

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

SMYRNA READY MIX CONCRETE, LLC

and

Cases 09-CA-251578

09-CA-252487

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

09-CA-255573

09-CA-258273

**COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for the General Counsel takes cross-exceptions to Administrative Law Judge Arthur J. Amchan's September 1, 2020 decision in the above matter. Pursuant to Section 102.46(c) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel hereby submits the following Cross-Exceptions to the Administrative Law Judge's Decision:

1. To the failure to find that General Manager Ben Brooks telling employees they would no longer be required to travel to Florence, KY is a violation of the Act. (ALJD 20) ^{1/} This conclusion is contrary to record evidence and controlling law.

2. To the failure to find that Respondent giving employees \$100 at a November 15, 2019 meeting is a violation of Section 8(a)(3) of the Act. (ALJD 19) This conclusion is contrary to record evidence and controlling law.

3. To the failure to grant a notice reading remedy. (ALJD 28-30) This is contrary to controlling law and the Act's remedial purposes.

^{1/} References to the Administrative Law Judge's Decision will be designated as (ALJD ___); references to the trial transcript will be designated as (Tr. ___); references to the General Counsel's exhibits will be designated as (G.C. Ex ___); and, references to Respondent's exhibits and the Union's exhibits are designated as (Resp. Ex. ___) and (Unknown Ex. ___), respectively.

ARGUMENT IN SUPPORT OF EXCEPTIONS

- I. The Administrative Law Judge erroneously failed to find that, by promising employees they would no longer be required to drive to Respondent's facility in Florence, Kentucky in response to employees' union organizational activities, Respondent violated Section 8(a)(1) of the Act.

The Administrative Law Judge erred in failing to find that General Manager Ben Brooks telling employees they would no longer be required to travel to Florence, Kentucky violated Section 8(a)(1) of the Act. The granting or announcement of employee benefits while a representation election is pending constitutes an unlawful interference within the meaning of Section 8(a)(1) of the Act when such is done for the purpose of inducing employees to vote against the Union. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board has recognized that such seemingly beneficent acts are considered coercive and violate Section 8(a)(1) when taken in response to union activity - a "fist inside of a velvet glove" designed to unlawfully entice employees' cessation of union organizing. The Board has determined that the rule set out in *Exchange Parts* is also applicable to the granting of benefits during an organizational campaign, but before a representation petition has been filed. *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006).

Ultimately, "[t]he lawfulness of an employer's conferral of benefits during a union organizing campaign depends on its motive." *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016). The Board infers both improper motive and interference with Section 7 rights when an employer grants benefits during an organizing campaign without showing a legitimate business reason. *Id.* See also, *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) (granting wage increase unlawful where wage increase was unscheduled, contrary to employer's policy, addressed a primary concern of certain employees, and the size, timing, and applicability of the increase was entirely at respondents' discretion); *ManorCare Health Service-Easton*, 356

NLRB 202, 222 (2010), *enfd.* 661 F.3d 1139 (D.C. Cir. 2011) (“Absent showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.”).

Here, the Administrative Law Judge correctly credited employee testimony that Brooks told them on November 15, 2019 that they would not have to travel to Florence, KY anymore or as frequently. (ALJD 20) However, the Administrative Law Judge erred in finding that there was not a connection between the union organizing and the cessation of trips to Florence by Winchester drivers. He also erred in finding that the statements were not an implied promise of an increased benefits and improved working conditions. As an initial matter, there was ample testimony that the shared frustrations with having to make trips to Florence was the cornerstone and genesis of the union organizing drive. (ALJD 11-12) Brooks was aware of these concerns. (ALJD 12) Therefore, Brooks’ promise to resolve that concern would have been particularly effective at quelling unionization efforts. See, *Doane Pet Care*, 342 NLRB 1116 (2004) (telling employees that the loss of bonuses that had formerly been given to employees, health insurance costs, and employees being charged for uniforms, issues raised by those employees during a union campaign would be looked into, and the announcement that a potential new bonus for employees was being considered, found unlawful); *Majestic Star Casino*, 335 NLRB 407, 408 (2001) (employer’s statement that it would look into employees’ concerns found unlawful).

The statement also came on the heels of Brooks’ unlawful termination of Sunga Copher, the spearhead of the nascent organizing campaign. Brooks’ presence at the safety meeting was unusual. His prior presence at the Winchester facility was sporadic at best. Employees were not accustomed to seeing Brooks at the plant, and the significance of his visit, timed shortly after the launch of the union organizing campaign and the lead union organizer’s discharge, was not lost

on employees. The evidence supports that Brooks' presence and statements at the meeting were for the purpose of quashing the organizing drive, particularly given that the statement about no longer having to travel to Florence was also contemporaneous with other unfair labor practices of granting employees \$100 bonuses and soliciting grievances.

Finally, the Administrative Law Judge's observation that employees were told they would not have to travel to Florence anymore because Respondent had hired new drivers in Florence does not undermine the unlawfulness of the statement. Beyond the self-serving testimony of Brooks, there is no evidence supporting that Respondent actually hired employees in Florence. Moreover, Respondent may have hired these employees as part of the effort to remedy employees' grievances. Thus, even if Respondent had hired additional employees in Florence, doing so in order to remedy employees' grievances at the Winchester plant and quash support for organizing violates the Act. From that perspective, Brooks' statements about no longer traveling to Florence clearly violated Section 8(a)(1) of the Act.

II. The Administrative Law Judge erroneously failed to find that giving employees \$100 is a violation of Section 8(a)(3) of the Act.

The Administrative Law Judge correctly found that Respondent, by General Manager Ben Brooks, violated Section 8(a)(1) of the Act by giving drivers \$100 in cash at a meeting on November 15, 2019. (ALJD 19) However, the Administrative Law Judge did not address whether the same action was a violation of Section 8(a)(3) of the Act as alleged in paragraph 11 of the complaint. The Administrative Law Judge correctly found that "[t]here is no credible explanation for the November 15 cash bonus – other than it was meant to discourage unionization." (ALJD 6) The Administrative Law Judge further found that "[t]here is simply no credible explanation for Brooks' unprecedented largess on November 15, in giving every

Winchester driver \$100 in cash, other than it was part of an effort to discourage employees from organizing,” and stated “[t]hus, I find he violated Section 8(a)(1) in doing so.” (ALJD 19)

Section 8(a)(3) of the Act is intended to protect employees’ Section 7 rights to form, join, or assist labor organizations, or to refrain from doing so, and without a result which leads to them being subjected to retaliation by their employers. The acts described by the Judge, efforts to discourage organizing and unionization, amount to not just violations of Section 8(a)(1) of the Act, but also violations of Section 8(a)(3) of the Act. See, e.g. *Clock Electric*, 338 NLRB 806 (2003) (under a *Wright Line* analysis, granting employees wage increases to discourage them from supporting a union organizing campaign was a violation of Section 8(a)(1) and (3) of the Act); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) (granting wage increase unlawful where wage increase was unscheduled, contrary to employer’s policy, addressed a primary concern of certain employees and the size, timing, and applicability of the increase entirely at respondents’ discretion, violated Section 8(a)(1) and (3) of the Act). Here, as in *Clock Electric* and *Holly Farms Corp.* based on Respondent’s improper motive in granting the November 15 bonus, and in the absence of a legitimate business reason for doing so, Respondent violated both Section 8(a)(1) and (3) of the Act.

III. The Administrative Law Judge erroneously failed to find that a notice reading is warranted under the circumstances of this case.

The Administrative Law Judge erred in not finding that a notice reading is warranted under the circumstances of this case. A notice reading is necessary and essential to properly remedy Respondent’s conduct for several reasons. First, the Board has held that a notice reading is more effective at remedying violations during an organizational campaign than a traditional notice posting because of the greater impact an employer has on employees when standing and reading before them. See, *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993), *enfd.* mem 55 F.3d 684

(D.C. Cir. 1995). The reading of the notice will also “ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards.” *Excel Case Ready*, 334 NLRB 4, 5 (2001).

Second, testimony established that the breadth and severity of Respondent’s unfair labor practices was so wide-reaching and severe that extraordinary remedies are necessary. The Board has held the remedy of reading a notice by a company representative is appropriate when the unfair labor practices are “so numerous, pervasive and outrageous” that extraordinary remedies are necessary “to dissipate fully the coercive effects of the unfair labor practices found.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995)(unfair labor practices found to be “egregious and notorious”). Here, the scope of Respondent’s unfair labor practices included a discharge of an the lead union supporter for his union or protected concerted activity, a discharge of a supervisor for refusing or failing to commit an unfair labor practice, and because he was related to a union supporter, giving employees bonuses to discourage them from engaging in union or other protected concerted activities, changing the status of the plant to an on-demand facility and in doing so, discharging the remainder of the drivers at the facility, soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting union organizational activity, and requiring employees to sign unlawful separation agreements. Every single driver at the Winchester, Kentucky facility was impacted by these unfair labor practices. Moreover, all of the unfair labor practices were committed by high ranking officials of Respondent, making the need for a notice reading even greater. *OS Transport LLC*, 358 NLRB 1048, 1049 (2012) (relying on senior officials’ involvement in the commission of unfair labor practices to require a notice reading).

A notice reading is also necessary because the impact and awareness of the unfair labor practices was unit wide. *OS Transport LLC*, 358 NLRB 1048, 1049 (2012) (relying on awareness of unfair labor practices within the unit to require a notice reading). The record establishes that knowledge of the unfair labor practices was proliferated amongst all of the drivers. All of the drivers at the facility were ultimately impacted by the unfair labor practices, two voluntarily left, and the remainder were unlawfully discharged. The unfair labor practices were directed at the entire workforce of drivers, and they have not been corrected or disavowed to date.

The evidence showed that there was not just widespread knowledge of Respondent's numerous and egregious unfair labor practices, but that every single driver in the unit, as well as the only supervisor at the plant, was affected by them. The partial closure of the plant is a particularly egregious violation that must be sufficiently remedied through a method more effective than a traditional posting. In short, the Administrative Law Judge erred in not ordering a notice reading to remedy the violations.

Dated: November 9, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

November 9, 2020

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

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