

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

SMYRNA READY MIX CONCRETE, LLC

and

GENERAL DRIVERS, WAREHOUSEMEN AND
HELPERS, LOCAL UNION NO. 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Cases 09-CA-251578
09-CA-252487
09-CA-255678
09-CA-258273

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I. OVERVIEW

This matter is before Administrative Law Judge Arthur Amchan upon General Counsel's Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing in Cases 09-CA-251578, 09-CA-252487, 09-CA-255678, and 09-CA-258273, which issued on May 13, 2020. The above cases are all based on charges filed by General Drivers, Warehousemen and Helpers, Local Union No. 89, Affiliated with the International Brotherhood of Teamsters ("Union").

The complaint alleges that Smyrna Ready Mix Concrete, LLC ("Respondent") violated Section 8(a)(1) of the Act by interrogating its employees about their union activities and the union activities of other employees, promising employees that they would no longer be required to drive to Respondent's facility in Florence, Kentucky in response to employees' union organizational activities, and soliciting employee complaints and grievances and thereby impliedly promising its employees that they would receive increased benefits and improved terms and conditions of employment if they refrained from union organization activity.

The complaint further alleges that Respondent violated Section 8(a)(1) and (3) by discharging supervisor Aaron Highley because he refused to commit unfair labor practices, discharging employee Sunga Copher, James Bowling, Randall Carmichael, Nicole Long, Jason Means, David Smith, and Sheldon Walters because the employees engaged in union activity and to discourage employees from engaging in these activities, by granting employees at its Winchester, Kentucky facility cash bonuses of \$100, requiring employees to sign separation agreements with unlawful provisions as a condition of receiving severance pay, and ultimately partially closing the Winchester, Kentucky facility and converting it to an on-demand facility, all because the employees assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

The administrative hearing on the allegations of the third consolidated complaint was held via Zoom Videoconference on June 29 through July 2, 2020 and continued on July 13 through July 15, 2020. The record evidence convincingly supports Counsel for the General Counsel's legal argument.

II. FACTS

A. Respondent's Employees Start a Union Organizing Drive; Respondent Responds by Instructing Plant Manager to Surveil Union Activity, by Interrogating Employees about Union Activity, and by Discharging Lead Union Activist

Smyrna provides ready-mix concrete, material hauling and concrete pumping services in several states, including in central Kentucky where it operates 15 plants.¹ (Tr. 20, 32-33) Three plants near Lexington, Kentucky – Georgetown, Nicholasville and Winchester, the plant involved herein, were acquired in 2017. (Tr. 31, 733) Aaron Highley was the plant manager at Winchester

¹ / References to the transcript will be designated as (Tr. __); Joint Exhibits will be designated as (Jt. Ex. __); General Counsel's Exhibits will be designated as (G.C. Ex. __); Union's Exhibits will be designated as (Un. Ex. __); and Respondent Exhibits will be designated as (Resp. Ex. __).

at the time and continued in the position when Smyrna acquired the plant. (Tr. 32, 733) In 2018, Ben Brooks became the general manager for the Smyrna's 15 central Kentucky plants, including the three Lexington-area plants. (Tr. 48, 735, 685-686)

In the summer of 2019, about 10 drivers, including 9 mixer-operators and 1 tanker driver, as well as 2 mechanics, worked at the Winchester plant. (Tr. 34-35, 739) Mixer-operators typically hauled loads of cement from the Winchester plant, but could also be dispatched to other Central Kentucky plants. (Tr. 40, 43, 291-292) In the summer and fall of 2019, Winchester drivers were directed to assist at the Florence, Kentucky plant, which was over an hour's drive from Winchester. (Tr. 40, 42-43, 230-231, 291-293) Frustrated with the Florence assignments, the drivers decided as a group to refuse to volunteer for out-of-area assignments. (Tr. 120-121, 123, 231-233, 638-639, 679) Highley conveyed the drivers' position to Brooks, who responded that the drivers must comply with the Florence assignments or else they would be discharged. (Tr. 179, 423) The drivers began to discuss organizing a union. (Tr. 50-51)

Around late October 2019, mixer-operator Sunga Copher, who is also Highley's nephew, contacted Teamsters Local No. 89 (the Union) and openly discussed unionization with several coworkers. (Tr. 50-55) Copher first met with the union organizer on October 26, 2019. (Tr. 345-347) Copher set up a follow up meeting, and on November 7, 2019 after work hours, the union organizer met with Copher and two other Winchester employees, Sheldon Walters and Charles Grimm. (Tr. 56-57, 365-366)

On November 8, 2019, Brooks visited the Winchester plant. (Tr. 60, 748-749, 1092-1093) Brooks informed Highley that employees had met with a union the previous evening and that Copher was involved. Highley denied any knowledge of an employee effort to unionize. (Tr. 749-750) After stating that he would investigate further, Brooks asked Highley to provide

him with names of employees involved with the union effort. (Tr. 750, 753) Highley spoke to Copher that afternoon, telling him that Brooks had received a call about union activity, believed that Copher was involved, and wanted Highley to find out what was going on. (Tr. 58-59) Highley then asked Copher if he knew about any union activity and Copher replied that he did not know what was going on. (Tr. 59) Also, on about November 8, 2019, Salesman Chris Newell overheard employees at Smyrna's Georgetown plant discussing an employee-only meeting and reported it to Brooks. (Tr. 1093-1094, 1349-1350, 1388, 1413-1414) Brooks told Newell he would "find out" what it was about when he got to Winchester. (Tr. 1094)

Later that same day, Brooks discharged Copher, claiming that there were reports about Copher's performance and attitude. (Tr. 61; G.C. Ex. 2) When questioned by Copher about details of such reports, Brooks did not identify what performance issues or attitude issues he was referring to. (G.C. Ex. 2) Copher told Brooks that Highley had questioned him about the Union, and Brooks stated that he was there "about some other things too." (Tr. 61; Resp. Ex. 90) Copher had never received any kind of discipline before. (Tr. 46, 74) He had never been told he was underperforming in any way. (Tr. 46) In fact, he had received several raises, always at the maximum allowable amount based on his performance. (Tr. 46-47) Plant Manager Highley stated that Copher did not have a bad attitude or performance issues. (Tr. 755) Employee Jason Means agreed that Copher did not have a bad attitude or performance issues. (Tr. 650) After Copher's discharge, Highley expressed his disapproval to Brooks, stating that Copher was one of the best drivers he had, and asked, "is that really the best you could come up with?" (Tr. 751-752) Brooks responded "we are not going to try to run a company with our hands tied behind our back. I will shut this plant down first." (Tr. 751-752)

B. Respondent Solicits Employee Grievances and Offers Benefits to Employees

A week after Copher's discharge, on November 15, 2019, Brooks conducted a meeting at the Winchester plant. (Tr. 186, 557, 1109) Immediately prior to the meeting, Brooks commended Highley's performance as a supervisor at the plant. (Tr. 648-649) Brooks also commended the employees' performance. (Tr. 306-307) He announced that drivers would no longer need to travel to the Florence plant because staffing had been improved at Florence. (Tr. 186, 189, 434, 559, 646-647) Brooks also told employees they could come to him if they had issues and to let him know if there was anything employees needed at the plant, and then concluded the meeting by handing each employee \$100 in cash. (Tr. 434, 559-561, 647, 759-761, 1110-1112) Brooks had never given such a "cash bonus" to employees at Winchester before. (Tr. 47, 186-187, 307, 434, 1197) He admits that the money was given to employees as a "morale booster." (Tr. 1112)

C. Respondent Discharges Highley, a Supervisor Who Failed to Inform on Union Supporters

On November 18, 2019, Brooks discharged Highley, stating that Smyrna was taking the plant in a different direction. (Tr. 761) In doing so, Brooks told Highley that he "gave [Highley] a week" but Highley had failed to get him "a list [of union supporters]." (Tr. 761) Prior to that date, Highley was never told that his performance as a plant manager was lacking. (Tr. 762) He had not been told Respondent was trying to reduce hours, or that employees were working too many overtime hours. (Tr. 761-762) Highley had never been told that the Winchester plant was not as productive as it should have been, or that his job was in jeopardy. (Tr. 762) He had never been disciplined in any way. (Tr. 763) There was never any discussion of a potential plant shutdown. (Tr. 763) Respondent has never terminated any plant manager for similar conduct,

and other managers who have been accused of more serious misconduct have been simply demoted or suspended. (Tr. 930, 1207-1208)

D. Respondent's Actions Chill the Union Organizing Campaign

Copher's termination, followed by Highley's termination, put an end to all organizing efforts. (Tr. 379, 432) Immediately following Highley's termination, one employee quit. (Tr. 304) Another employee quit shortly thereafter. (Tr. 192) With respect to talk about the union organizing drive, employees stated "nobody talked about it anymore. We did not want to risk our jobs." (Tr. 432) Even Highley's replacement, James Goss, sensed that drivers were scared ". . . because they just got through getting rid of that Copher guy, and then they got rid of Aaron on Monday, so maybe they thought they could be next." (Tr. 957)

E. Respondent Reduces Operations at the Winchester Facility and Lays Off Employees in Order to Prevent Any Chance the Union Campaign Would be Successful

Following Copher's and Highley's terminations, Brooks began visiting the Winchester plant more frequently - about 2 to 3 times per week, whereas he had previously visited only once every 1 to 3 months. (Tr. 48-49, 185, 425-426) Although performance at the plant had doubled from 2018 to 2019 (Tr. 174, 185-186, 438, 765; G.C. Exs. 26 and 27), around January 7, 2020, Brooks told the remaining six drivers that the plant would be closing, and they would be laid off and given 2 weeks' severance pay. (Tr. 173-174, 196, 440, 566-567, 570, 656, 659; G.C. Exs. 26 and 27) At that time, Brooks did not place any conditions on receiving the severance. (Tr. 659)

On January 10 or January 13, 2020, Brooks told the drivers they would be eligible to be rehired in the spring when the plant reopened. (Tr. 196-197, 199, 203, 664) Brooks provided several reasons for the closing, including that business was slow and that repairs were needed at the plant. (Tr. 197, 567, 572-573, 665) Brooks also explained that, rather than receiving

2 weeks' pay, employees could receive 4 weeks' pay if they signed a separation agreement. (Tr. 570, 663)

On Monday, January 13, 2020, the terminated drivers reported back to the plant to sign the separation agreement. (Tr. 197, 574) The separation agreement included, among other things, a broad covenant "not to persuade or instruct any person to file a suit, claim, or complaint with any state or federal court or administrative agency" at the risk of having to pay damages and attorney's fees for any breach (G.C. Exs. 3, 4, 10, 11, 20, 21) and the following provisions:

Non-disparagement. Employee agrees that, following Employee's termination of employment, Employee will not disparage or speak unfavorably about [Smyrna] . . . to third parties or in public or otherwise take any action or make any comment whatsoever that would harm, injure, or potentially harm or injure the goodwill of [Smyrna] . . .

Covenant not to Reapply. Employee hereby agrees that he/she will neither apply for nor accept a position of employment with the Company, or any of its business units, subsidiaries, or affiliates. (G.C. Exs. 3, 4, 10, 11, 20, 21)

The six drivers reviewed the agreement while they were assembled at the plant. (Tr. 197-198, 661-662) All six signed the agreement and received 4 weeks' pay. (G.C. Exs. 3, 4, 10, 11, 20, 21)

After discharging the six remaining drivers, Smyrna did not fully shut down the plant as it had indicated to employees, but ostensibly converted the Winchester facility to an "on-demand" plant that operates as-needed to service customers close to Winchester. (Tr. 67-70, 922-923; G.C. Ex. 28) Other drivers now travel from the Georgetown and Nicholasville plants, as often as twice a week, to assist at Winchester. (Tr. 72-73, 724) Additionally, work that used to be dispatched from the Winchester area is now being dispatched from the Georgetown and Nicholasville plants. (Tr. 724) The two Winchester mechanics continue to work at Winchester and assist at other plants as needed. (Tr. 445, 667, 723-724) Despite claims that business was

slow, in the last month of operations, efficiency increased at the plant. (Tr. 1208-1209) Prior to the shutdown of the plant, employees were never disciplined or warned that their performance was not up to par. (Tr. 1384, 1599) The CEO did not consult with the CFO about whether converting the plant to an on-demand facility was a sound financial decision. (Tr. 1680) Employees were not given the opportunity to transfer to other plants. (Tr. 1673) In the past, when Respondent has shut down plants, it has allowed employees to transfer to other facilities. (Tr. 1674)

III. LEGAL ANALYSIS

A. Background

Section 8(a)(1) of the Act states that it is an Unfair Labor Practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Any prohibited interference by an employer with the rights of employees to organize, to form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities, constitutes a violation of this section of the Act. This is a broad prohibition on employer interference, which means, in part, that an employer may not discharge, constructively discharge, suspend, layoff, fail to recall from layoff, demote, discipline, or take any other adverse action against employees because of their protected, concerted activities.

Section 8(a)(3) of the Act is intended to protect employees' Section 7 right to form, join, or assist labor organizations, or to refrain from doing so, without a result being subjected to retaliation by their employers. *Wright Line* applies where an employee claims that his employer has unlawfully taken adverse action against him on account of protected activity. See, *Wright Line*, 251 NLRB 1083 (1980). Part one of the test requires the employee to "make a *prima facie*

showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer's decision.” *Wright Line* at 1089. More specifically, the General Counsel must show (1) that the employee was engaged in protected activity; (2) that the employer was aware of the activity; and, (3) that the activity was a substantial motivating reason for the employer's actions. *Wright Line* at 1087. An employer does not violate Section 8(a)(3) when it would have taken the same action for legitimate business reasons. *Wright Line*, at 1089.

B. Respondent Unlawfully Interrogates Sunga Copher

Interrogation of employees is unlawful if, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 186 (1992), *Rossmore House*, 269 NLRB 1176, 1177 (1984). Factors to be considered include (1) the background of the questioning (i.e., is there a history of employer hostility to the union activity); (2) the nature of the information sought (i.e., did the supervisor seek information on which to base adverse action against individual employees?); (3) the identity of the questioner (i.e., how high up in the chain of command?); (4) the place and method of interrogation (i.e., was the employee called from work to the boss’s office?); and (5) the truthfulness of the reply. *Rossmore House* at 1178, fn. 20. Another factor, whether the employee is an open and ardent union supporter, is sometimes substituted for the “truthfulness of the reply” factor. Compare *Exterior Systems Inc.*, 338 NLRB 677, 698 (2002) to *Westwood Health Care Center*, 330 NLRB 935 (2000). In *Westwood*, the Board cautioned that the factors are not to be mechanically applied, but are to be used as a guideline for evaluating the circumstances in which the questioning takes place. *Westwood* at 939. Moreover, asking employees about their attendance at union meetings has been held to constitute coercive interrogation in violation of Section 8(a)(1) of the Act. See, e.g., *Los Angeles Airport Hilton*

Hotel and Towers, 354 NLRB 202 (2009) (interrogation of employee about attendance at union meeting unlawful, as was another interrogation that occurred in context of warning being given for participating in protected concerted activity).

Here, the evidence established that on November 8, 2019, Brooks asked Highley to see if he could come up with some names of employees who were involved with the union effort and see what he could find out. Later that day, Highley asked Copher about his and other's union activities. Specifically, Highley told Copher that Brooks believed Copher was involved in union activity and wanted Highley to find out what was going on. (Tr. 58-59) Highley asked Copher if he knew about any union activity, and Copher replied that he did not know what was going on. (Tr. 59) The familial relationship between Highley and Copher does not preclude a finding that Respondent violated the Act because Copher was not an open union supporter at that time. The interrogation was conducted by the highest-level supervisor at the facility in the context of higher-level manager wanting to know who was involved in the organizing campaign. Copher was terminated later that day. Based on the *Rossmore House* standards and the surrounding circumstances, Highley's questioning of Copher based on Brooks's demands amount to unlawful interrogation.

C. Respondent Unlawfully Discharges Sunga Copher

It is undisputed that Sunga Copher was the initiator of the union organizing drive. He talked to union representatives and to other employees about unionizing. Respondent's knowledge of Copher's union activity is established by Brooks' admission to Highley that he knew employees had been organizing and that Copher was involved. Chris Newell also admitted that he reported to Brooks that there had been a meeting of the Winchester employees the night before. Brooks' comment to Highley that he would shut the plant down rather than deal with a

union and his directions to find out who was supporting the union show Respondent's animus against the organizing drive. The timing of Copher's discharge- the day after he arranged and attended an initial organizing meeting with a union representative, which Brooks was aware of – further supports an inference of discriminatory retaliation. See, e.g., *Charter Communications, LLC*, 366 NLRB No. 46 (March 27, 2018) (unlawful motive in discharge of lead organizer was established by, inter alia, the temporal proximity of his discharge in relation to his union activities), *Airgas USA, LLC*, 366 NLRB No. 104 (June 13, 2018)(employer animus was evidenced by suspicious timing of discipline), *Dish Network, LLC*, 363 NLRB No. 141, slip op. at 13 (2016)(finding that “the close timing between [an employee's] escalated protected activity . . . and his firing, which all occurred within 3 months,” supported a finding of animus). Moreover, Respondent provided no evidence that it has ever disciplined employees for similar conduct before. (Tr. 1193) It provided shifting reasons for his termination. Furthermore, despite a discipline system that progresses from verbal warning, to written warning, and then to suspension, Respondent discharged Copher without issuing any prior discipline or even discussing the decision with Highley - Copher's immediate supervisor. (Tr. 737, 1175, 1261, 1266) It is thus clear that Respondent's justifications for Copher's discharge are contrived and designed to conceal its true motive of anti-union animus.

D. Respondent Unlawfully Grants \$100 Cash Bonus, Solicits Complaints and Grievances, and Promises Employees That They Will no Longer be Required to Drive to Florence, Kentucky

The granting or announcement of employee benefits while a representation election is pending constitutes an unlawful interference within the meaning of Section 8(a)(1) of the Act when such is done for the purpose of inducing employees to vote against the union. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board has recognized that such seemingly

beneficent acts are considered coercive and violate Section 8(a)(1) when taken in response to union activity - a “fist inside of a velvet glove” designed to unlawfully entice employees’ cessation of union organizing. The Board has determined that the rule set out in *Exchange Parts* is also applicable to the granting of benefits during an organizational campaign but before a representation petition has been filed. *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006). Where such conduct is asserted to have violated Section 8(a)(3), the Board often uses the *Wright Line* dual motive analysis to assess the evidence. *Clock Electric*, 338 NLRB 806 (2003).

Ultimately, “[t]he lawfulness of an employer’s conferral of benefits during a union organizing campaign depends on its motive.” *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016). The Board infers both improper motive and interference with Section 7 rights when an employer grants benefits during an organizing campaign without showing a legitimate business reason. *Id.* See also, *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) (granting wage increase unlawful where wage increase was unscheduled, contrary to employer’s policy, addressed a primary concern of certain employees and the size, timing, and applicability of the increase entirely at respondents’ discretion); *ManorCare Health Service-Easton*, 356 NLRB 202, 222 (2010), *enfd.* 661 F.3d 1139 (D.C. Cir. 2011). (“Absent showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.”)

In this case, there is ample evidence that Respondent harbored anti-union motivation for granting the cash bonus to employees on November 15, 2019. Brooks had fired lead organizer Sunga Copher just 1 week earlier and told Highley he would rather shut the plant down than have it run as a unionized operation (a threat which he later carried out). As with the employees in *Exchange Parts*, the Winchester employees could not miss the interference that the source of

this cash bonus would also be the source from which future benefits must flow and which may dry up if not obliged. The unlawful motive is bolstered by Brooks's admission that the bonus was given as a "morale booster," or a "hundred dollar handshake," and the fact that he had never given such a cash bonus to employees at Winchester before. (Tr. 47, 186-187, 307, 434, 1111-1112, 1197)

Moreover, Brooks' comments made during the November 15, 2019 meeting that employees could come to him with issues and that they will no longer have to drive to Florence are also separate violations of the Act. As noted above, the grant or promise of benefits during an organizing campaign is unlawful when done for the purpose of inducing employees not to support a union. Additionally, the Board has repeatedly held that in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See, e.g. *Center Construction Co., Inc.*, 345 NLRB 729, 729-731 (2005); *Uarco, Inc.*, 216 NLRB 1, 2 (1974). The remedial promise need not be specific or even explicit. *Grouse Mountain Associates II*, 333 NLRB 1322, 1324 (2001). Where an organizational campaign is ongoing, the solicitation of grievances creates a rebuttable presumption that the employer is going to remedy them. *Aladdin Gaming, LLC*, 345 NLRB 585, 607 (2005), citing *Maple Grove Health Center*, 330 NLRB 775, 775 (2000); *Uarco, Inc.*, and *Center Construction Co.*, supra. This is especially true when an employer that has not previously had a practice of soliciting employee grievances suddenly initiates such a practice during an organizational campaign. *Amptech, Inc.*, 432 NLRB 1131, 1136-1138 (2004).

Here, Brooks' statements that employees could come to him and that they would no longer be required to travel to Florence are unlawfully coercive. The statements came on the

heels of Copher's unlawful termination, the spearhead of the nascent organizing campaign. Brooks' presence at the safety meeting was unusual since his prior presence at the Winchester facility was sporadic at best. Employees were not accustomed to seeing Brooks at the plant, and the significance of his visit, timed shortly after the launch of the union organizing campaign and the discharge of the lead union organizer, was not lost on employees. Respondent has offered no evidence to rebut the presumption that Brooks' solicitation of grievances and promise to employees that they would no longer have to travel to Florence was anything but an unlawful promise to remedy employee grievances. This is particularly significant since employees' concerns about driving to Florence had been a factor in their determination to seek assistance from a union. See, *Doane Pet Care*, 342 NLRB 1116 (2004) (telling employees that issues raised by those employees during a union campaign would be looked into found unlawful); *Majestic Star Casino*, 335 NLRB 407, 408 (2001) (employer's statement that it would look into employees' concerns found unlawful).

E. Respondent Unlawfully Discharges Aaron Highley

The evidence at trial established that Respondent unlawfully discharged Plant Manager Aaron Highley for refusing to give Brooks a list of names of union supporters. An employer violates Section 8(a)(1) by discharging a supervisor for refusing to commit an unfair labor practice. *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69 (1993), *Parker Robb Chevrolet*, 262 NLRB 402 (1982). Here, Brooks instructed Highley to interrogate or surveil employees to determine who was involved in the organizing campaign, and when Highley did not provide any names, Brooks discharged him, thus interfering with employee Section 7 rights. If Highley had complied with Brooks' request to provide him with the names of employees involved with the union effort, the act of gathering and submitting names of union supporters to Smyrna would

have constituted unlawful interrogation and surveillance of employees' Section 7 activity, in violation of Section 8(a)(1). See, e.g., *Astro Shapes, Inc.*, 317 NLRB 1132, 1133 (1995) (unlawful surveillance for supervisor to park in tavern parking lot where union meeting was scheduled because he was curious how many employees would show up); *Dadco Fashions*, 243 NLRB 1193, 1198-1199 (1979) (unlawful surveillance for supervisor purposely to drive by union's roadside park highway meeting "because she was curious").

Respondent claims that Highley was discharged because of his poor management of the Winchester plant, but such claims are disputed by its own actions and are highly suspect. Highley was never informed his performance was lacking. (Tr. 762) Nor was he told he needed to improve his performance. (Tr. 1201-1202) On the contrary, Brooks evaluated Highley each year and authorized his raises. (Tr. 740) Respondent did not follow its progressive discipline and instead skipped immediately to discharge without any warning for Highley. Such discharge came only 10 days after his nephew, the lead union organizer, was abruptly and unlawfully terminated, and only 10 days after Brooks' statement that he would rather shut down the plant rather than allow it to unionize. Although Respondent is expected to argue that Highley allegedly mismanaged the plant, the undisputed evidence establishes that it took no disciplinary action against Highley whatsoever until after it learned of the union organizing campaign and considered the family relationship between Highley and Copher. *Cf. Tasty Baking Co.*, 330 NLRB 560, 560 (2000) (employer violated Section 8(a)(1) of the Act when it demoted a supervisor and took other adverse employment actions against her in retaliation for her husband's union activities). Moreover, while Respondent maintains that the Winchester facility was doing poorly compared to other plants, the evidence established that Highley was never informed of this, and the yardage of concrete produced at the Winchester plant had actually

doubled in the year before the closing of the plant. (Tr. 174, 185-186, 438, 765; G.C. Exs. 26 and 27). The circumstances surrounding Highley's termination thus severely undercut any claim that Respondent had legitimate reasons to discharge Highley and supports the conclusion that Highley was terminated for refusing to participate in Respondent's unlawful scheme to identify and target union supporters. See, *NLRB v. Oakes Mach. Corp.*, 288 NLRB 456, 457-458 (1988)(finding, under a *Wright Line* standard, the discharge of a supervisor unlawful where employer claimed the termination was based on poor oversight of employees rather than the supervisor's threat to testify against the company in support of an employee's NLRB charge).

It is expected that Respondent will argue that after terminating Highley, it uncovered an independent basis for his discharge, specifically that Highley failed to inform Brooks of a vehicle accident involving Copher, and that his failure to report it was a terminable offense. However, the evidence established that the accident in question occurred in 2017, before Brooks' tenure as general manager, and that Highley did in fact report the accident to Brooks' predecessor, James Goss. (Tr. 834-838) Goss instructed Highley that he did not have to move the report up the chain if it was easily fixable and, pursuant to Goss's direction, Highley wrote an incident report and kept the report in his own on-site records. (Tr. 834-838) Thus, the evidence demonstrates that Highley reported the accident and documented it as instructed; there is no violation of any of Respondent's rules that would warrant Highley's termination. Rather, the true reason for Highley's termination is the reason given to him mere moments before terminating him: that Brooks had given him a week to give him a list of names of employees involved in the union organizing campaign.

F. Respondent Unlawfully Discharges the Remaining Employees, Has Them Sign Unlawful Severance Agreements, Unlawfully Partially Closes the Winchester Plant and Converts it to an On-Demand Facility

Following its discovery of the union organizing drive, Respondent took the most coercive and destructive practice an employer can commit: it laid off all remaining drivers as the culmination of its campaign to prevent Winchester from becoming a union plant to decisively rid its workforce of employees sympathetic to the union campaign. It then transformed its Winchester plant to an “on-demand” plant. The discharge of the remaining employees should be analyzed under *Wright-Line*. In *Fresh Organics, Inc.*, 350 NLRB 309 (2007), the Board analyzed the closure of a store in the face of a nascent organizing drive under *Wright Line*, and rejected the employer’s claims that the decision to close the store was motivated by business considerations because the employer failed to offer a credible explanation for the timing of its decision to close the store. Additionally, the Board relief on statements by the employer that it would close the store if unionized and that the closure for remodeling killed “two birds with one stone.” *Id.* Thus, the Board concluded that the employer would not have made the same decision to close the plant absent union activity. *Id.*

Here, Respondent’s decision to terminate the drivers was not accompanied by a cessation of operations at the plant. The plant and its equipment have not been sold or discontinued in use. Respondent acknowledges that it continues to use the plant as an on-demand facility, using drivers from other plants. Two mechanics continue to be employed at the Winchester plant. Respondent further admits that other work that used to be assigned to the Winchester plant is not being loaded out of other nearby plants. The evidence further establishes that in the past, when Respondent has closed plants, it has allowed drivers to transfer to other plants. However, drivers at Winchester were not given such an opportunity. Nevertheless, Respondent has posted job

postings in Kentucky since terminating these employees, and allowed at least one employee to transfer to a nearby plant.

The evidence strongly supports a finding that anti-union sentiment played a significant role in Respondent's decision to terminate Winchester employees James Bowling, Randall Carmichael, Jason Means, Nicky Long, David Smith, and Sheldon Walters. As noted above, by the time of their termination, Respondent had already unlawfully fired the spearhead of the nascent organizing campaign, Sunga Copher, as well as his uncle, Plant Manager Aaron Highley, for refusing to provide names of union supporters to Brooks.

The timing of the decision to terminate the Winchester employees raises an inference of unlawful motive. There is no evidence whatsoever that Respondent considered discharging the employees *en masse* until after the nascent organizing campaign commenced in late October and early November 2019. Evidence indicates that Brooks discussed the November 7, 2019 union meeting with Highley on November 8, 2019, the very next morning after the meeting occurred and the same day that Brooks terminated Copher, and Brooks recommended to CEO Jeff Hollingshead that the plant be closed less than 2 months after learning of that union activity. The suspicious timing, combined with the alleged unlawful firings of Copher and Highley and the threats to close the plant, support the conclusion that anti-union sentiment was a motivating factor for firing the remaining drivers.

Respondent cannot and has not established that it would have made the same decision absent union activity. While it claims that the plant was closed due to efficiency reasons, as Newell admitted that plant performance improved in every aspect in its last month of operation after he took over the plant. (Tr. 1208-1209) Respondent's claim also ignores that Winchester had doubled its production from the prior year, and that hours employees spent assisting other

facilities such as Florence were not deducted from their efficiency calculations, making the plan appear to be less efficient than it was in reality. (Tr. 1485-1487, 1528-1529) Moreover, there is no evidence whatsoever that inefficiency was ever addressed in any way with the plant manager or employees prior to Respondent's knowledge of the union organizing drive. Indeed, Respondent gave employees an unexpected bonus on November 15, 2019. It would not make sense to provide employees with such a bonus if they were underperforming as Respondent claims. Respondent cannot meet its burden of showing that it would have discharged the employees even in the absence of the union activity at the Winchester plant.

Respondent further violated Section 8(a)(1) of the Act by requiring employees to sign severance agreements with unlawful provisions as a precondition for severance payments. The release signed by all employees contains provisions that coerce employees in the exercise of Section 7 rights to discuss working conditions with the employees who remained employed by Respondent at the Winchester plant and the other regional plants (Para. 7 Non-Disparagement), prevent them from availing themselves of the Board's processes (Para. 3 Covenant Not to Sue), and codify Respondent's hostility to employing them because of their union activity (Para. 14 Covenant Not to Reapply).

Non-disparagement provisions (paragraph 7 of the general release) are unlawful if they require terminated employees to forfeit their Section 7 rights in exchange for the benefits of the separation agreement. See, *Shamrock Foods Co.*, 366 NLRB No. 117 (June 22, 2018), citing *Clark Distribution Systems*, 336 NLRB 747, 748 (2001), and *Metro Networks*, 336 NLRB 63, 64 (2001). The Board in *Clark Distribution* and *Metro Networks* held that the employers therein unlawfully conditioned acceptance of their severance agreements on the signatory employee agreeing not to assist in any claims against them, as this would bar the signatory employee from

assisting the Board's investigation of charges filed by others. In *Shamrock*, the Board majority analyzed the non-disparagement provision of the separation agreement under Board precedent involving settlements; specifically, *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 2 (2016), which cited and followed *Clark Distribution Systems* and *Metro Networks*, above. Based on that precedent, the majority affirmed the judge's finding that the on-disparagement provision in the separation agreement was unlawful on the ground that the provision was not narrowly tailored to the facts giving rise to the discharge of the employee, given that he had been discharged for an unlawful reason and the provision "broadly required him to waive certain Section 7 rights, including . . . making disparaging remarks or taking actions which would be 'detrimental' to the employer." Slip op. at 3 n. 12.

The Covenant Not To Sue explicitly prohibits the employees from persuading or instructing any person to file a suit, claim, or complaint with any state or federal court or administrative agency against the Released Parties" and has no language limiting this to prospective NLRB claims and, moreover, provides that it should be construed as broadly as possible. Although Respondent is expected to argue that the language of the agreement does include language indicating that the agreement does 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," this cited language appears only in the non-disparagement provision and the covenant not to sue does not include any such savings clause. Moreover, the non-disparagement provision references the EEOC and SEC as examples, but makes no mention of the NLRB or NLRA. Finally, the agreement not to reapply evinces a continued hostility towards the employees' union activities when done in connection with their unlawful discharge.

Based on the unlawful provisions above, and the otherwise overly broad waiver of claims and rights contained in the release, it was also unlawful for Respondent to require that the employees sign such releases as a condition of receiving severance pay. Such conditions in the face of the employees' job loss was coercive.

It is expected that Respondent will argue that the severance agreements were lawful under *Baylor University Medical Center*, 369 NLRB No. 43 (2020), which limited the Board's holdings in *Shamrock Foods Co.*, *Clark Distribution Systems*, and *Metro Networks*. However, *Baylor* is clearly distinguishable from this case. In *Baylor*, the Board found the general release to be lawful, overturning the Administrative Law Judge, who had applied *Boeing* in finding multiple provisions unlawfully overbroad and coercive. The Board concluded that the *Boeing* case was inapposite inasmuch as *Baylor* did not involve employment rules. Instead, the Board considered the release in light of precedent involving separation agreements. The release in *Baylor* contained provisions like the ones found here. However, the Board reasoned that the provisions in *Baylor* did not infringe on Section 7 rights because (1) the agreement was not mandatory and applied only in the event of separation, (2) the agreement pertained only to postemployment activities and had no impact on terms and conditions of employment or accrued severance pay credit or benefits arising out of the employment relationship that the employer would have been obligated to pay regardless of whether the departing employee signed, (3) the agreement was proffered under lawful circumstances, that is, there was no allegation that any of the employees had been unlawfully discharged or that there were any other surrounding circumstances evincing a tendency to infringe of employees' exercise of Section 7 right.

Here, although the separation agreement herein was not mandatory and applied only to postemployment activities, the evidence establishes that it was not proffered under lawful

circumstances: at the time it was distributed, Respondent had already committed and was in the process of committing additional unfair labor practices. It was aware of union organizing activity based on the evidence described above, and based on the fact that 8(a)(1) and (3) charges had already been filed at the time that the separation agreement and general release was presented to employees. Thus, the rationale of rendering the release in *Baylor* lawful would not apply here. Employees reasonably interpreted the Agreement to restrict their Section 7 rights. The Separation Agreement and General Release, presented to employees when they were unlawfully discharged unquestionably interfered with their Section 7 rights in that receipt of severance was conditioned upon their signing the agreement. The Agreements, and specifically the individual provisions Non-Disparagement, Covenant Not to Sue, and Covenant Not to Reapply are clearly independent violations of Section 8(a)(1) of the Act.

V. REMEDY

As part of the remedy for the unfair labor practices alleged in paragraphs 5 through 11 of the third consolidated complaint, the General Counsel seeks an Order requiring certain additional remedies beyond the Board's standard remedies. These remedies are necessary due to the breadth and severity of Respondent's unfair labor practices, which renders traditional remedies insufficient to dissipate the likely chilling effects of Respondent's unlawful conduct.

A. An Order Requiring A Notice Reading Should Issue

Counsel for the General Counsel seeks an Order requiring that at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent's representative, Ben Brooks or Jeff Hollingshead, read the notice to employees in English on work time in the presence of a Board Agent and a representative of the Union, or in the alternative that Respondent promptly have a Board Agent, read the Notice to Employees during work time in the presence of

Respondent's supervisors and agents identified in paragraph 4 of the third consolidated complaint and a representative of the Union. The date and time of the Notice reading should also be approved by the Regional Director.

A Notice reading is necessary and essential to properly remedy Respondent's conduct for several reasons. First, the Board has held that a Notice reading is more effective at remedying violations during an organizational campaign than a traditional notice posting because of the greater impact an employer has on employees when standing and reading before them. See, *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), enf. mem 55 F.3d 684 (D.C. Cir. 1995). The reading of the notice will also "ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards." *Excel Case Ready*, 334 NLRB 4, 5 (2001).

Second, testimony established that the breadth and severity of Respondent's unfair labor practices was so wide-reaching and severe that extraordinary remedies are necessary. The Board has held the remedy of reading a notice by a company representative is appropriate when the unfair labor practices are "so numerous, pervasive and outrageous" that extraordinary remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannin, Inc.*, 318 NLRB 470, 473 (1995)(unfair labor practices found to be "egregious and notorious"). Here, the scope of Respondent's unfair labor practices included . Moreover, many of the unfair labor practices were committed by high ranking officials in the facility, making the need for a notice reading even greater. *OS Transport LLC*, 358 NLRB No. 117 (2012) (relying on senior officials involvement in the commission of unfair labor practices to require a notice reading).

A Notice reading is also necessary because the impact and awareness of the unfair labor practices was unit wide. *OS Transport LLC*, 358 NLRB No. 117 (2012) (relying on awareness of unfair labor practices within the unit to require a notice reading). Respondent's unfair labor practices that were proliferated unit-wide included the termination of the head union proponent, the termination of a supervisor for refusing to commit an unfair labor practice, interrogation, the solicitation of grievances, the promise of and grant of benefits, and a partial shutdown of the plant. These unfair labor practices were directed at the entire workforce, and they have not been corrected or disavowed. A notice reading is necessary to remedy these egregious violations.

B. An Order Should Issue Requiring That The Discriminatees be Made Whole, Including For Reasonable and Consequential Damages Incurred

Counsel for the General Counsel seeks an Order requiring that the named discriminatees be made whole, including reasonable consequential damages incurred as a result of Respondent's unlawful conduct. The Board has broad discretion to exercise its remedial authority under Section 10(c) of the Act. Upon finding a violation, the Board may require "such affirmative action... as will effectuate the policies of th[e] Act." See, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938); *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004) (Board may impose additional remedies "where required by the particular circumstances of a case"); *Excel Case Ready*, 334 NLRB 4, 5 (Board has broad discretion to fashion a just remedy to fit the circumstances of each case it decides). Each remedy should "be tailored to the unfair labor practice it is intended to redress." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984).

Consequential damages for Concepcion are necessary in this case to prevent the possibility of remedial failure with respect to her reinstatement. Respondent has raised the defense that Concepcion may be ineligible for reinstatement due to her immigration status. If

this is the case, under *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 152 (2002), Concepcion would be precluded from collecting backpay. Thus, she would not be fully made whole. In order to avoid this gap in the make-whole remedy, an Order should issue requiring that Concepcion be made whole, including reasonable consequential damages incurred as a result of Respondent's unlawful conduct. These consequential damages would include all economic consequences that directly and foreseeably resulted from Concepcion's unlawful discharge and resulting loss of regular income, including but not limited to the loss of a car or house, or interest and late fees incurred on credit cards.

C. An Order Should Issue Granting All Other Just and Proper Relief

The General Counsel seeks all other relief as may be appropriate to remedy the unfair labor practices alleged.

VI. CONCLUSION

For the reasons discussed above, Counsel for the General Counsel respectfully requests that the Administrative Law Judge find that Respondent violated Section 8(a)(1) and (3) of the Act as alleged in the third consolidated complaint. Attached hereto as Attachment A is a proposed Notice to Employees for your consideration.

Dated: August 20, 2020

Respectfully submitted,

/s/ Zuzana Murarova

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Attachment A

PROPOSED NOTICE

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT ask you about your or other employees' support for a union.

WE WILL NOT fire your supervisors because they refuse to identify union supporters, or to commit unfair labor practices against you.

WE WILL NOT fire you because of your membership in or support for General Drivers, Warehousemen & Helpers Local Union 89, affiliated with International Brotherhood of teamsters, AFL-CIO (Teamsters Local 89) or any other union.

WE WILL NOT partially close our facility and convert it to an "on-demand" facility because of your membership in or support for Teamsters Local 89, or in any other union.

WE WILL NOT require you to sign a Separation Agreement that prohibits you from filing a charge with the National Labor Relations Board or from making disparaging remarks or speaking "unfavorably" about us as a condition of receiving severance pay after being terminated.

WE WILL NOT require you to sign a Separation Agreement that prohibits you from reapplying for employment with us as a condition of receiving severance pay after being terminated.

WE WILL NOT otherwise require you to sign a Separation Agreement because of your membership in or support of Teamsters Local 89, or any other union.

WE WILL NOT tell you that you will no longer be required to drive to the Florence facility to discourage you from supporting a union.

WE WILL NOT grant you cash bonuses in order to discourage you from supporting a union.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL offer Sunga Copher, Aaron Highley, James Bowling, Randall Carmichael, Nicole Long, Jason means, David Smith, and Sheldon Walters immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and/or privileges previously enjoyed.

WE WILL make the above employees whole for the wages and other benefits they lost because we discharged them, plus interest and expenses, and **WE WILL** compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director of Region 9 a report allocating their backpay award to the appropriate calendar year(s).

WE WILL remove from our files all references to the discharges of Sunga Copher, Aaron Highley, James Bowling, Randall Carmichael, Nicole Long, Jason Means, David Smith, and Sheldon Walters, and **WE WILL** notify them in writing that this has been done and that the discharges will not be used against them in any way.

SMYRNA READY MIX CONCRETE, LLC

(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

550 MAIN ST
RM 3-111
CINCINNATI, OH 45202-3271

Telephone: (513)684-3686
Hours of Operation: 8:30 a.m. to 5 p.m.

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

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

August 20, 2020

I hereby certify that on this date I served the Counsel for the General Counsel's Brief to the Administrative Law Judge on the following parties by electronic mail:

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