Shamrock Foods Company *and* Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL–CIO–CLC. Cases 28–CA–177035, 28–CA–178621, 28–CA–181714, and 28–CA–182541

January 7, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On April 25, 2017, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, an answering brief,[1] and a reply brief. The Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions except as explained below and to adopt the recommended Order as modified below.[3]

Under the circumstances of this case, we agree with the judge's conclusion that the Respondent did not violate Section 8(a)(3) and (1) by proffering and entering into a settlement agreement with discriminatee Tom Wallace by which Wallace waived his right to remedial reinstatement in exchange for a cash payment. We disagree with the judge, however, that the Respondent was shown to have promulgated and maintained an unlawful rule in violation of Section 8(a)(1) when Supervisor Jake Myers told employee D'Juan Williams he could not carry a cell phone on the warehouse floor.

I.

A.

The Respondent unlawfully discharged Wallace on April 6, 2015, during an active campaign by the Union to

[1] The Charging Party joined the General Counsel's answering brief.

[2] We adopt the judge's findings, for the reasons she explained, that the Respondent violated Sec. 8(a)(3) and (1) of the National Labor Relations Act by ending its practice of allowing employee D'Juan Williams to leave work early on certain days. Relatedly, we affirm the judge's finding that the Respondent violated Sec. 8(a)(1) when Dayshift Manager Armando Gutierrez told Williams on August 14, 2016, that Williams could no longer leave early "because of the [union] flyers" he had distributed. Having found that statement unlawful, we find it unnecessary to pass on Gutierrez's similar statement to Williams on August 17, as finding that additional violation would not affect the remedy. Also with respect to Williams, we deny the General Counsel's exception contending that Heather Vines-Bright, the Respondent's Human Resources Manager in Arizona, violated Sec. 8(a)(1) by telling Williams that the denial of permission for him to continue leaving early on some days "may have something to do with" the "labor issues that have been going on at the warehouse and stuff," as the complaint did not allege this statement to be unlawful.

We also adopt the judge's finding that the Respondent violated Sec. 8(a)(1) when Operations Manager Tim O'Meara told employee Mike Meraz, during the Union's organizing campaign, that the Respondent could not look into changing its policy of retaining Meraz' discipline for a safety violation on his employee record for 2 years "because [e]very policy, every pay plan that is in the warehouse is frozen. . . . [b]ecause of the current situation we're in," and "if we weren't in our current situation, yeah, I think in years past we've had policy committees that have . . . looked at policies and changed them." The Respondent asserts, and the General Counsel does not dispute, that at the time of Meraz' discipline, a change to the safety policy was not expected, nor had the Respondent used committees to change policies pursuant to any fixed pattern or practice. Where, as here, an employer has provided certain benefits in an "indefinite manner," the Board permits employers to "tell their employees that those benefits . . . will be deferred during the pendency of organizational efforts where they make clear that the purpose in doing so is to avoid the appearance of interference." *Village Thrift Store*, 272 NLRB 572, 572–573 (1983). We find that O'Meara's comments to Meraz did not meet this standard because, as the judge found, they "implie[d] that if there were not union activity, the Respondent would be open to making improvements to its disciplinary policy." Cf. *Ace Heating and Air Conditioning Co.*, 364 NLRB No. 22, slip op. at 4–5 (2016) (finding employer adequately expressed that its "purpose in keeping wages unchanged was to avoid the appearance of attempting to interfere with [an] ongoing election proceeding" where the employer explained that until election-related matters "were resolved, wages would remain unchanged because otherwise it might look like . . . bribery").

Further, we agree with the judge, for the reasons she stated, that the Respondent violated Sec. 8(a)(1) when it held a December 2015 holiday banquet for its employees that included more elaborate prizes and enhanced paid time as coercive benefits.

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

[3] Although we have not adopted all the violations found by the judge, we agree for the reasons she stated that the remedial notice, in addition to being posted, should be read aloud to the unit employees in order to dissipate as much as possible the lingering effects of the serious unfair labor practices the Respondent has been found to have committed in this and other recent cases. *Shamrock Foods Co.*, 366 NLRB No. 117 (2018) ("*Shamrock I*"), enfd. 779 Fed.Appx. 752 (D.C. Cir. 2019); *Shamrock Foods Co.*, 366 NLRB No. 107 (2018), enfd. 779 Fed.Appx. 752 (D.C. Cir. 2019). We also agree that the Respondent's CEO, Kent McClelland, should at a minimum be present on that occasion in view of his involvement in those violations. We will therefore require that the notice either be read to employees by McClelland or (at the Respondent's option) by an agent of the Board with McClelland present. See, e.g., *Ingredion, Inc. d/b/a Penford Products Co.*, 366 NLRB No. 74, slip op. at 1 fn. 2 (2018), enfd. 930 F.3d 509 (D.C. Cir. 2019); *Domsey Trading Corp.*, 310 NLRB 777, 779–780 (1993), enfd. 16 F.3d 517 (2d Cir. 1994).

We shall further modify the order in accordance with this decision, as set forth below, and we shall substitute the attached notice for that set out in the judge's decision.

organize the Respondent's food distribution warehouse in Phoenix, Arizona.[4] Wallace actively supported the Union's campaign after his discharge. In November and December 2015, along with other union supporters, he picketed with union signs (including "Workers United to Bring Tom Wallace Back") and helped to distribute union flyers at the warehouse.

On February 1, 2016, a U.S. district court issued an order under Section 10(j) of the Act reinstating Wallace pending the outcome of the Board's adjudication of his discharge.[5] Prounion employees then distributed a flyer informing the warehouse of the court's order, and the judge implicitly credited testimony that many of Wallace's coworkers were excited about the prospect of his returning to work.

At first, the Respondent offered Wallace reinstatement in compliance with the court's order. Then, on February 9, it offered him a settlement of $178,000 in exchange for the waiver of his right to reinstatement. Wallace rejected this offer and asked for a payment of $350,000--to include the settlement of a disability charge he had filed with the Equal Employment Opportunity Commission over his discharge--plus 3 years of medical coverage. On February 11, the administrative law judge's decision issued in *Shamrock I*, in which Wallace's discharge was found unlawful. *Shamrock I*, 366 NLRB No. 117. On the same day, the Respondent increased its offer to Wallace to $214,270.30--an amount more than four times the amount of remedial back pay he had accrued. The personnel official who conveyed this offer to Wallace was told by upper management that the Respondent "did not want Wallace to return to work." On February 12, Wallace accepted the Respondent's offer.[6] He received the agreed payment shortly afterward.

The complaint in this case alleges that the settlement agreement constituted an unlawful bribe to prevent Wallace from engaging in future union organizing activity inside the Respondent's facility. The judge rejected that allegation, relying in part on Federal Rule of Evidence 408 ("Compromise Offers and Negotiations"). The judge also opined that passing on the allegation would require her to analyze the validity of the claim underlying the settlement--i.e., Wallace's discharge.

B.

Although we agree with the judge's ultimate conclusion that the settlement is lawful, we observe that this is an unusual case warranting careful scrutiny of the Respondent's actions. As found by the judge, the record indicates that the Respondent was committed to preventing Wallace from returning to work, even temporarily per the district court's 10(j) order.[7] As noted above, the Respondent had already unlawfully discharged Wallace, and Wallace was an active and well-known union supporter after his termination. The Respondent, moreover, has never contended that Wallace's work performance was deficient or that his reinstatement would cause friction with other employees or with management, which are the typical employer defenses against remedial reinstatement. Yet, the Respondent's management told its personnel official categorically that the Respondent "did not want Wallace to return to work."

Further, as described, the Respondent knew that Wallace's reinstatement had become an issue of importance to many other warehouse employees. The Respondent reasonably would have viewed Wallace as a leader of the union campaign by the time the 10(j) order for his reinstatement issued in February 2016 and would have recognized that Wallace's return to work--or its prevention--would have a dramatic impact on the campaign, as the settlement agreement ultimately did have.[8]

The Respondent's generous settlement offer to Wallace also raises concern. At the time of the offer, the Respondent knew that its potential financial liability to Wallace would be limited essentially to his lost (and unmitigated) pay plus his other related losses.[9] Yet, to avoid reinstating Wallace, the Respondent was willing to pay him more than four times the amount of backpay he would have received at that time under a Board order. That fact, along with the totality of the other evidence, at least suggests that

[4] *Shamrock I*, 366 NLRB No. 117.

[5] All further dates are in 2016 unless otherwise indicated.

[6] The settlement agreement did not require Wallace to seek dismissal of the complaint allegation challenging his discharge in *Shamrock I* or prospectively waive any Sec. 7 rights.

[7] Because the complaint alleges that the settlement agreement in this case violated Sec. 8(a)(3), the judge was correct that *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), rather than *Independent Stave Co.*, 287 NLRB 740 (1987), would normally provide the applicable analysis. Under *Wright Line*, when an employer action is alleged to be unlawfully discriminatory under Sec. 8(a)(3), the General Counsel bears the initial burden of showing that protected activity was a motivating factor for the action. If this showing is made, the burden shifts to the respondent to show that it would have taken the same action even in the absence of the employee's protected activity. *Independent Stave* establishes the relevant factors for determining whether a settlement agreement should be enforced over a party's objection, and whether the Board should adjudicate the underlying charge.

[8] The judge found from the credited testimony, in fact, that Wallace's failure to return to work "impacted negatively on the Union's organizing efforts," noting that in June 2016 only about 25 percent of the employees who had initially signed cards for the Union re-signed them.

[9] At the time of settlement, the Respondent had already litigated the discharge allegation at the hearing in *Shamrock I* and briefed the issue to the judge in that case; accordingly, the Respondent was not attempting to avoid those legal costs.

the Respondent's motive was to prevent Wallace from engaging in further union activity in the Respondent's workplace rather than to ensure cost savings or employee productivity.[10]

Finally, the Respondent made essentially no effort to demonstrate that it would have offered Wallace such a generous settlement agreement absent his union activity. As the General Counsel points out, at the hearing the Respondent did not question any management witness as to its reason(s) for offering and paying Wallace the amount it did. Because those reasons were directly at issue, that failure certainly raises the specter that the actual reason was to prevent Wallace from continuing his union activity in the Respondent's workplace.[11]

C.

In all the circumstances, then, there appears to be at least a colorable basis for finding that the Respondent's settlement offer to Wallace was unlawful. The evidence supporting the Respondent's unlawful motive in offering the settlement to Wallace, however, must be considered against the Board's longstanding policy, established in *Independent Stave* and its progeny, to encourage the compromise and settlement of unfair labor practice charges.[12] And there is nothing inherently unlawful about settlement in which an employee waives reinstatement in exchange for an enhanced remedial payment from the employer; indeed, the Board has approved many such settlements.

The Board has declined to give effect to settlement agreements that contain a prospective waiver of Section 7 rights.[13] Such cases are not implicated here. The issue here is not whether to give effect to a settlement agreement. It is whether to find that the offer of settlement violated the Act. Moreover, the Respondent's offer to Wallace was not conditioned on a prospective waiver of Section 7 rights; the settlement agreement required him only to agree not to resume employment.[14] It is also clear from the record that Wallace independently negotiated with the Respondent, was not coerced into entering into this agreement, and had the option of refusing any settlement offer, thus requiring the Respondent to reinstate him immediately or be found in contempt of the outstanding 10(j) decree. Moreover, although the Respondent's payment significantly exceeded the amount of remedial backpay Wallace had accrued, the settlement also resolved an entirely separate claim he had filed with the EEOC, and part of the payment he received represented the value of that claim. In short, there appears to be an equally colorable argument that the settlement was a bona fide resolution of the multiple claims Wallace had asserted against the Respondent.

D.

Taking all of those circumstances into consideration, we are not persuaded by the General Counsel's contention that the settlement agreement in this case should be found unlawful. In the absence of a more compelling basis for concluding that the settlement interferes with the Board's interest in protecting Section 7 rights or Wallace's exercise of those rights, we find that the public policy favoring settlements warrants letting the settlement stand.[15] Accordingly, under the particular circumstances of this case, we adopt the judge's finding that this complaint allegation should be dismissed.

II.

On August 16, Supervisor Myers noticed a cell phone in D'Juan Williams' pocket and told him that he could not have his cell phone on the warehouse floor. Williams said he used his phone as a recorder, not as a cell phone, but Myers responded that it was "still a cell phone."

The judge found that Myers unlawfully extended a written safety rule the Respondent had previously issued

[10] The inference of unlawful animus would be further supported by the other violations the Board found in *Shamrock I* (including Wallace's unlawful discharge) and in this case.

[11] See, e.g., *Asarco Inc.*, 316 NLRB 636, 640 fn. 15 (1995), enf. denied on other grounds 86 F.3d 1401, 1412 (5th Cir. 1996); *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1289 (9th Cir. 1978).

[12] "[T]he Board has from the very beginning encouraged compromises and settlements." *Wallace Corp. v. NLRB*, 323 U.S. 248, 254–255 (1944). "The Board has long had a policy of encouraging the peaceful, nonlitigious resolution of disputes. 'The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them.'" *Independent Stave*, 287 NLRB at 741 (quoting *Wallace*, 323 U.S. at 254).

[13] See *Clark Distribution Systems*, 336 NLRB 747, 751 (2001) (declining to give effect to a settlement agreement containing a waiver of employee's right to participate as a witness in a Board case); see also *Webel Feed Mills & Pike Transit Co.*, 229 NLRB 178, 179–180 (1977) (declining to enforce settlement agreement where, among other reasons, settlement payment was found to constitute a bribe for the purpose of removing a union leader).

[14] We emphasize that the issue presented here concerns whether an offer to settle an unfair labor practice allegation violated the Act, not whether a severance offer extended in the absence of any such allegation does so.

[15] We do not agree with the judge's implication that Federal Rule of Evidence 408, by its terms, would preclude our finding the settlement agreement unlawful. As the subject of the complaint allegation, the agreement is not merely evidence; it is the material basis of the case and is therefore, by definition, admissible. Moreover, the rule bars only evidence pertaining to the merits of "the claim"—i.e., the underlying claim which is the subject of settlement. In the present case, the merits of the underlying claim—Wallace's discharge—are not at issue. The courts and the Board have also found that Rule 408 does not bar evidence of an unfair labor practice independently committed in the course of settlement negotiations. See *Church Square Supermarket*, 356 NLRB 1357, 1369 fn. 40 (2011); *Miami Systems Corp.*, 320 NLRB 71 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997); *Cirker's Moving Co.*, 313 NLRB 1318, 1326 (1994).

prohibiting the use of "musical devices," including cell phones, to listen to music while working due to the risk they created of distraction resulting in accidents.[16] She reasoned that Myers' statements to Williams constituted the promulgation of a broader, unlawful rule altogether prohibiting the use of cell phones on the warehouse floor.

We do not agree that Myers promulgated an unlawful rule. His statements were made only to Williams and "could not reasonably be interpreted as establishing that [the Respondent] intended to implement a new, more restrictive" rule for other employees.[17] Indeed, the Board has repeatedly held that a statement made to a single employee is not the promulgation of a rule for the entire work force.[18] We therefore dismiss this allegation.[19]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(e) and 2(a), and reletter subsequent paragraphs accordingly.

2. Substitute the following for paragraph 2(e):

"(e) Within 14 days after service by the Region, hold a meeting or meetings during working hours, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the warehouse employees at its Phoenix, Arizona facility by President/CEO Kent McClelland in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of McClelland, with translation available for Spanish-speaking employees."

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 7, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT grant you benefits, such as more elaborate prizes and enhanced paid time at our annual holiday banquet, in an effort to discourage you from supporting a union.

WE WILL NOT blame your union activity for preventing us from making improvements to your pay plans or work policies.

WE WILL NOT blame the Union or your union activity for our stricter enforcement of work rules or threaten you

[16] In *Shamrock I*, the Board severed and retained for further consideration the allegation that this previously issued rule, "Head/Ear & Cell Phone Use," was unlawful. 366 NLRB No. 117, slip op. at 3. Ultimately, the Board remanded the allegation to the administrative law judge. On July 8, 2019, the judge granted the General Counsel's motion to withdraw this complaint allegation.

[17] *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 777 (2006).

[18] See *Flamingo Las Vegas Operating Co., LLC*, 361 NLRB 1047 (2014), affirming and incorporating by reference 359 NLRB 873 (2013), rev. granted in part on other grounds mem. 2016 WL 3887170 (D.C. Cir. June 10, 2016) (per curiam); *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1131 (2014); *Teachers AFT New Mexico*, 360 NLRB 438, 438 fn. 3 (2014); *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 243 & fn. 5 (2014); *St. Mary's Hospital of Blue Springs*, supra.

[19] We note that the General Counsel did not allege that Myers' statements were unlawfully coercive as applied to Williams alone. The complaint alleges only that Myers "promulgated and since then maintained an overly-broad and discriminatory rule or directive prohibiting its employees" from carrying cell phones. Nor did the General Counsel present any evidence that Myers "since then maintained" a rule based on his statements.

with stricter enforcement of work rules to discourage your union support.

WE WILL NOT promise you benefits or improved working conditions based on whether you stop engaging in union activity or stop supporting the Union.

WE WILL NOT rescind our policy of allowing flexibility in your work schedules, such as leaving early on certain days, because you or others engage in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files all references to the stricter schedule enforcement of D'Juan Williams, and WE WILL notify him in writing that this has been done, or if there is no reference in his file, WE WILL notify him in writing that the flexibility he was previously granted in his schedule has been restored and the schedule change will not be used against him in any way.

SHAMROCK FOODS COMPANY

The Board's decision can be found at www.nlrb.gov/case/28-CA-177035 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Sara Demirok, Esq., for the General Counsel.
Todd A. Dawson, Esq., Nancy Inesta, Esq. (Baker & Hostetler, LLP), for the Respondent.
David Rosenfeld, Esq., Weinberg (Roger & Rosenfeld), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Phoenix, Arizona, on February 7–9, 2017. The Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union (Charging Party or Union) filed charges and amended charges on May 26, June 17, September 30, August 8, August 22, and October 27, 2016.[1] The General Counsel issued the consolidated complaint on October 28. Shamrock Foods Company (the Respondent or Shamrock) filed a timely answer denying all material allegations.

The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: granting employees benefits; blaming the Union for preventing changes to wages, benefits, and other working conditions; promising improvements in its disciplinary policy if its employees refrained from continued organizational efforts; blaming the Union and employees' union activities for stricter enforcement of rules and withdrawal of benefits; threatening employees with stricter enforcement of rules and withdrawal of benefits; and promulgating and maintaining an overly-broad rule prohibiting cell phones on the warehouse floor. The complaint further alleges the Respondent violated Section 8(a)(3) and (1) of the Act by: soliciting employee Thomas Wallace (Wallace) to sign an agreement not to return to work in exchange for $214,270.30; and ceasing its practice of permitting employee D'Juan Williams (Williams) to leave work early on certain days.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Arizona corporation with an office and place of business in Phoenix, Arizona, is engaged in the wholesale distribution of food products. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. CEO's Failure to Appear to Testify

Before turning to the substance of the complaint, I will address the refusal of President/CEO Kent McClelland to testify at the hearing, despite being served with a valid subpoena. The Respondent's petition to revoke this subpoena was denied on January 17, 2017. The General Counsel argues that adverse inferences are warranted. I agree. See *Rogan Bros. Sanitation, Inc*., 362 NLRB 547, 549 fn. 9 (2015); *Carpenters Local* 405, 328 NLRB 788 fn. 2 (1999).

The Respondent argues an adverse inference would be improper "in light of General Counsel's failure to demonstrate that McClelland possessed relevant knowledge or that his absence prevented General Counsel from eliciting evidence regarding a material matter." The Respondent first points to *Corliss Resources*, 362 NLRB 195 at fn. 56 (2015), where the administrative law judge, noting that the General Counsel did not contend an adverse inference should be drawn, declined to do so sua sponte. The General Counsel did not file exceptions in *Corliss Resources*, and the Board (to no surprise) did not pass on the matter. Reliance on this case is therefore misplaced.

Next, the Respondent cites to *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995), for the premise that it is improper for a

[1] All dates are in 2016 unless otherwise indicated.

judge to rely on adverse inference to fill an evidentiary gap in General Counsel's case. I do not read the case to stand for such a broad proposition. The Board in *Riverdale* pointed out that the "adverse inference drawn by the judge constitutes virtually the General Counsel's entire case regarding the Respondents' joint employer status." In the instant case, an adverse inference will not comprise the General Counsel's case almost entirely. It is also worth pointing out that the adverse inference in *Riverdale* involved a subpoena duces tecum that the General Counsel did not seek to enforce, and the Respondent's failure to call one of its own witnesses to rebut what little testimony the General Counsel adduced in its case in chief. It did not, as here, involve a witness's decision to flout a subpoena and refuse to testify.

The Respondent further cites to *Denny's Transmission Service*, 363 NLRB No. 190 (2016), where the administrative law judge declined to draw adverse inferences based on the company's failure to call a witness who was no longer in its employ. The General Counsel did not file exceptions in *Denny's*, so, as in *Corliss Resources*, the Board did not pass on the matter. In any event, a respondent's decision not to call a witness in support of its own defense is a far cry from a witness refusing to comply with a subpoena. This is particularly true where, as the judge in *Denny's* noted, the evidence showed the witness would not necessarily be inclined to testify in the company's favor.

Finally, the Respondent cites to *M-B Co., Inc*., 290 NLRB 68, 68 fn. 2 (1988), where the Board agreed with the judge that the company's decision not to call certain non-supervisory individuals to testify in aid of its defense did not give rise to an adverse inference. I will not belabor contrasting the scenario in *M-B Co.* with the situation present here, *i.e.*, the CEO refusing to appear pursuant to the General Counsel's subpoena following the Respondent's failed attempt revoke it.

Simply put, Kent McClelland chose to disregard his obligation to testify pursuant to the subpoena issued to him at his own peril. To permit the Respondent to escape the consequences of its highest level official flouting a valid subpoena would severely undermine the Act and the Board processes derived from it. Accordingly, I find sanctions are very clearly warranted. Specific adverse inferences are detailed in context below.[2]

B. Background and the Respondent's Operations

Shamrock Foods operates food distribution warehouses in several states. The instant case concerns the warehouse in Phoenix, Arizona. Approximately 280 employees work within the Phoenix warehouse. Warehouse employees include receivers, forklift operators, order selectors (sometimes referred to as "pickers"), and loaders. The number of warehouse employees from December 2010–December 2013 was as follows: 232 employees in 2010, 251 in 2011, 311 in 2012, 300 in 2013, 358 in 2014, and 360 in 2015. (R. Exh. 13.)[3]

About 250 drivers transport items to and from the warehouse. The drivers are part of the Respondent's transportation department, which is separate from the warehouse.

During the relevant time period, Kent McClelland (McClelland) served as Shamrock's president and chief executive officer (CEO). Mark Engdahl (Engdahl), who reported directly to McClelland, served as vice-president of operations for food service, overseeing the warehouse and transportation employees at the Phoenix warehouse. Tim O'Meara, the operations manager, reported directly to Engdahl. Ivan Vaivao, the warehouse manager, reported directly to O'Meara. Vaivao oversaw other managers, who in turn oversaw supervisors in the warehouse.

Robert Beake (Beake) served as senior vice president human resources (HR).[4] Heather Vines-Bright (Vines-Bright), an HR manager, reported to Beake.

C. Union Organizing Activity

Warehouse employees began organizing efforts with the Union in late 2014. Steven Phipps, who worked as a loader and forklift driver for Shamrock for 19 years, was the main employee organizer.[5] (Tr. 416.) He first contacted the Union in November 2014. Phipps created flyers on the Union's behalf, and distributed them at the warehouse with a group of 5–7 other employees during October–December 2015. (GC Exh. 22; Tr. 417–419.)

By early 2015, Respondent was aware some of its employees were in contact with the Union. Between January and May 2015, Engdahl held meetings with employees to educate them about unions. (Tr. 63–64.) By the end of February, the Union had collected authorization cards from approximately 90 employees.

[2] The Respondent did not rely on *NLRB v. International Medication Systems*, 640 F.2d 1110, 1116 (9th Cir. 1981), cert. denied 455 U.S. 1017 (1982), as authority for the principle that I may make no adverse inference. Even if *International Medication* may be read to support the proposition that adverse inferences may not be made when a witness refuses to appear pursuant to a valid subpoena, it is contrary to Board law. See cases cited above, as well as *Lemay Caring Center*, 280 NLRB 60 fn. 2 (1986); *Today's Man*, 263 NLRB 332 (1982); and to at least three other circuits. *Hedison Mfg. Co*., 643 F.2d 32, 34 (1st Cir. 1981); *NLRB v. C. H. Sprague & Son Co*., 428 F.2d 938, 942 (1st Cir. 1970*); NLRB v. American Arts Industries*, 415 F.2d 1223, 1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970); *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). In *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771 (D.C. Cir. 1984), the D.C. Circuit squarely rebuked the Ninth Circuit's reasoning in *International Medication Systems*. It is clear administrative law judges lack the authority to compel a witness's appearance at an administrative hearing. The upshot of a holding that witnesses may simply refuse to testify and await subpoena enforcement in Federal court with no interim consequences, however, would be to reward employer and union respondents who encourage their witnesses to simply ignore subpoenas, resulting in delay of hearings and a flood of enforcement proceedings in the Federal courts. Such a construction of *International Medication* would severely undermine the Act.

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for the Respondent's exhibit; "GC Exh." for the General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

[4] At the time of the hearing, Beake had retired from the senior vice president human resources position and transferred his responsibilities to Vince Daniels. He still worked for Shamrock on special projects and in an advisory role for McClelland and his father, Board Chairman Norm McClelland. (Tr. 83.)

[5] Phipps was discharged in June 2016 for safety violations. (Tr. 435.)

By the end August 2015, the Union had collected authorization cards from a total 107 employees. (Tr. 447–449.)

D. The Holiday Banquet

Complaint paragraphs 5(a) and 7 allege the Respondent violated Section 8(a)(1) of the Act when it granted its employees benefits by raffling off and presenting prizes to them at a holiday banquet on December 19, 2015. At the hearing, I granted the General Counsel's motion to amend the complaint to include a related allegation that the Respondent paid for employees' time to attend the holiday banquet. (Tr. 198.)

1. Facts

Shamrock hosts various events for employees, including an annual holiday banquet.[6] Prior to 2015, the holiday banquet for the warehouse workers typically was held at the warehouse auditorium during the employees' lunch break.[7] For at least the past couple of years it consisted of a meal, speeches, awards for perfect safety and attendance (PSA awards), and a raffle.[8] (R. Exhs. 4–7.) The holiday banquet was held offsite at a resort hotel in 2007 and 2008 but did not include a raffle. (Tr. 278.) In recent years, the warehouse banquets have lasted about an hour, and employees have been paid for any time exceeding their 30-minute lunch break. (Tr. 271, 278.) The shift is extended in proportion time spent at the banquet beyond the employees' lunch break. (Tr. 54.) The transportation employees historically attended a separate holiday banquet, usually held offsite.

On December 19, 2015, Shamrock held its annual holiday banquet at the Talking Stick Resort and Casino. All food operations employees, including warehouse, transportation, and other departments, were invited to attend and were permitted to bring a guest. (GC Exh. 17.) Attendees were provided with drink tickets. (Tr. 38, 263.) McClelland, O'Mara, and Vaivao all attended. Registration and check-in began at 4:30 p.m., followed by a reception, remarks from Board Chairman Norman McClelland, dinner, dancing, awards, and raffle prizes. The banquet ended at 9 p.m. (GC Exh. 2.) Employees were paid for four hours of their time to attend the banquet. (Tr. 262, 553.)

Raffle items at the 2015 holiday banquet ranged in value from $45 gift cards at the lowest end to a $5,000 travel certificate at the highest. The other raffle prizes were: two laptop computers valued at $499.99 each; four iPad Air tablets valued at $499 each; an Xbox valued at $499.99; two PlayStations valued at $429.99 and $399.99; two 55-inch flat screen TVs valued at $479.99 each; a 60-inch flat-screen TV valued at $699.99, and another donated 60-inch TV; two drones valued at $199.99 each; ten $100 gift cards; four Bose speakers valued at $119 each; two Insignia Soundbar speakers valued at $99.99 each; four Beats speakers valued at $112.49 each; and three GoPro cameras valued at $299.99 each. The prizes, along with the winning raffle ticket numbers, were displayed as part of a PowerPoint presentation. (GC Exh. 4.) The total cost for the raffle prizes was $14,848.72. (GC Exhs. 3–5.) The cost of the banquet, not including the prizes, was $144,511.90. (Tr. 57; GC Exh. 6.)

Thomas Richardson has worked in the warehouse at Shamrock since 2007. He attended the holiday banquet in 2014 in the warehouse auditorium. A raffle was held following awards for perfect safety and attendance (PSA) other employee achievement awards. (R. Exh. 6.) Prizes for the raffle included smaller ticket items such as basketballs, footballs, volleyballs, tool sets, chairs, griddles, and other small kitchen appliances. The larger ticket items consisted of: four laptops, with two valued at $279.99 each and two valued at $249 each; four Kindle Fires valued at $99.99 each; and four Galaxy tablets valued at $139.99 each. The grand prize was an iPad Air, valued at $319.99. Two of these were awarded—one for the day shift and one for the night shift.[9] The cost for the prizes was $4,704.03.[10] (Tr. 268; R. Exh. 11.)

Vaivao recalled the raffle prizes in years prior to 2015 included big ticket items like big screen televisions, laptops, iPads, and Kindles, as well as small items such as footballs, basketballs, and tool kits. (Tr. 561, 564–566; R. Exh. 5.) Engdahl authorized expenses for the events at all of Shamrock's branches. He recalled Shamrock has given out different items, such as trips, canoes, boats, and quads, but was not certain if these prizes were for warehouse employees. (Tr. 53–54.) Warehouse employees D'Juan Williams. Michael Meraz, Steven Phipps, as well as Richardson, remembered items such as footballs, basketballs, tickets to a sporting event, and a television. No employee recalled seeing a boat or a $5,000 gift certificate as a raffle item. (Tr. 269–270, 336–337, 402–403, 430–431.)

Vaivao was among the individuals who decided the location of the 2015 holiday banquet. One of the reasons he gave for the decision to hold it offsite was the auditorium, which holds about 180 people, was becoming too small to accommodate the warehouse employees. Shamrock also wanted to combine day and night shifts and have one party for all of operations, including transportation. (Tr. 548, 550–552.)

Shamrock accrues money in an employee appreciation account to budget for events, including the holiday banquet. Employee appreciation events are included in one general ledger expense line. (Tr. 620.) Budgeting is calculated using the fiscal year, starting October 1 and ending September 30 annually.

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[6] Testimony about various events was elicited but is not material, as this decision focuses on the annual holiday banquet.

[7] There was generally one banquet for the day shift and another for the night shift. (Tr. 549.)

[8] The raffle in 2012 was among employees who had perfect safety and attendance. (R. Exh. 4.) In 2013 and 2014, the employee awards and the raffle were separate, though both include prizes. (R. Exhs. 5–6.) There is no allegation involving the employee awards.

[9] Richardson's recollection, at Tr. 268, is consistent with the receipt showing the highest priced item in 2014 was an iPad Air. (R. Exh. 11d.) I found Richardson to be a credible witness based on his open and straightforward demeanor while testifying. As a current employee testifying against his own pecuniary interest, his testimony, along with the testimony of other current employee witnesses, is particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co*., 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

[10] The total cost does not differentiate between award prizes and raffle prizes, except for the $25 gift cards awarded to the 58 employees who received PSA awards. (R. Exh. 11a.)

Departments are identified by number, with 701–703 representing the warehouse.[11] (Tr. 624.)

Budgeting for the 2013 year-end event is reflected in the previous fiscal year, beginning October 1, 2012, and ending September 30, 2013.[12] On October 31, 2012, Shamrock accrued $10,000 for the warehouse department for the employee recognition event. Shamrock accrued an additional $2,500 each of the months from March–July 2013. There are no records reflecting what, if anything was accrued in November–December 2012, January–February 2013, or August–September 2013.

For the 2014 year-end event, Shamrock accrued $10,000 in October 2013 for the warehouse department. It accrued an additional $3,000 in each of the months from November 2013–February 2014, as well as $7,000 in each of the months from April–June 2014. Shamrock accrued $5,362 in July 2014, and $22,500 in September 2014. (R. Exh. 12.)

Turning to the 2015 year-end event, for the warehouse department, Shamrock accrued $7,000 in each of the months from October–December 2014, and January 2015. On February 23, 2015, $7,000 was accrued but that same amount was credited back on February 28.[13] On March 24, 2015, $7,000 was accrued but that same amount was credited back on March 31. On April 30, 2015, $7,000 was accrued and refunded the same day. Shamrock accrued $4,500 in July 2015, and $10,000 in August 2015, broken down into two separate entries of $4,500 and $5,500 respectively. It accrued an additional $17,155 in September 2015, broken down into three separate entries. (R. Exh. 12.)

2. Analysis

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct would reasonably tend to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co*., 124 NLRB 146, 147(1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American. Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

The Supreme Court, in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), stated that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." As the Court explained in *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964):

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

(fn. omitted.) The Court further stated that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. It is well-settled that the *Exchange Parts* principles apply to promises and/or granting of wage increases or other benefits if they are made in response to union organizational activity, regardless of whether a representation petition has been filed. *Network Dynamics*, 351 NLRB 1423, 1424 (2007); *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006).

Unlike most 8(a)(1) allegations, analysis of a claim that benefits were promised, announced, or granted to coerce employees in their choice of bargaining representative is motive-based. *Network Dynamics Cabling, Inc*., 351 NLRB 1423, 1424 (2007). The granting of benefits to employees during union organizational activity "is not per se unlawful" where the employer can show that its actions were governed by other factors. *American Sunroof Corp*., 248 NLRB 748, 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981).

To establish such a claim, the General Counsel must first prove, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc*., 319 NLRB 916 (1995). If the General Counsel meets this burden, the employer must demonstrate a legitimate business reason for the timing of the benefit. One way to do this is to show the benefit was "part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union." *American Sunroof*, supra; see also *Real Foods Co*., 350 NLRB 309, 310 (2007); *Holly Farms Corp*., 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1087–1090 (2004).

It is clear from the above-stated facts that the holiday banquet the warehouse employees were invited to attend in December 2015 was a much more lavish event than the holiday banquets dating back at least the past 7 years. In contrast to the holiday banquets held during lunchtime at the warehouse from 2009–2014, the 2015 banquet was held at a casino, employees were eligible to receive more expensive prizes, they were invited to bring a guest, drink tickets were provided, and the event lasted longer than an hour.

[11] The text of Respondent's Exhibit 12 is very difficult to read. It is clear that many of the "0" entries erroneously appear to be "8" on the copy in the record. This is most apparent from the entries depicting year where, for example, the entry on the third line down for October 31, 2013, reads "10/31/2813".

[12] The year-end employee appreciation awards took place at the holiday banquet. There is no evidence of a separate year-end employee awards event so the accruals labeled "year end associate recognition accrual" and those labeled "year end banquet accrual" are apparently for the same event.

[13] Amounts in parentheses are credits, not expenses. (Tr. 625.)

The Respondent argues that the 2015 banquet was in line with past practice, and cites to *K-Mart Corp*., 336 NLRB 455, 470–471 (2001), for support.[14] In that case, however, there was no quantification of the raffle prizes at the events at issue, as there is here. Moreover, the Respondent cites to the administrative law judge's decision, which the Board did not discuss on appeal.[15]

The Respondent attempts to conflate the PSA and other employee awards with the raffle awards. This argument is a red herring and it fails, as does the Respondent's attempt to compare the annual holiday banquet to other unrelated employee events. The Respondent also asserts that the prizes were proportionate to the attendance, since the transportation department was also included. The math simply does not add up, however, as calculated in the statement of facts above. In addition, the decision to invite the warehouse employees to the type of offsite event usually only offered to the transportation department is telling. The Respondent next points out that the $5,000 travel voucher was a single award granted to a single employee. The voucher and the various other prizes, however, were available for all employees to win. In any event, the Respondent's contentions regarding past practice are belied by the evidence, as detailed above.

The Respondent argues that the banquet was not coercive because the union campaign was in abeyance by December 2015. In support, the Respondent relies on *Sigo Corp*., 146 NLRB 1484, 1485–1486 (1964). In *Sigo*, the union filed a petition for representation on June 5, 1963, but withdrew it on June 13. On June 17, the company announced a new insurance plan. The Board found this was not unlawful because, at the time the benefit was offered, the union had withdrawn its petition and the employer had no notice that the union intended to continue its organizational activity or to file another petition. In the instant case, no petition had been filed or withdrawn. There is nothing to suggest the level of finality to the organizing drive was communicated to the Respondent as it was in *Sigo.* The Respondent contends, nonetheless, that the Union's organizing drive was essentially dead by May 2015. This is squarely contradicted by the fact that Phipps and a group of employees distributed flyers and talked to employees in the break room about the Union during October–December 2015. Also, in November 2015, a group of employees picketed at the warehouse, holding signs that said, "Workers United to Bring Tom Wallace Back." (GC Exh. 23; Tr. 483.) In December 2015, employees distributed flyers about the Respondent's treatment of its workers. (GC Exh. 22; Tr. 418.)

It is also undisputed that the Union was pursuing charges against Shamrock around the time of the annual holiday banquet. Employee Andres Contreras filed a charge against Shamrock alleging unfair labor practices on October 13, 2015, and the Union filed unfair labor practice charges on October 28 and December 11, 2015.[16] *Shamrock Foods*, JD-49-16 (NLRB Div. of Judges, June 10, 2016). On September 8, 2015, the General Counsel filed a petition for injunction under Section 10(j) of the Act in the U.S. District Court for the District of Arizona. A complaint alleging numerous unfair labor practices issued on July 21, 2015, and was amended in August and September. A hearing regarding the complaint took place between September 8–16, 2015, overseen by Administrative Law Judge (ALJ) Jeffrey Wedekind. The management officials who testified included McClelland, Engdahl, and Vaivao. The record was held open after the hearing to allow for investigation of a new charge the Union had filed seeking a remedial bargaining order.[17] The Respondent submitted new documents into the record on October 21, 2015. *Shamrock Foods*, JD (SF)-05-16 (NLRB Div. of Judges, February 11, 2016). On September 11, 2015, the Respondent filed a request for special permission to appeal to the Board ALJ Wedekind's order denying its petition to revoke a subpoena duces tecum. On December 1, 2015, the Board denied this request. *Shamrock Foods*, 2015 WL 7769413 (2015). It is safe to say the Union's pursuit of various unfair practice charges was in full force during the time period leading up to the annual holiday banquet.

With regard to the pay, it is undisputed that employees were paid for four hours to attend the 2015 banquet. In the past, employees were paid for the time beyond their 30-minute lunch break to attend the banquet, which generally lasted about an hour. The Respondent points to Vaivao's testimony that off-duty employees were paid four hours to attend previous banquets. His testimony on this point is confusing, however:

> Q Were you one of the individuals that helped or participated in the decision that they would be paid?
> A [Vaivao]Yes.
> Q And what did you consider in making that decision?
> A Considering---trying to standardize it. Transportation had been having their events and they were getting paid. To my knowledge, what I've heard is to be consistent with DOT rules but they were paid for attending. So for us to have this together as an operation, we felt that it'd be consistent with what's been going on. We---it's consistent---we paid the associates to attend years past with, you know, the extended time past their half an hour lunch. So it's consistent with what we've done.
> Q Okay. So you didn't see it or did you see it as a departure from what you had done in the past?
> A No, not at all. If an associate would come in on their day off, we were paying the four hours to attend.
> Q Okay. So if an associate came into the luncheons, you would pay them for the time they were there?
> A In the warehouse, yes.

(Tr. 554.) It is unclear whether off-duty warehouse associates were paid for four hours or were paid for the time they came into the warehouse for the event, which lasted well short of 4 hours. Vaivao further testified that not very many off-duty employees attended, describing it as, "Couple here, couple there . . ." (Tr. 554–555.) In any event, the treatment of a couple of

[14] The Respondent cites to the factors set forth in *B&D Plastics*, 302 NLRB 245 (1991), which apply to pre-election cases. This is not such a case, but a more rigid application of the *B&D* factors would not change my decision.

[15] It appears the dismissal of this allegation was not the subject of exceptions, as the Board explicitly ruled on the various other administrative law judge findings the parties had appealed.

[16] The complaints stemming from these charges were dismissed on June 10, 2016.

[17] This charge was subsequently withdrawn.

employees is not the same as the enhanced benefit of four hours of pay to all employees to attend the holiday banquet in 2015. Moreover, it is clear that paying warehouse employees four hours for the holiday banquet was not established past practice. An email written by Rose Brancato, a senior finance manager, notes that the added payroll expense for the warehouse employees to attend the meeting was "outside of what was planned." Tom Petrola, operations analyst responded to Brancato's email, stating that "the payroll bump is new to Warehouse this year . . . " (GC Exh, 7.) The Respondent also contends that employees were paid to attend other events. The issue before me, however, is the Respondent's past practice with regard to the holiday banquet.

Based on the foregoing, I find the General Counsel established that the Respondent conferred a benefit on the warehouse employees that would reasonably be viewed as an attempt to coerce them in their choice of union representation.

The burden now shifts to the Respondent to demonstrate a legitimate business reason for the timing of the benefit. The Respondent admits that the record does not reflect the precise date the decision to hold the banquet off-site in the evening was made (R. Br. 5, fn. 6), but argues it must have been made by October 2014, since it began setting aside greater accruals that month than it had previously. When directed to certain months reflected in the Respondent's exhibit showing accruals, Petrola testified that around $3,000 per month was accrued for the 2014 holiday banquet, while $7,000 per month was accrued for the 2015 holiday banquet. (Tr. 625–626). This testimony does not withstand scrutiny, however, as the record reflects that in October 2014, $7,000 was set aside for the banquet, while in both October 2012 and October 2013, $10,000 was set aside.[18] For the months February–April 2015, accruals were made and rescinded, essentially resulting in no accruals for those months. By contrast, the Respondent accrued $3,000 in February 2014, and 7,000 in each of the months from April–June 2014. The accruals simply fail to establish when the decision was made to change the location and timing of the banquet.[19]

The Respondent contends that there was not enough space in the warehouse auditorium to continue to hold the holiday banquet on-site.[20] There were two more employees in 2015 than in 2014 when the banquet was held in the auditorium, and the employees who had the day off on the day of the banquet usually did not attend. (R. Exh. 13; Tr. 554–555.) This explanation, therefore, is unpersuasive.[21]

In sum, I find the General Counsel has met its burden to prove the Respondent violated Section 8(a)(1) by conferring benefits to dissuade employees from supporting the Union as alleged.

E. Thomas Wallace Settlement Agreement

Complaint paragraphs 6(a),(b),(d), and 8 allege that on about February 11, 2016, the Respondent solicited its employee Thomas Wallace to sign an agreement providing that, in exchange for the payment to him in the gross amount of $214,270.30, he agree to a release and waiver, in violation of Section 8(a)(3) and (1).

1. Facts

Thomas Wallace (Wallace), a former warehouse worker, was terminated on April 6, 2015.[22] He was an outspoken Union supporter, and, in a previous decision, ALJ Wedekind determined he was unlawfully terminated based on his union activities. *Shamrock Foods Co*., JD (SF)-05-16, supra. On February 1, 2016, the U.S. District Court for the District of Arizona ordered Shamrock to offer Wallace reinstatement. (GC Exh. 23.)

After his termination, but prior to the order reinstating him, Wallace remained active with the Union. In November 2015, he and Phipps picketed, holding signs that said, "Workers United to Bring Tom Wallace Back." (GC Exh. 23; Tr. 483.) In December 2015, employees, including Wallace, distributed flyers about the Respondent's treatment of employees. (GC Exh. 22; Tr. 418.) Phipps also created a flyer about the order reinstating Wallace, and he and coworkers distributed it at the warehouse on February 9–11. (GC Exh. 11; Tr. 420.) Phipps perceived that many of his coworkers were excited about Wallace returning to work, but many were skeptical that it would happen. (Tr. 424.)

At the time of his termination, Wallace's hourly rate was $12/hour plus applicable bonuses. On average he earned about $27/hour. (Tr. 512–513.)

On February 5, 2016, Beake sent Wallace a letter offering him reinstatement at his hourly rate, or payment of $78,000 to waive reinstatement. (GC Exh. 9.) In the letter, Beake assured Wallace

[18] For this reason, I do not credit Petrola's testimony. I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness, and between witnesses with similar apparent interests. See, e.g., *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). Testimony or other evidence in contradiction to my factual findings has been carefully considered but discredited. Where there is inconsistent evidence on a material point, my credibility findings are incorporated into my legal analysis.

[19] Vaivao, who was involved in the decision about where to hold the banquet, was not asked about the timing. The General Counsel has requested an adverse inference pursuant to *Flexsteel Industries*, 316, NLRB 745, 758 (1995). I find such an inference is warranted and conclude that Vaivao would have testified that the decision was made after the Respondent became aware that employees had contacted the Union. I likewise find McClelland would have so testified if he had complied with the subpoena and appeared at the hearing. I further find McClelland would have testified that the reason Shamrock granted the warehouse employees enhanced prize opportunities and paid time to attend the banquet was to discourage their support for the Union. I note that my decision would be the same without these adverse inferences.

[20] The Respondent's brief cites to Vaivao's testimony at p. 549 for the proposition that the warehouse party was broken down by shift due to space constraints. (R. Br. p. 4, citing Tr. 5439, lines 3–16.) The cited testimony, however does not reference space constraints as the reason for holding one party for the day shift and another for the night shift.

[21] The Respondent did not argue in its brief that productivity was a factor in the decision to hold the holiday banquet in the evening. Given Engdahl's testimony that the banquet typically lasted about an hour (of which 30 minutes was a lunch break) and the day was extended to make up for the time spent at the banquet, such an argument would be unpersuasive without more specific evidence than appears in the record.

[22] Wallace's termination was adjudicated in a previous proceeding before ALJ Jeffrey Wedekind. Judge Wedekind found that Wallace's termination violated Sec. 8(a)(3) and (1) of the Act. See JD(SF)–05–16, supra.

that acceptance of the settlement was "purely voluntary" and that a decision to accept reinstatement instead of a lump sum would not be held against him. Beake informed Wallace that acceptance of the offer would not prevent the Board from seeking a remedial posting referencing his termination. Beake also assured Wallace that his discharge would not be used against him in any way. Wallace did not seriously consider this offer and was focused on returning to work. (Tr. 489.)

Beake's letter instructed Wallace to call Vines-Bright by February 12 and let her know whether he wanted to return to work. Wallace called Vines-Bright on February 8 and informed her that he was ready to return to work.[23] (Tr. 490–491.) Wallace asked some questions about his schedule and chain of command. Vines-Bright said she would get back to him. (Tr. 214–215.) Vines-Bright called him back the following day to tell him his schedule would be the same as it was before his termination. She offered an additional $100,000.[24] (Tr. 492–493.) Vines-Bright went on vacation, so Natalie Wright, a human resources specialist, followed up with Wallace. She had been told that Shamrock did not want Wallace to return to work. (Tr. 231.) Wallace told Wright he was declining Shamrock's offer and said it would take $350,000 plus three years of medical coverage for him to agree not to return to work. (Tr. 232–235; 495–496.) Wright expressed that this might be too high and asked if there was wiggle room. Wallace said that Shamrock needed to come in strong and mentioned that the warehouse was going to "go bananas" because of all the union activity that had been taking place. (Tr. 496–497.)

On February 11, Wright orally conveyed an offer of $214.270.30 to Wallace, and sent him a draft of the offer. (GC Exh. 16; Tr. 235.) The following day, February 12, Wallace signed a settlement agreement waiving reinstatement in exchange for $214, 270.30. (GC Exh. 8.) The agreement resolved a charge Wallace had made with the Equal Employment Opportunity Commission (EEOC) alleging disability discrimination. (Tr. 524.) The agreement states, in relevant part:

> In exchange for your decision to waive your right to return to work at Shamrock and the release of claims explained below, you will receive a check in the gross amount of $214,270.30, less FICA and Medicare tax deductions that are mandatory, despite your exempt status designation on your W-4.
> . . .
>
> It is understood that, in exchange for your Settlement Payment set forth in this letter, you release and waive the right to return to your former position with Shamrock.
>
> . . .
>
> You also waive any claimed right or opportunity to seek reemployment, reinstatement, new employment, or an independent contractor relationship with Shamrock or any of Shamrock's parent, subsidiary or affiliated entities, at any location, now or ever in the future, and agree that you will not apply for nor seek in any way to be reinstated, reemployed, retained or hired by any of them in the future.
>
> Nothing in this Agreement is intended to, or shall, interfere with your ability to file or otherwise institute a charge with an administrative agency alleging discrimination under federal, state, or local civil rights, labor and/or employment discrimination laws (including, but not limited to, Title VII, the ADA, the NLRB, and the ADEA). However, you waive any right, and you shall not be eligible, to any relief, remedies, recovery, or monies in connection with any such charge against Shamrock, regardless of who filed or initiated any such compliant, charge, or proceeding.
>
> . . .
>
> You agree to reasonably cooperate with the Company in connection with any matter which you were involved or any existing or potential claim, investigation, administrative proceeding, lawsuit or other legal or business matter which arose during your employment by the Company, as reasonably requested by the Company.

Wallace's termination and subsequent failure to return to work impacted negatively on the Union's organizing efforts. In June 2016, only about 25 percent of the employees who had initially signed cards re-signed them. (Tr. 425–428, 443–446, 451, 462–465.)

2. Analysis

The parties disagree on the applicable legal framework. The General Counsel argues the case should be analyzed under *Wright Line*, while the Respondent argues it should be analyzed under *Independent Stave*. There are problems with both approaches.

Independent Stave Co., 287 NLRB 740, 743 (1987), sets forth the relevant considerations for approving non-Board settlements. The complaint allegation, coupled with the nature and posture of the settlement agreement at issue, render *Independent Stave* inapplicable.[25]

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), governs mixed-motive cases where discriminatory intent is alleged. To prove a violation under *Wright Line*, the General Counsel must make an initial showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. If this is accomplished, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. I agree with the Respondent that a typical motive-based analysis that considers the legitimacy of an agreement settling pending

[23] Though she did not recall specifics, Vines-Bright recalled that Wallace intended to return to work. (Tr. 212.)

[24] There are some conflicts with regard how and precisely when the various offers were conveyed, but none of them are material. With regard to any conflicts between Wallace and Vines-Bright, I credit Wallace because Vines-Bright admittedly had trouble recalling the conversations. (Tr. 215–217.)

[25] As noted by the General Counsel, the settlement agreement did not resolve any unfair labor practice charges. The Board, therefore, was not in a position to approve or deny it prior to its execution. (GC Br. 53.)

legal claims clashes with Federal Rule of Evidence 408.

Federal Rule of Evidence 408 states:

> (a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

"While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto." Advisory Committee's Notes to the Federal Rules of Evidence, Notes on Rule 408 (1972).

The complaint allegation implicitly requires me to undertake an analysis of the validity of the claims underlying the settlement.[26] The General Counsel argues that the "Respondent took action by repeatedly and successfully soliciting Wallace to enter into an agreement waiving his right to reinstatement in exchange for a large sum of money." This begs the question, what was a reasonable sum of money?[27] As the Respondent points out, the settlement resolved Wallace's EEOC disability discrimination claim.[28] If Wallace successfully prevailed on this claim, he would be entitled to compensatory damages for any out of pocket expenses and up to $300,000 for any emotional harm he could prove resulted from discrimination. If warranted, punitive damages could be assessed. 42 U.S.C. § 1981a. Shamrock would also be required to pay Wallace's attorney fees. 42 U.S.C. § 12205. Without delving into the validity of claims underlying the settlement, there is no way to know if the amount of money the Respondent offered Wallace was reasonable.[29]

While it is abundantly clear the Respondent did not want Wallace to return to work at Shamrock, this is always the case when an employer decides that it will settle a case in exchange for an employee waiving reinstatement.[30] An allegation of unlawful motivation, be it discrimination based on disability or anti-union retaliation, underlies every agreement settling such claims. For the Board to get involved in passing on the ultimate issue of motivation in a case that private parties have voluntarily settled implicates broader considerations in a manner that conflicts with the purpose of Rule 408, *i.e.*, "promotion of the public policy favoring the compromise and settlement of disputes."[31] Advisory Committee Notes, supra; see also *U.S. v. Contra Costa County Water Dist*., 678 F.2d 90 (9th Cir. 1982*); Hughes Christensen Co*., 317 NLRB 633, 635 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir., 1996).

I recommend dismissal of complaint paragraph 6(a)(b), and (d).

F. Allegations Concerning Employee D'Juan Williams

The complaint contains some related allegations concerning employee D'Juan Williams. Complaint paragraphs 5(c) and 7 allege that the Respondent violated Section 8(a)(1) when on August 14, 2016, Armando Gutierrez: (1) blamed its employees' union activities for its stricter enforcement of work rules and withdrawal of benefits for its employees; and (2) threatened its employees with stricter enforcement of work rules and withdrawal of benefits if they engaged in union activities. Complaint paragraphs 5(e) and 7 alleged that on August 17, 2016, Gutierrez: (1) blamed the Union's organizing campaign and its filing of unfair labor practice charges for its stricter enforcement of work rules and withdrawal of benefits for its employees;[32] (2) blamed its employees' union activities for its stricter enforcement of work rules and withdrawal of benefits for its employees; and (3) threatened its employees with stricter enforcement of work rules and withdrawal of benefits for its employees if they engaged in union activities. Complaint paragraphs 6(c), (d), and 8 allege that on about August 14, 2016, the Respondent ceased its practice of allowing employee D'Juan Williams to leave work early on certain days in violation of Section 8(a)(3) and (1).

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[26] The General Counsel here argues that the settlement agreement itself is unlawful, and that statements made in the course of settlement discussions show coercion. This is different from cases where the Board has stated that statements made during settlement negotiations may be used to establish independent violations, such as threats, that occurred during the course of settlement. See *Miami Systems Corp*., 320 NLRB 71 fn. 2 (1995), modified but affirmed on point, *Uforma/Shelby Business Forms v. NLRB*, 111 F.3d 1284, 1293–1294 (6th Cir. 1997).

[27] As held by the Court of Appeals for the Sixth Circuit, "Where, as here, a party has raised an issue going to the validity or amount of a claim, that is insufficient for admitting settlement offers that go to the same issue because to do so violates Rule 408 on its face." *Stockman v. Oakcrest Dental Center, P.C*., 480 F.3d 791 (6th Cir. 2007).

[28] The fact that the settlement resolved Wallace's pending EEOC claims renders it distinct from cases where the employer unilaterally offers incentives in exchange for an agreement not to pursue potential claims. See *Mundy v. Household Fin. Corp*., 885 F.2d 542, 546 (9th Cir. 1989); *Cassino v. Reichhold Chemicals, Inc*., 817 F.2d 1338, 1343 (9th Cir.1987); *Clark Distribution Systems, Inc*. 336 NLRB 747 (2001).

[29] As the Board stated in *PAC Structural Inc*., 330 NLRB 868, at fn. 14 (2000), "it is not the Board's place to determine whether a disabled person actually had a viable ADA claim."

[30] To be clear, I am not deciding whether the terms of settlement agreement, including the waivers, would hold up if challenged. I have serious doubts the Respondent could enforce the waiver of any relief Wallace may be entitled to in connection with a charge with the EEOC or NLRB, or whether it could enforce the provisions requiring cooperation with company, for example.

[31] The evidence does not indicate fraud, duress, or other actions that lead me to infer that Wallace signed the agreement involuntarily.

[32] There was no evidence or argument presented about Gutierrez blaming unfair labor practice charges for the alleged violations. Accordingly, this portion of the complaint is dismissed.

1. Facts

At all relevant times, Armando Gutierrez has been the dayshift shipping or outbound manager. Supervisors under Gutierrez's direction schedule the loaders, and then Gutierrez reviews the schedule before it is posted. Jake Myers is the shipping supervisor for the day shift. Anthony Urias held the position prior to Myers.[33]

D'Juan Williams has worked for the Respondent since 2009. He was an order selector or "picker" until October 2012 and has since worked a loader on the dayshift. He was moved into the loader position because his quality as a picker was poor, but because he knew how to do both positions, he would go back and forth as needed. (Tr. 592.)

In May or June 2015, Williams signed a union authorization card. (Tr. 288.) In November or December 2015, he started attending union planning committee meetings and asked coworkers to sign cards. (Tr. 289.) In April and May 2016, he and coworker Steve Ditto began passing out union flyers in the break room by the operations manager's office during lunch breaks and talking with employees who had questions about the Union. (Tr. 289–291; GC Exh. 12.)

Loaders have fixed start times, but end times vary depending on workload. (Tr. 109.) The goal is to have more than half of the cases loaded onto trucks for delivery during the next shipping day, which technically begins at 10:00 p.m. the night before. The final case count is not available until 5:30 p.m. (Tr. 355–356.)

Williams' shift begins at either 9:45 or 10 a.m. and usually ends between 5:30 and 9 p.m. Beginning in October 2014, Williams received permission from Urias and Gutierrez to leave early, usually between 4:30 and 4:45 p.m., on the third Wednesday of the month during the school year to attend PTA meetings at his son's school. He did not leave early in June or July because school was not in session. Each month, Williams would remind his supervisor the Sunday before the Wednesday he planned to leave early. (Tr. 284–287.) Time records show that Williams left before 5:00 on the following third Wednesdays between October 2014 and May 2016: October 15, 2014, August 19, 2015, November 18, 2015, January 20, 2016, February 17, 2016, April 20, 2016, and May 18, 2016. He left shortly after 5:00 on September 16, 2015, and October 21, 2015. Williams did not leave either before or shortly after 5:00 on August 17, 2016, September 21, 2016, October 19, 2016, November 16, 2016, December 21, 2016, or January 18, 2017. (R. Exh. 9.)

On Sunday, August 14, 2106, Williams reminded Gutierrez that he needed to leave early the following Wednesday, and Gutierrez responded that he would not be able to. Williams asked why, and Gutierrez said it was because of the flyers. (Tr. 295.) Gutierrez told Williams he needed to be fair to everyone in the warehouse.[34] (Tr. 116–118.) Williams requested a meeting with Gutierrez and someone from human resources. Gutierrez did not check with anyone else in management prior to telling Williams on August 14 that he could not leave early on August 17. (Tr. 117.)

On August 15, Gutierrez emailed Daniel Santamaria from HR stating that Williams wanted to meet with him. Santamaria responded that he was not in, and asked what Williams needed. Gutierrez replied, "Last year he was leaving early one Wed a month for his kids school. I told him that I couldn't do it this year because if I do it for him I would have to do it for everyone else." Santamaria emailed Gutierrez back stating, "Yes that was a good answer to give him we can not (sic) do it for one and not others" and recommended a meeting between Williams and Vines-Bright. (GC Exh. 10.)

On August 17, 2016, Williams asked Vines-Bright why he would not be able to leave early on certain Wednesdays. Vines-Bright said she would look into it, and commented:

> I mean I know that we . . . obviously you know about a lot of labor issues that have been going on at the warehouse and stuff, all the labor relations stuff going on so, you know obviously we have to make sure that we're treating everybody equally and fair and consistent with everybody, so that may have something to do with it.

(GC Exh. 19.) After this discussion, Vines-Bright contacted Gutierrez, who told her the warehouse was too busy to let Williams leave early.

Later on August 17, Williams attended a meeting with Vines-Bright, Vaivao, and Gutierrez.[35] Vines-Bright told Williams that management had explained to her why it was difficult to let him leave early, and turned it over to Vaivao and Gutierrez for elaboration. Williams stated, "Before you start, Armando was telling me something on Sunday about the reason why. I want to hear the reason why, that you were telling me on Sunday." Gutierrez said that if he let Williams leave early, he would need to let the other employees leave early too. Williams replied, "I understand that, but you were also saying something about a flyer, you had mentioned a flyer." Gutierrez responded, "Well, there were things that were posted and there were things that were said, um, that I wasn't fair to everyone. So the only way to knock that noise is just to make sure . . . ." At this point, Vines-Bright interrupted, stating, "Well, I mean, this doesn't have anything to do with the flyer." Williams then stated, "Well, this is what I'm saying, that was mentioned, so that's . . . I'm trying to understand, why that was brought up." Gutierrez then said he was just trying to be fair across the board.

Vaivao then stated that they could not accommodate everyone because the caseload was too high, noting that the workload had increased on the dayshift. He also said there were more routes leaving before 10 p.m. After some back and forth, Williams responded that he had been permitted to leave early for two years, even when they were in their busy season. Vaivao explained that in the busy season they averaged 660,000 cases top ship but last week they had 662,000. He noted that Williams was one of a handful of employees with special requests, and they could not accommodate him at the time, but would entertain it if and when they could. Vines-Bright noted that Williams could use annual leave, and Vaivao offered to switch his days off to accommodate his schedule. (GC Exh. 20.)

[33] At the time of the hearing, Urias was the meat plant supervisor.

[34] Gutierrez did not remember whether he told Williams the flyers had anything to do with the reason he could not leave early. (Tr. 124.)

[35] Williams recorded the entire meeting.

Vaivao was not aware that Williams was going home early every third Wednesday until Gutierrez called him to speak to Williams about it in August. (Tr. 583, 586.) According to Vaivao, Shamrock gained additional business from schools, and the business from its customer Harkins was consolidated to Tuesdays and Wednesdays. This required Williams to load an additional truck on Wednesdays. Shamrock does not use temporary workers during the summer because caseloads are lower and they want to ensure employees get 40 hours of work. (Tr. 584–587.)

A review of shipping cases shows that the caseload was highest in the months of February–May for each of the fiscal years from 2014–2016.[36] (GC Exh. 13.)

2. Analysis

The Section 8(a)(1) legal standards set forth above apply. I find that Gutierrez's comment that Williams could not leave early because of the flyers would reasonably tend to coerce employees and interfere with their rights, and it was therefore a violation of Section 8(a)(1). It is undisputed that union flyers critical of management were distributed at the warehouse in April and May 2016. A reasonable employee would take the comments to mean that there can be no more leniencies in scheduling because of employees' union activity.

I credit William's testimony about the August 14 conversation for a number of reasons. First, I found Williams to be a credible witness. He testified in an open and forthcoming manner and did not appear to embellish his testimony. Moreover, as a current employee testifying against his own pecuniary interests, I find his testimony particularly reliable. See fn. 8, supra. Finally, Williams' testimony is not contradicted, as Gutierrez did not remember whether he told Williams the flyers had anything to do with the reason he could not leave early. (Tr. 124.)

Further bolstering Williams' testimony is the back-and-forth that occurred at the August 17 meeting where Williams reminded Gutierrez he had also said something about a flyer. Gutierrez responded, "Well, there were things that were posted and there were things that were said, um, that I wasn't fair to everyone. So the only way to knock that noise is just to make sure . . . ." This comment, like the August 14 comment, would reasonably be construed to mean that union activity critical of management would be dealt with in the form of stricter adherence to rules and withdrawal of previously granted leniencies.

Turning to the Section 8(a)(3) allegation, the Act states that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." Section 8(a)(3) claims involving mixed motives are analyzed under *Wright Line*, supra. To prove a violation under *Wright Line*, the General Counsel must make an initial showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. The elements commonly required to support this showing are union activity, employer knowledge of that activity, and antiunion animus by the employer. *Briar Crest Nursing Home*, 333 NLRB 935, 936 (2001).

If the General Counsel makes the initial *Wright Line* showing, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.*, 294 NLRB 924, 956 (1989).

I find the General Counsel has met the initial *Wright Line* burden. It is undisputed that Williams passed out union flyers critical of management in April and May 2016. On August 14, when Gutierrez told Williams he could not go home anymore, he said it was because of the flyers, which is direct evidence of discriminatory intent. Gutierrez's comments about the flyers on August 14 and 17 prove he knew about them. There is no evidence regarding distribution of any other flyers critical of management in or around this same time period. I find, therefore, that Gutierrez's comments referred to union flyers.

The General Counsel contends an inference should be drawn that floor captain Richard Sanchez informed management about the flyers because he walked in the direction of Vaivao and O'Meara's offices following a heated conversation in the break room about the content of one of the union flyers in May 2016. (GC Br. 43.) I decline to make this specific inference because it would be too speculative. The evidence does establish, however, that through May 2016, employees reported to Vaivao when other employees would talk about the Union.[37] (Tr. 147–148.) Williams and Ditto passing out flyers and talking to employees in the break room was the only employee union activity that occurred in May 2016. Accordingly, I find that Vaivao was aware of it.[38]

Turning to animus, it is clear from the content of his comments that Gutierrez took umbrage with the flyers' suggestion that employees were not being treated fairly. See *Nichols Aluminum, LLC*, 361 NLRB 216 (2014) (General Counsel is not required to show "particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action.") Moreover, antiunion animus can be inferred from the timing of the change to Williams' schedule, which occurred the first Sunday he reminded Gutierrez of his PTA meeting following distribution of the union flyers. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981). Animus can also be inferred from the presence of other unfair labor practices, as found herein and in prior recent decisions.

[36] GC Exh. 13 does not reflect the number of cases that must be loaded by 10 p.m. (Tr. 597.)

[37] Vaivao was evasive on this point until confronted with his prior testimony. (Tr. 142–147.)

[38] This finding is relevant even though Vaivao was not the decisionmaker. "[I]t is well established that the Board imputes a manager's or supervisor's knowledge of an employee's protected concerted activities to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation." *G4S Secure Solutions, Inc.*, 364 NLRB No. 92, slip op. at 4 (2016).

Richardson Bros. South, 312 NLRB 534 (1993); *Aliante Gaming*, *LLC*, 364 NLRB No. 78, slip op. at 1 fn.5 (2016).[39]

The Respondent argues that management's decision not to let Williams leave early in August 2016 and thereafter was not an adverse action. Specifically, the Respondent argues that Gutierrez had accommodated Williams by permitting him to leave early in the past, and it offered continued accommodation in the form of changing his schedule or permitting him to use annual leave every fourth Wednesday.[40] The Respondent also argues that Williams was not routinely granted permission to leave early every third Wednesday. While both the Respondent's assertions are true, I still find Williams was subjected to an adverse action when his previous flexibility to leave early on the third Wednesday of every month, subject to approval, was taken away in blanket fashion. It is clear from Gutierrez's August 15, 2016, email to human resources stating, "Last year he was leaving early one Wed a month for his kids school. I told him that I couldn't do it this year because if I do it for him I would have to do it for everyone else" that Gutierrez was aware of Williams' regular practice. The fact Williams did not leave early every single third Wednesday does not save the wholesale rescission from constituting an adverse action. See *Wal-Mart Stores, Inc.*, 340 NLRB 220 (2003) (Rescinding previously granted schedule deviation was adverse action).

Based on the foregoing, I find the General Counsel has made an initial showing sufficient to support the inference that protected conduct was a motivating factor in its decision rescind its previously-granted flexibility for Williams to leave work early as alleged. The burden therefore shifts to the Respondent to show the same action would have taken place even absent union activity. Given Gutierrez's comment to Williams that his decision was motivated by the union flyer, I find this burden has not been met.

After Williams requested a meeting with human resources to discuss the matter, Vaivao offered an explanation that due to caseloads and Williams' position as a loader, the workload was too heavy to permit him to leave early. I find this is a pretextual after-the-fact justification. Prior to Vaivao's explanation, Gutierrez had already told Williams he could not leave early because of the flyer. He did not check with anyone else in management prior to giving this reason. In addition, Gutierrez had already conveyed to human resources that he told Williams he could no longer accommodate him because he had to be fair to everyone. Vaivao admittedly was not aware that Williams had going home early on some Wednesdays until Gutierrez called him to speak to Williams in August 2016. The Respondent's attempts to paint Vaivao as the decisionmaker are not supported by the weight of record evidence, which shows that Vaivao reacted to the decision, but he did not formulate it.[41]

Based on the foregoing, I find the General Counsel has sustained the burden to prove the allegations related to D'Juan Williams as alleged in the complaint.

G. Cell Phone Rule

Complaint paragraphs 5(d) and 7 allege that the Respondent violated Section 8(a)(1) when, on August 16, 2016, Jake Myers promulgated and since then maintained an overly-broad and discriminatory rule or directive prohibiting its employees from having cell phones on the warehouse floor.

1. Facts

On January 2, 2015, Shamrock distributed a policy on "Head/Ear & Cell Phone Use" which states:

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

(R. Exh. 3.)[42]

On August 16, 2016, Myers told Williams he could not have his cell phone on the workroom floor. Williams said he used it as a recorder, not a cell phone, and Myers responded that it was still a cell phone. (GC Exh. 18; Tr. 178, 298.)

2. Analysis

The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), end. 203 F.3d 52 (D.C. Cir. 1999).

Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would

[39] Consistent with the Board's analysis in *Aliante Gaming*, I do not rely on the findings in previous ALJ decision to establish animus by themselves but consider them as part of the totality of the circumstances.

[40] The latter accommodation does not square with the Respondent's stated rationale that Williams was no longer permitted to leave early because of workload.

[41] I specifically discredit Vaivao's testimony that he made the final decision because the evidence shows Gutierrez did not inform Vaivao of his decision not to let Williams leave early until after it had occurred. I note that even if Vaivao's explanation provided a legitimate basis for the Respondent's actions, the evidence belies a showing that the Respondent acted pursuant to it. See *Dentech Corp* , supra; *Metro-West Ambulance*¸ 360 NLRB 1029, 1030 (2014). I also infer that McClelland, had he appeared, would have testified that he knew about Williams' union activity.

[42] Judge Wedekind previously ruled that this policy was not overly broad, observing that "the rule on its face does not ban employees from carrying cell phones or using them to take pictures or videos." JD(SF)–05–16, p. 59.

reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. The question of whether a rule or policy violates the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber*, 238 NLRB 1323, 1324 (1978).

The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, supra at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage*, supra at 646.

On its face, the Respondent's rule is not overly-broad, as it speaks only to musical devices. Myers extended it, however, when he told Williams he could not have his cell phone on the workroom floor. Cell phones are used for more than listening to music—they are also commonly used as cameras and recording devices. The General Counsel cites to *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1693 (2015), where the Board found a rule barring the use of camera phones and recordings without prior permission was overly-broad. See also *Whole Foods Market*, 363 NLRB No. 87 (2015). This caselaw supports the General Counsel's contention that Myers' broadly worded instruction to Williams would reasonably be construed as prohibiting him from using his cell phone to memorialize activity protected by Section 7, and therefore runs afoul of *Lutheran Heritage*.

The Respondent contends that Williams understood Myers's instruction as simply an enforcing the written policy. Williams testified, however, that he understood that he was not permitted to have his cell phone on the workroom floor, which is broader than the written policy. (Tr. 382.)

While the policy provides business justification for not allowing musical devices in the warehouse, the Respondent provided no justification for Myers' more broad proscription. Notably, Williams told Myers he used it his phone as a recording device, not as a phone, but this did not change Myers' instruction. Accordingly, I find the General Counsel has met the burden to prove Myers promulgated and enforced an overly-broad rule regarding cell phone usage.

H. Operations Manager Tim O'Meara's Comments to Employee Mike Meraz

Complaint paragraphs 5(b) and 7 alleged the Respondent violated Section 8(a)(1) when June 8 or 9, 2016, Tim O'Meara: (1) blamed the Union's organizing campaign for preventing Respondent from making changes to its employees' wages, benefits, and other working conditions by telling its employees that every policy and pay plan was frozen because of Union; and (2) promised its employees improvements in Respondent's disciplinary policy if its employees refrained from continued organizational efforts by telling its employees that, if not for the Union campaign, Respondent would consider changing its policies.

1. Facts

On June 9, 2016, forklift operator Mike Meraz met with O'Meara in Santamaria's office. Meraz recorded the meeting. O'Meara gave Meraz a disciplinary form that reflected safety violation points assessed to him after he broke a sprinkler in the warehouse. Meraz question whether the points stayed on his record for two years, and O'Meara responded that they did. The following exchange ensued:

> Meraz: Yeah, were they ever going to re-look at that?
>
> O'Meara: "I will be honest with you right now. Every policy, every pay plan that is in the warehouse is frozen."
>
> Meraz: What I mean is as far as . . .
>
> O'Meara: Because of the current situation we're in. There's nothing I can do with anything.
>
> Meraz: So even for that two years, 'cause that seems, I mean, excessive. I've been doing this stuff since '85 and I've never seen anywhere being like that.
>
> O'Meara: Yeah, well, um, unfortunately it can't even be looked at.
>
> Meraz: Yeah.
>
> O'Meara: Now if we weren't in our current situation, yeah, I think in years past we've had policy committees that have been put together by various people that have, you know, looked at policies and changed them.

(GC Exh. 21.) O'Meara testified at a hearing on May 25, 2016, in cases 28–CA–167910 and 28–CA–169970, which included allegations that he was involved in committing unfair labor practices. *Shamrock Foods*, JD (SF)-35-16 (NLRB Div. of Judges, September 28, 2016).

2. Analysis

The Section 8(a)(1) legal standards set forth above apply here.

O'Meara testified that he did not recall telling Meraz that policies and pay plans were frozen or that if they weren't in the current situation, the safety policies and pay plans could be looked at. (Tr. 252–254.) The tape recording of the conversation reveals that O'Meara did in fact make these comments.

The General Counsel cites to *Grouse Mountain Assoc*., 333 NLRB 1322, 1324 (2001), where the Board held a comment that the employer "could not implement any new benefits while union organizing efforts were active," was overly broad because it effectively placed the delay on the union campaign. See also *Kentucky Fried Chicken*, 341 NLRB 69, 69–70 (2004).

In the instant case, O'Meara blamed the "current situation" for the fact that policies and pay plans in the warehouse were frozen, and there was nothing he could do about anything. The "current

situation" is easily decoded as the union's activity and ongoing litigation related to it.[43] The Respondent pointed to no evidence regarding any other "situation" that required Shamrock to freeze all policies in the warehouse.

In addition, O'Meara said that if they weren't in their current situation, "yeah, I think in years past we've had policy committees that have been put together by various people that have, you know, looked at policies and changed them." This implies that if there was not union activity, the Respondent would be open to making improvements to its disciplinary policy.

Based on the foregoing, I find the General Counsel has proven the allegations related to Tim O'Meara's comments to Mike Meraz.

CONCLUSIONS OF LAW

By granting employees benefits in the form of more elaborate prizes and enhanced paid time at its annual holiday banquet, blaming the Union for preventing changes to wages, benefits, and other working conditions; promising improvements in its disciplinary policy if its employees refrained from continued organizational efforts; blaming the Union and employees' union activities for stricter enforcement of rules and withdrawal of benefits; threatening employees with stricter enforcement of rules and withdrawal of benefits; and promulgating and maintaining an overly-broad rule prohibiting cell phones on the warehouse floor, the Respondent has violated Section 8(a)(1) of the Act.

By rescinding its practice of permitting employee D'Juan Williams (Williams) to leave work early on certain days to attend PTA meetings, the Respondent has violated Section 8(a)(3) and (1) of the Act.

By the above conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent did not otherwise engage in any other unfair labor practices alleged in the consolidated complaints in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having granted employees benefits in the form of more elaborate prizes and enhanced paid time at its annual holiday banquet, the Respondent will be ordered to cease and desist from these actions.

Having blamed the Union for preventing changes to wages, benefits, the Respondent will be ordered to cease and desist from this action.

Having blamed the Union and employee's union activities for stricter enforcement of rules and withdrawal of benefits, the Respondent will be ordered to cease and desist from this action.

Having promised improvements in its disciplinary policy if its employees refrained from continued organizational efforts, the Respondent will be ordered to cease and desist from this action.

Having threated employees with stricter enforcement of rules, the Respondent will be ordered to cease and desist from this action.

Having promulgated and maintained an overly-broad rule prohibiting cell phones on the warehouse floor, the Respondent will be ordered to cease and desist from this action.

Having found that the Respondent rescinded its practice of permitting flexibility in D'Juan Williams' schedule to attend PTA meetings in violation of Section 8(a)(3) and (1) of the Act, the Respondent will be ordered to return to its previous practice of permitting flexibility in D'Juan Williams' schedule to attend PTA meetings, and to refrain from rescinding flexibility in his work schedule or the work schedule of any other employee for discriminatory reasons.

I will order that the Employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id., slip op. at 3.

I will also order that the Respondent hold a meeting or meetings, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix" shall be read to employees by Kent McClelland in the presence of a Board agent. This remedial action is intended to ensure that employees "will fully perceive that the Respondent and its managers are bound by the Act's requirements." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005).

The Board has broad authority under Section 10(c) to devise remedies that "effectuate the policies of the Act." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). In determining an appropriate remedy, the Board has a duty "under Section 10(c) to tailor its remedies to varying circumstances on a case by case basis, in order to ensure that its remedies are congruent with the facts of each case." *Diamond Walnut Growers, Inc*., 340 NLRB 1129, 1132 (2003). As such, Thus, the Board has "broad discretion to fashion 'a just remedy' to fit the circumstances of each case it confronts." *Excel Case Ready*, 334 NLRB 4, 5 (2001) (quoting *Maramont Corp*., 317 NLRB 1035, 1037 (1995)); see also *Pacific Beach Hotel*, 361 NLRB 709, 711 (2014).

Judge Wedekind previously determined that President and CEO Kent McClelland was complicit in the commission of unfair labor practices, including the decision to terminate vocal union advocate Wallace.[44] See JD(SF)–05–16, supra. In the instant case, by virtue of adverse inferences, I have found that he was complicit in the commission of unfair labor practices. The Union and employees are now aware that McClelland refused to even show up at the hearing, despite being served with a valid subpoena. Employees are undoubtedly left with the impression that McClelland does not believe he is bound by the Act's requirements. *Federated Logistics & Operations*, supra. Requiring McClelland to read the notice, is a just remedy based on the

[43] For this reason, the Respondent's reliance on *The Singer Co.* 199 NLRB 1195 (1972), and like cases is misplaced.

[44] If Judge Wedekind's findings are not upheld on appeal, this rationale will not serve as a basis for the notice reading. This also holds true if the Board considers any of Shamrock's unfair labor practices found by Judge Tracy in *Shamrock Foods*, JD (SF)-35-16, supra, as a basis for the notice reading. I note that Judge Wedekind ordered a notice reading in his decision.

circumstances of this case, in that it will help to ensure employees that Shamrock's President and CEO understands and takes seriously his obligations to comply with the Act.[45]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[46]

ORDER

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

1. Cease and desist from

(a) Granting employees benefits in the form of more elaborate prizes and enhanced paid time at its annual holiday banquet;

(b) Blaming the Union and employees' union activities for preventing changes to wages, benefits, and other working conditions;

(c) Blaming the Union and employees' union activities for stricter enforcement of rules and withdrawal of benefits;

(d) Promising improvements in its disciplinary policy if its employees refrain from continued organizational efforts;

(e) Promulgating and maintaining an overly-broad rule prohibiting cell phones on the warehouse floor;

(f) Discriminatorily rescinding its practice of permitting flexibility in D'Juan Williams' schedule to attend PTA meetings, or rescinding flexibility in any employee's schedule for discriminatory reasons;

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

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

(a) Rescind any work rules prohibiting employees from using cell phones or other recording devices to engage in protected activity;

(b) Restore the flexibility in employee D'Juan Williams' schedule to the same extent it had previously been granted;[47]

(c) Within 14 days of the date of the Board's Order, rescind from its files any references to the unlawful change in D'Juan Williams' work schedule and notify him this has been done and will not be used against him in any way, or, if there is no reference in the Respondent's files, notify D'Juan Williams in writing that the flexibility he was previously granted in his schedule has been restored and that the schedule change will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix"[48] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2015.

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

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 25, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT grant you benefits, such as more elaborate prizes and enhanced paid time at our annual holiday banquet, in an effort to discourage you from supporting a union.

WE WILL NOT blame your union activity for preventing us from making improvements to your pay plans or work policies.

[45] I emphasize that this measure is remedial, not a punitive sanction.

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

[47] Any disagreement on this point will be addressed in compliance proceedings if necessary.

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

WE WILL NOT blame the Union or your union activity for our stricter enforcement of work rules or threaten you with stricter enforcement of work rules to discourage your union support.

WE WILL NOT promise you benefits or improved working conditions based on whether you stop engaging in union activity or stop supporting the Union.

WE WILL NOT announce work rules prohibiting you from using your cell phones or other recording devices to engage in protected activity, such as documenting your working conditions, and WE WILL rescind any such rules that prevent you from engaging in that activity.

WE WILL NOT rescind our allowing flexibility in your work schedules, such as leaving early on certain days, because you or others engage in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files all references to the stricter schedule enforcement of D'Juan Williams, and WE WILL notify him in writing that this has been done, or if there is no reference in his file, WE WILL notify him in writing that the flexibility he was previously granted in his schedule has been restored and the schedule change will not be used against him in any way.

SHAMROCK FOODS COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-177035 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.