

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

<b>SMYRNA READY MIX CONCRETE, LLC</b>	:	CASE NO. 09-CA-251578
	:	09-CA-252487
	:	09-CA-255573
and	:	09-CA-258273
	:	
<b>GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS</b>	:	<b>RESPONDENT'S REPLY IN SUPPORT OF ITS EXCEPTIONS AND REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF</b>

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Respectfully submitted,

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## **I. Introduction**

Smyrna Ready Mix Concrete, LLC (“SRM”) submits this Reply Brief in support of its Exceptions and Brief in Support (“Exceptions Brief”). This matter arose after SRM terminated Winchester Driver Sunga Copher (“Copher”) for excessive overtime hours and negative attitude in refusing to travel to assigned plants, and after it terminated Winchester Plant Manager (Copher’s Uncle) Aaron Highley (“Highley”), for failing to effectively manage his Drivers’ labor hours and efficiencies, which led to negative revenues and the closure of the Winchester Plant. In his ruling, the ALJ ignored substantiated facts, twisted the record to fit his reasoning, and ignored and/or misapplied applicable law in finding that SRM violated the Act in various ways. The General Counsel’s (“GC”) Answering Brief (“Response”) follows this same erroneous pattern.

## **II. The ALJ erred in finding that Copher’s termination violated Sections 8(a)(1) and 8(a)(3) of the Act.**

Hoping to shield the ALJ’s Decision from proper review, the GC’s Response misconstrues SRM’s Exceptions and the ALJ’s reasoning. The GC refers to SRM’s strong arguments undermining the ALJ’s reasoning as mere credibility attacks, to try to benefit from the deferential standard of *Standard Dry Wall Products*, 91 NLRB 544 (1950). (General Counsel “GCR” p. 6). For example, the GC relies on half of a footnoted sentence, where the ALJ claims he “considered witness demeanor” but without reference to specific testimony or credibility judgment. (GCR p. 7). Yet, the GC ignores part of the same sentence in which the ALJ admits to having *also* credited testimony based on “the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.” (ALJD n. 2). The ALJ’s actual analysis shows that his credibility decisions were based on factors unrelated to demeanor – factors that call for independent review by the Board, consistent with Board law. *In Re Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011). The ALJ does not use

the word “demeanor” or any synonym thereof, within his credibility analysis. *See Permaneer Corp.*, 214 NLRB 367, 369 (1974) (“an [ALJ] cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word demeanor.”).<sup>1</sup>

One of SRM’s primary objections to the ALJ’s claimed credibility determinations is his finding that the GC satisfied its *Wright Line* burden to establish that SRM (specifically, Ben Brooks) knew about Copher’s union activities, had animus against such activity, and terminated Copher as a result, which then served as the claimed catalyst for SRM’s allegedly unlawful subsequent conduct. (ALJD 18:21-30). Remarkably, neither the ALJ nor the GC cited any record evidence showing how Brooks learned of Copher’s union activities or sought to terminate him as a result. Like the ALJ, the GC leaps to an “inherent probability” argument, based solely upon the timing of Copher’s discharge, while ignoring Copher’s proven misconduct. (GCR p. 10).

Newell heard Driver Long mention a Drivers’ meeting (not a “union meeting” as the GC asserts – See, GCR, p. 9) and relayed this information to Brooks. (Tr. 1412-15). But, neither Long nor Newell mentioned Copher in relation to this meeting. Thus, if Brooks were inclined to use this information as the trigger for terminating an employee for union activity, the target would be Long, not Copher. Also, Copher’s own recording shows that Brooks had no knowledge of any such activity.<sup>2</sup> (R. Ex. 90). Brooks was concerned with the multiple reports of Copher’s misconduct—

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<sup>1</sup> SRM further submits that deference to the ALJ’s assessment of witness demeanor is improper since the hearing was conducted by Zoom, which compromises a full and true view of demeanor.

<sup>2</sup> The ALJ’s complete disregard of Copher’s secret recording is unreasonable and unsupportable. The recording supports Brooks’ (and SRM’s) version of events, not the GC’s (or Highley’s). The recording shows Brooks responded with surprise when Copher blurted “union” into the conversation, and Copher admits to Brooks’ quizzical response, supporting Brooks’ lack of knowledge and lack of animus. (R. Ex. 90). The GC fails to address, much less refute, this argument. The GC instead misdirects, arguing that “Brooks could not name a single instance in which Copher’s work was inadequate or his attitude poor...nor could Brooks name anyone who made any such allegations against Copher.” (GCR p. 12-13). But, the recording shows no such discussion. Brooks said he was not going to debate Copher about his misconduct by providing examples but had examples of his misconduct, which the record supports. (R. Ex. 90).

his failure to show up to Taylorsville and his excessive overtime hours (Copher had the highest overtime hours of any Central Kentucky Region (“CKR”) Driver in 2019). (Tr. 1093, 1100; R. Ex. 23). The GC repeatedly tries to discount this misconduct, but 4 of the GC’s own witnesses testified they had heard complaints, or had complained themselves, about Copher. (Tr. 500-01, 677, 1086).

The GC claims Brooks’ conversation with Stott about the Drivers’ meeting suddenly “turned” to Copher and infers Brooks was searching for union supporters. (GCR p. 8). The record guts this inference, especially because Copher failed to dispute Newell’s testimony that Copher, while snickering, as much as admitted he had failed to report to Taylorsville, Newell said it wasn’t funny and that “this problem wasn’t going to go away” because Brooks would hear about it. (Tr. 1338). Consistent with Newell’s promise (which happened *before* Copher’s union activity), Brooks heard that Copher had refused to report to Taylorsville, and the issue did not go away. Near this same time, Long and Walters complained to Brooks about Copher riding the clock. (Tr. 1086).<sup>3</sup> Brooks’ talk with Stott “turned” to Copher because of these complaints, and the requested inference to see a retaliatory motive is based on the GC’s (and the ALJ’s) twisted reading (or disregard) of record evidence that Brooks did not know of union activity or Copher’s involvement.<sup>4</sup>

Finally, and most exceptionally, the ALJ and the GC claim it “incredible” that SRM would find Copher was “stealing time” but not discipline or terminate him for it. (GCR p. 13). These statements highlight a complete blind-eye to the record. Brooks testified without contradiction that he learned of Copher’s excessive overtime and terminated him within hours. (Tr. 1100-01). But, both the ALJ and GC inexplicably ignore this testimony and then blame Brooks, claiming he failed

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<sup>3</sup> Copher had twice as much overtime as Walters and Long, supporting their complaints. (R. Ex. 59, 61, 63).

<sup>4</sup> In another twisted reading of the record, the ALJ found that Stott and Brooks did not talk about Taylorsville on the morning of Copher’s discharge, only because Stott did not give cumulative testimony about it. (ALJD 4:24-29). No evidence refuted Brooks’ testimony about this conversation, and testimony from Stott on this point would have been unnecessarily cumulative. The GC also mischaracterizes the conversation, claiming the “only time Stott said he spoke to Brooks about [Copher] was on October 19, 2019.” (GCR p. 9). Stott testified that October 19<sup>th</sup> was the first time – not the “only” time – he alerted Brooks about Taylorsville. (Tr. 1024).

to act in exactly the way he acted. Ironically, the GC then attacks SRM's records of the Drivers' hours, claiming that SRM submitted only demonstrative charts without the underlying evidence.<sup>5</sup> (GCR p. 14). That is simply not true. The underlying evidence was introduced into evidence – and by none other than the GC. (General Counsel "G.C." Ex. 30). The GC entered SRM records showing every hour worked by the CKR Drivers, including Copher, in 2019 (not just Fall 2019, as the GC claims). (*Id.*). These records show that Copher had the highest overtime hours of any Driver, fully supporting SRM's termination decision. (*Id.*).<sup>6</sup> The GC and the ALJ cannot ignore this evidence simply because it does not fit their narrative. The GC did not establish its *Wright Line* burden, and the ALJ's decision should be reversed.

### **III. The ALJ erred in finding that Highley's termination violated Section 8(a)(1) of the Act.**

The ALJ noted that Highley's testimony was self-serving. (ALJD 7:3-4). Yet, in finding that Highley's termination was unlawful, the ALJ ruled that Brooks engaged in conduct that not even Highley claims occurred. The ALJ ruled that Brooks asked Highley to surveille the Drivers regarding their union activities. (ALJD 21:14-15). The GC doubles down on that unsupported ruling, claiming that Brooks asked Highley to surveille or interrogate the Drivers about union activities. (GCR p. 18). Neither theory – surveilling or interrogating – is supported by the record, not even by Highley's self-serving testimony. Highley instead claimed *only* that Brooks asked him to get a list of union supporters and that Highley refused. (Tr. 761). Assessing union support by making a list is not unlawful as long as not done through illegal means. This lack of record support reinforces the ALJ's error in failing to consider this case under *Spring Valley Farms*, 272 NLRB

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<sup>5</sup> The GC also argues that the ALJ correctly credited the Drivers' self-serving testimony about their hours being underreported in SRM's records, claiming those records did not reflect time worked in Florence (which is nonsensical for a host of reasons and would mean they worked even *more* than their already exorbitant hours).

<sup>6</sup> Further, the record contains documents evidencing every single delivery made by a Winchester Driver from July 8, 2019 through May 30, 2020 (not just Fall 2019, as the GC claims), regardless of whether that delivery was hauled out of Winchester, Nicholasville, Florence, Georgetown, or any other CKR SRM plant. (R. Ex. 75). These records demonstrate that none of the Winchester Drivers actually went to Florence as frequently as claimed.

1323 (1984). There, a supervisor was terminated after refusing a directive to talk to drivers to see if they were voting in favor of a union prior to an election. *Id.* at 1328. The supervisor’s termination was *not* unlawful, however, because (a) she was asked only to “talk” to employees about their union inclinations, not to issue threats or promises, and (b) no evidence showed that any employees were aware of the request and would link the discharge to the refusal. *Id.* at 1328, 1332. Here, Highley does not even claim he was asked to “talk” to employees, or interrogate or surveille or threaten or make promises, and no employee testified to knowing that Highley had been asked to prepare a list or that he was fired for refusing. Neither the law, nor the record here, supports the GC’s apparent argument that writing names on a piece of paper, without more, is unlawful surveillance or interrogation.

The GC attempts to distinguish *Spring Valley* by arguing that Highley was asked to “get...names of people that were *involved* with the union,” presuming this *might* have resulted in conversation with the Drivers. (GCR p. 19; Tr. 753). The GC’s inferences are without merit and speculative at best. SRM has articulated its legitimate business reasons for Highley’s termination, and there is no evidence by which the GC has met its burden of proving an unfair labor practice here.<sup>7</sup> There is *no evidence* that Brooks asked Highley to interrogate, poll, or conduct unlawful surveillance to create this list, and there is *no evidence* the Drivers were aware of Brooks’ alleged request or was fired for refusing. Accordingly, Highley is not protected by the Act as a supervisor, and this claim fails as a matter of law. *See Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 403 (1982).

**IV. The ALJ erred in determining that Brooks unlawfully gave the Winchester Drivers \$100 in cash, and unlawfully solicited grievances on November 15 in violation of Sections 8(a)(1) and 8(a)(3).**

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<sup>7</sup> At GCR p. 35, the GC concedes that the Winchester plant’s performance “undisputedly improved in every aspect in its last month of operation December 2019.” This improvement shows that, contrary to the GC’s arguments, there was merit to SRM’s conclusions about Highley’s poor management.

Neither the record nor case law supports the ALJ's finding that Brooks' giving the Winchester employees \$100 in cash violated Section 8(a)(1). The ALJ and the GC cite *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), relying on its holding that employees would not likely "miss the inference" that the company was the source of the benefits being conferred, was the source from which future benefits must flow, and which may dry up "if not obliged," and relying on the "fist inside the velvet glove" analogy with regard to payment of the \$100 safety bonus. *Exchange Parts Co.*, however, is easily distinguishable. There, the grant of benefits occurred while a representation petition was pending and was accompanied by brazen employer statements that the Company, not the Union, was the source of such benefits, *see* 375 U.S. at 406-407, neither of which is true here. There was no petition, and Brooks did not refer to the union or make any statement emphasizing the Company as a source of benefits, either during the meeting or at any time.<sup>8</sup> The GC did not present evidence to establish an unlawful motive or to counter SRM's legitimate business reason for the bonuses, especially in light of past practice. (Tr. 1111-12; 1572-73; R. Ex. 91) (Brooks' practice on nine occasions in 2019 and SRM's for 20 years).

Similarly, as to Brooks' alleged solicitation of grievances, SRM established its past practice through a GC witness, who testified he had attended 4-5 meetings with Brooks in Winchester, and that each time, Brooks had asked the drivers what they needed around the plant and how things were going. (Tr. 599-600). The GC responds with a misdirection, arguing that rank and file employees from Winchester had not actually called Brooks in the past. (GCR 25-26). But, the issue is NOT whether employees actually called Brooks, but rather whether Brooks previously

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<sup>8</sup> The GC's remaining cases are likewise unpersuasive for the same distinguishing reasons. Those cases found unlawful a conferral of benefits during the critical period or made with clear evidence of employer efforts to influence union support.

had said they could do so if they needed something, which a GC witness confirmed as true. The GC overlooked, and the ALJ erroneously refused to credit, this testimony of past practice.<sup>9</sup>

**V. The ALJ erred in concluding that SRM violated Section 8(a)(1) and (3) of the Act by closing Winchester and terminating the remaining Drivers.**

Unrefuted records show the Winchester Plant had the lowest EBITDA (by wide margin) in its region and show that its poor productivity and labor costs ran contrary to SRM's business model requiring efficiency. (R. Ex. 9). How long was SRM required to lose money by continuing to operate the Winchester Plant simply because 2-3 employees had met with a union months earlier? One month, two months, six months, a year? Neither law nor logic requires a business to swallow losses of this magnitude during a "nascent" (i.e., future potential) organizational campaign, especially when the closing occurs not mid-year but at the more logical year end. The evidence and past practice show that SRM would have closed Winchester even absent the minimal union activities.

The GC continues to use tortured math trying to discredit SRM's financial records. For example, the GC points to Winchester's "doubled yardage" from 2018 to 2019 to suggest the Winchester Drivers were good performers, but then turns a blind eye when confronted with the actual rationale for that increase – that Winchester doubled its trucks/drivers. (GCR p. 34-35). The GC ignores that "doubled yardage" does not automatically result in increased profit.<sup>10</sup> As accurately reasoned by Stott, SRM "might as well put them trucks on the moon" because SRM was not receiving any benefit from their use in Winchester. (Tr. 980). The GC mischaracterizes

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<sup>9</sup> The GC and the ALJ also erroneously rely upon case law finding unlawful the solicitation of grievances during the critical period only, which again is not the case here. See, GCR p. 25. The GC admits that here, there was only a potential for organization, referring to the Winchester Driver's activities as a "nascent organizing campaign." *Id.* Here, even if Brooks solicited grievances for the first time in the safety meeting (which SRM denies and the GC's own witness says otherwise), such solicitation would be unlawful only if during the "critical period" after the filing of a petition.

<sup>10</sup> As the old joke highlights, the solution to losing money per truck load is not to get more trucks.

the Winchester Drivers' performance in the two months of operation after Highley was terminated, arguing that revenues slightly increased, but refusing to acknowledge why. (GCR p. 35). First, Highley was a weak manager who did not hold employees accountable (supporting his termination). (Tr. 1205-07). Second, employees improved after Highley was gone because SRM assigned 3 upper-level managers to micro-manage the Drivers – a cost which negated the additional revenue. (Tr. 1117). It was a wash (at best). The 3 managers also were diverted from their day-to-day jobs during this time, likely to SRM's detriment. The record shows no real improvement by the Winchester Drivers, no matter how the GC twists the numbers.

Further, undermining any inference of animus, SRM took on these efforts to turn the plant around AFTER it received the first ULP Charge filed here by the Teamsters, which the GC and the ALJ ignore. Had SRM intended to discriminate against the Winchester Drivers, it would have closed the plant in November. Instead, SRM brought in additional managers, interviewed new plant manager candidates, and assessed the Drivers' performance absent Highley to determine whether they could turn the plant around. (Tr. 1117-18). Contrary to the GC's blanket assertions, this is not the conduct of an employer attempting to "chill" union activities under *Darlington*. SRM did not decide to close the plant until after this two-month investment of time and resources (during which no organizing activity occurred according to Palmer and GC witnesses) failed to generate evidence of a turnaround. The GC did not sustain its burden under *Wright Line* or *Darlington* given this lack of evidence and admission.<sup>11</sup>

**VI. The ALJ erred in determining that the Agreements signed by 6 employees on January 13, 2020 were unlawful.**

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<sup>11</sup> The GC conveniently omits these facts in its Response and instead argues liability based upon "suspicious timing" (again, two-months stale), and claiming the plant was is not completely closed, i.e., is being used on-demand on rare occasions when customer need dictates. (GCR p. 27-28). This argument ignores why Winchester was losing money in the first place, (Drivers' inefficiencies, leading to excessive labor hours), not equipment costs. With those Drivers not undermining SRM's efficiency model, SRM can continue to use that facility as needed by assigning Drivers at other facilities. It is particularly telling that SRM was able to absorb all of Winchester's business with the addition of only one Driver, an undisputed fact also wholly ignored by the ALJ. (Tr. 1219).

The ALJ erred in basing conclusions on what an “employee might believe” as to the Agreements, and the GC similarly errs in relying on how employees “would reasonably interpret the Agreement[s]”. (ALJD 26:34; GCR p. 33). Such guesses and assumptions are not evidence, especially here where employee actions speak loudly; four of the six who signed Agreements cooperated with the Board’s investigation, provided affidavits, and testified at the hearing. GC witness Long testified she was “not concerned at all” about participating in the Board’s investigation. (Tr. 205). None of those signing Agreements believed they were giving up their Section 7 rights by doing so.

Further, the GC skims over the fact that *Baylor University Medical Center*, 369 NLRB NO. 43 (2019) overruled (or at a minimum, significantly narrowed) the rulings in *Shamrock Foods Co.*, *Clark Distribution Systems*, and *Metro Networks*. The facts here align with those in *Baylor* as explained in SRM’s Exceptions Brief.<sup>12</sup>

## **VII. The ALJ’s recommended Order should not be enforced.**<sup>13</sup>

The GC does not refute SRM’s main argument regarding the ALJ’s extraordinary remedy of forcing SRM to reopen the Winchester plant and reinstate all employees including Copher and Highley, a remedy which is not routinely granted and which has not been supported by adequate factual justification. *RAV Truck and Trailer Repairs, Inc.*, 369 NLRB No. 36 at n. 3 (2020). The

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<sup>12</sup> The Agreements were not mandatory and applied only to postemployment activities. The Agreements also were proffered under lawful circumstances. No union activity had occurred for 2 months, the employees were not forced to sign, and the language, and testimony of those signing, confirm that no reasonable employee would conclude they could not make a good faith report or participate in a government investigation. (G.C. Exs. 3-4, 11, 19-21).

<sup>13</sup> The GC first incorrectly attacks SRM for “not prov[ing] that it was losing money by keeping the plant open.” (GCR p. 34). SRM specifically explained in its Exceptions Brief that it was not addressing all of those issues as the ALJ reserved those issues for the compliance stage of the proceedings. SRM has established that reopening the Winchester plant to restore operations would be “unduly burdensome,” and will continue to provide evidence of such during the compliance proceedings in this case. *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989). Unlike the employer in *Lear Siegler, Inc.*, SRM did not transfer its operations and subcontract the work, rather the work being performed by the Winchester employees was absorbed by sister plants and the hiring of only one additional employee. (Tr. 1219).

Board's remedy is not tailored to "the nature and extent of the violations." See *Hickmott Foods, Inc.*, 242 NLRB 1357. The GC also failed to respond to SRM's central argument that it is wholly inappropriate to reinstate the 6 Winchester Drivers under the factors in *Independent Stave Co.*, 287 NLRB 740 (1987), which weigh in favor of enforcing the January 2020 separation agreements. The Agreements are fair and reasonable and did not require any alleged discriminatee to sacrifice any Section 7 rights as previously discussed; and, the Union was aware of, but did not advise any of the Drivers to exercise their option to revoke the Agreements within 7 days after execution.

Instead, the GC argues that SRM did not establish that Copher would have been terminated based his three no-call/no-shows. (GCR p. 37). The record says otherwise. SRM's policy calls for termination after the second no-call/no-show, and Copher engaged in that behavior, even based on his uncle's records, which Highley kept secret and failed to report to HR, showing that even Highley knew the likely result – that his nephew would be terminated, especially given Copher's self-serving and unbelievable excuses. (Tr. 1043-54; R. Exs. 1, 80). See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993) (when an employer establishes that the discriminatee engaged in unprotected conduct for which he would have been discharged, "reinstatement is not ordered and backpay ends on the date the employer first knew of the misconduct").

With respect to Highley, the GC baldly asserts that "there is no evidence that Highley's reinstatement would be disruptive to Respondent's operations," while ignoring ample evidence otherwise, namely Highley failing to follow SRM's procedures (i.e. failing to input data in SRM's computer system, failing to require Drivers follow SRM's loading procedures, and failing to pass on paperwork to HR). (GCR p. 36; Tr. 807-08, 1054, 1113). Placing Highley back in charge of the plant would require SRM to abdicate control of the facility—hardly a remedy tailored to the nature of the alleged violations.

Respectfully submitted,

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