

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

SMYRNA READY MIX CONCRETE, LLC

and

Case Nos. 09-CA-251578  
09-CA-252487  
09-CA-255573  
09-CA-258273

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

*Zuzana Murarova, Esq.*, for the General Counsel.  
*Stephen A. Watring, Esq.*, (Auman, Mahan & Furry), Dayton, Ohio, *Robert Horton, Timothy Garrett, Mary Leigh Pirtle, Kimberly S. Veirs, Esqs.*, (Bass, Berry & Sims) Nashville, Tennessee, for Respondent.  
*David O. Suetholz and Pamela Newport, Esqs.*, (Branstetter, Stranch & Jennings) Louisville, Kentucky and Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried between June 29 and July 2 and between July 13 and July 15, 2020 by remote Zoom video technology. The General Counsel participated from Cincinnati, Ohio; Respondent from Nashville, Tennessee and the Charging Party Union, Teamsters Local 89, from Louisville, Kentucky. Teamsters Local 89 filed the initial charges between November 12, 2019 and March 20, 2020. The General Counsel issued a third consolidated complaint on May 13, 2020.

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by: discharging Sunga Copher on November 8, 2019, granting employees cash bonuses on November 15, discharging James Bowling, Randall Carmichael, Nicole Long, Jason Means, David Smith and Sheldon Walters on January 10, 2020 and requiring employees to sign an illegal separation agreement on January 13, 2020. He also alleges that Respondent violated Section 8(a)(3) and (1) in closing its Winchester, Kentucky concrete plant and converting it to an on-demand facility.

The General Counsel further alleges that Respondent violated Section 8(a)(1) on November 8, 2019 by Winchester plant manager Aaron Highley<sup>1</sup> interrogating employees about union activities, on November 15, by General Manager Ben Brooks by promising that employees would no longer have to drive to Respondent's Florence, Kentucky plant and soliciting

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<sup>1</sup> Highley's name is sometimes misspelled as Highly at some places in the transcript.

complaints and grievances if they refrained from union activity. Finally, he alleges Respondent violated Section 8(a)(1) by discharging Aaron Highley on November 18, because he refused to commit unfair labor practices.

5 As discussed below, I conclude that Respondent violated the Act as follows: terminating  
 Sunga Copher, giving the Winchester drivers a cash bonus, soliciting their grievances,  
 terminating Aaron Highley, changing the Winchester facility to an on-demand plant and  
 terminating all of the concrete drivers who worked there. I also find that Respondent violated  
 10 the Act in requiring the drivers to sign its separation agreement on January 13, 2020 in order to  
 received enhanced benefits. I dismiss the other complaint allegations.

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

FINDINGS OF FACT

I. JURISDICTION

20 Respondent manufactures, sells and delivers ready mix concrete in 12 states. Its  
 headquarters is in Nashville, Tennessee. This case primarily involves its concrete plant in  
 Winchester, Kentucky, just east of Lexington. Respondent annually performs services valued in  
 excess of \$50,000 in states other than Kentucky. Respondent admits, and I find, that it is an  
 employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and  
 25 that the Union, Teamsters Local 89, is a labor organization within the meaning of Section 2(5) of  
 the Act.

II. ALLEGED UNFAIR LABOR PRACTICES<sup>2</sup>

30 Smyrna Ready Mix (SRM) was established by Mike Hollingshead, the father of the  
 current Chief Executive Officer, Jeff Hollingshead. SRM headquarters are in Nashville,  
 Tennessee. It now operates at 200 locations in 12 states. The company is divided into regions,  
 some of which include plants in more than one state. Moreover, not all facilities in a state are  
 necessarily in the same region.

35 In mid-2017 SRM acquired 3 concrete plants in the vicinity of Lexington, Kentucky from  
 Central Ready Mix. These plants are located in Winchester, to the east of Lexington,  
 Nicholasville, to the south of Lexington and Georgetown to the northwest. These facilities are  
 part of SRM’s Central Kentucky Region which consists of 15 plants. When SRM began  
 40 operations at Winchester in about September 2017, it retained the plant manager, Aaron Highley,  
 who had been Central’s plant manager since 2010. Also retained was driver Sunga Copher,  
 Highley’s nephew, who had worked for Central at the Winchester facility since 2015 or 2016.<sup>3</sup>

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<sup>2</sup> While I have considered witness demeanor, I have also credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989).

<sup>3</sup> Copher’s application for employment with SRM is dated August 23, 2017.

In July 2018, SRM demoted its Central Kentucky General Manager and replaced him with Ben Brooks. Between July 2018 and November 8, 2019, when he fired Sunga Copher, Brooks visited Winchester every 4-6 weeks. Prior to November 8, he never disciplined any Winchester employee or suggested that any Winchester employee be disciplined or coached. Also, prior to November 8, Brooks never told Highley that the plant was underperforming or that Highley's management was lacking in any way.

In late October 2019, Sunga Copher contacted Teamsters Local 89. On the evening of November 7, 2019, Copher and drivers Sheldon Walters and Chuck Grim met with Teamster Vice President John Palmer at a restaurant in Winchester to discuss initiating a union organizing campaign at the Winchester facility. Each employee affixed his name to a sign-in sheet.

SRM's 8 or 9 Winchester concrete drivers always clocked into work at Winchester.<sup>4</sup> However, they regularly drove to other plants, loaded their trucks at those plants and delivered concrete from the plant at which they loaded. The other plants at which they most often loaded were the sister plants in Nicholasville and Georgetown. However, in 2019 they also regularly drove to other plants, such as one located in Florence, Kentucky outside of Cincinnati, loaded their trucks there and delivered concrete to worksites close to that facility.

*November 8, 2019: Ben Brooks fires Sunga Copher*

Winchester drivers generally reported to work about 7:00 a.m., but earlier if they were to drive to another facility. On the morning of November 8, 2019, Winchester driver Nicole Long drove to the plant in Georgetown, Kentucky. There she had a conversation with the Georgetown plant manager, Roy Chastain<sup>5</sup> and SRM mechanic, Jeff Rod, who is based in Winchester. Long told Chastain and Rod that there was a union meeting the night before involving Winchester drivers, but that she did not attend because she was afraid it would cause her to lose her job, Tr. 1687-89. Long mentioned that at this meeting there was a sign-in sheet. This conversation was overheard by Chris Newell, a SRM salesman, who worked out of the Winchester facility, Tr. 1349-50, 1386-88.

Newell almost immediately called Ben Brooks to inform him what he had overheard. Tr. 1093, 1387-88. Both Newell and Brooks testified that Newell told Brooks that Long had mentioned a sign-in sheet but denied that Long said anything about a union or that Newell mentioned the word union to Brooks. I credit Long that she specifically mentioned that the meeting was a union meeting and I find that Newell informed Brooks of that fact. Moreover, even if Long did not specifically say the word union, Newell understood that was what the meeting was about, Tr. 1413-14. While Newell denied knowing that Long was talking about a union meeting, he conceded that he appreciated that the meeting was extraordinary. I infer he put 2 and 2 together, concluded employees were discussing organizing and communicated this belief to Brooks, Tr. 1420.

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<sup>4</sup> 2 mechanics and Chuck Grimm, a tanker driver, also were based at Winchester. The mechanics are still based there.

<sup>5</sup> According to Respondent's brief, this gentleman's name is Chasteen, not Chastain. He was the batch man, as well as the plant manager, at Georgetown, Tr. 1603-04.

Moreover, whether Newell knew the meeting concerned unionization is beside the point. As discussed below Brooks asked Aaron Highley to investigate what the meeting was about. It is every bit a violation of the Act to engage in surveillance of non-union related protected concerted activities as it is of activities directly connected to unionization, *Natural Life, Inc. d/b/a Heart and Weight Institute*, 366 NLRB No. 53 (2018); *Almonte*, 327 NLRB No. 26 (1998); *David's*, 271 NLRB 536 (1984).

Brooks visited the Georgetown facility and the Nicholasville facility on November 8, just prior to travelling to Winchester where he would terminate Sunga Copher. At Georgetown, he talked to plant manager Roy Chastain. Brooks asked Chastain about the driver's meeting in Winchester the night before. Chastain did not testify in this trial and Brooks testified that the only thing Chastain said was that some drivers at Winchester were making things difficult for others, Tr. 1096-97.<sup>6</sup> I find that Chastain told Brooks exactly what Niki Long told him, that there was a union meeting at Winchester the night before which she was afraid to attend. However, I also find that Brooks already knew the meeting was a union meeting from talking to Newell.<sup>7</sup>

While he was at Nicholasville, Brooks called Aaron Highley and instructed Highley to keep Sunga Copher at the Winchester plant when he returned from his next delivery. At some point, Brooks called Jeff Hollingshead, SRM's CEO. Brooks told Hollingshead that he was going to terminate Copher and may have told him about the union meeting at Winchester the night before, Tr. 1666.

Brooks testified that while he was at Nicholasville, he discussed the drivers' meeting and an incident at Taylorsville that allegedly occurred in October with plant manager Jason Stott. Stott did not testify about any conversation with Brooks on November 8. He testified that he discussed the Taylorsville incident with Brooks on the morning that it allegedly occurred in October, not on November 8. I find that Stott did not discuss the alleged Taylorsville incident with Brooks on November 8.<sup>8</sup>

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<sup>6</sup> Brooks testimony at Tr. 1097 that Chastain told him he didn't know anything about the drivers' meeting is not truthful. Before he called Brooks, Chris Newell testified that he overheard Nikki [Long] talking to "I guess Roy and maybe Jeff was in there," Tr. 1350. Nicole Long identified Roy as the Georgetown plant manager and Jeff as an SRM mechanic, Tr. 1687-88. Brooks talked to Chastain after Newell told him about the drivers' meeting. It is highly unlikely then when Brooks asked Chastain about the meeting that Chastain said he didn't know anything about it. I find Brooks testimony in this regard to be false.

<sup>7</sup> Even if Brooks accurately testified to what Chastain told him, they both understood that the meeting the night before was a union meeting. *Chemical Construction Corporation*, 125 NLRB 593, 599 (1959) [Bricker's description of Lowry's activities as a cause of "dissension" appears almost as a "transparent euphemism."]

<sup>8</sup> Brooks testified, "then the conversation turned to the Taylorsville incident, where, you know, the drivers did not show up back in October," Tr. 1103. Assuming that Brooks and Stott discussed Taylorsville on November 8, there is no explanation as to why they did so, nor did Brooks testify who initiated the discussion about Taylorsville. If such a discussion took place, Brooks' testimony suggests he was looking for a pretext for which to fire Copher.

Sunga Copher made several deliveries of concrete on November 8. From Nicholasville, Brooks drove to Winchester where he confronted Copher. Copher recorded their conversation, R. Exh. 90, parts of which are undecipherable. After Brooks started talking, Copher asked Brooks if he and come to see him about the Union. Brooks responded something to the effect of  
 5 “and other things too.” Given that the record does not adequately reveal the reason that Copher decided to secretly record Brooks, I give the recording no weight in determining what Brooks knew or his motivation in discharging Copher. His knowledge of Copher’s protected activity, animus toward it and his discriminatory motive is adequately established by other evidence.

10 Brooks informed Copher that he was being fired for poor performance and a negative attitude. Brooks gave Copher a termination notice stating this and nothing else, G.C. Exh. 2.

Copher took issue with the accusations against him, none of which had ever been made to him previously. Brooks did not give Copher any examples of either his alleged poor  
 15 performance or negative attitude. He told Copher that some employees had complained about him but refused to identify these people to Copher or what they complained about. Brooks also informed Copher that SRM would give him 2 weeks of severance pay. Copher was not asked to sign any documents in order to receive this money.

20 After terminating Copher, Brooks went to speak with plant manager Aaron Highley. Brooks and Highley both testified that Brooks asked Aaron Highley about the driver’s meeting on the previous evening, Tr. 1095 749-50, 753. Highley testified that Brooks asked him to get him a list of people who were involved with the Union, Tr. 753. Brooks denied doing so, Tr. 1107. However, Brooks testified that, “I told him to ask around and see how everybody was  
 25 feeling, not find out who was there, just find out what was going on,” Tr. 1258, 1267-68. On the basis of this testimony, I find that Brooks asked Highley to engage in surveillance of employees’ union activities—even if I were to credit Brooks as opposed to Highley. For reasons discussed below, I credit Highley’s account.

30 Brooks also testified that he told Highley that Sunga Copher had failed to show up at Taylorsville several weeks before when he was supposed to be there. Highley denied Brooks discussed Taylorsville with him and also denied Copher ever refused to go to Taylorsville or that anyone ever reported to him that Copher didn’t show up there, Tr. 843-44, 850. I credit Highley and find that Brooks did not discuss the alleged incident at Taylorsville with him on November  
 35 8. If he had, you would expect he would also have mentioned it to Copher, which he did not.

Finally, I do not credit Brooks’ testimony at Tr. 1088-1093 that with his work elsewhere his first opportunity to address the Taylorsville incident occurred on November 8. If Brooks had been informed that Sunga Copher had failed to show up as expected at Taylorsville, one would  
 40 expect he would immediately call Aaron Highley either to have Highley look into it or to direct Highley to fire Copher immediately. His testimony is also belied by the fact that he did not mention Taylorsville to Sunga Copher when he fired him. Even assuming that Copher was supposed to go to Taylorsville and did not, Respondent has not established that this had anything to do with Copher’s termination.

45 *Ben Brooks’ November 15, 2019 meeting with the Winchester drivers*

Ben Brooks met with the Winchester drivers for what was ostensibly a safety meeting on November 15. Aaron Highley attended parts of this meeting. Brooks told the drivers that SRM appreciated their work, particularly their servicing of the Florence facility. Brooks also told employees that if they every needed anything to call him on his cellphone. He said he would  
 5 make himself available, Tr. 1110-1111.<sup>9</sup>

Brooks then gave each driver \$100 in cash which he had never done before, Tr. 1197-99.<sup>10</sup> Brooks said nothing critical about the performance of the drivers, Aaron Highley or the profitability of the plant. Brooks did not tell the drivers that they should be doing anything  
 10 differently. He told the drivers that SRM had hired additional drivers at Florence and that as a result they would not have to drive there as much, or anymore. Brooks did not distribute cash bonuses to the drivers at Nicholasville or Georgetown, some of whom had also serviced the Florence plant.

While Respondent states at pages 40-41 of its brief that giving cash bonuses was an established SRM practice, the record shows that some of these bonuses were given to management (dispatchers) and only occasionally to rank and file drivers, R. Exh. 91; Tr.. 1613-14. Ben Brooks supervised 15 locations in central Kentucky and bonuses were given to rank and file employees only at a couple of locations in 2019. The record does not indicate that  
 15 Respondent gave bonuses to rank and file employees on any predictable schedule, or in any predictable amount. There is no credible explanation for the November 15 cash bonus—other than it was meant to discourage unionization, *Star, Inc.*, 337 NLRB 962 (2002).

*November 18, 2019: Ben Brooks fires Aaron Highley*

Brooks discussed the union meeting with Highley several times between November 8 and November 18, when he fired him. Highley did not give Brooks any information about the meeting or employees' union activities, Tr. 1268.  
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On the morning of Monday, November 18, 2019, Ben Brooks arrived at the Winchester facility accompanied by Chris Newell. He approached Aaron Highley and told Highley that SRM had to let him go. Brooks told Highley that SRM was going to take the plant in a "different direction" and was going to try reducing the man hours at the facility. According to Highley, Brooks also said "I gave you a week." Highley testified he asked, "a week for what?"  
 30 Further, Highley testified that Brooks responded, "a week to give me a list," Tr. 761.  
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Brooks did not specifically contradict Highley's testimony about his conversation with Highley on November 18. According to Brooks, all he said to Highley was that SRM was going in a different direction. He testified that he did not give Highley any other explanation for his

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<sup>9</sup> Brooks' testimony that rank and file employees from Winchester had called him in the past is unsupported by any other evidence. I decline to credit it. Randall Carmichael testified that Brooks, on about 4-5 occasions during the year, had come to the plant and asked employees what they needed and how things were going. However, there is no credible evidence that he previously suggested to employees that they call him at anytime with their concerns.

<sup>10</sup> SRM also gave employees a Christmas bonus of a week's salary, about \$600. Sheldon Walters' recollection of receiving another cash bonus from Brooks in 2018 is obviously incorrect, given Brooks' testimony to the contrary.

termination, Tr. 1200-01. Chris Newell, who was present for the entire conversation, testified that Brooks did not say anything about wanting a list from Highley or giving Highley a week to get it, Tr. 1342-44. I am disinclined to credit any purely self-serving testimony from either Highley, Brooks or Newell because each testified incredibly on some points.

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However, the fact that Brooks fired Highley almost exactly a week after his discussion with Highley on November 8 and Brooks' failure to specifically contradict Highley's testimony about their conversation on November 18, leads me to credit Highley with regard to their conversations on November 8 and 18. Thus, I find that Brooks told Highley to get him a list of union supporters within a week and told Highley he was discharging him for his failure to do so.

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Moreover, assuming that Highley's testimony is not accurate about the conversation on November 18, I find that Brooks indicated in some manner to Highley that he was being terminated in part for his failure to get more information for Brooks about the union organizing campaign. I find it unlikely that Brooks would dismiss the man who had run the Winchester plant for 9 years with virtually no explanation.

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Additionally, I find that another reason Brooks fired Highley was the fact that he was Sunga Copher's uncle. Both at trial and in its brief, Respondent took great pains to emphasize the family tie between Highley and Copher. It went so far as to establish on the record that Highley gave Copher's mother (his sister) as his emergency contact for SRM, Tr. 1059. I infer a relationship between Highley's discharge and the fact that Copher is his nephew. It is black letter law that discrimination predicated on the protected activity of others, such as family members, is as much a violation of the Act as discrimination against the employee who engaged in union or other protected activity, *Golub Bros. Concessions*, 140 NLRB 120 (1962); *Tolly's Market, Inc.*, 183 NLRB 379 fn. 1 (1970); *PJAX*, 307 NLRB 1201, 1203-05 (1992) enfd. 993 F.2d 378 (3d Cir. 1993).

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Due to his relationship with Copher, Respondent held Highley responsible for Copher's union activities and fired him for failing to prevent these activities. I reach this conclusion because the record fails to establish any credible reason for Highley's discharge other than his failure to engage in surveillance of employees protected activities and/or his failure to prevent these activities.

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Prior to November 18, neither Brooks nor any other SRM manager had criticized Highley's performance or the way he managed the Winchester plant.<sup>11</sup> Not only that, but despite being supposedly told by Stott in October that "we've got big problems at Winchester," and other reports of problems there from Newell and others, Brooks never asked anybody to

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<sup>11</sup> At page 9 of its brief, Respondent states that Brooks repeatedly counseled Highley about the Winchester plant's alleged inefficiencies, citing the transcript at Tr. 1095-1096 and 1288. The record does not support this assertion even if I were to take Brooks' testimony at face value, which I do not.

At Tr. 1095-96, Brooks testified that on November 8, after asking Highley a few questions about the drivers' meeting the night before, "I think I hinted around, "Well let's get these guys loaded and get them out of here," you know, talking about the drivers, getting them out on loads."

Brooks' testimony at Tr. 1288 does not indicate that Brooks counseled Highley about anything. His testimony at Tr. 1109-1110 and 1113 about his observations regarding the Winchester plant's inefficiencies does not include testimony that he addressed any of this with Highley.

document their concerns. As a result, I find all Respondent's testimony in this regard to be false. In April 2019, Brooks gave Highley a \$1 per hour raise—which establishes that at least at that point Brooks was satisfied with Highley's management of the Winchester plant.

5 *I discredit all of Respondent's alleged nondiscriminatory reasons for terminating Aaron Highley*

10 To the extent the Respondent was aware that Highley was allowing some drivers to turn down trips to Florence and elsewhere, the record shows that Ben Brooks was aware of this for at least 2 months prior to terminating Highley and never criticized him for it. Highley's reliance on volunteers was no different than Jason Stott's practice at Nicholasville and consistent with SRM policy.<sup>12</sup>

15 Highley's practice of finding "make-work" for Winchester employees on rainy days was also consistent with SRM practice and its policy of trying to guarantee drivers at least 40 hours of work each week. As James Goss testified, "What we do is if there's a rain day, we try to give employees and operators hours to help out during the week. You know, get them to maybe shovel underneath the plant, clean up the shop, you know, the office area. We just tried to give them their hours," Tr. 918-19. SRM in placing help wanted advertisements states that it staffs accordingly to ensure optimal hours for our operators while avoiding lay-offs.

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If Winchester drivers were not pulling their trucks under the bin to get loaded fast enough, Ben Brooks had observed this for some time and never said a word to Highley about it.

25 No SRM manager had indicated that the Winchester plant was not performing satisfactorily, or that employees at Winchester were getting too many hours of work or overtime hours.<sup>13</sup> In fact, Winchester had doubled its production of concrete in 2019 as compared with 2018, albeit with additional trucks. When Nicholasville plant manager Stott was suspended for 3 days a few months earlier, SRM sent Highley to Nicholasville to manage that facility.

30 *November 18, 2019 to January 10, 2020: James Goss and Chris Newell manage the Winchester plant; SRM changes it to an on-demand plant and terminates all the drivers.*

35 Shortly or immediately after SRM terminated Highley, several employees, including Chuck Grimm, Chris Sizemore, and Scott Keaton quit. Thus, for the next 6 weeks the Winchester plant operated with several less employees than it had just prior to Highley's

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<sup>12</sup> Despite all the evidence regarding the Florence plant, Respondent did not fire anyone for refusing to go there or refusing to volunteer to travel there. Thus, much of the evidence regarding Florence is relevant to this case only as background. The Board has long held that a refusal to perform voluntary work does not constitute an unprotected partial strike, *St. Barnabas Hospital*, 334 NLRB 1000, 1000 (2001), *enfd.* 46 Fed. Appx. 32 (2d Cir. 2002); *Inova Health System*, 360 NLRB 1223, 1230 (2014).

<sup>13</sup> In connection with Highley's unemployment insurance claim, Respondent reported to the State of Kentucky that it coached Highley on November 11, 2019. There is no documentation to support this coaching and thus I credit Highley that prior to his termination, he had never been accused of poor performance or misconduct, Tr. 762, 765.

termination. Jason Means stopped driving a concrete truck and took over Grimm's job driving the tanker.

5 Upon Aaron Highley's termination, Chris Newell and James Goss immediately took over day-day management of the Winchester plant. Several employees, concerned for their jobs, made inquiries to Goss, a SRM relief operations manager. Goss told them in November 2019 that they had nothing to worry about. Neither Goss, nor Newell nor Brooks ever indicated that the plant was underperforming or that any of the drivers were not performing their job satisfactorily. I do not credit Goss and Newell's testimony that Winchester employees were loafing during the period they managed the plant. Neither said a word about this to any employee and there is no documentation to support their testimony-either from them or Brooks. Goss, in fact, testified that the performance of the Winchester plant improved under his management, Tr. 937-38. Moreover, Goss testified that the employees were afraid for their jobs, making it very unlikely that they would loaf or resist taking directions from Goss and Newell.

15 The Winchester facility almost doubled its concrete production in 2019 as compared with 2018 (approximately 28,000 yards as opposed to 14,000 yards) and produced and delivered significantly more concrete in December 2019 than in November 2019. During 2019 Brooks assigned several new concrete trucks to Winchester as opposed to Nicholasville.<sup>14</sup>

20 At some point prior to January 7, 2020, CEO Jeff Hollingshead, with a recommendation from Ben Brooks, decided to make Winchester an on-demand facility and lay-off all the concrete truck drivers. He testified that he made this decision for a number of reasons: he considered the plant a poor performer, its EBITA (earnings before interest, taxes and amortization) was the worst in SRM's Central Kentucky Region, the concrete market in the Lexington area was soft and could be handled by 2 facilities, and "we just couldn't get everybody on board to doing things the way we want to run our company," Tr. 1566.<sup>15</sup> The Winchester, Nicholasville and Georgetown plants had been underperformers ever since SRM acquired them in August/September 2017, Tr. 1656-57.

30 At trial, Hollingshead testified that unlike Winchester, SRM had seen some improvement at Nicholasville and Georgetown. He gauges improvement by EBITA margin improvement and other things, such as, "folks' willingness to get on board, and to, you know, learn our model and help us get a point in the right direction," Tr. 1657. Hollingshead's testimony thus concedes that the reasons for making Winchester an on-demand plant included non-economic considerations. I infer that one of these considerations was his concern regarding continued union activity or other protected activity by Winchester employees.

40 By the time Hollingshead decided to change the status of the Winchester facility, he was aware of the drivers' meeting on November 7 and the pro-union sympathies of several of the remaining employees.

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<sup>14</sup> Winchester and Nicholasville had about the same number of drivers in 2019 (8-9). Georgetown had about 4-5 concrete truck drivers.

<sup>15</sup> It is unclear whether the EBITA accurately reflects the performance of the Winchester plant. It may be that Winchester did not get credit for concrete hauled from Florence, while the expenses and man hours of Winchester drivers at Florence were charged to Winchester.

On January 7, 2020, Ben Brooks informed the Winchester drivers that the plant would be changed to an on-demand plant and that Friday, January 10, 2020 would be their last day. He told them they would be getting 2 weeks' severance pay. Hollingshead was aware of the marked increase in the efficiency of the Winchester plant and the improvement in its EBITA margin in November and December 2019, but decided to change it to an on-demand plant anyway because this improvement was made "with folks not getting on board while we were trying to do it," Tr. 1595.

On January 10, Brooks informed the employees that they could receive 4 weeks' severance pay if they signed a separation agreement. Without signing, they would receive 2 weeks pay. Brooks told the drivers, with the exception of tank truck driver Jason Means, that they would not be allowed to transfer to other facilities. By way of contrast, when SRM changed its Somerset and Brooks, Kentucky plants to on-demand facilities in 2019, the employees were allowed to transfer to its Shepherdsville and Nicholasville plants.

The decision not to offer Winchester employees a transfer was not strictly a decision based on economics. Hollingshead testified, "these operators did not do what we asked them to do. Had they done what we asked them to do, we would have been more than willing to offer a transfer but since they didn't, we couldn't offer a transfer to them," Tr. 1674. Contrary to Hollingshead's testimony I find that there is no credible evidence that any Winchester employee – with the possible exception of Nichole Long, failed to do anything they were asked to do between November 18, 2019 and January 10, 2020.

*The Separation Agreements*

On Monday, January 13, the drivers came into the plant for the sole purpose of signing the separation agreements. Those agreements in pertinent part provide as follows:

3. **Covenant Not to Sue.** Employee hereby covenants and agrees that Employee has not, and will not file, commence or initiate any suits, grievances, demands, or causes of action against the Released Parties based upon or relating to any of the claims released and forever discharged pursuant to this Agreement. In accordance with 29 C.F.R. § 1625.23(b), this covenant not to sue is not intended to preclude Employee from bringing a lawsuit to challenge the validity of the release language contained in this Agreement. **If Employee breaches this covenant not to sue, Employee hereby agrees to pay all of the reasonable costs and attorneys' fees actually incurred by the Released Parties in defending against such claims, demands, or causes of action, together with such and further damages as may result, directly or indirectly, from that breach. Moreover, Employee agrees that he/she will not persuade or instruct any person to file a suit, claim, or complaint with any state or federal court or administrative agency against the Released Parties.** The parties agree that this Agreement will not prevent Employee from filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), or its equivalent state or local agencies, or otherwise participating in an administrative investigation. However, to the fullest extent permitted by law, Employee agrees to relinquish and forgo all legal relief, equitable relief, statutory relief, reinstatement, back pay, front pay, and any other damages, benefits,

remedies, and relief to which Employee may be entitled as a result of any claim, charge, or complaint against the Released Parties and agrees to forgo and relinquish reinstatement, all back pay, front pay, and other damages, benefits, remedies, and relief that he/she could receive from claims, actions, or suits filed or charges instituted or pursued by any agency or commission based upon or arising out of the matters that are released and waived by this Agreement. **The Parties intend that this paragraph and the release of claims herein be construed as broadly as lawfully possible.** (emphasis added)

**Non-Disparagement.** Employee agrees that, following Employee’s termination of employment, Employees will not disparage or speak unfavorably about the Company or any of the other Released Parties to their 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 the Company or other Released Parties. This provision is not intended to, nor shall it (or any other provisions herein) 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, including without limitation the Securities and Exchange Commission and the Occupational Safety and Health Administration.

**Covenant not to Reapply.** Employee hereby agrees that he/she will neither apply nor accept a position of employment with the Company, or any of its business units, subsidiaries, or affiliates.

*SRM’s activities at the Winchester plant since January 10, 2020*

Since January 10, 2020 concrete deliveries in the Winchester area have been made by drivers from Nicholasville or Georgetown. On some occasions they have loaded their trucks with concrete at the Winchester plant. The 2 SRM mechanics for the Lexington area continue to work out of the Winchester plant.

*Findings of Fact regarding Respondent’s affirmative defenses of employee misconduct and poor performance*

*Issues at the Winchester plant prior to Sunga Copher’s termination*

A number of SRM drivers at Winchester and Nicholasville were very unhappy about working out of other plants. They were particularly unhappy about having to drive their trucks to Florence and deliver concrete from that plant. Florence is a 90 minute to 2-hour drive from Winchester. The Florence plant was very busy in 2019 and was short-handed. The amount of concrete delivered from Florence dwarfed the amount delivered from the other Kentucky facilities. Drivers from the Lexington area were sent to Florence for several months prior to November 2019. Given the drive time plus their deliveries out of the Florence plant, the Winchester drivers often ended up working as much as 14 hours in a day.<sup>16</sup>

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<sup>16</sup> There is a significant difference between SRM’s records and driver recollections as to how frequently Winchester drivers went to Florence and other SRM plants outside the Lexington area in

Drivers at Winchester discussed refusing to go to Florence and also refusing to volunteer to go to Florence and some other facilities, such as Taylorsville and Shelbyville, KY, which are also 1 to 2 hours west of Winchester. Several drivers, including Copher, Sheldon Walters and Scott Keaton resisted going to Florence and would not go unless directly ordered to do so.

Plant Manager Aaron Highley set up a rotation for Florence trips but sometimes just sent the driver who was willing to make the trip. The plant manager at Nicholasville, Jason Stott did something very similar, Tr. 997-999. Seeking volunteers for such unpopular trips was consistent with SRM practice, Tr. 1179—1180.

One Nicholasville driver quit rather than go to Florence, but SRM rehired him when he changed his mind, Tr. 999-1000. Ben Brooks was aware that the driver quit and that he had been rehired.

Ben Brooks testified that he received a complaint from a customer about Sunga Copher “sometime in the September, October range.” He also said that about this time Nicole Long and Sheldon Walters raised concerns about Copher not pulling his weight, i.e., staying at the Winchester plant when they were making concrete deliveries, “basically saying he was riding the clock,” Tr. 1086, 1185. Both Walters and Long denied complaining to Brooks about Sunga Copher, Tr. 1684, 1696. However, Walters resented the fact that Copher spent more time at the Winchester plant than other drivers and complained to fellow drivers about this.<sup>17</sup> Nevertheless,

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2019. The uniformity of the drivers’ testimony, the absence of any contrary testimony from any other rank and file witnesses, leads me to conclude that Respondent’s records may not be accurate. For one thing, if Winchester drivers had to go to Florence as infrequently as SRM records indicate, it would not seem that these trips would become such the issue with drivers that it became. Similarly, there would be no reason for Ben Brooks to thank employees for servicing Florence if those trips were infrequent.

Niki Long testified that in the summer of 2019 she loaded at plants other than Winchester, Nicholasville or Georgetown 2-3 times a week. Respondent’s records indicate that Long loaded at Florence 5 times between July 8, and November 8, 2019, once at Taylorsville, and nowhere else outside of the Lexington area. 3 of the Florence trips were in September; 1 in mid-August and 1 in late October, R. Exh. 74.

Scott Keaton quit in November after Respondent fired Aaron Highley. Thus, he is not an alleged discriminatee and has no direct stake in the outcome of this case. For that reason, I consider Keaton’s testimony very reliable. Keaton testified that he loaded at a plant outside of the Lexington area 2-3 times a week. Sheldon Walters testified he went to Florence twice a week, Respondent’s records, R. Exh.-74 indicate that Walters went to Florence 6 times between July 8 and November 8, 2019, Jason Means testified that before he became the tank truck driver, he went to plants other than Winchester 2-3 times a week, most often to Florence.

Randy Carmichael testified that on some days 3 trucks from Winchester went to Florence and during some weeks at least one truck from Winchester went to Florence every day. He agreed to go to Florence at times when other drivers did not want to make the trip. Although Respondent introduced records concerning other drivers’ trips to Florence, it introduced no records or even timecards for Carmichael.

<sup>17</sup> Copher and Highley appear to concede that Copher drove less than other concrete drivers. However, they testified that Copher performed necessary tasks at the Winchester plant that other drivers did not, such as loading the bins with the raw material from which ready-mix concrete is

I credit both Walters and Long that they never complained to Brooks. If they had complained, I find incredible that Brooks never addressed these complaints with either Copher or Aaron Highley, see Tr. 1185-86. What makes Brooks' testimony particularly incredible is his belief that "riding the clock" is synonymous with "stealing time" an offense that one would expect any employer to address immediately.<sup>18</sup>

*Copher's alleged failure to show up at Taylorsville*

According to Copher, in September 2019, while Aaron Highley was on vacation, Chris Sizemore, who served as Highley's assistant, approached Sunga Copher and asked him to take a trip to Taylorsville, which is about 80 miles west of Winchester. Copher said he did not want to go and that "Sizemore moved on."<sup>19</sup> Respondent's evidence is that in October one or two trucks were supposed to travel from Winchester to Taylorsville and that they (or it) never showed up. It has no documentation concerning this incident, including the date on which it allegedly occurred, who was involved or how the situation was rectified.

It is Respondent's position that refusing to go someplace as dispatched would be a pretty significant offense for which an employee should be disciplined, Tr. 796. Or, as Respondent states at page 43 of its brief, "It is well established on the record that refusing work was a serious, dischargeable offense." For this reason, I find incredible Brooks' testimony that he was too busy supervising a job in Shepherdsville to turn his attention to this significant offense for 3 weeks. Brooks was not so busy that he was unable to discuss the incident with Newell and Stott sometime in October. If he could talk to Newell and Stott about the Taylorsville incident, he had time to ask Highley about it or direct Highley to investigate or fire Sunga Copher immediately.

Sometime in the fall of 2019 James Goss, a relief operations manager, was operating the Taylorsville facility. According to Goss, one day he asked Jason Stott, the plant manager in Nicholasville, for 2 trucks to be sent to Taylorsville the next morning. The next day the trucks didn't show up. Goss testified he called Stott, who was responsible for assigning trucks to this task. Goss, on direct examination, testified that Stott told him that the trucks were supposed to

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produced.

<sup>18</sup> Respondent's brief at page 10 cites the testimony of alleged discriminatee Jason Means who described Sunga Copher as someone who was milking the clock and needed to be counseled. The testimony referenced is as follows:

I thought that Copher was a good worker. He did occasionally milk the clock and Highley had needed to counsel him about that, Tr. 677. On redirect examination, Means testified that he had heard this had been an issue in the past, but that he had not witnessed it, Tr. 679—681.

<sup>19</sup> Sizemore quit Respondent's employ in November 2019 and was not called to testify by any party.

<sup>20</sup> In his affidavit given to the Board Agent, Copher stated that Highley asked him to go to Taylorsville. Chris Newell's testimony at Tr.1405-06 provides some support for Copher's testimony that he was approached by Sizemore, not Highley, about going to Taylorsville and Highley's testimony that he was not aware of this incident. Jason Stott testified he talked to Highley. I find neither Newell nor Stott a credible witness generally. On the other hand, neither Copher nor Highley's testimony is particularly credible in many respects. Copher's initial testimony about Taylorsville was less than candid and he backtracked when confronted with his affidavit.

come from Winchester. After Stott called Winchester, he allegedly reported to Goss that “They’re not coming, they decided they’re sticking together. They ain’t coming,” Tr. 911-912. Goss testified that he contacted Brooks on the same day, Tr. 913.

5           On cross examination by the General Counsel, Goss backtracked from his testimony on direct and stated that Stott told him the drivers were not coming from Winchester and did not recall Stott telling him that the Winchester drivers were sticking together, Tr. 934-35. Then on cross-examination by Union counsel, Goss reverted partially to his earlier testimony, then recanted, Tr. 945-948. On this basis, I find all of Goss’ testimony in support of Respondent’s case to be incredible. None of Respondent’s witnesses testified that Goss identified Sunga Copher as a driver who failed to show up at Taylorsville.

15           Nicholasville plant manager Jason Stott also testified about the Taylorsville incident. First, he was led by counsel to place the incident in October 2019. Then Stott testified that he called Aaron Highley, who was hesitant to send 2 trucks to Taylorsville. The next morning, Stott testified that he got a call from Goss, asking where were the 2 trucks. Then Stott called Highley, who said, “those guys ain’t doing that no more.” Stott testified further that he called Chris Newell and then Brooks. He told Brooks that, “we’ve got a big problem in Winchester.” According to Stott, Brooks said he would handle it. Tr. 977-79, 1024. The record establishes that Brooks never confronted Highley, Copher or anyone else about the failure of 2 trucks to show up at Taylorsville prior to November 8—if then. Due to this, I find Stott’s testimony about the Taylorsville incident incredible.

25           Ben Brooks also testified about the Taylorsville incident, which he testified occurred sometime between October 12 and 19, 2019, Tr. 1087. Brooks testified that a week later, Chris Newell and Jason Stott called him about the incident, which I find incredible in part because Stott did not testify that he waited a week to call Brooks. This appears to be an effort to explain why Brooks did not address the Taylorsville incident with Copher or Highley prior to November 8. However, even according to Respondent’s witnesses, Brooks knew there were “big problems at Winchester” 2 to 3 weeks earlier and did nothing about it, not even calling Highley to find out what was going on or directing anyone to find out who failed to show up or why.

35           According to Brooks, Newell and Stott identified Sunga Copher as one of the drivers who failed to show up at Taylorsville.<sup>21</sup> Stott in his testimony did not assert that Copher was a driver who failed to show at Taylorsville. Therefore, Brooks testified under oath to something he wasn’t sure about or that was false. Moreover, there is no explanation for why Newell would call Brooks a week later about Taylorsville, when the problem of the missing trucks had been solved. I find there was no such call.

40           Brooks testified that Newell told him that 2 Winchester drivers did not show up at Taylorsville in October and that Copher was one of them. Further, Brooks testified that he asked Newell the identity of the other driver and that Newell told him he did not know. Brooks made no effort to find out the identity of driver 2. Also, Brooks incredibly testified that on November 8, before firing Copher, he asked Highley if any Winchester drivers failed to show up at

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<sup>21</sup> Newell testified that only 1 concrete truck was supposed to go from Winchester to Taylorsville on the day in question and that another truck was supposed to go to Florence.

Taylorville, but did not mention Copher, Tr. 1179. According to Brooks, Highley told him that he was unaware that any of his drivers failed to show up at Taylorville.

5 Newell's testimony about Taylorville differs from that of Brooks. First of all, Newell testified that only 1 Winchester driver failed to show up in Taylorville on or about October 19. Newell testified that on that date, he talked to Sunga Copher. According to Newell, Copher approached him in his truck and told Newell that "we don't like having to go to other plants," Tr. 1369. Further, Newell testified that he asked Copher the identity of the driver who didn't go to Taylorville that morning. According to Newell, Copher did not say it was him, but "insinuated it was him," Tr. 1370.

10 Newell testified that he reported to Brooks that Copher insinuated that he was the driver who failed to go to Taylorville. Newell first testified that he called Brooks the morning the Winchester truck didn't show up in Taylorville, then changed his testimony and stated that he called Brooks after Brooks returned from vacation, Tr. 1333, 1339, 1408.<sup>22</sup> Brooks did not ask Newell to verify if it was true that Copher had been assigned to go to Taylorville or to document his conversation with Copher. Nobody ever reported anything about Copher's alleged failure to show up at Taylorville to Aaron Highley.

20 Stott never told Newell that Sunga Copher failed to show up at Taylorville. Stott did not even tell Newell he had asked Winchester drivers for help at Taylorville.

25 Brooks also testified that he discussed the Taylorville incident on November 8, just before firing Sunga Copher with Jason Stott. Stott did not testify to discussing Taylorville with Brooks on November 8, and I find he did not. In summary, whatever may or may not have happened with a truck from Winchester that did not show up as expected in Taylorville, had nothing to do with the termination of Sunga Copher's employment.

30 *Sunga Copher's allegedly excessive hours*

Jason Stott did not testify about any conversation he had with Brooks on the morning of November 8, 2010. In light of that, I discredit Brooks' testimony that Stott complained about the number of hours being worked by Winchester drivers that day.

35 Brooks did not testify that Stott mentioned Copher in that conversation, but that as a result of that conversation he pulled up employees' weekly hourly reports and specifically Copher's, and those of Niki Long and Sheldon Walters, all of whom were union supporters, Tr. 1098-99, 1183-84. Brooks could not recall the names of any other employees whose hours he

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<sup>22</sup> Newell is a particularly incredible witness. His testimony is riddled with fabrications. He testified that in the weeks prior to the change to an on-demand plant "we talked to some of the drivers about it...they weren't real willing to go to another plant," Tr. 1348-49, also see Tr. 1379-1385. The record shows that a decision to make this change wasn't made until sometime after XMAS and James Goss didn't find out about it until a few days beforehand. Newell's testimony is tailored to support Respondent's theory of this case regardless of whether it is accurate or true.

researched. From this, I infer that if he looked at these reports, he was looking for a basis to retaliate against employees whom he knew or suspected were union supporters.

In either event, I do not believe that Brooks suddenly became interested in excess hours at Winchester. What I do believe is that his interest in Winchester hours and Copher's hours, as well as Long's and Walters' was due to learning about the union meeting at Winchester the night before. As noted previously, when Brooks fired Copher he did not tell him that he was unnecessarily working too many hours, riding the clock or stealing time from SRM.

*Sunga Copher's No Call/No Shows in 2018*

On July 3, 2020, between the two sessions of the trial in this matter, Ben Brooks went to the Winchester plant and discovered documents which appear to be memorializations by Aaron Highley of occasions on which Sunga Copher did not report to work and did not call anyone at the Winchester facility in advance, Tr. 1115, 1138, R. Exh. 80. These absences occurred on July 7, 2018, August 9, 2018 and November 13, 2018. Aaron Highley testified that these were not disciplinary write-ups. Sunga Copher testified that he submitted doctors' notes or other documentation excusing these absences after the fact. I decline to credit either's testimony on this matter. It appears that Copher had 3 no call/no shows in 2018, that Highley documented, but for which he did not discipline Copher. He did not let anyone else in SRM management know about these incidents.<sup>23</sup>

Respondent's attendance policy mandates that an employee who fails to show up at work a second time during his or her employment, without calling in beforehand, is subject to termination. However, there is no evidence in this record that any SRM employee has been terminated for more than 1 no call/no show. On the other hand, there is no evidence that SRM was aware of an employee having 2 or more no call/no shows.

*Niki Long's work record at SRM*

SRM hired Niki Long as a concrete truck driver on August 7, 2018. She had previously driven concrete trucks in Indiana. In her year and a half driving for Respondent, Long was never disciplined and was never told either that her performance, or the performance of the Winchester plant was lacking. Long did not like James Goss and the feeling was mutual. Long on one or more occasions resisted taking direction from Goss, Tr. 247-48, 916—918. Nevertheless, Goss did not discipline Long. Goss reported to Ben Brooks that Long was having trouble following directions. Brooks did not ask Goss to discipline or even document his concerns with Long, Tr. 1209-19.

I find Goss' testimony at Tr. 938-39, that he saw write-ups that Highley had made regarding misconduct by Long, to be false. If Respondent terminated Long in part for misconduct, it would have preserved such records. While Respondent was able to find documentary evidence that Aaron Highley had written up Sunga Copher and another former employee, it did not contend that it found such documentation for Long, Tr. 1138, R. Exh. 78.

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<sup>23</sup> Copher also missed work December 17-19, 2018, but it is unclear whether or not he called Highley in advance. Highley did not allow Copher to work on December 20 and 21, 2018.

That Respondent harbored animus towards Long and Sheldon Walters on account of their union activity is established, amongst other evidence, by Ben Brooks testimony at Tr. 1182. When asked whose hours he investigated on November 8, just prior to firing Copher, Brooks could only remember Copher, Walters and Long, the only three concrete truck drivers who he knew were pro-union. Brooks testimony about Long's work ethic is merely a post-hoc rationalization for SRM's discriminatory discharge.

*There is no evidence in this record of misconduct or poor performance with regard to any of the five other employees terminated on January 10, 2020.*

While Respondent's witnesses testified generally and unconvincingly that the Winchester employees were not performing up to SRM expectations between November 18, 2019 and January 10, 2020 there is no evidence in this record that is specific to Sheldon Walters, James Bowling, David Smith, Randy Carmichael or Jason Means in this regard.

#### *Respondent's attendance and discipline policies*

Respondent has a progressive disciplinary policy, Tr. 1175. As a general matter, none of the alleged discriminatees in this matter would have been subject to discharge pursuant to such a policy—at least with regard to the facts known to Respondent at the time of the employees' discharges.

With regard to attendance, Respondent's handbook provides that: "Any employee absent without calling (No Call/No Show) will receive a written warning. Second occurrence during employment, the employee will be subject to discharge. When calling out absent for the day, it is necessary to call your supervisor at least 30 minutes before your shift starts.," R. Exh. 1-page SRM 107.

#### *Analysis and Conclusions*

*There is no credible evidence that Aaron Highley interrogated employees about union activities as alleged in complaint paragraph 5; it is therefore dismissed.*

The only evidence supporting complaint paragraph 5 is Sunga Copher's testimony at Tr. 58-59 about a conversation he had with Aaron Highley on November 8, 2019 after Ben Brooks had been to Winchester and left. Copher testified that Highley told him that Brooks had told Highley that Copher was spearheading the union movement at Winchester. Then, according to Copher, Highley asked Copher what he knew about it. Highley did not testify to any such conversation, therefore I decline to credit Copher's testimony in this regard. I therefore dismiss the allegation in complaint paragraph 5.

#### *Respondent violated Section 8(a)(3) and (1) in terminating Sunga Copher*

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the

burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

Improper employer motivation may be inferred from circumstantial as well as direct evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602, 61 S.Ct. 358, 367, 85 L.Ed. 368 (1941); *Birch Run Welding*, 761 F.2d 1175 at 1179 (6<sup>th</sup> Cir. 1985). Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir.1985), cert. denied, 476 U.S. 1159, 106 S.Ct. 2277, 90 L.Ed.2d 720 (1986) (citing *NLRB v. E.I. DuPont De Nemours*, 750 F.2d 524, 529 (6th Cir.1984)). *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995). A discharge following closely on the heels of protected activity is particularly powerful evidence of discrimination, *Jim Causley Pontiac v. NLRB*, 620 F.2d 122, 126 (6th Cir.1980).

The General Counsel has made an initial showing that Respondent discriminatorily discharged Sunga Copher. Respondent knew or suspected that Copher engaged in union activity, bore animus towards that activity and discharged him largely or entirely because of it. I infer Respondent's knowledge, animus and its discriminatory motivation from the following: the timing of his discharge, which occurred almost immediately upon Ben Brooks learning of the union meeting which Copher attended, the lack of any warning about his alleged misconduct/poor performance, Respondent's failure to give Copher an opportunity to address the allegations against him and SRM's unexplained departure from its progressive discipline policy, *Tubular Corporation of America*, 337 NLRB 99 (2001).

Respondent contends that anti-union animus on its part is disproved by the following: the Hollingshead family's past affiliation with the Teamsters, its recognition of a Teamsters local in Piqua, Ohio and its hiring of former Teamster members at other facilities in Kentucky and Indiana. It also cites its offer to Jason Means to transfer as a tank truck driver to another SRM facility. Anti-union animus otherwise established is not disproved by an employer's failure to retaliate against all known union supporters, *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); *Volair, Inc.*, 341 NLRB 673, 676 n. 17 (2004). This principal applies logically to the fact that an employer's managers may once have been union members. One's perspective often changes when their status changes from employee to employer.

As to Piqua, the record establishes that the prior owner of that business would not sell to SRM unless it agreed to recognize and bargain with the Union and hire all the predecessor's employees. Thus, recognition of the Teamsters in Piqua is irrelevant to this case for more than one reason. Finally, with regard to SRM hiring of former Teamsters who worked for Allied

Concrete, the record makes clear that SRM preferred that they work for it without a union and that it did not recognize any union at the facilities at which these employees went to work.<sup>24</sup>

5 Respondent did not make out its affirmative defense by establishing that it would have terminated Copher in the absence of his union activities. All his alleged misconduct, if it occurred, had been known to Respondent for weeks or months before November 8. Respondent did not discipline or coach Copher for this alleged conduct and did not document it.

10 Finally, I find that the “negative attitude” for which SRM fired Copher and for which it provides no specifics was a code phrase for his union activity, *Bronco Wine*, 256 NLRB 53 and n. 4 (1981) *James Julian, Inc. of Delaware*, 325 NLRB 1109 (1998); *Boddy Construction Co.* 338 NLRB 1083 (2003).<sup>25</sup>

15 *Respondent by Ben Brooks violated the Act as alleged in paragraph 9(b) by giving all the Winchester drivers \$100 in cash on November 15.*

20 The Board has long recognized that the danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged, *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

25 There is simply no credible explanation for Brooks’ unprecedented largess on November 15, in giving every Winchester driver \$100 in cash, other than it was a part of an effort to discourage employees from organizing. Thus, I find he violated Section 8(a)(1) in doing so, *Franklin Park Mall, Inc.*, 212 NLRB 21 (1974). Although, Brooks stated that this cash bonus was in appreciation for their good work and servicing Florence, Respondent has taken the position in this case, that the Winchester drivers were terrible employees, completely undeserving of continued employment, let alone a bonus. Also telling is the fact that Brooks only gave cash to the Winchester drivers, not the Nicholasville drivers who also serviced Florence and who since  
30 have been deemed worthy of continued employment by SRM.

35 Finally, I reject Respondent’s contention that the distribution of \$100 bills on November 15, was consistent with its past practice. There is no evidence of such distributions occurring on a continuing or regular basis. Instead this was a random event rather than a customary or consistently conferred benefit. Employees could reasonably infer that the cash was intended to discourage any interest they might have in unionization, *B & D Plastics*, 302 NLRB 245 fn. 2 (1991).

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<sup>24</sup> In response to Brooks’ offer, Means asked if he could park the tanker truck at Winchester because his private automobile was not in good enough condition to drive it from his home to either Georgetown or Nicholasville every day. Brooks told Means that was not an option, Tr. 656-57. There is no evidence in this record as to why SRM could not accommodate Means’ request.

<sup>25</sup> An excellent summary of euphemisms found by the Board to refer to union activity or sympathies is found in Judge Wedekind’s decision adopted by the Board in *Pacific Green Trucking, Inc.*, 368 NLRB No. 14, at pp. 6-7 (2019).

*Respondent did not violate the Act on November 15, 2019 when Ben Brooks told Winchester employees that they would not have to drive to Florence, Kentucky anymore or as frequently.*

5           When Ben Brooks told Winchester employees they would not have to drive to Florence  
anymore or as frequently, the record indicates the reason for this change was that Respondent  
had hired additional drivers in Florence, as opposed to Brooks' awareness of the union meeting.  
There is no evidence, for example, that Nicholasville and Georgetown drivers continued to travel  
10 to Florence after November 15, 2019. If they did so, that would establish a connection between  
the union organizing and the cessation of trips to Florence by Winchester drivers. I also find that  
Brooks did not impliedly promise increased benefits and improved working conditions on  
November 15 by telling employees they would be driving to Florence less frequently, or not at  
all.

15           *Respondent, by Ben Brooks, violated the Act on November 15, 2019 by soliciting  
employees to call him with their grievances and impliedly promised to remedy them to  
discourage support for the Union.*

20           Absent a previous practice of doing so, an employer violates Section 8(a)(1) by soliciting  
grievances to discourage employees from organizing. I find that Ben Brooks on November 15,  
by inviting the Winchester drivers to call him on his cellphone was implicitly promising to  
rectify their grievances in order to discourage them from pursuing unionization. This is a  
violation regardless of the fact that the Union had not filed a representation petition, *Maple  
25 Grove Health Care Center*, 330 NLRB 775 (2000); *NLRB v. Exchange Parts Co.*, 375 U.S. 405,  
409 (1964). *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006); *Curwood Inc.*, 339 NLRB  
1137, 1147-1148 (2003) enfd. in pertinent part 397 F.3d 548, 553-54 (7th Cir. 2005).

*Respondent violated Section 8(a)(1) in terminating Aaron Highley*

30           Supervisors, such as Aaron Highley, are generally not protected by the Act. However, an  
employer violates Section 8(a)(1) when it discharges a supervisor **for refusing or failing to  
commit an unfair labor practice**, *Frenchy's K & T*, 263 NLRB 45, 47 (1982); *Parker-Robb  
Chevrolet, Inc.*, 262 NLRB 402 (1982); *Trus Joist Macmillan*, 341 NLRB 369, 389-90 (2004).  
In *Parker-Robb Chevrolet, Inc.*, the Board reversed the Judge's conclusion that the employer  
35 violated the Act by discharging a supervisor. The Board, however, stated that:

.. an employer may not discharge a supervisor for giving testimony adverse to an  
employer's interest either at an NLRB proceeding or during the processing of an  
employee's grievance under the collective bargaining agreement. Similarly, an employer  
40 may not discharge a supervisor **for refusing to commit unfair labor practices, or  
because the supervisor fails to prevent unionization**. In all these situations, however,  
the protection afforded supervisors stems not from any statutory protection inuring to  
them, but rather from the need to vindicate employees' exercise of their Section 7 rights.

45   262 NLRB at 402-403 (emphasis added).

One example of a situation in which a supervisor is protected is that in *Trus Joist Macmillan*, above. In that case a supervisor was directed to give a pro-union employee a bad performance review. The supervisor refused and failed to do so because the employee's performance was good. The employer then fired the supervisor for his failure to help upper management get rid of a leading union adherent.

An even better example is *Frenchy's K & T*, 263 NLRB 45, 47 (1982) in which the supervisors' did not affirmatively refuse to commit unfair labor practices, he simply failed to follow his superiors instructions to issue discriminatory discipline and even lied that he had done so.<sup>26</sup>

The legality of Highley's discharge turns upon Respondent's motivation. Thus, the *Wright Line* analysis applies here as well. I conclude that Respondent would not have fired Highley in the absence of his failure to engage in an unfair labor practice—namely the surveillance of employees' union activities, *Belcher Towing Co.*, 238 NLRB 446 (1978) enfd. in relevant part 614 F. 2d 888 (5<sup>th</sup> Cir. 1980). I also find that SRM would not have fired Highley if he were not Sunga Copher's uncle. Due to that relationship Respondent held Highley responsible for Copher's union activities and fired him for his failure to prevent these activities, *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), enfd. 823 F.2d 1086 (7<sup>th</sup> Cir. 1987) and *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989), enfd. 907 F.2d 400 (3<sup>d</sup> Cir. 1990).

Respondent's proffered reasons for Highley's discharge are pretextual given the lack of any warning and lack of documentation of Highley's alleged mismanagement of the Winchester plant. Moreover, the fact that Respondent had been aware of these alleged shortcomings for weeks and months before Highley's discharge also establishes the pretextual nature of its defense, *Best Western Motor Inn*, 281 NLRB 203 (1986).

*Respondent violated Section 8(a)(3) and (1) in changing the Winchester plant to an on-demand facility, laying-off or terminating the Winchester concrete truck drivers and refusing to give them an opportunity to transfer to other SRM facilities.*

The record herein indicates that 2 concrete plants rather than 3 could handle SRM's workload in the Lexington, Kentucky area. However, the question remains why, assuming that to be true, in consolidating its operations around Lexington, did Respondent choose to change Winchester, rather than Georgetown or Nicholasville to an on-demand facility.

Respondent contends there was no union or other protected activity after November 7, 2019. However, the record establishes that James Goss and Chris Newell overheard employees discussing the Union after November 18. Moreover, I find Respondent's animus towards union activity to be sufficiently extreme to meet the General Counsel's initial burden under *Wright Line*. Additionally, the record establishes that one reason for the lack of more union activity was employees' fear of retaliation. James Goss testified that when he arrived at the Winchester

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<sup>26</sup> *Spring Valley Farms*, 272 NLRB 1323, 1332 (1984) cited by Respondent, appears to be inconsistent with the general tenor of Board law, which is that an employer violates Section 8(a)(1) for discharging a supervisor for his or her failure to spy on employees' union or other protected activities.

plant on November 19, it seemed like the employees were scared. “Probably 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. Assuming they did not already know it, that the November 7 meeting was a union meeting was made clear to James Goss and Chris Newell by employees after Goss and Newell began managing the Winchester plant, Tr. 955-57, 1422. Brooks also probably heard employees discuss the Union after November 18, Tr. 1432-33.

That employees had plenty of reason to eschew union activity is established by Respondent’s blatantly discriminatory discharge of Sunga Copher, the leader and initiator of the in-house unionization effort, within hours of learning about the November 7, 2019 union meeting and the discharge of his uncle, the plant manager. In this regard, Sheldon Walters testified that on November 8, all the employees were talking about Sunga Copher’s discharge. He and Chuck Grimm concluded that management had found out about the union meeting the night before. Thus, Walters testified that nobody talked about the Union anymore because, “We didn’t want to risk our jobs. A lot of us have kids,” Tr. 431-32.

The General Counsel’s initial burden is also satisfied in part by Jeff Hollingshead concession that non-economic considerations played a rule in his decision to alter the plant’s status, lay-off the truck drivers and deny them the opportunity to transfer-in the absence of any evidence of misconduct or poor performance on the part of at least 5 of the 6 employees who were terminated.

Despite the passage of time, the circumstances herein evidence a particularly strong animus against unionization and the employees involved. By January 10, 2020 Respondent was aware that at least 3 of the six remaining concrete truck drivers (Sheldon Walters, Nichole Long and Jason Means) had shown evidence of union sympathies. Respondent also could not be sure whether others harbored such sentiments as well.<sup>27</sup> James Goss vaguely recalled both Randy Carmichael and David Smith saying something to him about the Union. His recollection is that Carmichael told him that SRM fired Sunga Copher for trying to get a union together and that Smith told Goss that he did not have anything to do with the Union, Tr. 955-56.<sup>28</sup>

It then discharged all six and refused to let them, unlike the employees at Somerset and other plants to transfer. The fact that none of the 6 were allowed to transfer is particularly telling since there is no evidence of misconduct or poor performance for at least 5 of these drivers. On the other hand, there is no indication that Respondent had reason to suspect any employees at Georgetown or Nicholasville of union sympathies.

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<sup>27</sup> Ben Brooks observed Means wearing a shirt with a union insignia sometime after November 18, Tr. 1124. He knew Long had talked about the Union meeting on November 8. Brooks’ examination of Walters’ timecard indicates he had learned that Walters as well as Copher had attended the union meeting on November 7.

<sup>28</sup> Smith did not testify in this proceeding. However, sometimes an employee who goes out of his or her way to deny interest in unionization does so precisely because they fear for their job. Depending on the context of Smith’s remarks they could have led Goss to think his sentiments were or had been just the opposite, *Duvernoy & Sons, Inc*, 177 NLRB 538 (1969).

Once the General Counsel has met its initial burden, Respondent has the burden of proving that it would have “closed” Winchester in the absence of union activity on the part of the Winchester drivers, *Real Foods Co.*, 350 NLRB 309, 313 (2007).<sup>29</sup>

5 SRM’s allegations of poor performance or misconduct by any of the drivers are not  
credible. This contention is inconsistent with Brooks’ conduct on November 15, when he  
complimented the drivers, gave each \$100 in cash and did not mention anything they should be  
doing differently. Moreover, even assuming that there was an issue with regard to some of the  
laid-off drivers, Respondent made no specific allegations of poor performance or misconduct  
10 with regard to James Bowling, Randall Carmichael, Jason Means, Sheldon Walters or David  
Smith.

In the absence of any specific proof of poor performance and misconduct, I infer that  
Hollingshead’s concession that employees were terminated because folks were “not on board” is  
15 code for their suspected union sympathies, *James Julian, Inc. of Delaware*, 325 NLRB 1109  
(1998) [“bad attitude is often a euphemism for pro-union sentiments particularly when there is no  
credible alternative explanation for the perceived attitude problem]. This is particularly true in  
light of the fact that the production of the Winchester plant had improved dramatically from  
2018 to 2019 and from November 2019 to December 2019. I find that the General Counsel has  
20 met his initial burden of showing discriminatory motive and that Respondent has not met its  
burden of showing that it would have changed the status of the Winchester plant, laid off its  
drivers and denied them the right to transfer in the absence of the known union activities of some  
of those drivers.

25 It is not always the case that the General Counsel must establish that an individual  
discriminatee engaged in union or other protected activity or that a Respondent was aware of an  
individual employee’s union activity. For example, where an employer institutes an  
unprecedented mass discharge in the context of a union organizing campaign, knowledge of each  
employee’s protected activity is unnecessary for the General Counsel in proving illegal  
30 discrimination, *Birch Run Welding*, 761 F.2d 1175 at 1179-80 (6<sup>th</sup> Cir. 1985).

Indeed, the knowledge of any of the individual’s protected activities may be unnecessary,  
as in this case, when the employer is aware of union or other protected activity, and has, as in  
this case, suspicions as who is involved and bears considerable anti-union animus, *Hunter*  
35 *Douglas, Inc.*, 277 NLRB 1179 (1985) enfd. 804 F.2d 808 (3d Cir. 1986). Moreover, in the  
context of an organizing drive, it is a violation of Section 8(a)(3) to discharge a neutral employee  
in order to facilitate or cover-up discriminatory conduct against known union supporters, See  
*Bay Corrugated Container*, 310 NLRB 450, 451 (1993) enfd. 12 F. 3d 213 (6<sup>th</sup> Cir. 1993).

40 The partial closure of a business violates Section 8(a)(3) and (1) under the following  
circumstances: 1) the person(s) exercising control over the closed plant (1) have an interest in  
another business of sufficient substantiality to give promise of their reaping a benefit from the  
discouragement of unionization in that business; 2) act to close their plant with a purpose of  
producing such a result (i.e., the discouragement of unionization 3) occupy a relationship to the other  
45 business which makes it realistically foreseeable that such business will also be closed down if they

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<sup>29</sup> This case is sometimes cited as *Fresh Organics*.

persist in organizational activities, *Textile Workers v. Darlington Mfg. Co.* 380 U.S. 263, 270 (1965).

I find that the Respondent violated Section 8(a)(3) and (1) of the Act by making  
 5 Winchester an on-demand plant and laying off the Winchester drivers because of employees’  
 known and suspected union sympathies and because, in doing so, the Respondent intended and  
 could reasonably foresee that employees at its other facilities would be chilled in their Section 7  
 activity, *Rav Truck & Trailer Repairs, Inc.*, 369 NLRB No. 36 (March 3, 2020) slip opinion 1  
 10 ft. 2, and pp 11-13. Nicholasville and Georgetown employees in particular would be likely the  
 deduce that union activity would result in one of those plants meeting a similar fate to that of  
 Winchester.

*The Respondent Employers’ action was “inherently destructive” of Section 7 rights.*

15 Under Section 8(a)(3), liability for an adverse action against an employee turns on  
 whether the employer acted with anti-union animus. In most cases, the General Counsel has the  
 burden of independently showing an unlawful motive. *Wright Line*, 251 NLRB 1083 (1980),  
 enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, it is well  
 established that some employer actions may be so “inherently destructive” of the rights protected  
 20 by Section 7 that the Board may fairly infer unlawful animus directly from those actions.  
*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 701 (1983); *NLRB v. Great Dane Trailers*, 388  
 U.S. 26, 33-34 (1967); and *Tracer Protection Services*, 328 NLRB 734 fn. 2 (1999). Such  
 actions include terminating or refusing to hire some or all of the applicants or employees in a  
 bargaining unit solely because they engaged in union activity.

25 Respondent Employer’s action in “terminating” all of the alleged discriminatees and  
 denying them future employment solely on the basis of their known and suspected union  
 sympathies without credible evidence of punishable misconduct or poor performance, was  
 “inherently destructive” of Section 7 rights within the meaning of *Great Dane*. It was therefore  
 30 unlawful.

Once the General Counsel makes this initial showing, the burden of persuasion shifts to  
 the Respondent to prove its affirmative defense that it would have taken the same action even if  
 the employees had not engaged in protected activity, *Wright Line*, 251 NLRB 1083 (1980), enfd.  
 35 662 F.2d 899 (1st Cir. 1981); *La Gloria Oil and Gas Co.*, 337 NLRB 1120 (2002). I find that  
 Respondent has not met this burden and that its explanation for its actions is pretextual.

The discriminatees’ failure to “get on board” is simply code or a euphemism for their  
 known or suspected union sympathies. If the proffered reason is pretextual-either false or not  
 40 relied upon-the respondent fails to meet its burden. Moreover, a finding that the proffered reason  
 is pretextual reinforces the initial showing of animus and discriminatory motive, *Fast Food  
 Merchandisers*, 291 NLRB 897, 898 (1988); *Fluor Daniel, Inc.*, 304 NLRB 970, 970-71 (1991);  
*Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9<sup>th</sup> Cir. 1966).

45 *The appropriate remedy for Respondent’s discharge of Sunga Copher is reinstatement  
 and full backpay until he is either reinstated or declines a lawful offer of reinstatement.*

It is well-settled Board law that employee misconduct discovered during an investigation undertaken because of an employee's protected activity does not render the discharge lawful, *Supershuttle of Orange County*, 339 NLRB 1 (2003); *Kiddie, Inc.*, 294 NLRB 840, 840 n. 3 and 4 (1989). However, a Respondent is generally not precluded in the compliance proceeding from showing that new evidence demonstrates the unsuitability of the discriminatee for employment, (*Kiddie, supra; Fixtures Manufacturing Corporation*, 251 NLRB 778 (1980)).<sup>30</sup>

A related principle is that an employer seeking to be excused from its obligation to reinstate or pay backpay to a discriminatee for misconduct which was not a factor in the discriminatory action, has a heavier burden than when it is merely seeking to justify the original determination. Such an employer must prove the misconduct was, "so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant" *Hawaii Tribune-Herald*, (aka *Stephens Media, LLC*, 356 NLRB 661, 662-63 (2011), *O'Daniel Oldsmobile*, 179 NLRB 398, 404-05 (1969).

In other cases, however, the Board has stated the Respondent's burden in avoiding an obligation for reinstatement and full backpay differently, i.e., whether the employer can establish that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, e.g., *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69 (1993) [a case in which the discriminatee engaged in repeated sexual harassment-misconduct for which the Board could have also found him unsuitable for employment]. In these cases, the Board has stated that reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct, *Berkshire Farm Center*, 333 NLRB 367 (2001) [discriminatee opened and read mail addressed to management officials]; *Tschiffrie Properties, Ltd.*, 365 NLRB No. 34, slip opinion 2-3 (2017) [The Respondent must establish that it would have lawfully discharged any employee for the discriminatee's misconduct]

Since *Kiddie* has not been overruled, Board decisions leave open exactly what a Respondent must prove in compliance to cut off a discriminatee's reinstatement rights and backpay on the basis of "after the fact" evidence it would not have acquired but for its discriminatory motive. The Board decisions do not distinguish between situations in which the Respondent acquires the evidence as the result of a discriminatory investigation, as in this case, from one in which the evidence is obtained otherwise.

Moreover, Board decisions do not indicate whether the test is an objective one or a subjective one. Can an employer such as SRM prevail by showing that it never overlooked 3 no call/ no shows previously, or only by showing that any employer would discharge an employee like Copher, even if, like Copher, the employee hadn't had any attendance violations for almost a year prior to his discharge? Moreover, does a Respondent merely have to show that it never overlooked such misconduct in the past, or affirmatively show that it has discharged employees for substantially similar misconduct.

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<sup>30</sup> It is not so clear that Copher's no call/no shows constitute evidence of which Respondent was unaware when it fired him. Respondent had knowledge of this misconduct through Aaron Highley, who was its agent at the time Copher was fired.

I find that the test is an objective one and that Sunga Copher is entitled to reinstatement and full backpay. Furthermore, Respondent should not have the opportunity to prove otherwise based on its July 3, 2020 discoveries in a compliance proceeding. The record does not establish Respondent has ever terminated an employee for 3 no call/no shows within a year, despite what  
 5 its handbook states, Tr. 1606-10. Although, Respondent argues that such evidence was not required to be produced pursuant to the General Counsel's subpoena, I find that it was incumbent for Respondent to produce such evidence in the hearing on the merits because it raised the issue of its "after-acquired" evidence in the merits proceeding.

10 Moreover, I find that 3 no call/no shows a year to 17 months in the past, without a recurrence did not render Copher unsuitable or unfit for further employment with SRM. To find otherwise is an open invitation to Respondents to comb thru records and take other steps looking for a pretext on which it would have discharged the employee in order to limit back pay and reinstatement, completely contrary to the spirit of the Act.<sup>31</sup>

15 *The Separation Agreements signed by 6 employees on January 13, 2020 violate Section 8(a)(1).*

20 The Board's decision in *The Boeing Company*, 365 NLRB No. 174 (2017) does not apply to this case because SRM's separation agreement is not a generally applicable workrule. A separation agreement is legal if an employee's waiver of Sec. 7 rights is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver. *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 2 (2016). This is not the case with regard to the separation agreements signed by the 6 employees who signed them on January  
 25 13, 2020. The Board has found unlawful settlements like the one in this case that prevent a signatory employee from exercising rights that are unrelated to the facts giving rise to the settlement. *Clark Distribution Systems, Inc.*, 336 NLRB 747, 748 (2001) (severance package barring employees from participating in the prosecution of any claims against the employer held unlawful).

30 Respondent's separation agreement violates the Act in a number of ways: 1) It does not specifically mention that an employee is not prohibited from filing an unfair labor practice charge with the Board or cooperating with a Board investigation. Indeed by specifically mentioning the EEOC and not the Board, an employee might well believe the agreement  
 35 prevents the filing of a ULP charge. This is true because the agreement states it is to be construed as broadly as possible. Particularly troubling is the clause prohibiting legal action "based upon or relating to any of the claims released and forever discharged pursuant to this Agreement." Broadly read this clause would prevent a signatory from relying on the discharges in this case to prove anti-union animus in another case of alleged discrimination. 2) The  
 40 agreement would likely be read to prohibit assistance to other employees who wish to file an unfair labor practice charge or are considering doing so.

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<sup>31</sup> I contrast this to a situation in which a discriminatory investigation reveals evidence of conduct that clearly would render an employee unfit for further service, for example, credible death threats against other employees or managers.

The non-disparagement clause by its terms would prevent an employee from informing another person who has a dispute with SRM from even explaining their understanding of the other person's rights under the Act. This is not necessarily academic since the record indicates that some drivers from Georgetown were at one time somewhat interested in the Union. Finally,  
 5 the agreement is illegal in discriminatorily prohibiting the signatory employee from seeking employment with Respondent or any related company.

Respondent's reliance on *Baylor University Medical Center*, 369 NLRB No. 43 (2019) is misplaced. The Board in that case distinguished cases like *Baylor* in which there had not been  
 10 any discriminatory discharges from cases such as the instant one, where the separation agreement was tendered to employees in the context of their discriminatory discharge, 369 NLRB No. 43, slip op. at 2 fn. 6. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 fn. 12 (2018) (finding provisions of a proffered separation agreement unlawful because, among other reasons,  
 15 the employee had been unlawfully discharged), enf. mem. No. 18-1170 (D.C. Cir. 2019) (per curiam); *MetroNetworks*, 336 NLRB 63, 66-67 (2001).

SRM, like the employers in *Shamrock Foods* and *Metro Networks*, has already demonstrated its willingness to retaliate against employees for engaging in Section 7 activity. Thus, it was not privileged to offer them enhanced benefits in exchange for the sacrifice of their  
 20 Section 7 rights.

*The 6 employees terminated on January 10, are entitled to reinstatement and back pay*

In assessing the effect of employee waiver and release agreements, the Board has applied  
 25 the same standard it uses when assessing whether to give effect to private parties' non-Board settlement of unfair labor practice cases. This involves consideration of the factors set forth in *Independent Stave Co.*, 287 NLRB, 740, 743 (1987). The Board will examine 1) whether the charging parties, the respondents and any of the individual discriminatees have agreed to be bound and the position taken by the General Counsel regarding the settlement; 2) whether the  
 30 settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation and the stage of litigation; (3) whether there has been fraud, coercion, or duress by any of the parties in reaching the settlement; and 4) whether the respondent has engaged in a history of violations or has breached previous settlement agreements resolving unfair labor practices, *A.S.V. Inc.*, 366 NLRB No. 162 (2018) slip op. at 2-4, 50-51.  
 35

I find that the Board should not give effect to the severance agreements for the following reasons: 1) While Respondent and the discriminatees agreed to be bound, the Charging Party Union did not. Moreover, the General Counsel opposes giving effect to the agreements. 2) the settlement is unreasonable in exacting promises never to apply for employment again with SRM  
 40 and requiring the discriminatees to sacrifice some of their Section 7 rights and 3) Respondent by January 10, 2020 had a history of violating the Act in firing Sunga Copher, giving illegal bonus payments and soliciting grievances on November 15, 2019 and terminating Aaron Highley for refusing to spy on employees' protected activities.

*The appropriate remedy for SRM's illegal change of the status of the Winchester facility is a restoration of its operations as they existed before discrimination.*  
 45

Where an employer has curtailed operations and discharged employees for discriminatory reasons, the Board's usual practice is to order a return to the status quo ante—that is to require the employer to reinstate the employees and restore the operations as they existed before discrimination—unless the employer can show that such a remedy would be unduly burdensome, *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989); *We Can, Inc.*, 315 NLRB 170, 174 (1994). Respondent has not shown on the current record that it would be unduly burdensome for it to restore the Winchester facility to the status it had prior to January 10, 2020 and to reinstate not only Sunga Copher and Aaron Highley, but also the six drivers who were terminated on January 10.

The record establishes that SRM is still loading concrete trucks at Winchester on occasion and is making some concrete deliveries in the Winchester area, using trucks and drivers from Nicholasville and/or Georgetown. Its 2 Lexington area mechanics still operate out of the Winchester facility. It is also clear that production at the Winchester plant was on the upswing at the time SRM shut down most of its operations there.

At the compliance stage of this proceeding, Respondent will have the opportunity to demonstrate, on the basis of evidence not available to it at the time of the instant proceeding that it would be inappropriate to return to the status quo ante.

#### Remedy

The Respondent, having discriminatorily discharged Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall compensate them for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, computed as described above.

Respondent shall file a report with the Regional Director for Region 9 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016).

Respondent shall also return its Winchester, Kentucky facility to the status quo ante as of January 10, 2020.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>32</sup>

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<sup>32</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

**ORDER**

5 The Respondent, Smyrna Ready Mix Concrete, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- 10 (a) Discharging or otherwise discriminating against any employee for engaging in union or other protected concerted activity.
- (b) Discharging or otherwise discriminating against any supervisor for refusing or failing to commit an unfair labor practice.
- (c) Discharging or otherwise discriminating against any employee or supervisor due to the union or other protected activity of other persons, including relatives.
- 15 (d) Giving employees cash bonuses to discourage them from engaging in union or other protected concerted activities.
- (e) Changing the status of any of its facilities in retaliation for union or other protected concerted activities or to discourage such activities.
- 20 (f) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting union organizational activity.
- (g) Offering a separation agreement to a discharged employee that is not narrowly tailored to the facts giving rise to the settlement.
- (h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

25

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

30 (a) Within 14 days from the date of the Board’s Order, offer Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

35 (b) Make Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

40 (c) Compensate Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Compensate Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means for their search-for-work

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adopted by the Board and all objections to them shall be deemed waived for all purposes.

and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the discharges and within 3 days thereafter notify Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means in writing that this has been done and that the discharges and any reference to them will not be used against them in any way.

(f) Rescind the separation agreements signed by Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means on January 13, 2020.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Winchester, Nicholasville and Georgetown facilities copies of the attached notice marked "Appendix".<sup>33</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since November 8, 2019.

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

Dated, Washington, D.C. September 1, 2020

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<sup>33</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

*Arthur J. Amchan*

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Arthur J. Amchan  
Administrative Law Judge

**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

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

**FEDERAL LAW GIVES YOU THE RIGHT TO**

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

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in union or other protected concerted activity.

WE WILL NOT discharge or discriminate against any supervisor for refusing or failing to commit an unfair labor practice.

WE WILL NOT discharge or otherwise discriminate against any employee or supervisor due to the union or other protected activity of other persons, including relatives.

WE WILL NOT give employees cash bonuses to discourage their participation in union or other protected concerted activities.

WE WILL NOT solicit grievances from employees and impliedly promise to remedy them in order to discourage employees from supporting union organizational activity.

WE WILL NOT change the status of any of our facilities in order to discourage employees from engaging in union or other protected concerted activities.

WE WILL NOT illegally and coercively require you to sign an illegal separation agreement when you leave our employment.

WE WILL NOT offer you a separation agreement that waives any of your Section 7 rights which is not narrowly tailored to the facts giving rise to the settlement and which fails to make clear that you are free to engage in Section 7 activity in any other matter.

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

WE WILL, within 14 days from the date of this Order, offer Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith , James Bowling and Jason Means 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 or privileges previously enjoyed.

WE WILL make Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means whole for any loss of earnings and other benefits resulting from their terminations, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith , James Bowling and Jason Means for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 9 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges/terminations of Sunga Copher, Aaron Highley, Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges/terminations will not be used against them in any way.

WE WILL rescind the separation agreements signed by Nicole Long, Randall Carmichael, Sheldon Walters, David Smith, James Bowling and Jason Means on January 13, 2020.

WE WILL restore the status of our Winchester, Kentucky concrete plant to the status it had prior to January 10, 2020.

**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. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies 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. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 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, (513) 684-3750.