

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

SMYRNA READY MIX CONCRETE, LLC	:	CASE NO. 09-CA-251578
	:	09-CA-252487
	:	09-CA-255573
and	:	09-CA-258273
	:	
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	<u>POST-HEARING BRIEF OF RESPONDENT</u>

I. INTRODUCTION

This is the Post-Hearing Brief of Respondent Smyrna Ready Mix Concrete, LLC (“SRM” or “Smyrna”). Because the Regional Director is pursuing 10(j) relief in Court pending the Judge’s decision, SRM respectfully urges the Judge to expedite his decision in this matter and dismiss this matter in its entirety.

II. FACTUAL BACKGROUND

A. The Company and its Management

SRM provides ready mix concrete, material hauling, and concrete pumping services to contractors, professional homebuilders, and homeowners across 12 states, and within 20 regions. (Hollingshead, 1549). SRM staffs most of its ready mix facilities with a Plant Manager who oversees the day to day operations at that facility and all assigned employees, which may include a combination of mixer-operator drivers, a tanker driver, a loader, and mechanics. (Copher, 34; Carmichael, 551). At its most basic level, the Plant Manager role is responsible for receiving customer orders and scheduling mixer-operator drivers to deliver loads of concrete to customer locations. (Highley, 733-734). These Plant Managers report directly to a General Manager, who

oversees facilities within a certain region, and who reports directly to SRM's CEO, Jeff Hollingshead ("Hollingshead"). (Brooks, 1074-1075, 1101; Highley, 734). This case concerns the plant in Winchester, Kentucky. The Winchester plant is one of several "sister plants" in the Lexington Market. It is one of approximately 15 plants in the Central Kentucky Region overseen by General Manager Ben Brooks ("Brooks"). (Brooks, 1074). Hollingshead and Brooks were the decision makers concerning the alleged unfair labor practices at issue in this case. (Brooks, 1101, 1114-1115; Hollingshead, 1563-1565).

SRM's business model is based on the efficient delivery of concrete and effective pricing. (Hollingshead, 1578-1579). Plant Managers cannot control pricing, but they wholly control the efficiency in which concrete is loaded and delivered. (Highley, 1232-1233). SRM's concrete trucks are outfitted with a Zonar System, which is a pre-trip inspection program and GPS software that lets the Plant Manager or dispatcher know where a concrete truck is located at any time. (Stott, 989; Brooks, 1298).

SRM expects drivers to arrive at work, turn on their truck's Zonar system, do their pre-trip inspection, and get in line to be loaded within 15 minutes of clocking in each day. (Goss, 920-921; Hollingshead, 1595; Highley, 816; Stott, 991). If a driver is the first to arrive to the plant, that driver is expected to pull underneath the plant (also referred to as the hole) so that the truck is ready to receive a load of concrete when a customer order is received. (Goss, 921). Drivers who arrive next are expected to get in line behind the first truck so that the trucks can be loaded similar to an assembly line. (Copher, 33, 96-97; Long, 218; Stott, 991; Hollingshead, 1552, 1595). The Plant Manager enters information regarding the customer order into SRM's computer system, and this information is then printed onto a Yellow Ticket and given to the applicable driver. (Highley,

807-809). Once the load is delivered, the customer and the driver sign the Yellow Ticket and it is returned to SRM for its files. (Ex. 81-84; Copher, 1713).

SRM's business model also requires cooperation among its various facilities. Plants within a region and in neighboring regions are expected to send drivers to assist on occasions when customer demand exceeds the available trucks. (Alsup, 1496). This sharing of drivers occurs most frequently among plants that are within close proximity. However, certain large-pour projects occasionally require SRM trucks to travel greater distances to ensure customer needs are met. (Copher, 39-41).

B. SRM's Undisputed Track Record of a LACK of Anti-Union Animus

Perhaps the most unusual aspect about this case is the overwhelming evidence showing a decided lack of anti-union animus on the part of SRM and the management decision makers in this case. These facts render the suspect allegations against SRM even more dubious.

Brooks' wife, Ashley Brooks, went to college on a Teamster's scholarship. Brooks' father-in-law is a retired Teamster. (Brooks, 1073). Hollingshead's grandfather and two of his uncles were Teamsters. (Hollingshead, 1557). Before this case, SRM has not been involved in any prior NLRB cases. (Hollingshead, 1557).

In May 2018, SRM purchased the assets of Piqua Concrete ("Piqua"), an ongoing ready mix concrete business in the Dayton, Ohio area, with four operating locations and approximately 80 employees. (Hollingshead, 1557-1558, 1562). At the time of the acquisition, Piqua's drivers were represented by the Teamsters. (Hollingshead, 1558). Upon acquisition, SRM maintained Piqua as a union company, retained all of its drivers, and voluntarily adopted Piqua's collective bargaining agreement to the applause of its Teamster drivers. (Hollingshead, 1558-1561). The relationship with the Teamsters has been good ever since. (Hollingshead, 1561). Later in 2018,

when the old contract expired, Hollingshead as lead negotiator successfully negotiated a new union contract in only one bargaining session. (Hollingshead, 1562-1563). Brooks had the opportunity to observe the Teamster drivers at Piqua first-hand, and compared them favorably to the Winchester drivers involved in this case, explaining that it was like “night and day”. (Brooks, 1078-1079).

As if this were not enough evidence of lack of anti-union animus, there is even more. In December, 2018, SRM purchased assets of Allied Ready Mix (“Allied”), a defunct ready mix concrete business that had previously operated two Kentucky facilities whose drivers had been represented by none other than the Charging Party in this case, Teamsters Local 89. (James, 866, 878-879; Brooks, 1169). Allied was dismantled at the time of SRM’s purchase, and the Teamster employees were on strike and picketing. (Hollingshead, 1622, 1624, 1629-1630).

The testimony of Jonathan James (“JJ” or “James”), a life-long Teamster and current SRM driver, on the events that unfolded concerning SRM’s hiring of Allied’s Teamster drivers off of the picket line is both compelling and telling. (James, 865-908). When the Hollingsheads crossed the picket line to visit Allied’s ownership, the reception from the Teamsters on the picket line was “anything but a cordial welcome.” (James, 868). With the Teamster picketers hollering obscenities at them, the Hollingsheads approached the picketers. (James, 869). The Hollingsheads proceeded to the picket line over the warnings of the Allied contingent to stay away from the picketers. (James, 869-870). As a part of that picket line conversation, the Hollingsheads told the striking employees that if they wanted to be union, that was no problem because SRM had other unionized workforces. (James, 870). The Hollingshead’s further told the picketers, “We want to hire all you guys.” (James, 870).

And hire them they did. At the recommendation of the Charging Party in this case, the Allied Teamster drivers filled out applications to work for SRM. (James, 872-874; Brooks, 1080-1081). A day or so after submitting his application, JJ got a call from Brooks for an interview. (James, 872). JJ told Brooks “I’m just sitting out here on the picket line. I’m available right now.” (James, 872). He then drove in from the picket line for an interview with Brooks and eventually was hired. (James, 874). The same happened with other drivers. Among others, both the former Union Steward, and JJ, the former Assistant Steward, were hired by SRM. (James, 866-867, 873-874). They are still employed by SRM to this day. (Brooks, 1084).

Brooks was well aware of the fact that he was hiring Teamsters, including the former Union Steward. (Brooks, 1082-1084). All told, Brooks extended offers to approximately 16 drivers – all Teamsters. (Brooks, 1081-1082). Eight of those drivers ultimately accepted SRM’s offer to work in SRM plants under Brooks’ leadership. (Brooks, 1080-1082, 1171-1172). With the former Allied plants being shuttered, (Hollingshead, 1623), SRM hired JJ and other Teamster drivers to work out of other SRM plants, (James, 879-880; Hollingshead, 1625), essentially self-salting the workforce with Teamsters. It is impossible to reconcile the allegations against SRM with the above undisputed track record.

C. SRM’s Acquisition of the Winchester Plant and its Operation

SRM acquired the Winchester plant on August 31, 2017, when it purchased certain assets of Central Ready Mix Concrete Company, Inc. (“Central”), which included ready mix facilities in four towns surrounding Lexington, Kentucky – Somerset, Winchester, Nicholasville, and Georgetown (the “Lexington Plants” or the “sister plants”). (Copher, 109; Long, 226-337; Walters, 416-417). SRM believed the Lexington Plants had been underperforming under Central’s ownership and purchased these facilities with the goal of improving operations. (Hollingshead,

1578-1579). After a year of continued underperformance under other managers, (Hollingshead, 1580, 1582), SRM promoted Brooks to Regional Manager. (Hollingshead, 1584).

SRM retained the Plant Managers and the employees at the Lexington Plants after its acquisition. (Copher, 32). Of these sister plants, the Nicholasville and Winchester Plants were the largest and had a comparable number of drivers. (Brooks, 1286). These Plants are expected to work together as one plant. (Stott, 1019). Jason Stott (“Stott”), the Nicholasville Plant Manager, was responsible not only for his plant’s operations, but was also responsible for dispatching (or assigning loads to drivers) for the Nicholasville, Georgetown and Somerset facilities. (Stott, 967). Aaron Highley (“Highley” or “Uncle Aaron”), the Winchester Plant Manager, was only responsible for dispatching at the Winchester facility. (Stott, 967-968). If Stott wanted trucks dispatched from Winchester, he would have to work through Highley. (Stott, 967-968, 995-996, 1018-1019).

While performance in the Lexington market improved under Brooks, the Winchester Plant was a chronic underperformer. (Hollingshead, 1565). SRM evaluates the overall performance based on EBIDTA margin, which is the earnings before interest, depreciation, taxes and amortization as a percentage of revenues. (Hollingshead, 1548-1549, 1551-1552, 1575-1576). SRM acquires ready mix businesses with low margins with the goal of increasing those margins through increased efficiencies and strategic pricing. (Hollingshead, 1578-1579). The purchase of the Lexington Plants was one of these low margin acquisitions. (Hollingshead, 1578-1579). In 2019, Winchester’s EBIDTA was only 3% or \$77,218.63, the lowest of all the Central Kentucky Region plants. (R. Ex. 9; Alsup, 1451, 1484). In fact, Winchester’s EBIDTA was lower than Somerset’s, which was an on-demand plant (i.e., it had no employees). (R. Ex. 9; Hollingshead,

1588, 1654). At a 3% EBIDTA, the Winchester Plant's performance had decreased to such an extent that it had a negative Net Income. (Hollingshead, 1654).

In other words, SRM actually was losing money by keeping the Winchester plant open. (Hollingshead, 1654).

In an effort to increase productivity, SRM injected new trucks into the Lexington market. (Stott, 1004-1005; Hollingshead, 1661). As a result, Nicholasville received 1 new truck, and Winchester received approximately 4 trucks, 2 new trucks and 2 old trucks. (Stott, 1004-1005; Hollingshead, 1661). While providing additional trucks, including new trucks, to the Winchester plant logically helped improve Winchester's yardage production, it did not address another festering problem. During 2018 and 2019, Stott was in a constant battle with Highley and the Winchester drivers because of their refusal to work at other plants, whether it be at a sister plant, or a plant in and around the Central Kentucky Region. (Stott, 970-971, 977, 988, 1001-1003, 1017-1021, 1026).

This resistance was particularly evident when Stott would request Highley to send drivers to Florence, Kentucky. Florence was outside of the Central Kentucky Region and was particularly busy during 2019. (Brooks, 1076). However, teamwork at SRM was not optional, and Brooks directed the Central Kentucky Region to assist Florence as needed. (Stott, 997-998). Brooks had no control over the Florence, Kentucky plant because it is outside of his Central Kentucky Region, and Brooks had no input into the hiring of additional drivers for that plant. (Brooks, 1076-1077, 1111).

Stott complied with Brooks' directive and requested drivers on a rotating basis from the Lexington Plants so that the work was spread equally. (Stott, 999, 1020-1021). Stott, as the Plant Manager for Nicholasville, and Roy Chasteen ("Chasteen"), Plant Manager for Georgetown,

always sent drivers when it was their turn. When it was Winchester's turn, however, Stott would have to beg and plead to get Highley to send a truck. (Stott, 1018, 1020-1021). Highley would claim he could not spare any drivers, and if he did agree to send one, that driver would often call in sick to get out of going. (Stott, 1023). Stott would have to try to figure out how to cover for the Winchester drivers, to the point he was afraid he was going to get in trouble himself. (Stott, 977). He shared his concerns with Brooks. (Stott, 977). When Stott found out that Winchester would be receiving 2 new trucks and 2 old trucks instead of Nicholasville or Georgetown, Stott was frustrated because he knew the Winchester drivers were refusing to work as a team. (Stott, 980). In fact, Stott complaint to Brooks that, "he just might as well put them trucks on the moon than send them [to Winchester], because I wouldn't be able to get ahold of them." (Stott, 980).

Stott's concerns were confirmed and echoed by salesperson Christopher Newell ("Newell"). Stott called Newell on several occasions with complaints about Highley always stating he did not have enough trucks available to assist, only to be told by Newell that this was not true. (Newell, 1331-1332). On one occasion in particular, Newell was at the Winchester plant when Stott called. Despite Highley's claim that his drivers were busy, Newell observed several trucks and drivers just sitting around. (Newell, 1331-1332, 1361). Newell reviewed the Winchester drivers' schedule and discovered that Winchester did actually have drivers who were available to assist. Newell informed both Stott and Brooks about this discrepancy. (Newell, 1358-1359). Newell caught Highley failing to send trucks on several other occasions and informed Brooks of these instances as well. (Newell, 1332). Simply stated, this would negatively impact any concrete plant. (Carmichael, 597).

Highley's weak management style impacted the Winchester plant in other ways as well. During the summer and fall of 2019, Newell would often stop by area plants while he was out

calling on his customers. (Newell, 1330). Newell observed that the Winchester drivers were not loading trucks in the manner expected. (Newell, 1333). SRM's business model requires efficiency and the Company expects drivers to arrive to work in the morning and be ready to load. (Newell, 1333; Hollingshead, 1551-1552). The first truck to arrive should be under the hole and ready to load, with all other trucks in line behind. (Copher, 33, 96-97; Long, 218; Stott, 991; Newell, 1333; Hollingshead, 1552, 1595). Newell observed that the Winchester drivers would not pull under the hole and load until they were told to do so. (Newell, 1333).

Newell's observations were consistent with Highley's practice. Highley did not want anyone to be under the hole, because he claimed that it made his office too loud and he preferred to pick and choose which driver was assigned to which load. (Highley, 821, 828-830). However, in doing so, Highley wasted time because he would have to go find the driver he assigned. Then that driver had to stop what they were doing (as drivers were often hanging around in the lounge, cleaning, shoveling, etc. around the plant), get to their truck, pull it under the hole, and then load the truck. (Highley, 801-802, 823-824; Copher, 97; Keaton, 324). These inefficiencies could cost the Winchester Plant several load deliveries a day. (Goss, 936). Brooks repeatedly counseled Highley on this, to no avail. (1095-1096; 1288).

While drivers waited on loads to come in, rather than being in the ready position, they would wait in the drivers' lounge or find something to do around the plant. (Copher, 97-99). To the extent there was any system at all for the order of dispatching drivers, there was no common understanding of any such system. (Compare Copher, 33; Long, 216-219; Keaton, 324-326; Walters, 485-486). Furthermore, there was no common understanding on what drivers were supposed to do when all loads for the day had been completed. This led to substantial paid "down time". For example, driver Scott Keaton ("Keaton") testified that sometimes they would sit all

day at the plant waiting on a customer to call and cancel their order due to the rain. (Keaton, 338). As a weak manager, Highley asked for volunteers rather than making dispatching decisions. (Highley, 744, 831). All of this led to an inequitable distribution of work, particularly when it came to Highley's nephew, driver Sunga Copher ("Copher"). (Highley, 831).

D. The Events Leading to Copher's Discharge

The events leading to Copher's discharge started in the summer of 2019. Around that time, Brooks received complaints from drivers Nicole Long ("Long") and Sheldon Walters ("Walters") who each complained to Brooks that Copher was sitting at the plant while they delivered the loads – i.e., riding the clock. (Brooks, 1086). Around this same time period, Brooks also received a customer complaint that Copher had arrived late to a customer and had a poor attitude once he arrived. (Brooks, 1086). Copher had often been the topic of Winchester drivers' frustrations based on Highley's favoritism to Copher, his nephew. Both Copher and Highley testified regarding their familial relationship, and Highley even listed Copher's mother as his emergency contact at work. (Highley, 1057-1059).

Winchester drivers expressed frustration regarding Highley's favoritism of his nephew because Highley tolerated Copher's failure to take loads. For example, driver Jason Means ("Means"), described Copher as someone who was "milking the clock" and who needed to be counseled. (Means, 676, 680-681). Walters shared with Keaton his aggravation with Copher doing other work around the plant while everyone else hauled concrete, and driver Randall Carmichael ("Carmichael") reported hearing other drivers complain of the same. (Keaton, 299, 334; Walters, 500-501; Carmichael, 552, 627). Stott also heard Winchester drivers complaining about Copher – with drivers James Bowling ("Bowling"), Jeff Smith, Walters and Long complaining that they were having to deliver loads out of Nicholasville while Copher sat in

Highley's office. (Stott, 974-975). Importantly, of all of these drivers, only Long denied complaining to Stott during General Counsel's rebuttal. (Long, 1684-1685).

Starting in the fall of 2019, a problem arose concerning Winchester drivers balking at going to the Florence, Kentucky facility to help. While drivers and Highley were extremely inconsistent on the details, one thing is abundantly clear. Copher and other drivers eventually flatly refused to go to Florence. Walters testified that Copher, Keaton and Walters told Highley that they were refusing to go. (Walters, 422-423, 490-493). Keaton acknowledged that other drivers, but not him, refused. (Keaton, 292, 295, 300-301). Highley did not refute this testimony. (Highley, 792-794). Carmichael confirmed that some drivers refused to go. (Carmichael, 547-549). Highley also did not refute this testimony. (Highley, 790). In their affidavits, both Means and Highley confirmed that drivers had refused to go to Florence. (Means, 676; Highley, 782-787).

According to Walters, Highley called Brooks in the presence of other drivers, including Copher, and relayed the message that the drivers were refusing to go. (Walters, 491-492). According to Walters, Brooks told Highley to start from the bottom of the seniority list and ask for volunteers, and then to fire them if they refused to go. (Walters, 492). On what appears to be another occasion, Brooks called Highley about the drivers' refusal to go, and Highley told the drivers that they would be fired for refusal to go. (Highley, 783-787). The drivers did not deny that refusal had taken place. Highley relayed this message to his drivers and told them that he "did not want to fire anyone and that things would slow down with the cold weather...and not to put [Highley] in that position." (Highley, 787). On this occasion, Carmichael who had less seniority, volunteered to go to Florence because other drivers had refused, and he said he could not afford to be fired. (Walters, 424-425; Carmichael, 609-611).

The beginning of the end for Copher was in mid-October, 2019. Brooks was on vacation at the time. (Brooks, 1087). On October 19, (Stott, 1024), two drivers from Winchester were supposed to arrive at the Taylorsville plant but did not show up. (Goss, 911-912). James Goss (“Goss”), who was serving as the Taylorsville Plant Manager at the time, called Stott to inquire about where the trucks were and when they were expected. (Goss, 911-912). Stott in turn called Highley, who told Stott “[t]hose guys said they ain’t doing that no more.” (Stott, 979).

Stott relayed that information to Goss, who had to scramble to make other arrangements. (Goss, 912). Goss then contacted Brooks later that day to report the incident. (Goss, 913). Stott also contacted Brooks that day. Stott explained what had happened, and told him that they had “a big problem in Winchester.” (Stott, 979). Brooks, who was still on vacation, said that he would handle it. (Stott, 979). Stott also contacted Chris Newell about the incident. (Newell, 1336-1337; Stott, 979).

Because he was in the area, Newell was able to go to the Winchester plant to see what was going on shortly after Goss initially alerted Stott that drivers had not arrived as scheduled. (Newell, 1339). When he arrived, Newell observed that there again were sufficient trucks available. (Newell, 1339-1340). Copher, who was clocked in but was not loading his truck, walked over to Newell’s car and said to Newell, “You know, we’re all pretty good guys around here. We work hard, but we don’t like to haul from other plants.” (Newell, 1337-1338). Newell testified that when he asked Copher who didn’t show up to Taylorsville, Copher snickered, and insinuated that it was him, saying, “Well, I’m not going to say who, but it’s probably been a little while since I’ve been out and hauled from anywhere else.” (Newell, 1337-1338). Newell responded by telling Copher that it wasn’t funny and that “this problem wasn’t going to go away” because Brooks was going to hear about it. (Newell, 1338). Again, this all transpired on October 19.

Importantly, the contents of the preceding paragraph stand unrefuted. Even though he was called as a rebuttal witness, Copher in no way refuted Newell's testimony as to these events, including but not limited to the undisputed fact that Copher insinuated that he was the driver that did not go to Taylorsville as scheduled.

It is no coincidence that one week after being warned by Newell that "this problem wasn't going to go away," Copher secretly met with a Teamsters organizer, John Palmer ("Palmer"), for the first time. (Palmer, 345). It was understood that the consequences of not going to other plants was termination. (Long, 222-224; Walters, 492; Copher, 180; Highley, 797). Palmer advised Copher to do work as directed. (Palmer, 385). SRM records indicate that within a few days after Palmer's advice, Copher made his first trip to Florence in over three weeks. (R. Ex. 74-75). It was understood that the consequences of not going to other plants was termination. (Long, 222-224; Walters, 492; Highley, 797). Copher knew he was in trouble and for all appearances, was taking steps in anticipation of his discharge. His self-protection efforts culminated in anticipating and secretly recording his discharge meeting.

After Brooks returned from vacation, Newell later reported to Brooks his conversation with Copher, and Copher's insinuation that he was one of the drivers that did not show up. (Newell, 1338). Brooks recalls Stott also mentioning Copher by name. (Brooks, 1092). For the first two weeks after his vacation, Brooks' time was consumed by a very large and complex job out of the Shepherdsville plant in the Louisville market for one of SRM's top-five customers. (Brooks, 1088-1091). He had to devote his full attention to getting this job successfully up and running. (Brooks, 1088-1091).

Because of the Shepherdsville project, November 8 was the first chance Brooks had to visit the Lexington market since returning from vacation. (Brooks, 1092-1093). He went to the

Winchester plant first that day, planning to get to the bottom of the complaint about Copher not going to Taylorsville. (Brooks, 1093). But just as Brooks was pulling into the Winchester Plant parking lot, he received a call from Newell. (Brooks, 1093-1094). Newell said that he was on the phone at the Georgetown Plant and he had overheard Long from about 25 feet away talking about the Winchester drivers trying to hold a meeting at the Winchester Plant the night before. (Newell 1350, 1412). Newell did not hear any mention of Copher's name. (Newell, 1425). Brooks assumed the meeting was about drivers not wanting to drive to other plants, and told Newell he would look into it. (Brooks, 1094). Newell did not mention anything about the union to Brooks, nor had Newell overheard anything about the union. (Brooks, 1093-1094; Newell, 1349-1350, 1412-1415).

Brooks then went into the Winchester dispatch office, where he observed Copher and other drivers in the lounge rather than working. (Brooks, 1095). He asked Highley if he knew about the meeting and Highley said that he did not know what Brooks was talking about. (Brooks, 1257-1258). Brooks asked Highley to find out if the drivers were upset about something but did not ask Highley to find out who in particular participated in the meeting. (Brooks, 1258). He then told Highley to get the drivers that were in the lounge loaded and out of there. (Brooks, 1095-1096).

Brooks then left Winchester and visited the Georgetown Plant and spoke with the Plant Manager Chasteen. (Brooks, 1096-1097). Brooks asked Chasteen whether he knew about a drivers meeting, and he said he did not. Chasteen told Brooks, "[t]he only thing about Winchester I know is there's a couple drivers up there that are making it difficult on the others," which Brooks took to mean certain drivers were not pulling their share of the loads. (Brooks, 1097).

Brooks then travelled to Nicholasville and spoke with Stott. (Brooks, 1098). Brooks asked Stott about the drivers' only meeting, and Stott also was not aware of any gathering. (Brooks,

1098). Stott then discussed with Brooks the Winchester drivers' failure to show up to Taylorsville and the fact that the Winchester drivers were bragging to Nicholasville drivers about getting paid for plenty of hours but were not working as much. (Brooks, 1098, 1283). This conversation caused Brooks to pull up some of the Winchester drivers' weekly hours reports, including the reports for Copher, Long and Walters. (Brooks, 1182-1184). Comparatively, from September 15 through November 2, Copher had almost 100% more overtime hours (127.44) than Long (73.23) and Walters (69.71). (R. Ex. 59, 61, 63). Brooks concluded that Copher needed to be terminated. Brooks made the decision based on the complaints that he had been getting, the high overtime hours, Copher not wanting to haul concrete, and his own personal observations of Copher at the plant. All of this led Brooks to conclude that Copher was riding the clock and essentially stealing time by getting paid but not working and refusing work. (Brooks, 1100-1101). Brooks consulted with Hollingshead regarding his investigation and suggested Copher be terminated. (Brooks, 1101). Hollingshead told Brooks to move forward as he thought best. (Brooks, 1101).

Brooks informed Highley that he was returning to Winchester that afternoon and asked him to keep Copher at the plant, but did not explain why. (Brooks, 1101). Consistent with his normal practice, (Brooks, 1085), Brooks then filled out his termination slip for Copher, listing the generic reason of attitude and performance as his talking points for the termination meeting. (Brooks, 1101; G. C. Ex. 2).

Highley alerted Copher that Brooks had asked Highley to keep Copher at the plant. (Copher, 58-59). Three weeks previously, Newell had warned Copher that his no-show at the Taylorsville plant was not going to go away, and Copher had never had a one on one meeting with Brooks before. (Copher, 60). Knowing that the consequence of his actions was termination, Copher obviously anticipated what was to come and secretly recorded the meeting. (Copher, 138-

139). Fortunately for Respondent, this leaves no doubt about what was said at the meeting. (R. Ex. 90).

When he arrived to the plant, Brooks went straight into the driver's lounge and met with Copher. (Brooks, 1101-1102; R. Ex. 90). After some small talk, Brooks started the meeting by telling Copher that he was hearing about some negativity from some people, the first of his two talking points. Copher immediately attempted to steer the conversation away from Brooks' termination talking points and draw Brooks into a discussion about a union. (R. Ex. 90). Brooks did not take the bait, and even by Copher's account was surprised by Copher's interjection of the word union. (Copher, 141). Brooks indicated that the meeting was not about that, and returned to his talking points. (R. Ex. 90). Brooks told Copher he was hearing some other things "too" in addition to his negativity and that he was being let go for his overall job performance lacking as well. (Brooks, 1104-1106; R. Ex. 90). After Copher unsuccessfully attempted to draw Brooks into further discussion for his secret recording, the meeting was concluded.

Unbeknownst to Brooks, Copher and two other employees had a second secret meeting with Teamsters organizer Palmer on November 7, the day prior to Copher's termination. Palmer had instructed the employees of the importance of building a solid core before going public, and to deny any involvement if asked. (Copher, 136-137; Palmer, 351). There is no evidence that anyone mentioned either of these meetings with Palmer to Brooks or any other member of SRM management. In fact, in a conversation three or four days before Copher was fired, he confided in Uncle Aaron by asking him a generic question about unions. (Highley, 741-742). Up until that point, any union activity had been kept so confidential that even Highley, the on-site Plant Manager and Copher's uncle, had not heard anything about it. He did not report it to anyone else. (Highley, 741-742). According to Highley, Brooks had almost no interaction with employees. (Highley,

753-754). Brooks had just arrived in the Lexington market on November 8 when he was first alerted to some kind of driver meeting by Newell. According to Highley, even he did not have any knowledge of such a meeting. (Highley, 749-750). Other than the self-serving statements of Copher and Highley, there is no evidence of any kind suggesting that Brooks had knowledge of any union activity at the time that he made the decision to discharge Copher. Any suggestion to the contrary is based upon pure speculation.

Instead, the undisputed facts demonstrate that Copher would have been terminated long ago if evidence acquired during the course of the hearing had been known by SRM at the time. In 2018, Copher was no call, no show on three occasions in just 4 months. (R. Ex. 80). Highley also wrote up Copher for only wanting to work on the rainy days (i.e., days where little to no loads were delivered) in December 2018. (Highley, 1053; R. Ex. 80). Uncle Aaron protected his nephew by failing to submit these absence reports to Human Resources. Thus, upper management was unaware of Copher's conduct. (Highley, 1051-1052, 1054). Had SRM been aware, Copher, like any other driver, would have been terminated for violating the Company's Attendance Policy which states that an employee will be discharged after the second no call, no show. (Highley, 1041; Hollingshead, 1570-1572; R. Ex. 1).

E. The Innocuous Driver/Safety Meeting

From anyone's perspective, it is undeniable that there were problems at the Winchester facility, and it was part of Brooks' job to identify and address those problems. With that in mind, Brooks decided to hold one of his Driver/Safety Meetings with the Winchester drivers on November 15th with Safety Manager Jerry Weisshaupt. After a discussion of general safety issues, Brooks let the employees know he was available if they had any issues. He also explained that they should not have to go to Florence as much because of the hiring of additional drivers at that

plant. (Brooks, 1110-1111). Highley, as well as several other drivers, testified that Brooks did not promise the drivers would never have to go to Florence. (Highley, 758; Walters, 434; Carmichael, 559; Keaton, 306-307). The drivers described this Driver/Safety Meeting as being a typical driver/safety meeting, and explained that it was routine for Brooks to ask employees if there was anything they needed and let them know he had an open door policy if they had concerns. (Means, 646-647). Prior to November 15, 2019, Brooks had routinely asked the Winchester employees if they were having any issues or needed any help at the plant on at least 4-5 other occasions. (Carmichael, 559-600; Means, 646-647).

Brooks also handed all of the drivers \$100 cash as a morale booster, as he routinely does when he attends a Driver/Safety Meeting. (Brooks, 1110-1112; R. Ex. 91). Indeed, this is a company practice that predates Brooks and goes back for approximately 20 years. (Hollingshead, 1572-1575). Keaton joked with Brooks that he wanted Brooks to give him more \$100 bills. (Keaton, 317-318). Although several Winchester drivers claimed they had never received a cash bonus, Walters admitted that he received the same \$100 from Brooks at another meeting over one year prior. (Walters, 509-510). Jeffersonville driver James testified that he received the same \$100 bonus on three occasions. (James, 875). Brooks would often pay these cash bonuses from Cash On Delivery (“COD”) money that customers paid directly to drivers when the concrete was delivered. (Hollingshead, 1574-1575, 1613). SRM recorded this payment in the Employee Relations Account of its General Ledger. (Hollingshead, 1574; R. Ex. 91). In 2019 alone, Brooks distributed bonuses at his meetings using COD cash at least 11 times. (R. Ex. 91).

F. The Events Leading to Highley’s Termination

As a threshold matter, it must be remembered that as Plant Manager, Highley was a Section 2(11) supervisor. (Highley, 733-734). Therefore, the only facts that are important to his

termination are facts relating to the General Counsel's allegation that he was terminated for refusing to provide Brooks a list of union adherents. As explained in the argument below, even erroneously assuming that had been a reason for Highley's termination, it would not give rise to a violation of the Act.

Brooks credibly testifies that, although he asked Highley, the Plant Manager, to find out what was going on at the plant and report back to Brooks, he did not ask him to compile a list. (Brooks, 1107). While Highley testified otherwise, (Highley, 753), he also testified that Brooks mentioned Highley's failure to provide him the list as a reason for Highley's discharge. (Highley, 761). Suspiciously, Highley did not even mention in his testimony that Newell was present at all times during this termination discussion. (Highley, 760-761). Keaton confirmed this as well. (Keaton, 303-304). Newell credibly testified that there was no mention of any list at the time of Highley's termination. (Newell, 1344). Although Highley was called as a rebuttal witness by the General Counsel, he made no effort to refute Newell's testimony. Perhaps more importantly, he gave no explanation as to why he conveniently failed to disclose that Newell was a witness to this discussion.

Highley did not in any way act on the alleged request for a list. (Highley, 761). More importantly, the General Counsel offered no evidence that anyone else was made aware of the alleged request. While there was testimony that Highley asked Copher, his nephew, about union activity, that could not have been pursuant to the alleged request for a list. This is for the simple reason that, according to Highley, the request for a list came after Copher already had been discharged! (Highley, 751-753).

There are other reasons to doubt Highley's credibility on this point, as well as his other testimony. Of course, as an alleged discriminatee with something to gain, he is, by definition, an

interested witness. Furthermore, Highley's testimony makes abundantly clear that he was upset about the termination of Copher, (Highley, 752), even though he incredibly testified that this had nothing to do with Copher being his nephew. (Highley, 811). The relationship is so close that Copher's mother, Highley's sister, was Highley's emergency contact. (Highley, 1057-1059). There is no question that Highley went out of his way to protect Copher from termination in the past. (R. Ex. 80). Highley's testimony was internally inconsistent on multiple occasions. (Compare Highley, 746 to 782-787; See Highley, 840-841). His lapses in memory were convenient at best. (See Highley, 792-795). He was prone to evasive testimony, generalities, sweeping statements and excuses with no factual support. (Highley, 799, 804-805, 807-809, 812-813, 817, 820-826, 831, 834-838, 840-842). His testimony is inconsistent with company records, (Compare Highley, 737 to R. Ex. 80; Compare Highley, 1704-1705 to R. Ex. 74 and 75; Compare Highley 850 to R. Ex. 76), and at times inconsistent with numerous witnesses, including Stott, Newell, Goss, Brooks, Hollingshead, Long, (Long, 217), and even Copher. (Compare Highley, 749-753 with Copher, 58-59).

Because of the limited facts impacting the allegations pertaining to Highley, it is unnecessary to delve into the details supporting Highley's termination. Nonetheless, SRM will briefly address those facts for the sake of completeness.

The history of the Winchester plant's poor performance and Highley's weak management is discussed above. Between November 11th and 15th, Brooks visited the Winchester Plant two times and witnessed the plant's inefficiencies – the drivers were not pulling underneath the hole and lining up to haul out concrete. (Brooks, 1109-1110). Brooks spent additional time observing the employees' and Highley's practice of not requiring his employees to get under the hole and load efficiently. (Brooks, 1113). The drivers were sitting around with no urgency while Highley

was just smoking cigarettes in the office. (Brooks, 1113). This prompted Brooks to pull the drivers' weekly hourly reports again, and Brooks concluded that Highley had been showing favoritism to his nephew Copher because Copher's overtime far exceeded the other drivers. (Brooks, 1114). But not only this, the Winchester drivers' hours in total far exceeded what they should be for the amount of yards that were poured based on the SRM's yardage reports. (Brooks, 1114, 1202). Brooks compared Winchester's performance to its counterpart Nicholasville, which had a comparable number, but slightly less drivers. Comparatively, Nicholasville was far more efficient - pouring more yards, and using less drivers and total work hours to do so. (Brooks, 1203, 1205-1206). Brooks attributed Winchester's failures to Highley's poor management of hours and employees and his nonproduction. (Brooks, 1206-1207). After consulting with Hollingshead, Brooks decided it was time to make a management change at the Winchester Plant, and accordingly terminated Highley for these reasons on Monday, November 18.

G. The Two Months Culminating in the Plant Closing

Upon Highley's discharge, Brooks' goal "was trying to do everything I could to get this plant – going in the direction that needed it to go." (Brooks, 1117). Toward that end, he started making a point of being at Winchester three or four times a week. He brought in both Goss and Newell to turn the plant around. (Brooks, 1117). As indicated by Goss, his mission was to start running the plant "the Smyrna Ready Mix way." (Goss, 952). Brooks told Goss that he would be running Winchester until they could find someone else to run the plant. (Goss, 913). In fact, SRM started interviewing applicants for both a manager and drivers. (Walters, 454-455; Brooks, 1118). As Brooks explained, "[w]e were trying to run this plant as we had hoped ... we were not trying to shut it down. We were trying to keep going." (Brooks, 1118).

Unfortunately, the drivers were resistant to these efforts, and in the end sealed their own fate. The drivers were dismissive of Goss and Newell as managers and resisted their instruction. This instruction from Goss and Newell included moving away from Highley's inefficient loading practice of picking and choosing particular drivers for loads and instead getting the drivers under the hole and ready to load as soon as the driver arrived to work. (Long, 191, 247; Walters, 439; Carmichael, 581; Goss, 915). For example, Long pushed back and sought to educate Goss on the way they do things. (Long, 247). The Winchester Plant was losing multiple loads of concrete a day because of these inefficiencies, and Goss had to completely restructure their work schedules to stagger their arrival times in order to force the drivers to load quicker rather than bicker with each other over who had the next load. (Goss, 935-936). But even then, Goss and Newell had to constantly push the drivers to get under the hole and load instead of sitting around. (Goss 919-921; Newell, 1346, 1352).

Newell described the Winchester drivers' performance as pathetic and an everyday struggle. (Newell, 1345-1346). He constantly had to tell the drivers to get under the plant to load. (Newell, 1346). It was clear that the Winchester drivers were not happy with the new management changes, but Newell let them know that he and Goss were not leaving until the drivers started increasing their yardage and starting doing the work on their own without having to be told. (Newell, 1433-1434).

Goss and Newell regularly reported these issues to Brooks, who was often present to witness these struggles himself. (Brooks, 1118-1123). Brooks concluded that things really were not getting any better and the Winchester drivers really were not what SRM was looking for as employees. (Brooks, 1125, 1212). With SRM constantly struggling to get the drivers to perform their jobs, and with the slower winter months approaching, Brooks believed the time was right to

make a change. (Brooks, 1214-1215). He reported those observations to Hollingshead, at which time the conversation shifted to turning Winchester into an on-demand plant. (Brooks, 1124-1125, 1211-1212). Hollingshead then made the decision to close the plant and convert it to an on-demand plant. (Brooks, 1125; Hollingshead, 1564). An on-demand plant functions only on an as needed basis in a support role. (Brooks, 1125). Hollingshead made this decision based upon the historical poor performance at the plant culminating in the inability to get the drivers on board and turn the plant around. (Hollingshead, 1565-1567, 1594-1599).

For whatever reason, any union organizing effort ended in November, 2019. (Palmer, 376). Even the Union admitted that it did not have any discussions with SRM's employees after November, 2019 until after the other employees were notified of the plant closing in January, 2020. (Palmer, 374-375). The drivers themselves made little to no mention about the union, and even then, the discussion was negative about the union. (Newell, 1432). No union authorization cards were ever collected, and from the Union's perspective, the employees were only in the initial committee building stage. (Palmer, 404-405). Brooks saw driver Means wearing a Teamsters shirt on one occasion, but he did not have any discussions with Means about it. (Brooks, 1124). Thus, there is very little evidence of any union activity or any other protected concerted activity during the two months prior to plant closure. There are no allegations that any unfair labor practices of any kind occurred in the two months after any union drive ended and prior to plant closure.

H. The Closure of the Winchester Plant and Termination of the Drivers

On January 6, 2020, Brooks and Goss notified the Winchester Plant drivers that their employment was being terminated effective Friday, January 10. (Brooks, 1126). While the plant was closing, Brooks made no secret of the fact that it would continue to be used as an on-demand

plant. (Means, 661). Brooks also explained that SRM would provide each employee two weeks' severance pay. (Brooks, 1126). SRM thereafter decided to increase the amount of severance to four weeks in exchange for their execution of a Separation Agreement. (Brooks, 1127). Brooks presented this additional offer to the employees in a meeting on Friday, January 10 and explained that he would distribute the Agreement to employees the following Monday. (Brooks, 1127-1128). Carmichael confirmed with Brooks that the drivers could still elect the two weeks' severance option if they did not want to sign the Agreement. (Carmichael, 619-620).

Brooks offered Means the option to transfer to another plant. (Brooks, 1130). Means was the only employee SRM offered a transfer because there was a need for a tanker driver, and Means had demonstrated more initiative than the other employees. After the previous tanker driver quit, Means immediately stepped up to assist and had always been willing to follow direction. (Brooks, 1130). Means turned down the offer to transfer because he did not believe his personal vehicle was reliable enough to commute back and forth from those locations. (Means, 657-658). Means was then given the same severance offers as the other drivers.

The other drivers were not given the opportunity to transfer because after six weeks they had failed to get their act together. (Brooks, 1131). In Brooks' words, "we were constantly battling these guys to get them to do exactly what we needed them to do." (Brooks, 1214-1215). That Monday, Brooks distributed the Separation Agreement to employees and answered any questions asked. (Brooks, 1128-1129). The drivers all reviewed and signed the Agreement. (Brooks, 1128). Following the closure of the Winchester plant, the drivers at the Nicholasville and Georgetown plants were able to absorb all of the business from the Winchester plant, with the addition of only one driver by transfer from another location. (Brooks, 1219). Only the two mechanics continue

to work out of the Winchester plant because that is where the shop used for the Lexington market is located. (Brooks, 1216-1217).

I. Drivers' Exaggeration of Trips to Florence

While unnecessary to his claims, the General Counsel chose to build his case on the false premise that the Winchester drivers were each driving to the Florence Plant to haul loads approximately 2-3 times every week during late summer through the fall of 2019. The General Counsel elicited testimony from multiple drivers and Highley to this effect. For the approximately 10 Winchester drivers, that equates to 20-30 trips to Florence per week. This poses a significant credibility problem for these witnesses because it is demonstrably false. (Brooks, 1135-1167; R. Exs. 74-76 and 81-84). Regardless of which driver was in which truck, not one single truck assigned to Winchester was delivering loads to Florence 2-3 times every week. In fact, the Winchester drivers in total only went to Florence 41 times during the 17 weeks between July 8, 2019 and November 8, 2019. Not the 340-510 trips as claimed.

This is further confirmed by a comparison of driver testimony with their own time records. One of the drivers' stated concerns about driving to Florence and other plants so frequently is that they had to arrive at the Winchester plant early to get to the other locations on time. According to the drivers, this meant arriving by 5:00 a.m. or 5:30 a.m., (Copher, 42; Keaton, 291; Walters, 418; Means, 637). For Long it was even worse, sometimes having to arrive as early as 4:45 a.m. (Long, 177). While SRM did not anticipate this exaggerated testimony, fortunately it introduced some limited time records (for an entirely different reason) that debunks the drivers' incredible story.

Thus, from September 15, 2019 through November 2, 2019, Copher only clocked in before 5:30 a.m. one time, and only clocked in between 5:30 a.m. and 6 a.m. 5 times. (R. Ex. 59). During this same period, Keaton and Walters never clocked in before 5:30 a.m. Keaton clocked in

between 5:30 a.m. and 6 a.m. 3 times and Walters did so 4 times. (R. Exs. 62 and 63). Means clocked in before 5:30 a.m. just one time (at 5:29 a.m.) and between 5:30 a.m. and 6 a.m. 2 times (at 5:55 a.m. and 5:59 a.m.). (R. Ex. 64). Bowling is the only one of these drivers actually to have clocked in before 5 a.m. on one occasion. He also clocked in between 5 a.m. and 5:30 a.m. 2 times, and between 5:30 a.m. and 6 a.m. 2 times. (R. Ex. 65). On the other hand, Long only clocked in before 6 a.m. a grand total of 2 times, once at 5:48 a.m. and once at 5:54 a.m. (R. Ex 61).

Contrary to their sworn testimony, during this seven-week period, these drivers only clocked in before 6 a.m. FOR ANY REASON a grand total of 23 times. This is an average of approximately 3 times a week combined, or an average total of 4 times for each of these 6 drivers spread out over the entire seven-week period. This is perhaps the biggest problem for Highley, who lamented under oath that he had to send drivers to other plants “almost every day.” (Highley, 743).

Interestingly, one driver, Carmichael, gave honest testimony which was relatively consistent with these documented facts. (Carmichael, 607-609). Otherwise, this gross exaggeration impacts the credibility of Highley, Copher and the other drivers. It also refutes their efforts to blame frequent Florence runs for poor Winchester plant performance and customer complaints. In addition, both Highley and Copher blamed Copher’s excessive overtime and staying late on him disproportionately taking late loads. (Copher, 148-149; Highley, 756-757). This likewise is demonstrably false. Copher, who drove truck 3060, did not take more late loads than other drivers on average. (Brooks, 1150; R. Ex. 76).

III. ARGUMENT

A. Summary of the Allegations

The General Counsel asserts a wide range of claims in its Third Consolidated Complaint.

SRM’s purported violations of the Act as alleged in that pleading are outlined below:

Sections of the Act Purportedly Violated	Factual Allegations
8(a)(1)	About November 8, 2019, Highley interrogated employees about their union activities and the union activities of other employees. (Third Consolidated Complaint, para. 5).
8(a)(1) and (3)	On November 8, 2019, SRM discharged Copher because he joined or supported a labor organization and in order to discourage union activities and/or membership. (Third Consolidated Complaint, para. 9(a)).
8(a)(1)	On November 15, 2019, Brooks promised employees they would no longer be required to drive to Florence, Kentucky to discourage union activity. (Third Consolidated Complaint, para. 6(a)).
8(a)(1) and (3)	On November 15, 2019, SRM granted employees at its Winchester facility cash bonuses of \$100 to discourage union activity. (Third Consolidated Complaint, para. 9(b)).
8(a)(1)	On November 15, 2019, Brooks solicited employee complaints and grievances, and impliedly promised employees they would receive increased benefits and improved terms and conditions of work if they refrained from union organizational activity. (Third Consolidated Complaint, para. 6(b)).
8(a)(1)	On November 18, 2019, Brooks attempted to get Highley to commit an unfair labor practice, which he declined to do, resulting in Highley’s discharge and dismissal. (Third Consolidated Complaint, para. 7(a) and (b)).
8(a)(1) and (3)	On January 10, 2020, SRM discharged Bowling, Carmichael, Long, Means, David Smith and Walters because they joined or supported a labor organization and in order to discourage union activities and/or membership. (Third Consolidated Complaint, para. 9(c)).
8(a)(1) and (3)	On January 13, 2020, SRM required Bowling, Carmichael, Long, Means, David Smith and Walters to agree to a Separation Agreement because he joined or supported a labor organization and in order to discourage union activities and/or membership. (Third Consolidated Complaint, paras. 8 and 9(d)).
8(a)(1) and (3)	On January 13, 2020, SRM partially closed its Winchester, Kentucky facility and converted it to an on-demand facility because he joined or supported a labor organization and in order to discourage union activities and/or membership. (Third Consolidated Complaint, para. 9(e)).

B. Several of the Board’s Claims Lack Record Support and/or Do Not Establish a Violation of the NLRA

The General Counsel failed to proffer any evidence establishing several of its claims in this dispute, and in fact, the record in this matter directly contradicts those allegations. Specifically, the General Counsel alleges that: (a) Highley unlawfully interrogated SRM’s employees about their union activities and the activities of their co-workers; (b) SRM unlawfully discharged Highley for his refusal to commit unfair labor practices; (c) Brooks unlawfully promised employees they would no longer have to drive to Florence in response to employees’ union organizational activities; and (d) Brooks unlawfully paid a \$100 cash bonus to employees to discourage union activities. However, the General Counsel has not established any such violations.

1. No Evidence Highley Interrogated the Employees or Was Terminated for His Refusal to Do So

The General Counsel asserts that SRM violated Section 8(a)(1) of the Act because Highley interrogated SRM employees about their union activities and the union activities of other employees, and then, confusingly, directly contradicts that allegation by claiming that SRM also violated Section 8(a)(1) by terminating Highley for his refusal to commit an unfair labor practice. The record negates these allegations on numerous grounds.

a. No Evidence of an Unlawful Interrogation

“It is well established that interrogation of employees is not illegal *per se*. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights.” *Rossmore House*, 269 NLRB 1176, 1177 (1984) (emphasis added). “There is not, and in the nature of things cannot be, a mechanical formula for deciding whether a given interrogation is coercive, that is, likely to deter the interrogated worker (or others, who had heard about the interrogation) from supporting or (as here) working actively for the union.

It would be untenable, as well as an insulting reflection on the American worker's courage and character, to assume that any question put to a worker by his supervisor about unions, whatever its nature and whatever the circumstances, has a tendency to intimidate, and thus to interfere with concerted activities in violation of section 8(a)(1).” *N.L.R.B. v. ACME Die Casting Corp.*, 728 F.2d 959, 962 (7th Cir. 1984). Rather, the words themselves or the context in which they are used must suggest an element of coercion or interference to be considered an unlawful interrogation. *Id.*

The Board failed to introduce any evidence that Highley interrogated SRM employees. In fact, the only time Highley allegedly asked any employee about union activities was on November 8, 2019 when Uncle Aaron allegedly told his nephew, Copher, that Brooks “had a concern that he heard that [Copher] was spearheading the union movement there, and asked if [Highley] had any information about that.” Highley then allegedly asked Copher “if he knew anything.” (Copher, 58-59). Importantly, the only evidence to this occurring at all is Copher’s second-hand account of what Highley said Brooks said to him. Highley’s own testimony concerning this conversation is at odds with Copher’s. Based upon Highley’s account, during THAT conversation, Brooks did not ask Highley to do anything, much less ask him to interrogate anyone. According to Highley, Brooks said that, “I’m [Brooks] going to get to the bottom of it” and left. (Highley, 749-750). In fact, Highley’s testimony on this point is more consistent with that of Brooks than that of Copher. (Brooks, 1094-1096).

Thus, according to the testimony of the only two people directly involved in that conversation, Brooks did not ask Highley to investigate or interrogate anyone at that time. Highley’s testimony came on the third day of the hearing. He also testified on the fourth, fifth and seventh days. Over SRM’s vigorous objection, Highley was permitted to sit in the hearing as the

Charging Party's own hearing representative. In that capacity, he sat through the hearing, including Brooks' testimony. (Highley, 1703). While Highley did refute certain aspects of Brooks' testimony on rebuttal, he did not either refute Brooks' account of this conversation or supplement his own account.

Copher's account of what Highley said Brooks said is classic hearsay. While admissible and relevant to the question of whether Uncle Aaron interrogated his nephew, it is not admissible for the truth of the matter asserted, i.e. what Copher said that Highley said that Brooks said. Even assuming that Uncle Aaron made that statement, he was not acting on behalf of SRM when making that statement and was not authorized to do so. Furthermore, even to the extent that the statement would not be considered hearsay, it is not credible in the face of the contrary testimony of Brooks, as well as the testimony of Highley, an alleged discriminatee, the Charging Party's hearing representative and Copher's uncle.

For similar reasons, to the extent that the General Counsel is attributing this alleged interrogation to Uncle Aaron alone, the plain truth is that this argument is not corroborated by Highley's testimony, and would be inconsistent with what actually was said in the conversation between Brooks and Highley. Given these facts, if Highley had made these statements to Copher, he was going rogue and not acting on behalf of SRM.

Furthermore, even crediting Copher's incredible testimony, this vague question from Uncle Aaron to Copher was certainly lawful under the analysis set forth in *Rossmore House*.

Pursuant to *Rossmore House*, the relevant test factors for determining whether a supervisor has engaged in "interrogation" are as follows:

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

Johnston Fire Servs., LLC, 367 NLRB No. 49 (2019), at 6, quoting *Rossmore House*, at 1178. This “totality of the circumstances” test is an objective test, irrespective of the employer’s subjective intent or the employee’s subjective perception of the question. *Observer & Eccentric Newspapers, Inc. v. N.L.R.B.*, 136 F. App’x 720, 727 (6th Cir. 2005).

With respect to the first factor, there is ample undisputed record evidence demonstrating that SRM holds no animus towards union activities. SRM willingly purchased Piqua in May 2018, and then accepted the Teamsters, adopted the Piqua contract, and successfully bargained a new one in one session. (Hollingshead, 1557-1558, 1562-1563). In October 2018, the SRM owners and CEO walked straight up to the picket line outside of Allied, which SRM also purchased, and invited the striking union employees to apply for positions at the Company. (James, 869-870). SRM hired multiple Teamsters who were formerly with Allied, and 8 of them accepted the offers, including both the Union Steward and the Assistant Union Steward, one of whom testified on SRM’s behalf. (Brooks, 1080-1082, 1171-1172; James, 866-867, 873-874). This is hardly the conduct of an anti-union company. Moreover, it is undisputed that prior to the instant matter, SRM has never received an unfair labor practice charge.

As to the second factor, neither Highley nor Copher provided any details regarding the alleged interrogation other than Highley asking Copher if he “knew anything” about union activity,

and Copher responding no. (Copher, 58-59). There is no evidence indicating Highley's conversation with Copher was done coercively, or in a negative light or was seeking information to be used adversely against employees. At most, Highley essentially was asking his nephew to verify what another source had told him, not trying to ascertain his views. In fact, because it is undisputed that Newell told Brooks, and Brooks told Highley, that the meeting supposedly had been at the plant (and on company property and possibly on working time), Brooks had a justification for wanting to get to the bottom of things. But Highley never relayed this conversation with Copher to *anyone* at SRM. Presumably, if Highley sought to elicit information from Copher to be used adversely against him, Highley would have passed along this conversation to Brooks. But the evidence is that Highley did not.

The General Counsel likewise has not established that an "interrogation" occurred with respect to the third, fourth and fifth factors. As an initial point, this conversation was an informal conversation between uncle and nephew, and there is no testimony that this discussion happened with any atmosphere of authority. (Copher, 135). Copher's claim that he lied to Highley about his union activities out of a "fear" of retaliation lacks any credibility based on their close relationship, and based on the fact that Copher felt perfectly comfortable asking Highley about his union experience only days earlier. (Highley, 741-742). If Copher had feared that Highley would tend to restrain, coerce or interfere with his employee rights, he would not have approached him to ask about his union experience.

On this undisputed record, and pursuant to *Rossmore House*, Highley's conduct as alleged was not an unlawful interrogation of SRM employees. Further, the undisputed facts here are nearly identical to the facts in *Toma Metals, Inc.*, 342 NLRB 787, 789 (2004), wherein the Board likewise held that no unlawful interrogation occurred. In *Toma Metals*, three employees asked the plant

materials manager whether there was any truth to rumors that a union was attempting to organize the employees. *Id.* The manager was unaware of this rumor, and later approached an employee at his workstation and asked, “[W]hat’s up with the rumor of the union I’m hearing?” *Id.* The employee responded that it was not a rumor and that it was actually happening, and stated the employees wanted a “piece of the pie.” *Id.* at 788. This employee was the manager’s wife’s first cousin and they “had friendly relations and engaged in daily conversations.” *Id.* at 789. The Board analyzed this conversation under the *Rossmore House* test, and held that the manager’s conduct was not unlawful because the conversation occurred between employees with a friendly relationship, was asked informally at the employee’s workstation, the question was broad and general, and the conversation was not sustained or repeated. *Id.*

The only arguably significant difference between *Toma* and the instant case is that the employee in *Toma* responded to his manager’s questioning by telling the truth. However, again, Copher’s stated reason for his untruth that he was fearful lacks any credibility – especially because Highley is Copher’s uncle and Copher asked Uncle Aaron about unions only a few days earlier. (Highley, 741-742). Even so, the *Rossmore House* factors are a “totality of the circumstances test,” and this factor alone is insufficient to establish coercion. *See, N.L.R.B. v. Acme Die Casting Corp.*, 728 F.2d 959, 963 (7th Cir. 1984) (question of whether employee knew “something about the union” was not unlawful despite employee’s false answer where the question was not tendentious or intimidating in content or inflections, was asked casually in a friendly manner and was not followed up). Even as alleged, Highley’s conduct here was entirely lawful. Therefore, this claim should be dismissed.

b. No Evidence Highley was Terminated for an Unlawful Purpose

Now changing the characterization of Highley from villain to victim, the General Counsel contends that SRM terminated Highley because he “refused to commit unfair labor practices” based, on Highley’s claim that he refused to provide Brooks with a list of names of employees who were involved with the union. Highley alleges that after Copher’s termination, Brooks directed him to get a list of names, and Highley told him he would do so. (Highley, 752-753). Then, Highley alleges that *after* Brooks told Highley he was terminated, Brooks said “I gave you a week [to give me a list],” and speculates that his failure to give Brooks a list was the real reason for his termination. (Highley, 761). Highley’s credibility on this point is immediately called into question. He conveniently omitted from his testimony the important fact that Newell was present for that latter conversation, perhaps hoping that Newell would not be called to testify concerning the conversation. Of course, Newell did testify. Both Newell and Brooks credibly testified that there was no such mention of a list. While called as a rebuttal witness, Highley made no effort to refute Newell’s testimony or explain his failure to mention that Newell witnessed the entire conversation.

Even if Highley’s story regarding his refusal to provide a list to Brooks was truthful, the Board still cannot establish a violation of Section 8(a)(1) with respect to Highley’s termination. Highley undisputedly was a statutory supervisor. And, it is well-established, by both Board precedent and the language of the Act, that supervisors are excluded from the protections of the Act. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982). The Board has recognized one narrow exception to this exclusion when a supervisor is discharged in response to certain conduct, including a refusal to commit unfair labor practices. *Id.* at 403. However, for the exception to apply, the discharge must have more than an incidental or secondary effect on the non-supervisory

employees – it must interfere with the right of the employees to exercise their Section 7 rights. *Id.* at 404. “Thus, it is irrelevant that an employer may have hoped, or even expected, that its decision to terminate a supervisor for his union or concerted activity would cause employees to reconsider, and perhaps abandon, their own concerted or union activity. No matter what the employer’s subjective hope or expectation, that circumstance cannot change the character of its otherwise lawful conduct.” *Id.*

The Board has submitted no evidence that Highley’s termination could reasonably interfere with the Winchester drivers’ Section 7 rights. Highley had one conversation with one employee regarding suspected union activities – with his nephew, Copher. (Copher, 58-59). In that conversation, Copher denied any involvement with the union. (Copher, 58-59). There is no testimony that either Copher or Highley reported this conversation to any other employees, or that Highley was aware that his nephew’s denial was untrue. Moreover, Highley testified that the alleged request to compile a list did not come until after Copher’s discharge, so the alleged “interrogation” of Copher could not have been pursuant to that subsequent request. (Highley, 752-753).

Further, while Highley claims that Brooks requested a list of employees who supported the union, there is no evidence to even suggest that Brooks asked Highley to interrogate any employee in order to compile the list. Likewise, there is no evidence that Highley ever told any other employee about this request. Brooks, who denies the request was even made, certainly did not discuss this with any other employees. In other words, no one but Highley testified about any such request for a list and no one but Highley ever knew about his alleged “refusal” to provide such a list.

There can be no “interference” when the activity is not “protected” and when the employees are not even aware of the conduct. Finally, even if Brooks had requested Highley, the Plant Manager and a fellow Section 2(11) supervisor, to compile a list of believed union adherents, there would be nothing illegal about that request standing alone. In fact, assessing union support is something employers do when confronted with a union organizational attempt. There is nothing wrong with assessing that support as long as it is not done through illegal means.

The Board’s decision in *Spring Valley Farms*, 272 NLRB 1323, 1332 (1984), is entirely consistent with this conclusion, and with strikingly similar facts. In *Spring Valley*, Supervisor Jones was employed as a delivery manager for a poultry feed supply company and was responsible for determining the date, type and amount of chicken feed to be delivered to customers. *Id.* at 1327. Jones dispatched drivers and was responsible for equalizing the work load among drivers and “knocking off” drivers as they approached 40 hours. *Id.* at 1331. Prior to the union election, Jones alleged her supervisor asked her how she thought the drivers would vote and told her that she should have stopped the union activities. *Id.* at 1328. Jones claimed she was told that if the employees voted for the union she would be fired. *Id.* Jones also claimed she was then directed to go out and talk to drivers to see how they were going to vote and to report back. *Id.* Jones’ supervisor denied this conversation occurred. *Id.* at 1329. Jones refused to follow through with this request. *Id.* at 1332. The union won the election two weeks later, and then shortly thereafter Jones was terminated for poor performance. *Id.* at 1328. Jones claimed that she had never been warned regarding her performance and had received excellent performance reviews. *Id.*

The *Spring Valley* Board noted the factual dispute among the parties and ultimately credited Jones’ testimony as more truthful, finding that Jones’ supervisor held her responsible for the union’s organizational efforts. Even so, the Board held that Jones’ termination was not

unlawful by distinguishing Jones' conduct from the precedent set forth in *Talladega Cotton Factory*, 106 NLRB 295 (1953), enfd. 213 F.2d 209 (5th Cir. 1954). The *Spring Valley* Board held that *Talladega* was distinguishable in several respects:

First there was no evidence of an overall campaign here to defeat the Union. Unlike the supervisors in *Talladega Cotton*, Jones was not directed to "break up" the Union. While she was asked by Herron to "talk" to the drivers and mill workers to ascertain their union inclinations, she was not directed to issue any threats or promises. Moreover, it is not even clear that the request sought unlawful interrogation by Jones, and certainly the record does not show she unlawfully interrogated any unit employee. Nor does it appear that the information sought was to be put to unlawful or discriminatory use. Second, unlike in *Talladega Cotton*, there was no evidence that any employees were aware of the request of Jones to ascertain their union inclinations, and there was no indication that they would, in any way, link Jones' discharge with their union activity or selection of the Union.

Finally, since Herron never subsequently attempted to gather any information obtained by Jones, it cannot be said that her discharge was in any way related to any failure by Jones to carry out an unlawful request. Thus, it cannot be said, as it was in *Talladega Cotton* that by the discharge of the supervisor Respondent "evidenced a fixed determination not to be frustrated in its efforts [to thwart the Union] by any halfhearted or perfunctory obedience from its supervisors." Accordingly, while I conclude that Respondent held Jones responsible for the employees selecting the Union and discharged her for this reason, I am not convinced that the record establishes that her discharge served the unlawful purpose found in *Talladega Cotton* or otherwise presents a situation requiring vindication of employee Section 7 rights.

Spring Valley Farms, 272 NLRB 1323, 1332 (1984). See also, *Colonial Rest Home, Inc.*, 2005 NLRB LEXIS 567, at *27 (November 30, 2005) (ALJ noting he had found no case after *Parker-Robb Chevrolet* "in which the Board has held that a supervisory discharge motivated by a supervisor's expressed reluctance to perform an illegal act impinged upon employees' Section 7 rights.")

The facts in this matter are entirely consistent with the facts in *Spring Valley*. The entirely normal act of asking a supervisor to assess union support, without more, is not an unfair labor practice. There is no evidence that Brooks asked Highley to interrogate, poll or conduct unlawful surveillance to create this alleged list, and there is no evidence that Highley did so. Further, no one was aware that Highley was allegedly directed to prepare a list, and no one was aware that Highley allegedly refused to prepare a list. Like the supervisor in *Spring Valley*, there are simply no facts supporting this claim. Furthermore, as discussed above in SRM's statement of facts, there are ample facts supporting SRM's decision to terminate this manager and go in a different direction. Especially in the absence of credible evidence, the Board should not intrude on SRM's right to choose its own managers. For these reasons, the General Counsel's claim should be dismissed.

2. No Evidence that Brooks Unlawfully Solicited Grievances and Promised Benefits at the Driver/Safety Meeting

The General Counsel contends that during the November 15, 2019 Driver/Safety Meeting, Brooks solicited employee complaints and grievances, and impliedly promised employees they would receive increased benefits and improved terms and conditions of work if they refrained from union organizational activity. The General Counsel further contends that Brooks also promised employees they would no longer be required to drive to Florence, Kentucky to discourage union activity. None of these allegations are supported with evidence.

First, not a single employee has reported that Brooks solicited complaints and grievances of the Winchester drivers. Rather, the drivers described the Driver/Safety Meeting as being a typical driver/safety meeting. (Means, 646-647).

The record contains undisputed evidence that Brooks routinely asked employees if they had any issues or needed any help at the plant, and had done so with the Winchester drivers on 4-

5 other occasions prior to November 15, 2019. (Carmichael, 559-600; Means, 646-647). Furthermore, this November 15, 2019 meeting did not occur during the “critical period” – and the record is undisputed on this point. The “critical period” is a subject of well-established Board doctrine, and “begins on the date the petition is filed, and runs through the date of the election.” *Id.* at 24, citing *Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1961); *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Conduct occurring prior to the critical period is generally not considered objectionable unless it adds meaning and dimension to related post-petition conduct. *Ideal Electric; Data Technology Corp.*, 281 NLRB 1005, 1007 (1986); *Nat'l League of Prof'l Baseball Clubs*, 330 NLRB 670, 676 (2000). In the present case, no petition was ever filed, no union authorization cards had been collected, and in fact, from the Union’s perspective, the employees were only in the initial committee building stage. (Palmer, 404-405).

With respect to the claim that Brooks promised “increased benefits and improved terms and conditions of employment,” the only facts presented by the General Counsel concern Brooks’ discussion about the Winchester drivers’ traveling to Florence. The facts, however, fail to support this claim for several reasons. First, Brooks did not promise the Winchester drivers that they would never have to drive to Florence again. Rather, he stated that the Florence Plant had hired more employees and that would mean the Winchester drivers would have to go less often. (Brooks, 1111; Highley, 758). This is not much different than Highley previously suggesting to drivers that they would not be going to Florence as much because things would be slowing down. (Highley, 787). Highley, as well as several other drivers, admitted that Brooks did not promise the drivers would *never* have to go to Florence. (Highley, 758; Walters, 434; Carmichael, 559).

Second, Brooks did not say that SRM would hire more drivers in Florence – he said they had already hired the drivers. (Brooks, 1111; Highley, 758). In other words, there was no promise

of improved terms and conditions of work – they were already improved. *See, MacDonald Machinery Co.*, 335 NLRB 319 (2001) (Claim against employer, who was presented with concerns and began remedying those concerns prior to union organizing campaign, was insufficient to demonstrate a compelling inference of an implied promise intended to unlawfully influence employees). This is consistent with SRM’s Truck Delivery Reports which demonstrate that at the time of the Driver/Safety Meeting, no Winchester driver had been to Florence since October 29th. (R. Ex. 74-75). Also, it is undisputed that Brooks had no control over the Florence, Kentucky plant because it is outside of his Central Kentucky Region, and Brooks had no input into the hiring of additional drivers for that plant. (Brooks, 1076-1077, 1111). Brooks provided only truthful and accurate information to the Winchester drivers regarding something that had already occurred. His statement was entirely lawful. This claim should be dismissed.

3. No Evidence the Cash Bonus Paid to drivers Was Unlawful

The General Counsel alleges that on November 15, 2019, Brooks offered a cash bonus to employees for the purpose of discouraging union activities. However, the record is undisputed that SRM has paid cash bonuses to employees for over 20 years, and Brooks paid cash bonuses to employees at his Driver/Safety Meetings. (Hollingshead, 1572; Brooks, 1110-1112; R. Ex. 91). In fact, two Central Kentucky Region drivers reported receiving the exact same \$100 cash bonus from Brooks in the year prior to November 2019, including Walters, one of the General Counsel’s own witnesses. (Walters, 509-510). The other employee was former Teamster James, who received the same cash bonus directly from Brooks on three occasions in 2019. (James, 875).

SRM’s accounting records further support SRM’s position, establishing Brooks had used SRM COD cash to pay bonuses to employees on 11 occasions in 2019. (R. Ex. 91). There is not a shred of evidence to even infer that this bonus was offered to employees to discourage union

activities other than the Board's misplaced conclusion. Not a single employee has alleged that they themselves believed the bonuses were given for this nefarious purpose. The Board's claim here is a double-edged sword in that if Brooks had failed to pay the cash bonus to these employees, he would have been acting *inconsistently* with his past practice and would no doubt be accused of unlawful activity for that inconsistency. The record simply does not support the Board's contention that the bonus was paid to deter union activity and this claim should be dismissed.

The NLRB in *International Paper Company*, 313 NLRB 280 (1993) analyzed a similar claim involving a company awarding safety jackets to employees at one facility for the first time during the critical period – just one day prior to the election. The General Counsel argued that there was no precedent for the award at the company's Raleigh plant and that it was unlawful conduct. *Id.* at 293. However, the company provided undisputed testimony that there was precedent for the same manager giving gifts of a similar nature at two other plants. The company further elicited testimony from an adverse witness admitting that the company had awarded slightly less valuable jackets 5 years prior to the Raleigh plant employees. *Id.* at 294. The ALJ noted that although the timing of the jacket distribution was suspicious, “mere suspicion is insufficient to establish a violation of the Act.” *Id.* The ALJ held that the award did not violate the employees' Section 7 rights. *Id.*

Like the company in *International Paper Company*, SRM and Brooks clearly have a past practice of providing cash cash bonuses to employees. Moreover, this bonus payment was not made during any critical period. Other than pure speculation, there is no reason to believe that the bonus was paid for any illegal purpose. This claim should be dismissed as well.

C. SRM Terminated Copher for Lawful Reasons

There is no evidence that SRM terminated Copher because “he formed and assisted the Union and engaged in concerted activities, and to discourage [other] employees from engaging in these activities” as alleged in the Third Consolidated Complaint filed in this case. (Third Consolidated Complaint, at 9(f)). The proper test for evaluating whether Copher’s discharge was unlawful is set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *David Saxe Prods., LLC*, No. JD(SF)-25-19, 2019 NLRB LEXIS 473 (Aug. 27, 2019), at *51. Under this test, the General Counsel must prove by a preponderance of the evidence that the employee's union or other protected activity was a substantial or motivating factor in the adverse action. *Id.* The General Counsel do this by demonstrating the employee engaged in protected activity, the employer knew it, and the employer had animus against such activity. *Id.* “If the General Counsel makes the required initial showing, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's actual or suspected union or protected activity.” See *Shamrock Foods Co.*, 366 NLRB No. 117 (2018), at 26-27.

When examining the facts, it is clear that neither Copher’s union activity, nor any other protected activity was a motivating factor in the decision to terminate his employment. In the fall 2019, three different management employees reported an incident to Brooks wherein at least one Winchester driver had failed to report as directed to the Taylorsville plant in mid- to late-October 2019. (Newell, 1336-1337; Stott, 979; Goss, 912-913). The testimony is unrefuted that, Copher insinuated to Newell that he was one of the drivers that did not show up to Taylorsville as scheduled. (Newell, 1337-1339). Despite being the General Counsel’s hearing representative and being present during Newell’s testimony, Copher made absolutely no effort to refute this damning

testimony when called on rebuttal. (Newell, 1337-1338, Copher, 1708-1721). It is further unrefuted that during this same conversation Newell cautioned Copher that “this problem wasn’t going to go away.” (Newell, 1338).

It is unrefuted that, based on this exchange, Newell reported to Brooks that it was Copher who had failed to report to Taylorsville as directed. (Newell, 1338; Brooks, 1176). Brooks could not deal with the issue immediately upon returning from vacation because a large and very complicated pour in Shepherdsville, KY for a top SRM client required his attention, and he spent the following two weeks ensuring that job was running smoothly. (Brooks, 1091).

While Brooks was busy at Shepherdsville, Copher evidently took Newell’s caution that “this problem wasn’t going to go away” to heart. It is well established on the record that refusing work was a serious, dischargeable offense. Apparently and logically sensing that his days at SRM might be numbered, Copher sought out a union organizer and accepted his first trip to Florence in over three weeks. (R. Ex. 74-75).

On Friday, November 8, Brooks visited the Winchester plant. He received a call from Newell as he was pulling into the parking lot. Newell reported that he had overheard at the Georgetown Plant about a drivers only meeting the night before at the Winchester plant. (Brooks, 1093-1094). Brooks assumed the meeting was about drivers refusing to drive to other plants. (Brooks, 1268). Later in the day, Brooks asked Stott if he knew anything about the drivers meeting, and he replied that he did not, but he explained that the Winchester drivers had been bragging to his drivers about getting paid for plenty of hours, but not having to work as hard as his drivers at the Nicholasville plant. (Brooks, 1098, 1283). This conversation caused Brooks to pull up the weekly hours reports for some of the Winchester drivers, including Long, Walters, and Copher. (Brooks, 1182-1184). These reports revealed to Brooks that from September 15 through

November 2, Copher had almost 100% more overtime hours (127.44) as compared to Long (73.23) and Walters (69.71). (R. Ex. 59, 61, 63).

Based on these reports, Brooks concluded that Copher's excessive overtime hours were completely inconsistent with his observations of Copher hanging around the plant and not hauling concrete, but were entirely consistent with the complaints he had heard from Long and Walters regarding Copher riding the clock. (Brooks, 1182-1184). Brooks conferred with Hollingshead who advised Brooks to move forward with the termination if he thought it best. (Brooks, 1101, 1104-1106; R. Ex. 90).

The General Counsel has failed to prove that the employer knew about Copher's union activity and has failed to prove that the employer believed or suspected that the Copher had engaged in or was likely to engage in such activity. *See Meijer, Inc. v. N.L.R.B.*, 463 F.3d 534 (6th Cir. 2006) (holding knowledge of the protected nature of the conduct is an essential and requisite element of an unfair labor practice violation for interfering with protected concerted or union activity); *Gestamp S.C., L.L.C. v. N.L.R.B.*, 769 F.3d 254, 262 (4th Cir. 2014), vacated on other grounds, 573 U.S. 957 (2014) (finding that the employer knowledge requirement entails proving knowledge "on the part of the company official who actually made the discharge decision"). There is no evidence presented by the General Counsel that Brooks, the company official who made the decision to terminate Copher, knew that Copher was engaged in union activity or that he believed or suspected as much.

The evidence actually shows that Brooks did not know of Copher's union activity prior to terminating Copher. Copher had been instructed to keep it quiet and had even lied about it to Highley. (Copher, 58-59, 136-137). Brooks had heard there had been a drivers meeting the night before at the Winchester plant, and had heard there was a sign-up sheet, but there was no mention

of the meeting being a union meeting. (Brooks, 1093-1094). Newell, who reported the meeting to Brooks, denied ever hearing anything about the meeting being a union meeting. The meeting (according to Newell's unrefuted testimony on this point) was actually supposed to have been at the Winchester plant, not off-site, and he said as much to Brooks. (Newell, 1349-1350, 1413-1414). Thus, it would be unreasonable for Brooks to assume that this meeting – occurring at the Company's plant – was a union meeting. And, there was certainly no evidence that Copher even attended this meeting. Given what he knew, as he testified, Brooks assumed that the meeting at the plant was about the drivers' refusal to perform a key part of their jobs – the refusal to assist other SRM plants with hauling loads of concrete. When Brooks questioned Highley, Chasteen, and Stott about the meeting on November 8, none of the three managers knew about the meeting, or who attended, or what the meeting was about. (Brooks, 1095-1098). There is little if any record evidence connecting Copher to this meeting whatsoever.

The only record testimony by which the Company could have known that this meeting had anything to do with union activity came only on rebuttal from Long. Long testified that she did mention that this was a union meeting while talking to Chasteen and Jeff Ruud. (Long, 1687-1689). But Long denied saying anything in this conversation about a "sign-up sheet," which Newell had heard, calling into question Long's specific recall of saying "union" in discussing the meeting. (Long, 1687-1689; Newell, 1350). Furthermore, her testimony is contradicted by Brooks' testimony regarding his conversation with Chasteen, during which Chasteen said he did not know what the meeting was about. (Brooks, 1097). Based upon these inconsistencies, coupled with Long's inability to remember exactly when her conversation took place, it is entirely possible that Newell and Long were not even talking about the same conversation. And, even more damning to Long's credibility is her own testimony in which she admitted that she had not gone

to the union meeting because she was in fear of losing her job. (Long, 1688). In almost the same breath, however, she claims to have told a Plant Manager, at another plant, on the very next day, that there had been a union meeting. (Long, 1688). Logic dictates that if Long was so fearful that she did not attend the union meeting, she would not have told a Plant Manager at another plant about the union meeting on the very next day.

Indeed, the General Counsel's entire case in this regard hangs on statements which Brooks is alleged to have made to Highley on November 8. This in turn is based upon testimony of Highley and Copher. Copher was not a direct witness or participant in these conversations. His testimony is based solely upon hearsay of what Highley said Brooks said. Furthermore, the testimony of uncle and nephew are not even consistent on what Brooks allegedly said, and Copher significantly "embellishes" on Highley's limited recollection.

This leaves General Counsel's claim hanging from the testimony of Highley, who alternatively plays the role of both villain and victim in the General Counsel's story. As illustrated in the above statement of facts, Highley clearly is the least credible witness to testify in this entire case. To fully believe his testimony, one would have to discredit company records as well as aspects of the testimony of most witnesses, including many of the General Counsel's own witnesses.

If anything, the evidence reveals that Copher knew he was about to be terminated, and wanted to muddy the waters by injecting the word union during the termination meeting. Anticipating his termination, Copher came to the termination meeting loaded for bear, complete with a recording device and his own talking points. When Brooks started telling Copher he had heard about Copher's negative attitude from some people, and before he could finish his thought, Copher interrupted him and blurted out the word union in the discussion, saying "he (referring to

his uncle, Highley) asked me if I had to say anything about the Union or anything. I said ‘nope.’” (Brooks, 1104-1106; R. Ex. 90). Brooks then responded that that was not what he was talking about. (Brooks, 1104-1106; R. Ex. 90). Even Copher noted Brooks’ surprised look on his face when Copher started talking about the union, showing that Brooks was not aware of any such activity. Brooks made clear he was not there to talk about the union, but was hearing some other things “too” in addition to Copher’s negative attitude, and he was being let go for his overall job performance as well. (Brooks, 1104-1106; R. Ex. 90; Copher, 142). Copher knew his days of riding the clock and dodging trips to other plants were over after he had been caught by Newell not showing up to Taylorsville. Copher clearly had heard Brooks tell Highley a few weeks earlier to fire employees who refused to go to other plants as directed, and he knew what was coming. (Copher, 179). In a last-ditch effort to save his job, Copher serendipitously recorded this conversation and blurted out something about a union before Brooks could even get a full sentence out. And, there is no dispute that, by this time, Brooks already had made his decision to terminate Copher. (Brooks, 1101; Copher, 62).

The General Counsel has failed to present credible evidence to establish that SRM knew, believed, or suspected that Copher had engaged in or was likely to engage in union activity or other protected activity prior to his termination. The General Counsel may argue that Copher also engaged in protected activity by refusing to go to Florence or refusing to assist in hauling loads at other plants. However, the record shows that this, in fact, was a part of a driver’s job – regardless of which plant – and that this refusal would constitute a partial strike, which is not protected under the NLRA. *First Nat’l Bank of Omaha*, 171 NLRB 1145, 1151, enforced, 413 F.2d 921 (8th Cir. 1969). Partial strikes, where employees continue working on their own terms, are therefore unprotected by Section 7 of the Act. *Id.* at 1149-51; *Valley City Furniture*, 110 NLRB 1589, 1594

(1954), enforced, 230 F.2d 947 (6th Cir. 1956). Employees, thus, may not “refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises.” *Audubon Health Care Ctr.*, 268 NLRB 135, 136, (1983) (finding that nurses engaged in a partial strike when they refused to perform some of their job functions while performing others); *see Highlands Hosp. Corp.*, 278 NLRB 1097, (1986) (finding that the security guards engaged in a partial strike when they failed to perform some of their functions during a strike by the hospital employees); *see also N.L.R.B. v. Local Union No. 1229*, 346 U.S. 464, 476 (1953), at n.12 (“An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work.”) (citations omitted).

Similarly, the General Counsel cannot establish that the employer had animus against union activity or other protected activity. As already established, the record contains ample, unrefuted instances demonstrating that SRM harbors no anti-union animus. All of this evidence makes it unlikely, or at least less probable that SRM would open its door to other Teamsters, only to go to great lengths to discriminate against Copher. In context, the General Counsel’s allegations defy common sense.

Furthermore, even if the General Counsel had made out a prima facie case, SRM has met its burden to establish by a preponderance of the evidence that it would have taken the same action even in the absence of Copher’s actual or suspected union or protected activity. The “[National Labor Relations] Act recognizes an employer’s latitude to discharge an employee for cause.” *DIRECTV, Inc. v. N.L.R.B.*, 837 F.3d 25, 34 (D.C. Cir. 2016). The facts recounted above clearly demonstrate that SRM would have terminated, and in fact did terminate, Copher in the absence of his unknown union activity.

Although SRM did not know at the time, SRM has recently acquired evidence that Highley had actually written up Copher for some of this same behavior – not wanting to work and being a no call, no show on three occasions in just 4 months. (R. Ex. 80; Highley, 1043-1054; Brooks, 1115-1116, 1138, 1148-1149). Unfortunately, Highley failed to submit these absence reports to Human Resources, despite testifying that he would have turned them in had Copher missed consecutive days or weeks off so that Human Resources could make a determination about these policy violations. (Highley, 1051-1052, 1054). Had SRM known about this after-acquired evidence at the time, Copher would have been terminated for violating the Company’s Attendance Policy which states that an employee will be discharged after the second no call, no show. (Brooks, 1149; Hollingshead, 1570-1572; R. Ex. 1). As a result, Copher is barred from reinstatement under the after acquired evidence rule. See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993). He is also barred from back pay from the discovery of the after acquired evidence on July 3, 2020. Also see *John Cuneo, Inc.*, 298 NLRB 856, 856 (1990) (applying after acquired evidence rule when evidence first uncovered during unfair labor practice hearing).

Confronted with the clear applicability of the after-acquired evidence rule to Copher, the General Counsel is relegated to arguing that it should be entitled to an adverse inference in absence of documents pertaining to other discharges for the same reason. (Hollingshead, 1607-1610). Specifically, the General Counsel argues that this evidence should have been produced pursuant to its subpoenas. (Highley, 1043-1047). The General Counsel’s argument here smacks of desperation. First, SRM made a good faith effort to comply with the excessive and overly broad subpoenas. The record clearly establishes that SRM did not produce the no-call, no-show records pertaining to Copher for the simple reason that it did not become aware of the existence of those records until after the hearing commenced. (Highley, 1043-1047). Furthermore, the reason SRM

was not aware of those records is that Highley, Copher's uncle, the Charging Party's hearing representative, and an alleged discriminatee, failed to provide copies to SRM's Human Resources department. (Highley, 1051-1052). Presumably, this was to protect his nephew from termination. Second, SRM was under no continuing obligation to update its production during the course of the hearing by examining the subpoenas on a daily basis to see if there might be any other responsive information. Federal Rule 45, and thus Board procedures, imposes no such obligation, and the General Counsel may not do so by fiat. Third, and perhaps most importantly, on July 3, the same day the after-acquired evidence was discovered, SRM's counsel promptly shared that information on that same day with attorneys for both the General Counsel and the Charging Party. (Highley, 1043-1047). Because the hearing was not scheduled to resume until ten days later, the General Counsel and the Charging Party had many options at their disposal. They could have issued new subpoenas. They could have requested a conference with the Judge. They could have filed objections or a motion in limine prior to resumption of the hearing on August 13. Instead, they did nothing and waited until SRM sought to introduce the evidence to object to it. Even then, once the evidence was admitted, they could have sought a hearing continuance to issue another subpoena. They did not do that either. Simply stated, SRM did nothing wrong that would support an adverse inference. The after-acquired evidence rule clearly applies to limit any remedy being requested for Copher.

D. Requiring Employees to Sign Severance Agreements if They Desired to Receive Post-Termination Benefits Was Not Unlawful

In January 2020, SRM provided all of the drivers at the Winchester plant with Separation Agreements offering four weeks of severance pay in exchange for a waiver of claims against SRM. (Brooks, 1127). Initially, Brooks told the employees they would receive two weeks of severance pay, but he later told the employees they would receive four weeks of severance pay in exchange

for their execution of a Separation Agreement. (Brooks, 1127). However, Carmichael confirmed with Brooks that he could still elect the two weeks' severance option if he did not want to sign the Agreement. (Carmichael, 570, 619-620). Brooks distributed the Separation Agreements to employees and answered any questions asked on Monday January 13, 2020. (Brooks, 1128-1129). All employees immediately executed the document accepting the offer of four weeks' severance pay, and no one revoked their Agreement thereafter, despite having the Union review the Agreement. (G.C. Exs. 3, 4, 11, 19, 20, 21; Long 257-258). Accepting severance pay and signing the Separation Agreements was voluntary, and the employees were free to reject the offers of severance.

As an initial matter, the provisions of the Separation Agreements make clear that they are not intended to, nor do they have the effect of, restricting an employee's right to participate in an NLRB investigation or preventing employees from making good-faith, truthful reports to any government agency with oversight responsibility for SRM. (G.C. Exs. 3, 4, 11, 19, 20, 21).

Additionally, contrary to the allegations in the Complaint that SRM required employees to sign the Separation Agreements "because the ... employees ... formed and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities", (Third Consolidated Complaint, para. 9(f)), the employees were not "required" to sign the Agreements. They chose to do so. Moreover, no Union activity occurred after mid-November 2019. After that, the drivers themselves made little to no mention about the Union, and even then, any discussion concerned their negative attitude toward unions. (Newell, 1432). The record is completely devoid of any evidence that the Separation Agreements were an attempt by SRM to retaliate against its employees for union activity or other protected, concerted activity, but rather

SRM was offering employees financial assistance, if they wished to receive such assistance on the terms offered, while they sought other jobs.

The analysis in *Baylor University Medical Center*, 369 NLRB No. 43, (2020) is applicable here and precludes a finding of unlawfulness. Baylor was alleged to have violated Section 8(a)(1) by offering separation agreements to certain laid off employees. The complaint specifically alleged that a “no participation in claims” provision, a confidentiality provision, and a non-disparagement provision, were all unlawful. *Id.* at 3-4. The ALJ found that the no participation in claims provision and the confidentiality provisions were unlawful, applying the analysis set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), which is typically used to assess the “lawfulness of mandatory work rules relating to employees’ terms and conditions of employment.” *Baylor* at 1. Even under that standard, the ALJ had ruled that the non-disparagement clause in the challenged agreement was lawful, which clause barred “false, disparaging, negative,...or derogatory remarks”; as to that clause, the ALJ found that the provision was a rule “requiring employees to abide by basic standards of civility.” *Id.* at 4 (internal citations omitted).

On appeal, the Board determined that all three provisions were lawful and dismissed the complaint. The Board first disagreed with the ALJ’s application of the *Boeing* standard, explaining that *Boeing* should be used to assess allegations relating to work rules and further explaining that the provisions in question were not work rules but rather terms in a severance agreement. The Board noted that these provisions: (1) were part of an agreement that was not mandatory and were not a condition of continued employment; and (2) the agreement exclusively applied to “postemployment activities and ha[d] no impact on terms and conditions of employment or any accrued severance pay credit or benefits arising out of the employment relationship that the

Respondent would be obligated to pay regardless of whether a departing employee signed [the agreement].” *Id.* at 1.

SRM offered the Separation Agreements under circumstances that closely mirror those in *Baylor*, and its conduct was likewise lawful. First, the SRM Separation Agreements were completely voluntary. No employee was required to sign a Separation Agreement as a condition of continued employment. Second, the Separation Agreements applied exclusively to post-employment activities; that is, the exchange was the payment of post-employment severance payments that SRM was not legally obligated to pay in return for promises regarding post-employment activities.

While the Board has found that the offering of some severance agreements, such as those offered in *Clark Distribution Systems, Inc.*, 336 NLRB 747 (2001), violate Section 8(a)(1) and Section 8(a)(3), those agreements contained language and were offered under circumstances that are distinguishable from the instant case. In *Clark Distribution Systems, Inc.*, the Board found that the employer violated Section 8(a)(1) by “conditioning acceptance of the severance package on a requirement that employees not participate in the Board’s investigative process.” *Id.* at 748. But, here, there is no such provision in SRM’s Separation Agreements. SRM’s Separation Agreements not only do not require employees to forego participation in the Board’s investigative process, but actually state expressly that they do not “prohibit Employee from cooperating with any government investigation or court order or from making a good-faith, truthful report to any government agency with oversight responsibility for the Company.” (G.C. Exs. 3, 4, 11, 19, 20, 21).

Furthermore, the Board in *Baylor* overruled *Clark Distribution Systems* “to the extent it holds that it is invariably unlawful to offer employees a severance agreement that includes a non-

assistance clause” and limited that ruling, as well as the rulings in *Shamrock Foods Co.*, 366 NLRB No. 117 (2018) and *Metro Networks*, 336 NLRB 63 (2001) to their specific fact patterns. *Baylor* at 2, n. 6. This is a very important distinction as it relates to the instant case because in *Clark Distributions*, *Shamrock Foods*, and *Metro Network*, the employers were found to have discharged the employees who were offered severance agreements in an effort to discourage or limit union activity during union campaigns.

By contrast, here there is no evidence in the record that SRM was retaliating against employees for union activity or protected concerted activity. In fact, there is little evidence that any of these drivers participated in any protected concerted activity at all in the two months prior to being offered the Separation Agreements. (Palmer, 374-374; Newell, 1432). The solitary exception to this is Means, who was observed wearing a shirt with a Teamsters logo while at work. (Brooks, 1124). Ironically, Means ended up being the only driver who was offered the opportunity to transfer. (Brooks, 1130). In fact, with limited exceptions, there is very little if any evidence that any of these drivers ever participated in any union or other protected concerted activity at all. There certainly is no evidence that SRM was aware of that activity or that it was the catalyst for offering them Separation Agreements. Rather, quite the opposite is true. For these reasons, SRM submits that the Board’s ruling in *Baylor* is applicable here and shows that SRM’s conduct in offering separation agreements was not in violation of Section 8(a)(1) or Section 8(a)(3) of the NLRA.

E. SRM’s Closing of the Winchester Plant and Termination of the Drivers was Lawful

The General Counsel consistently has pursued the shutdown of the Winchester plant as a partial closing (23-24; Third Consolidated Complaint, para. 9(e)). Therefore, to prevail under either his 8(a)(1) or 8(a)(3) plant closing claims, General Counsel must first meet the stringent

threshold requirements set forth in the United States Supreme Court’s decision in *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263. The General Counsel does not even come close to proving these claims.

Darlington involved claims under Sections 8(a)(1)(3) and (5). Addressing all of those claims, the Supreme Court held that an employer may close part of its business, even if the closing is motivated by anti-union animus, unless it is also “motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.” *Id.* at 275. See also *Bruce Duncan Co., Inc.*, 233 NLRB 1243 (1977). Because the termination of the Winchester drivers was a direct result of the Winchester plant’s conversion to an on-demand facility, the layoff and partial closure should be analyzed together under *Darlington*. See *Rav Truck & Trailer Repairs*, 369 NLRB No. 36 (2020).

Furthermore, even if the General Counsel could meet these threshold *Darlington* requirements, an 8(a)(1) violation can be found only if the interference with Section 7 rights outweighs the business justification for the employer’s action. An 8(a)(3) violation can be found only if the employer’s decision to close is motivated by discriminatory reasons. *Id.* at 269.

In evaluating whether the General Counsel has met these standards (i.e., the unlawful interference “outweighs” the business justification for an 8(a)(1) claim and the discriminatory motivation for an 8(a)(3) claim), the Board uses a burden-shifting framework of *Wright Line*, 251 NLRB 1083 (1980) *FiveCAP, Inc. v. N.L.R.B.*, 294 F.3d 768, 777-778 (6th Cir. 2002); *Amglo Kemlite Labs., Inc.*, 360 NLRB 319, 325 (2014), enf’d 833 F.3d 824 (7th Cir. 2016); *Airgas USA, LLC v. N.L.R.B.*, 760 F. App’x 413, 417 (6th Cir. 2019), *reh’g denied* (2019). Thus, because General Counsel’s 8(a)(1) claims turn on SRM’s motivation, (see Third Consolidated Complaint,

paras. 9(f) and 11), the *Wright Line* analysis applies to both the 8(a)(1) and (3) claims. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, at n. 11 (2019). The critical question is whether the employer's conduct was motivated by the employees' protected activity under a *Wright Line* analysis, as discussed above, which places the initial burden on the General Counsel to show the employee's protected activity was a motivating factor for the adverse action. To do so, the General Counsel must demonstrate: "(1) the employee's protected activity, (2) the respondent's knowledge of that activity, and (3) the respondent's animus." *Anglo Kemlite Labs., Inc.*, 360 NLRB 319, 325 (2014). "The burden then shifts to the respondent to show that it would have taken the same action even in the absence of the employee's protected activity." *Id.* The General Counsel cannot meet its burden here.

1. The General Counsel Has Failed to Meet the Threshold *Darlington* Requirements

As noted above, in *Darlington*, the Supreme Court held that an employer may close part of its business, even if the closing is motivated by anti-union animus, unless it is also "motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect." *Darlington* at 275. Thus, in this case, even before any analysis of whether the partial closing was done for "anti-union animus" under *Wright Line*, the General Counsel must satisfy the threshold burden under *Darlington*. He has not done so. In fact, it is unclear what if any attempt General Counsel has made to satisfy that burden.

First, there is absolutely no evidence that the closing of the Winchester plant was in any way "motivated by a purpose to chill unionism." It is undisputed that any potential union drive at the Winchester plant was effectively over two months before the plant closing. (Palmer, 374-374; Newell, 1432). There was next to no union activity at Winchester during the two months leading

up to the plant closing, and there is certainly no evidence of any potential union organizing at any other plant. (Palmer, 374-374; Newell, 1432). Likewise, there is no allegation that SRM engaged in any unfair labor practices during that same two-month period. Under these facts, it is illogical to assume that SRM decided to close the plant to chill a union drive that had been dead for two months. The General Counsel presented zero evidence that the plant closing was motivated by a desire to chill unionism at Winchester, and much less at any other plant. In fact, any evidence is to the contrary. Simply stated, if SRM desired to chill unionism at the remaining [Central Kentucky] plants, Hollingshead and Brooks would have never hired JJ and his fellow Teamsters to work at other SRM plants in the Central Kentucky Region. Any suggestion to the contrary is unsupported by the evidence and is contrary to common sense. It is pure folly to suggest that SRM desired to chill unionism in Lexington but not in Louisville. Yet, that is General Counsel's case.

Second, there likewise is no evidence that SRM could have reasonably foreseen that the closing of the Winchester plant would chill unionism at other plants. There is no evidence of any significant union activity at the Winchester plant for the last two months, much less any evidence of knowledge of such activity by drivers at other plants. It is true that two months earlier, there was speculation that Copher may have been terminated for union activities. But there is no evidence that Hollingshead or Brooks even knew of this speculation. Furthermore, it would be a quantum leap to say that SRM could have reasonably foreseen that this somehow would make other drivers think that the closing of the plant two months later somehow was also designed to chill unionism. There was no union campaign going on at that time. Simply stated, at that moment in time, there was nothing to chill.

Third, the General Counsel did not present evidence that organizing activity was even going on at other plants, much less that it had been "chilled" by the closing of the Winchester

plant. In light of those plain facts, there is no reason that SRM would have guessed, much less foreseen, such a chilling effect. Simply stated, there was nothing to chill.

The General Counsel has not satisfied either of the *Darlington* threshold requirements, much less both of them.

2. Even If The General Counsel Could Satisfy *Darlington*, He Has Not Met His Burden Under *Wright Line*

The Board's recent decision in *Tschiggfrie Properties* is incredibly instructive in the present case. As the Board repeatedly emphasized, "*Wright Line* is inherently a causation test." *Id.* at 7. At its heart, the *Wright Line* test is simply an analytical framework in order to assess whether the General Counsel has proved causation. Furthermore, in words directly applicable to this case, the *Tschiggfrie Properties* Board held:

"Thus, the General Counsel does not *invariably* sustain his burden by producing—in addition to evidence of **the employee's protected activity** and the employer's knowledge thereof—*any* evidence of the employer's animus or hostility toward union or other protected activity. Instead, the evidence must be sufficient to establish that a causal relationship exists between **the employee's protected activity** and the employer's adverse action **against the employee.**"

Id. at 8 (italics original; bolding added).

An example given by the *Tschiggfrie Properties Board* is even more enlightening:

"[F]or example, an isolated, one-on-one threat or interrogation **directed at someone other than the alleged discriminatee and involving someone else's protected activity**—may not be sufficient."

Id. (emphasis added).

Applying *Wright Line*, as so clarified in *Tschiggfrie Properties*, it is abundantly clear that the General Counsel has fallen woefully short of meeting its initial burden of proof.

First, with the exception of Walters (who attended the November 7 meeting with Palmer and Copher) and Means (who wore a shirt with a Teamsters' logo to work one day), there is no evidence that these employees engaged in protected activity. (Walters, 428-429; Brooks, 1124). Even if the drivers' refusal to go on certain runs would be considered protected, it simply is too remote in time to have any nexus to the plant closing.

Second, with the same exceptions, SRM did not have knowledge of such activity. In fact, there is no evidence that SRM knew of Walters' meeting attendance prior to the plant closing.

Third, there is no evidence that the plant closing was prompted by anti-union animus, and there is scant evidence of anti-union animus at all. The only evidence of anti-union animus is based upon the self-serving and contradictory testimony of Copher and Highley. Both of these witnesses suffer from serious credibility problems. Furthermore, their testimony is greatly outweighed by the uncontradicted and voluminous record evidence establishing a decided lack of anti-union animus. Perhaps most importantly, in the words of the Board in *Tschiggfrie Properties*, any evidence of animus is not sufficient to sustain the General Counsel's burden. "Instead, the evidence must be sufficient to establish that a causal relationship exists between **the employee's protected activity** and the employer's adverse action **against the employee.**" *Id.* Even disregarding the evidence showing the lack of animus and crediting Copher and Highley's dubious testimony, that testimony does not in any way establish a causal relationship between the plant closing and the termination of other drivers two months later.

Only Means perhaps has a colorable argument here because, unlike the others, he at least engaged in some minor union activity by wearing a Teamsters' shirt one day in the two-month period leading to the plant closing. (Brooks, 1124). Still, this unrebutted evidence is not sufficient to establish a causal link under the clear language of *Tschiggfrie Properties*. This is all the more

true because SRM volunteered this information at the hearing, and Means is the only driver who was offered a transfer when the plant was closed. (Brooks, 1130). If Means' wearing the Teamsters shirt proves anything, it proves that the drivers were not as fearful for their jobs as the General Counsel would have the Judge believe. The fact that he was the only driver offered to transfer to another plant guts any argument about union animus.

Because the General Counsel has not met its burden under *Wright Line/Tschiggfrie Properties* as it relates to the plant closing and termination of the remaining drivers, this claim should be dismissed.

3. Even If General Counsel Met its Burdens Under *Darlington* and *Wright Line/Tschiggfrie Properties*, SRM Clearly Has Established That It Would Have Closed The Plant and Terminated The Drivers In The Absence of Any Union Activity

As a threshold matter, the mere lack of union activity during the two months prior to plant closing goes a long way in satisfying SRM's burden. It strains credulity to believe that, absent business reason's, SRM would have shuttered the plant because of limited union activity by another driver two months earlier.

The real reasons SRM converted the Winchester Plant to an on-demand facility was at least in part because the Winchester drivers refused to do the work that was expected of them, (Hollingshead, 1566), and that plant's underperformance. The bottom line was the plant was losing money all things considered, and efforts to turn things around were resisted by the employees. There was no light at the end of the tunnel.

The Board recently found that the employer had established that economic reasons motivated its decision to close a plant despite the presence of "low-level union activities" as is the case here. In *Dura-Line Corp.*, 366 NLRB No. 126 (2018), the Board found that Dura-Line "established that it would have closed [its] plant and relocated production for compelling economic

reasons regardless of the Union’s presence there and the relatively low-level union activities that [the Plant Managers] complained about.” *Id.* at 2. Among these reasons, similar to SRM’s Winchester plant, was that Respondent’s Middlesboro, KY plant was not efficient. *Id.* at 8. The Board found that Respondent’s desire to move its location from Kentucky to Tennessee was “critical to increasing the productivity and efficiency of the Respondent’s operations,” and was not unlawful under 8(a)(1) or 8(a)(3). *Id.* at 2-3. See also *Gunderson Rail Services, LLC*, 364 NLRB No. 30 (2016), at 43 (finding facility closure lawful where employer was motivated by “more global concerns” than a union drive, such as “to increase profits and meet Wall Street demands” after a hostile takeover attempt); *Chemical Solvents, Inc.*, 362 NLRB 1469 (2015), at 1475 (rejecting allegation that “a smattering of comparatively low-level union activities [e.g., grievance-filing and the mention of a possible strike] would have played a significant role in the Respondent’s decision to shut down an entire division” at an annual savings of \$300,000). Similarly here, the record evidence of union activity in this case is minimal as compared to the financial reasons for closing the plant. The General Counsel’s theory that this decision was made simply to avoid union representation of its employees cannot be credited, particularly when SRM had already intentionally purchased four unionized facilities in Ohio.

Accordingly, even if the General Counsel could satisfy his burden under both *Darlington* and *Wright Line/Tschiggfrie Properties*, the record clearly establishes that SRM would have taken the same action even in the absence of any protected activity. In fact, SRM has taken this very action on several occasions prior to January 2020 without any allegations of protected activity looming. Hollingshead converted three facilities to on-demand status – Brooks, Somerset, and Riverside. (Brooks, 1125-1126, 1216). This process is customary in the concrete industry, and based on SRM’s past practices, is customary for SRM as well. (Hollingshead, 1554). The record

also substantiates Hollingshead's decision not to transfer the employees based upon the reports he received concerning their lackluster performance. (Hollingshead, 1674).

SRM has clearly established that it decided to close the Winchester plant and terminate the remaining drivers for business reasons, unrelated to any union activity. Therefore, those claims should be dismissed.

F. The General Counsel's Requested Remedy Is Unwarranted

1. The Severance Agreements That Were Voluntarily Signed By The Drivers Bar Them From Reinstatement Or Backpay

With the exception of Copher and Highley, all alleged discriminatees voluntarily signed severance agreements releasing all of their claims and waiving reinstatement and backpay. (See e.g G.C. Ex. 3 at para. 3; also See G.C. Exs. 4, 11, 19, 20, 21). Under Board law, the enforceability of the severance agreements is governed by the factors first set forth in *Independent Stave Co.*, 287 NLRB 740 (1987). Also see *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007). These factors clearly weigh in favor of enforceability.

First, "there is no dispute that the alleged discriminatees voluntarily agreed to be bound." *Id.* at 615.

Second, the severance agreements are reasonable under all of the facts and circumstances. At that time, "no charges had been filed" as to these employees. The only pending charges related to the discharges of Copher and Highley. *Id.* In the words of the Board in *BP Amoco* and directly applicable to this case: "[T]he prospect of litigation was not obvious. Moreover, there was significant risk that a charge * * * would not be meritorious. Little or no union activity was occurring at the time * * *, and the record does not show that all of the alleged discriminatees had engaged in protected activity or that the Respondent was aware of it." *Id.* at 615-616. At that moment in time, there were only potential claims and no clear-cut violations, especially as to these

specific drivers. The drivers clearly considered the additional consideration valuable to them, and none of them revoked after signing. (See e.g Long, 257, 259).

Third, there was no fraud or coercion. The employees were not pressured to sign the severance agreements and had the ability to take them with them. (Long, 253-266). One employee even consulted with the union, who in turn consulted with legal counsel. (Long, 253-266). Smyrna readily admits that the employees were told that they were eligible for rehire despite boilerplate language to the contrary, (see e.g. G.C. Ex. 3 at para. 14; Brooks, 1215), and stands by that representation. That representation was not in any way fraudulent. There is no evidence to the contrary.

Fourth, there is not a history of unfair labor practices. In fact, there is overwhelming history establishing a lack of union animus.

The precedential value of *BP Amoco* to this case is compelling, not only for the similarities cited above but for other reasons. The Board in *BP Amoco* enforced the settlement agreements in the context of a case containing serious enough unfair labor practices that the Board saw it necessary to overturn an election result. Moreover, *BP Amoco* was decided when the Board was Republican controlled. It is anticipated that the General Counsel will instead rely on the subsequently decided case of *A.S.V, Inc.*, 366 NLRB No. 162 (2018). *A.S.V.* involves drastically different facts and is distinguishable on its face. Furthermore, it was decided over a strong dissent by a Republican member of the Board. See *Id.* at 5-8 (Member Kaplan, dissenting). For these reasons, *A.S.V.* is not a good predictor as to how the current Board would view the separation agreements signed in this case.

BP Amoco remains good law and represents the best insight as to how the current Board would view this issue. Under *Independent Stave* and *BP Amoco*, the Separation Agreements

should be honored. At worst, even if any provisions are deemed to be unenforceable due to illegality or any other reasons, such provisions can be severed from the Agreements, leaving the remainder of the Agreements intact. (See e.g G.C. Ex. 3 at para. 16). As a result, it would be inappropriate to award reinstatement or backpay for the drivers who signed those Agreements.

2. An Order To Reopen The Winchester Plant Would Be Inappropriate

Under established Board law, the Board’s remedy is to be tailored based upon “the nature and extent of the violations.” See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). A broad order must be supported by factual justification. *RAV Truck & Trailer Repairs, Inc.*, 369 NLRB No. 36 (2020). Here, there is no such justification for an order to reopen the Winchester plant.

Prior to this case, there is no history of unfair labor practices. There is a strong history of a lack of anti-union animus. Even in this case, the questionable allegations are hardly pervasive in nature. In light of the strong business reasons for closing the plant, ordering the plant to reopen would essentially be forcing SRM into making an unwise business decision by reopening a plant that was losing money.

Furthermore, in this case employees could be reinstated without ordering the reopening of the Winchester plant because there are two other SRM plants in the Winchester market within reasonable commuting distance.

3. An Order Reinstating The Alleged Discriminatees Would Be Inappropriate

While an order of reinstatement would be less draconian than an order to reopen the plant, it still would pose significant problems. The harsh reality is that there is only so much work, especially in the midst of the current pandemic and particularly in the slower winter months. Any order of reinstatement of these employees necessarily would result in the displacement of other employees in the Lexington market. Unlike the Winchester employees, this would include

employees that actually do their job without having to be told what to do every day. It also would include employees with higher seniority. Such an order would be inappropriate under the facts of this case. See e.g. *NLRB v. G & T Terminal Packaging Co, Inc.*, 246 F.3d 103 (2nd Cir. 2001).

4. An Order Reinstating Copher and Granting Him Full Backpay Would Be Inappropriate

As discussed above, Copher is barred from reinstatement under the after acquired evidence rule. See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993). He is also barred from back pay from the discovery of the after acquired evidence on July 3, 2020. Also see *John Cuneo, Inc.*, 298 NLRB 856, 856 (1990) (applying after acquired evidence rule when evidence first uncovered during unfair labor practice hearing). Copher is likewise barred from reinstatement and backpay because of his padding of his hours by staying on the clock and collecting excessive overtime while simultaneously refusing work and allowing others to do runs for him. See *NLRB v. Breitling Brothers Construction, Inc.* 378 F.2d 663 (10th Cir. 1967); *NLRB v. Magnusen*, 523 F.2d 643, 646 (9th Cir. 1975) (“Padding of work hours is equivalent to the theft of money.”).

5. Reinstatement of Highley Would Be Inappropriate

Reinstatement of Highley would be particularly inappropriate. If Highley were to be reinstated at all, it should be to a non-supervisory position. Reinstating Highley as Plant Manager would place him in day to day control of the entire Winchester plant. This would impinge on SRM’s ability to manage its work force, and raise concerns over customer relations, legal compliance and safety. Placing an additional manager at the facility with Highley potentially would be a violation of the Board’s order. This would unjustly impinge on SRM’s recognized right to manage its business. See e.g. *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

IV. CONCLUSION

Because the Charges lack merit, this case should be dismissed in its entirety. In the event the Judge concludes otherwise, it is respectfully requested that any remedy be appropriately limited and tailored to the violations found.

Respectfully submitted,

s/Stephen A. Watring

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August, 2020, a copy of the foregoing was forwarded via ordinary mail to:

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