faubel Applies to Appalachian [Tr. 120:1-3]
- November 17 or 19, 2018 - Faubel interviewed by McGuffin [Tr. 122:6-11]
- November 26, 2018 - Faubel starts work at Appalachian [Tr. 119:10-14]
- December 2018 (2nd week) - Doughton leaves Appalachian [Tr. 29:24-30:3]
- January 8, 2019 - Faubel directed to attend job mtg. [Tr. 130:8-15]
- January 9, 2019 - Faubel attends 2nd day of job mtg. [Tr. 134:13-17]
- January 9, 2019 - Faubel speaks with Daniel RE: promotion. Denies knowledge contact with or knowledge of the union – still offered promotion opportunity [GCX 8; Tr. 135:14-25]
- January 10, 2019 - Safety meeting with Daniel. Denies any knowledge or contact with the union. Still offered promotion opportunity [GCX 9]
- January 14, 2019 - Mtg with Dan in truck. Conditional offer of promotion tendered. Denies any union affiliation. Still offered promotion opportunity [GCX 10]
- January 14, 2019 - Phone conversation with Dan. Conditional offer remained. Dan still possesses no knowledge of any union activity or affiliation by Faubel. [Tr. 191:8-195:14]
- January 18, 2019 - Mtg with Dan and McGuffin where Faubel became belligerent and Dan changed his mind on promotion. Dan still has no awareness of any union activity on the part of Faubel. [Tr. 201:9-16; 205:25-206:5; 649:21-651:13]
- January 20, 2019 - Text from Dan to Faubel rescinding the promotion [GCX 21]
- January 21, 2019 - Text from Faubel to Dan apologizing for his behavior at the mtg on the 18th and acknowledging the promotion

- was off. Dan still does not possess any knowledge of Faubel's union activity. [GCX 21]
- January 21, 2019 - Faubel sent to Vet clinic with at least 4 workers (not isolated)⁴
 - January 29, 2019 - Union created YouTube video featuring Faubel who announced he is Union Organizer Eric. [Tr. 214:16-22]
 - January 30, 2019 - Union Publishes video and sends links to Appalachian leadership including McGuffin and Daniel. [Tr. 218:3-15]
 - January 30, 2019 - First knowledge by the company that Faubel was a union organizer or engaged in any union activity. [Tr. 266:18-267:13]

The General Counsel obviously established the first element of its *prima facie* case because Faubel hired into Appalachian as a union salt. [Tr. 458:14-18]. The second element, however, fails. The timeline clearly shows that Appalachian had no knowledge of Faubel's union activity or status. General Counsel claimed that Appalachian knew of Faubel's status through contact with Grogg's Heating and Air Condition owner Tim Hanlon (Dan erroneously referred to him by the name Hannon in his testimony.) However, the timeline and the clarification of the same by the judge's questioning demonstrate that Hanlon was contacted after the decision to rescind the offer of promotion and not before. [Tr. 54:15-55:25]. The second element of the General Counsel's *prima facie* case fails.

Respondent argues that the third element of *Wright Line's prima facie* requirement is also not met in the failure to promote allegation. It is true that Daniel and Dan expressed frustration

⁴ (Faubel's testimony about his partners at the Vet Clinic is contradictory. The GC alleges he was sent there to isolate him and worked with only one or two other individuals. Faubel's own testimony contradicts this claim. He claims only two others (McClung & Shane) here - [Tr. 210:19-22] and here he names two more (Marolf & Tim Rhodes (and McClung again)) - [Tr. 288:8-15] and Marolf testified to two more (Jason and Kevin Keith) here - [Tr. 319:9-16]

and exasperation with the effects the union was having on Appalachian. The loss of Doughton, the handbilling of the cars with fliers [GCX 2], and the uncertainty this activity was introducing into their business. However, Daniel expressly states in the January 10, 2019, safety meeting regarding the union solicitations that “I don’t want anybody to think ah... Obviously, you can do whatever you want to.” [GCX 9: RT 19:1].

That statement is hardly a display of union animus. Animus is a Latin term defined as “a usually prejudiced and often spiteful or malevolent ill will.” Merriam Webster Online Dictionary <https://www.merriam-webster.com/dictionary/animus>. Respondent argues that, as of January 21, 2019, Appalachian did not possess any union animus and that the third element of the *prima facie* case fails.

Finally, the death knell for the General Counsels failure to promote claim comes in the fourth element. Appalachian rescinded its offer to promote Faubel based his conduct on January 18, 2019, at the Crossings jobsite. Faubel admitted to cursing (although the 11th hour recording of the meeting he “discovered” [CPX 1] conveniently did not include the portion of the meeting where he cursed and was belligerent.) [Tr. 201:9-16]. McGuffin remembers the meeting and Faubel’s conduct a little differently indicating that he would have never allowed an employee to speak to him that way. [Tr. 649:15-651:10]. Even if Faubel’s conduct was not as bad as McGuffin’s memory recalled, Faubel acknowledged in his own testimony and actions that it rose to a level that was inappropriate, so much so that he felt compelled to apologize. [GCX 21]. The text also contained Faubel’s clear admission that he knew the promotion opportunity was gone and that it was because of his conduct. [GCX 21].

The fourth element of the *prima facie* case fails because the adverse employment action was not motivated by protected activity (which the Respondent had no knowledge) or union animus. The adverse action was the result of Faubel's inappropriate conduct.

In the unlikely event the court decides that the General Counsel has met its *prima facie* burden, the stated justification for rescission of the offer to promote remained valid. McGuffin's testimony makes clear that anyone who acted in such a fashion would lose the benefit of an offer to promote. The employer would have taken the same action absent any unlawful motive. So, while the Respondent strongly argues no *prima facie* case has been established, the stated justification provides a valid rebuttal under *Wright Line*.

G. ALLEGED DISCHARGE/FAILURE TO REINSTATE FAUBEL

Appalachian terminated Faubel for cause on May 28, 2019 upon his return from strike. [JX 15]. General Counsel alleged in its Complaint that the termination violated Section 8(a)(3) of the Act. Respondent contends the termination was for non-discriminatory reasons and was lawful.

General Counsel, in this allegation some four (4) months into the organizing campaign, has a much lower bar for much of the *Wright Line prima facie* burden. Respondent concedes that Faubel was engaged in protected activity and, unlike the failure to promote allegation discussed earlier, that it had knowledge of that activity. Arguing to the contrary on these items would be futile and Respondent concedes those elements have been met.

The real issue in this allegation is the fourth element – the termination was not motivated by Faubel's protected activity or union animus. Faubel, either through extreme negligence or purposeful industrial sabotage, engaged in conduct harmful and destructive to Appalachian's business. Anyone similarly situated would have been terminated for these actions regardless of whether their loyalties were with the company or the union. The conduct was unconscionable and

unforgivable. Most importantly on this element, the General Counsel nor the union proffered any evidence establishing a nexus between protected activity and Faubel's termination. Even if the judge affords ample leeway to the General Counsel and looks past this lack of nexus required by the clear standard in *Wright Line*, the Respondent had a valid business reason that is indisputable for terminating Faubel.

Faubel possessed a Fire Protection Worker License from the State of West Virginia. [GCX 18]. This is the top level of this licensing available. [Tr. 258:6-18; 584:5-17]. No other worker at the Crossings possessed this level of licensure. [Tr. 584:15-17]. This license permits the holder *inter alia* to install fire dampers. [Tr. 258:6-12]. A fire damper is a mechanical device placed into ductwork at prescribed intervals which will shut off the duct in case of a fire. This helps prevent or slow the spread of fire and smoke throughout a structure. [Tr. 408:16-18; 425:16-18]. Needless to say, fire dampers are an extremely important piece of equipment. Dampers must be inspected by the fire marshal after installation to ensure proper installation. Improper installation results in the marshal ordering that the impropriety be corrected before the building can receive clearance for occupancy.

Faubel testified extensively about the ill effects that could befall a company if fire dampers were incorrectly installed. [Tr. 299:20-300:16]. Faubel's improper installation was just another in a line of unlawful acts by Faubel to attempt to harm a company he was not having success in organizing. The most glaring example is his text, which he admitted under oath to sending, soliciting all employees to engage in a slowdown. [RX 5; Tr. 298:20-299:12]. As a paid union organizer, it is assumed Faubel knew of the illegality of encouraging a slowdown strike. Even if he was unaware, the union knew or should have known and as an agent, Faubel would be imputed that knowledge. Despite the unlawfulness of a slowdown strike under the Act, he engaged in the

conduct anyway for the sole purpose of bringing harm to the company. There exists no other reasonable interpretation of the slow down text.

It is a well-settled principle “that employees who engage in deliberate “slowdowns” of work or encourage others to do so, and thus refuse to work upon the terms prescribed by their employer but continue to work only on their own terms, are engaged in activities not protected by the Act, and their discharge for such activity does not violate the Act. *Davis Elec. Contractors, Inc.*, 216 NLRB 102, 106 (1975) (citing *Elk Lumber Company*, 91 NLRB 333, 337, 338 (1950); *N.L.R.B. v. Blades Manufacturing Corporation*, 344 F.2d 998, 1004, 1005 (C.A. 8, 1969); *General Electric Company*, 155 NLRB 208, 220-221 (1965); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973)). Appalachian had the absolute right to terminate Faubel on the basis of the text when it became aware of it but did not. It did not primarily because it was making every effort to not engage in any conduct that would be discriminatory against union supporters. Faubel claimed the text was meant to “fire them up.” [Tr. 299:5-8]. But upon further questioning, even he could not escape the plain meaning contained in the text. [Tr. 299:9-12].

It is not implausible, and Respondent argues it is likely, that Faubel installed the dampers upside down in order to also bring harm to the company. He acknowledged in his testimony that improperly installed dampers would be “a pretty big deal to a company that had to go back and pay to fix all of that.” Why was Faubel not more diligent in his installation of the dampers? As a holder of the top license level for fire damper installation in the state, it seems incredulous that he was unable to read the direction of the arrow that was clear to all observers in the courtroom and install the dampers correctly. He claimed the direction did not matter, but as discussed earlier, that does not comport with the clear evidence. Every experienced HVAC installer testified that it did

matter, and most importantly the fire marshal confirmed that it mattered when it forced Appalachian to reorient them.

Appalachian should have terminated Faubel for the slowdown text encouraging unlawful behavior which is not protected under the Act. The implausible installation of eight one percent (81%) of the fire dampers incorrectly, and the attendant harm to the company by loss of time, money, and reputation was simply a bridge too far.

Faubel attempted with great futility to demonstrate that he did not install fire dampers incorrectly; provided any number of recollections on the number of dampers he installed; and even tried at one point to claim he did not install *any* dampers on the fourth floor after Appalachian received the correct dampers. [300:13-16]. Another time he testified that he installed six (6). [Tr. 300:23-301:1]. At yet another time he testified it may have been six (6) to eight (8). [Tr. 291:19-22].

However, the most important testimony Faubel provides concerning the number of dampers for which he was personally and solely responsible came eight months before the opening of the hearing. Faubel makes a definitive and unmistakable admission when negotiating the salary offer for the possible promotion with Daniel when he says, "...honestly it's fair taking over than being the one that has to hang all of the dampers. Like, right now I'm the only one that's allowed to touch them. That marshall's [sic] on there..." [GCX 9: RT 30:4]. Context is important here. This statement was made in early January, prior to his termination and the fire marshal's determination that 81% of the dampers Faubel installed were incorrect. Faubel had no reason to artificially suppress the number of dampers for which he was responsible. He repeats this claim during another of his clandestine recorded conversations. [GCX 10: RT 5:10]. A statement of a prepared witness at hearing when it contradicts an admission, and in this case two admissions days

apart, by the witness prior to the start of litigation loses credibility. Combined with the avalanche of testimony corroborating his early January statement, this statement abrogates the General Counsel and union's attempt to obfuscate Faubel's responsibility for the improper damper installation.

Faubel's testimony, even concerning the incorrect dampers in December, for which no penalty was prescribed for any employee, is equally fraught with contradictions. Upon questioning from the judge about the first batch of uncorrected dampers he was clearly asked if he installed any of the incorrect dampers to which he did not just respond yes but explained his answer. [Tr. 244:21-245:1]. The judge asks a follow up question and Faubel confirms his affirmative answer. [Tr. 245:2-5]. Moments later he denies installing the dampers. [Tr. 245:13-16]. Moments later he waffles again and admits he installed the incorrect ones. [Tr. 245:3-6]. These inconsistencies on matters that have no import to the case at hand places doubt on the credibility of Faubel's entire testimony.

The General Counsel and the union also attempted to blur the timeline to demonstrate that Faubel bore no responsibility for the upside-down dampers. While none of the witnesses could remember exact dates on which dampers were installed or removed, there is a consistency in the aggregate that shines a light that clears the smoke. Here is the timeline:

- Late Nov. ('18) – early Dec. ('18)- Wrong dampers (prior to Doughton leaving) [Tr. 641:23-642:8]
- December 31, 2019⁵ - Correct dampers arrive on-site [Tr. 642:6-8]

⁵ 8-10 days after discovery of wrong damper. Faubel was the only witness to set a date concerning the discovery of the incorrect dampers, December 19, 2018. Using this date to allow for construing the facts in the light most favorable to the GC the approximate date of receipt of the correct dampers would be approximately December 31, 2018, which is in agreement with McGuffin's testimony cited.

- January 11, 2019⁶ - Installation completed for ALL dampers. Ready for inspection. [Tr. 642:9-12]
- January 14, 2019⁷ - Faubel declares he is the ONLY one installing dampers up to this point [GCX 10: RT 5: 10]
- January 18, 2019⁸ - Mtg with Dan and McGuffin where Faubel became belligerent and Dan changed his mind on promotion. [Tr. 201:9-16; 205:25-206:5; 649:21-651:13]
- January 21, 2019 - Faubel sent to Vet clinic with at least 4 other workers (not isolated)
- January 21, 2019⁹ - Fire marshal inspection [Tr. 642:13-19]
- January 21, 2019 – April 2019 - Company investigates fire damper Installation.

Most of the witnesses providing testimony, including General Counsel witnesses and Faubel himself, testified that he was assigned to the fourth floor. [Tr. 411:16-19; 452:9-18; 547:15-548:1; 583:20-24; 597:24-598:2; 643:14-17; 263:3-5]. On cross examination by both union counsel and General Counsel Tierson testified that he witnessed Faubel installing the dampers on the fourth floor. [Tr. 597:12-599:9]. Tierson credibly testified that Faubel was the only licensed worker installing on the fourth floor, which coincides with Faubel’s own claims in the recordings made contemporaneous to the events. [Tr. 597:24-598:2].

The union points out that no one was disciplined for the second-floor dampers. [Tr. 644:9-23]. There were only five incorrect in the second floor. [Tr. 645:8-11]. Armstrong and Bob

⁶ 7-8 days later.

⁷ Strict adherence to the dates for each phase by McGuffin produces an end date of January 11, 2019. It is unclear from the recording or transcript whether the installation is complete as of the time of the conversation. However, Faubel again declares he is the sole licensed person on-site and is the only one installing dampers up to this point.

⁸ Tierson testified confidently and repeatedly that all the incorrect dampers were installed prior to his promotion to foreman. [Tr. 605:23-606:13; 610:11-18]. Faubel was not sent to the Vet clinic until January 21, 2019, after Tierson’s promotion. [GCX 21; 206:7-19; 210:19-22]

⁹ 8-10 days after installation was complete.

Baccus (“Bob”) were both licensed fire damper installers [Tr. 644:644:15-23; 453:21-25] and the company was unable to ascertain who was at fault. Additionally, at five dampers, the severity was much lower on the second floor.

The timeline shows, contrary to his claims otherwise, that Faubel was clearly on-site during the incorrect installation of the dampers on the fourth floor and not yet at the Vet Clinic. The timeline and his admissions on both the January 10 and January 14 recording contradict the claim that he was only responsible for a few of the dampers in total.

Faubel was on-site for the entire period of the installation of the incorrect dampers. Faubel, by his own multiple admissions recorded contemporaneous to the events, was the only one permitted to install dampers. Multiple witnesses testified he in fact installed dampers on the fourth floor. Tierson emphatically under cross declared he installed them all and that Tierson witnessed the installation. Faubel holds the highest level of licensure available in West Virginia for installation of fire dampers. Eighty one percent (81) of the dampers he installed were incorrect. Whether was the result of extreme negligence or a purposeful act, the harm to the company, which Faubel detailed, was grave.

Appalachian terminated Faubel for legitimate business reasons and his union affiliation played no motivating role. Appalachian’s cautious handling of the unlawful text message speaks to their motivation. The company was hesitant to take any action regarding Faubel because of his announcement that he was Eric the organizer. The harm caused by the fire damper installation conduct was too grave to withstand the company’s reluctance to engage the announced union organizer directly.

V. RELIEF SOUGHT

Appalachian respectfully requests the standard remedy of rescission and notice posting for the admitted 8(a)(1) violation for the overbroad no-solicitation policy. Appalachian respectfully requests the Board find in favor of the Respondent and dismiss the remaining charges contained in the Complaint. Appalachian would further request any other relief to which it is may be entitled.

VI. SUMMARY

Based on the foregoing discussion and argument of the evidence presented at hearing, the General Counsel has failed in its burden of proof for all, but one allegation contained in the Complaint. The Respondent has not engaged in unlawful interrogation, threats, promises of benefits, has not unlawfully solicited grievances, has not promulgated any new rules in response to protected activity, and has not maintained unlawful rules except for that which was admitted herein. Appalachian has not discriminated against union supporters or any of its employees by isolating them from others, it has not unlawfully refused to recall Armstrong, and it did not unlawfully fail to promote or unlawfully terminate Faubel.

Respondent respectfully requests the judge consider its arguments and evidence and find that all non-admitted allegations are meritless. Respondent respectfully requests dismissal of all meritless charges.

Respectfully submitted:

/s/ James P. Allen Jr.

JAMES P. ALLEN, JR.

Managing Partner

&

/s/ Nathan E. Sweet

NATHAN E. SWEET

Attorney

National Labor Relations Advocates

312 Walnut Street, STE 1600

Cincinnati, OH 45202

(513) 646-3600

Representatives for Respondent

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been made on The Judges Division of the National Labor Relations Board via the Agency's e-filing portal, and courtesy copies have been electronically served on January 19, 2015 to the following parties:

Hon. David I. Goldman
Administrative Law Judge
David.Goldman@nlrb.gov

Jamie Ireland, Esq.
Attorney, NLRB
Jamie.Ireland@nlrb.gov

Jonathan D. Duffey, Esq.
Attorney, NLRB
Jonathan.Duffey@nlrb.gov

Kera Paoff
Attorney, SMART Local 33
Kera@wflawfirm.com

/s/ James Allen
James Allen