UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VERMONT INFORMATION PROCESSING, INC.

and **Case 03-CA-301055**

CHRISTOPHER BENDEL, an Individual
GORDON DRAGOON, an Individual
KALEB NOBLE, an Individual
KESTREL SWIFT, an Individual

GENERAL COUNSEL'S STATEMENT OF POSITION ON REMAND TO THE NATIONAL LABOR RELATIONS BOARD

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GENERAL COUNSEL'S STATEMENT OF POSITION ON REMAND TO THE NATIONAL LABOR RELATIONS BOARD

The General Counsel submits this statement of position to the National Labor Relations Board ("the Board") following the U.S. Court of Appeals for the District of Columbia Circuit order vacating in part, the Board's Decision and Order in *Vermont Information Processing, Inc.*, 373 NLRB No. 131 (2024), and remanding the case for the Board to adequately consider the discharges of Gordon Dragoon, Kaleb Noble, and Kestrel Swift without relying on unalleged conduct.[1]

I. PROCEDURAL HISTORY

On November 5, 2024, the Board issued its Decision and Order in Case 03-CA-301055, affirming the finding of Administrative Law Judge Arthur J. Amchan that Vermont Information Processing, Inc. (Respondent) violated Section 8(a)(1) of the Act by discharging employees Christopher Bendel, Gordon Dragoon, Kaleb Noble, and Kestrel Swift because of their protected concerted activities. *Vermont Information Processing, Inc.*, 373 NLRB No. 131 (2024). Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) and the Board filed a cross-application for enforcement.

On May 26, 2026, the D.C. Circuit found that substantial evidence supported the Board's determination that Respondent illegally fired Christopher Bendel. However, the D.C. Circuit set aside the Board's Order with respect to the discharges of Dragoon, Noble, and Swift and remanded the case for the Board to consider their discharges without relying on online chat communications about workplace conditions, which was unalleged conduct. *Vermont Information Processing, Inc. v. NLRB,* 176 F.4th 690, 702 (D.C. Cir. 2026).

[1] Throughout this brief, the following references will be used: Tr. at ___ for transcript at page(s); GC Ex. ____ for General Counsel's exhibit; and R Ex. ___ for Respondent's exhibits.

II. ARGUMENT

For the reasons set forth below, General Counsel respectfully urges the Board to uphold its finding that Respondent violated Section 8(a)(1) of the Act by discharging Dragoon, Noble, and Swift in retaliation for their protected concerted activities.[2]

A. Respondent discharged Dragoon, Noble, and Swift for their protected concerted activities.

The ALJ found that Respondent discharged Dragoon, Noble, and Swift because of their instant messaging chats about the salary spreadsheet and Bendel's termination, which the ALJ found to be inextricably linked to their roles in creating and disseminating the spreadsheet and therefore the due process requirements were met. *Vermont Information Processing, Inc.*, 373 NLRB No. 131, slip op. at 7 (2024). The Board, affirming the findings of the ALJ, found that Respondent discharged Dragoon, Noble, and Swift for their protected concerted activities of engaging in online chat communications about the salary spreadsheet, workplace conditions, and frustration over Bendel's recent discharge. *Vermont Information Processing, Inc.*, 373 NLRB No. 131, slip op. at 1 n. 5 (2024). The Board found, and the D.C. Circuit agreed, that the communications about the spreadsheet and Bendel's termination were inextricably linked to their roles in creating and disseminating the salary spreadsheet. *Vermont Information Processing, Inc. v. NLRB,* 176 F.4th 690, 700 (D.C. Cir. 2026). However, in its partial remand, the D.C. Circuit concluded that the Board improperly broadened its theory of liability beyond the scope of the complaint by enlarging the relevant conduct to include chats about workplace conditions. General Counsel respectfully submits that discharging Dragoon, Noble, and Swift because of their

[2] The General Counsel disagrees with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), *vacated in part*, 102 F.4th 727 (5th Cir. 2024), and will be urging the Board to reconsider the policy in a future, appropriate case.

communications about the salary spreadsheet and Bendel's termination alone are sufficient to find that Respondent violated Section 8(a)(1) of the Act.

The Board has found wage discussions to be inherently concerted because wages are a "vital term and condition of employment" and are the "grist on which concerted activity feeds," often acting as the preliminary to organizing or other action for mutual aid or protection. *See, e.g.*, *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n. 10 (2014).

Dragoon, Noble, and Swift spoke about wages amongst themselves, commiserated over the lack of pay transparency, and then commenced group action to address these concerns by disseminating a salary spreadsheet. (Tr. 60-61, 135-40, 192-94, 227, 236-38; GC Ex. 3, 5; R Ex. 7, 19). The salary spreadsheet, along with the discussions surrounding it, are clearly protected activity. As the Administrative Law Judge found, and the Board affirmed, Dragoon, Noble, and Swift engaged in concerted activity of creating and disseminating the salary spreadsheet and engaging in discussions related to the salary spreadsheet, and Bendel's termination and that Respondent was aware of, and bore animus towards it, and terminated the three due to that concerted activity. *Vermont Information Processing, Inc.*, 373 NLRB No. 131, slip op. at 1 (2024).

The Board, affirming the ALJ, correctly found that Respondent discharged Dragoon, Noble, and Swift for their protected concerted activities of communications about the salary spreadsheet and Bendel's termination. Those alone are sufficient to find a violation, even absent a finding that Respondent terminated Dragoon, Noble, and Swift due to discussions of workplace conditions. As such, the Board should find that Respondent unlawfully discharged Dragoon, Noble, and Swift for their protected concerted activities of online chat communications about the salary spreadsheet and frustration over Bendel's recent discharge.

B. Workplace conditions were closely connected to the subject matter of the complaint and Respondent had the opportunity to fully litigate the issue.

While Respondent may argue that the Board found a violation based on uncharged conduct, the chats about workplace conditions were inextricably linked to the employees' roles creating and disseminating the salary spreadsheet and Respondent was not prejudiced by the Board's finding because Respondent was aware of the connection between workplace conditions and the salary spreadsheet and questioned witnesses on workplace conditions during the hearing.

Even though the complaint did not include workplace conditions as part of Dragoon, Noble, and Swift's protected concerted activities, the Board may find a violation in absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989) enfd. 920 F.2d 130 (2d Cir. 1990). This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's witnesses. *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and was fully litigated. *Casino Ready Mix Inc.*, 321 F.3d 1190, 1199–200 (D.C. Cir. 2003).

1. Workplace conditions, related to the re-organization, were closely connected to the subject matter of the complaint.

Christopher Bendel, Gordon Dragoon, Kaleb Noble, and Kestrel Swift created and disseminated the salary spreadsheet in direct response to changes in their workplace conditions. The morning of February 15, 2022, Bendel had a one-on-one virtual meeting with his direct manager Sam Graefe about Respondent's upcoming reorganization. (Tr. 49-50). Curious and concerned about how the reorganization would impact his role and responsibilities, Bendel pressed

Graefe for clarity, which Graefe was unable to deliver. (Tr. 49-50). Though sparse on particulars, Graefe gave Bendel the impression that he would essentially be juggling two roles following the reorganization, taking on new responsibilities as part of the "core services"[3] team in addition to his existing ones. (Tr. 50-51). Although Bendel remained calm, he felt invalidated and upset. (Tr. 51). The result was that Bendel left this discussion more frustrated than before. It was becoming plain to him that Respondent was plowing ahead with an underbaked reorganization and that his role would be changing without due consideration to its impact on him nor sufficient thought about how to compensate him for his efforts. (Tr. 52-53).

Bendel's frustrations and concerns about salary and the upcoming reorganization were therefore fresh in his mind when, shortly after his meeting with Chris McGinty, Director of Development, he received a Google Meet message from his friend and colleague Kaleb Noble.[4] (Tr. 55-56, 134-36; GC Ex. 5). After discussing each others salaries, they began to create the salary spreadsheet. (Tr. 60-61, 135-40; GC Ex. 3, 5; Resp. Ex. 7, 19). The record makes clear that employees' concerns about wages and the re-organization that were discussed in the chats were the direct causes of the creation of the spreadsheet. As explained below, Respondent's counsel seemed to recognize this link during the hearing, as they asked numerous witnesses about the re-organization and workplace conditions. (Tr. 173, 250, 252-254, 257, 293, 294-296). As Bendel and Noble created the spreadsheet, in direct response to their complaints about terms and conditions of employment, and Dragoon, Noble, and Swift discussed these complaints in their online chats,

[3] The parties use the term "core services" and "shared services" interchangeably when referring to this team.

[4] The two had been discussing their concerns about their salaries and with the reorganization plan previously, expressing mutual frustration about these issues. (*See* GC Ex. 11 at Bates 00011). They also discussed issues with attrition and spoke about interviewing elsewhere, although neither had firm plans to leave. (*See* Resp. Ex. 13). Separately, discriminatee Dragoon had been engaging in similar discussions with other colleagues about Respondent's reorganization plan, wages, staffing levels, and management that day. (*See* Resp. Ex. 12).

the Board should find that workplace conditions were inextricably linked to the creation and dissemination of the salary spreadsheet.

2. Respondent had the opportunity to fully litigate the issue of workplace conditions, related to the re-organization.

Due to the close link between workplace conditions and the salary spreadsheet, workplace conditions were discussed throughout the hearing. Respondent's counsel questioned witnesses about workplace condition complaints in their online communications and workplace conditions more broadly. For example, Respondent's counsel asked Noble about the employees dissatisfaction in the workplace, including Noble's 50-50 split duties. (Tr. 173). Respondent's counsel extensively questioned Dragoon about his messages related to Respondent's reorganization, his messages related to management, and messages related to dissatisfaction of pay. (Tr. 250, 252-254, 257). Respondent's counsel questioned Chris McGinty, Director of Development, about the plan to re-organize development teams, change how teams were structured, managers, and duties of team leads, and the role that Dragoon and Swift held. (Tr. 293-296).[5] On direct examination John Simard, CFO, testified extensively about the workplace including compensation, the campus, onsite daycare, fitness center, and basketball court. (Tr. 474 – 475).

The topic of workplace conditions was covered in the hearing, at the time Respondent was adamant of its relevancy, seemingly understanding the link between workplace conditions and its role in employees creation of the salary spreadsheet. Respondent had the opportunity to fully litigate the issue and as such, the Board should find that workplace conditions discussions were inextricably linked to the creation of the salary spreadsheet and that Respondent unlawfully discharged Dragoon, Noble, and Swift in retaliation for their protected concerted activities of

[5] This line of questioning was made over the objection related to the relevance of the question raised by Counsel for the General Counsel. At the time, Respondent's counsel seemed to fully comprehend the link between working conditions and its role it played in causing employees to create and distribute a salary spreadsheet.

communicating about the spreadsheet, working conditions, and Bendel's termination in violation of Section 8(a)(1) of the Act.

III. CONCLUSION

After considering the evidence as directed by the D.C. Circuit Court of Appeals, the Board's findings remain true. Respondent unlawfully discharged Gordon Dragoon, Kaleb Noble, and Kestrel Swift in retaliation for their protected concerted activities. As such, the Board should find that Respondent violated the Act as alleged.

DATED at Buffalo, New York, this 16th day of November 2026.

Respectfully submitted,

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