

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

MEADWESTVACO CORPORATION
Employer

and

11-RC-6684

COVINGTON PAPERWORKERS UNION LOCAL 675
Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO
Intervenor

*Clinton S. Morse, esq., Jeffrey A. Van Doren, esq.,
Jimmy F. Robinson, Jr., esq., and LeClair Ryan*
of Roanoke, Virginia for the Employer.

*Devon J. Munro, esq., and John P. Fishwick, esq.,
of Roanoke, Virginia for the Petitioner*

*John G. Adam, esq., of Royal Oak, Michigan,
and Alice O'Brien, esq., of Washington, D.C.*
for the Intervenor

Ronald Morgan, esq., for Region 11

ADMINISTRATIVE LAW JUDGE DECISION AND
RECOMMENDATION ON OBJECTIONS

Eric M. Fine, Administrative Law Judge. I heard this matter on April 17-18, 24-25, and 28-29, 2008, in White Sulphur Springs, West Virginia. Based on the evidence as a whole, including my observation of the demeanor of the witnesses,¹ I make the following findings and conclusions.²

The petition for election was filed by Covington Paperworkers Union Local 675 (CPU) on October 29, 2007.³ On February 13, 2008, the Regional Director for Region 11 issued a Decision and Direction of Election, pursuant to which an election was conducted on March 12, 2008, in the following unit:

All production and maintenance employees of the Covington, Virginia Mill of

¹ In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth below.

² I have considered the Petitioner, the Intervenor and Employer's post-hearing briefs.

³ All dates are in 2007, unless otherwise stated.

MeadWestvaco Corporation employed during the payroll period ending February 3, 2008, but excluding electrical employees, office clerical employees, guards and supervisors as defined in the Act.

5 During the election 465 ballots were cast for the CPU; 451 ballots were cast for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (USW); three ballots were cast against the participating labor organizations, and there were 2 challenged ballots. The number of challenged ballots was not determinative of the results of the election.

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The USW timely filed 15 objections to the election. The USW withdrew objections 6, 8, 9, 10, and 13, and partially withdrew objection 4 at the hearing. The USW notified the parties following the close of the hearing that it was also withdrawing objection 11. The remaining objections provide as follows:

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1. On or about January 13, 2008, and October 28, 2007, CPU engaged in unexplained photographing and videotaping of employees engaged in section 7 activities. In addition, CPU agents interfered with the USW meeting.

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2. CPU secretly tape-recorded meetings of employees and USW officials and thereafter disseminated the fact that they had secretly tape-recorded the meetings.

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3. The Employer promulgated a work rule on or about February 22, 2008, that prohibits election campaigning during work time, which includes the time of the person soliciting as well as the time of the person being solicited. Despite the written rule and protest to the Employer by USW, CPU continued to engage in election campaigning during working time. CPU agents and supporters walked around the plant on working time and distributed flyers and leaflets and otherwise engaged in electioneering.

4. CPU also used the Employer's computer, copy, and fax machines for campaign purposes.⁴

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5. The Employer permitted CPU to station a vehicle festooned with CPU campaign material and billboards at the employee entrance and allowed them to leave the vehicle in the space days at a time, contrary to the Employer's own policies and the agents of the Employer appeared with CPU supporters as they distributed campaign material.

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7. CPU solicited and/or accepted contributions and other things of value from employers, businesses and owners of businesses during the course of the campaign. It publicized the fact that it had support from other employers and businesses and individuals, some of which have business dealings or relations with the Employer.

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12. At a meeting on or about October 28, 2007, and at other times CPU represented to the employees that they had met with management officials, that they had a "contract under glass" and that management had made assurances and/or promises to them should the CPU become the bargaining representative.

14. CPU told employees that they needed to become CPU members in order to be eligible for long and short term disability benefits under the existing plan. If they did not join the CPU, they would not be eligible for the benefits.

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15. CPU harassed, threatened and otherwise intimidated employees in the exercise of the Section 7 rights.

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⁴ During the hearing the USW withdrew the words computer and copy machines from this objection.

A. Background

The testimony of Melvin Anglin and Daryol Booth (D. Booth), who began working with the Employer in 1965 and 1967, respectively,⁵ reveals that there has been a union at the Employer since at least 1965. The union in the 1960's was United Paperworkers International Union (UPIU). It merged to form PACE around 1999. In May 2005, PACE merged with the USW. D. Booth was a member of the USW in 2007, and he held the office of local vice president, a position which he had been elected to in 2005. D. Booth resigned his position from USW on October 28, 2007, and at that time took the position as first vice president of the CPU. D. Booth resigned the position with the CPU on December 22, 2007. At the time of his testimony in April 2008, D. Booth was a USW supporter.⁶

B. Contract negotiations

D. Booth participated in contract negotiations with the Employer beginning in October 2006, which included representatives for the Employer, USW international representatives, and a committee for the USW Local. D. Booth was a member of the USW Local's bargaining committee, which also included: Roy Hall, the president, Rick Gibson, Phillip Wright, Doug Persinger, and Bruce Lowman. The other named committee members, along with D. Booth, on October 28, 2007, resigned their positions with the USW Local and assumed positions with the CPU. Hall became president of the CPU shortly after his resignation from the USW. In the latter part of 2007, Steve Brady and Luis Mendoza were the USW international representatives attending negotiations.

D. Booth credibly testified to the following: The USW International, the USW Local, and the Employer last met for negotiations on August 22, when the Employer presented a "supposal" for a six year contract. The USW Local Committee wanted to present the Employer's August supposal to the membership, and they thought there was a good chance they could reach an agreement if they could present the supposal. The Employer's "supposal" was not an official proposal and there was an agreement they would keep the supposal quiet until Brady went back to Pittsburgh and discussed it with USW International officials. Ed Wilson, the Employer's lead negotiator, was also supposed to discuss the supposal at corporate headquarters before it could become an official proposal. When the August 22 meeting ended, the intention was to get back together within two or three days, but that turned into weeks because there was no contact from Brady. During the August 22, meeting, the international representatives wanted to introduce terms about neutrality for organizing campaigns in other Employer mills in their counter-offer, which caused the USW Local committee to become disenchanted with the International.

Mark Asma, the Employer's human resource manager at Covington, testified that during the August 21 and 22, bargaining sessions, the USW International had made a formal six year proposal. Asma testified the main issues between the USW International and the Employer involved health care, neutrality, and successorship. Asma testified when the parties met in August they already had three contract turn downs, and they were trying to find some way to come to a resolution. Asma testified late the first day, the USW International proposed a six year agreement. Asma testified the report the Employer's committee received back from

⁵ Daryol Booth is referred to as D. Booth as his son Robert Booth (R. Booth) also testified.

⁶ Anglin left the Employer's employ in 1993 to become a union official. Anglin worked for the USW as a staff representative until March 2006, when he retired. He had previously been a staff representative for UPIU and PACE.

corporate headquarters was they prefer a three year agreement, and they would not want in any form certain conditions the International had proposed. One was a neutrality provision calling for the Employer to agree to be neutral should the International attempt to organize any non-organized MeadWestvaco location. The other objectionable conditions to the Employer were the International wanted a successorship clause different from the prior contract; and the International wanted a USW health care plan company wide extending outside of the Employer's Covington location.

Asma testified the Employer's response was they preferred a three year agreement. Asma testified that, "At that point in time, it appeared to me that we were going to break off negotiations." As a result, Asma asked for an off the record conversation, and he opened the door again on a six year term. Asma testified, "We gave an off the record offer of what the company believed it could live with and Mr. Brady agreed to review those conditions with higher level's in his organization." Asma testified "We came up with a framework for a six year agreement that was intended to be not discussed. It was intended to be confidential, and at that point in time, we were given assurances by Brady that we would get an answer very shortly after that session." Asma testified it was his understanding that Brady would have a response from the International Union early the next week. Asma testified he never heard anything from Brady about a response to a possible six year deal. However, Asma testified he continuously heard from the Local Union committee. He testified almost immediately and constantly Hall called him wanting to know if anyone from the USW International had called Tom Hardy, director of labor relations for the Employer.

*C. The Employer and the USW Local Committee meet on
September 26 without the presence of the USW International Union*

The USW Local Committee met with Employer officials without the USW representative on September 26. Roy Hall, then president of the USW Local, testified he called Asma to set up the meeting. Hall testified he did not tell Asma the Local might break away or become independent. He testified, "I think that I had told him on a phone call that we were considering rattling the cages in Pittsburg, but I believe that was pretty well the context of what I had said." D. Booth credibly testified he had a phone conversation with Asma before the September 26, meeting. During the call, Asma asked whether Wilson, the Employer's lead negotiator, should attend the proposed meeting. D. Booth responded probably not because the Local Committee was not going to have a USW international representative present, and if they went ahead with what they were thinking about, they did not want the international representative to be there. D. Booth testified Asma's response was, "I've got you".⁷ D. Booth testified that during the call Asma did express a concern about meeting with the Local without an International representative present.⁸

⁷ I found D. Booth, considering his demeanor, to be a credible witness, and have concluded this exchange occurred as he testified. D. Booth also testified they had been having a lot of problems with the International. He testified, "We were kind of fed up with them, to be honest, at that point, and disaffiliation was – breaking away from them was one of our thoughts, you know, the way to go. We thought that was probably the only option we had at the time. But one of the fears we had was if we did that and were successful, would we have a contract where we'd have to start all over again or continue where we had left off in our last negotiating session." D. Booth testified the purpose of the September 26, meeting was to address that concern.

⁸ Asma testified he told D. Booth during the call that he was concerned about having a meeting without the International Representative present. Asma testified D. Booth stated he did

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The September 26 meeting was held in a conference on the Employer's premises. The six person USW Local Committee attended and Employer was represented by Asma, Tom Pazdera, the production manager, and Steve Johnson, the maintenance and engineering manager.⁹ D. Booth identified notes he had written in preparation for the meeting in the form of an agenda. He testified the items listed on D. Booth's agenda were what "we felt had held up getting the contract ratified, which (were) wages, pensions, the health care, and the absentee procedure." D. Booth testified he did not take any notes during the September 26, meeting because, "It was an off the record meeting ...". D. Booth testified he made check marks following the meeting on his agenda outline of things that were discussed during the meeting, which included term of the agreement, ratification bonus, wages, pension, shift allowance, shoe allowance, health care, retro pay, signing bonus, and absence policy. D. Booth testified that, during the September 26 meeting, no one came out and said they agreed to anything pertaining to the contract. D. Booth testified nothing specific was mentioned about the local disaffiliating. D. Booth testified that the September meeting was not actually negotiations. However the Local Committee "put out the points where we felt like they needed to be improved for people to approve it." He testified, "They'd always said we could move the chairs around, and that's what we felt like we was doing, ..."

D. Booth testified the morning meeting lasted a little over 3 hours. It started in the morning, they took a lunch break and came back later in the afternoon at around 3 p.m. D. Booth testified after the lunch break there was a definite change in attitude on the part of the Employer. He testified, "It was just different, like the conversation flowed pretty good in the morning, but that afternoon it pretty much stopped on the contract talks. And that's - I do remember Mark (Asma) saying then that they weren't there to negotiate." D. Booth testified the meeting, after lunch lasted, "Probably less than an hour." D. Booth testified that, after the lunch break, "I don't believe we talked any more about the contract items at all." Rather, they discussed other issues like the cost of materials at the mill, and 10-hour shifts for maintenance workers.

D. Booth credibly testified that as soon as the meeting was over, the Company left the room. While the Local Committee was getting ready to leave, Johnson stuck his head in the door and asked to talk to Hall outside alone. After a while, Hall came back in and said that the International Union found out about the meeting and had called the Employer's corporate headquarters and told the Employer not to talk to the Local Committee any more about the contract items.¹⁰

not think the USW was going to have a problem with it; it would just make things move along faster. I do not credit, the latter part of Asma's testimony. While the Employer professed neutrality during these objection proceedings, the Employer's interests were clearly aligned with the CPU which was not seeking some of the contract provisions sought by the USW, which the Employer found objectionable. The Employer also sought to defend against the objections to the election thereby supporting the CPU's certification. Moreover, Asma, as an experienced labor relations official, never claimed the Employer made any attempt to notify the USW of the meeting, and thereby seek its approval. I have concluded that Asma was aware, given the posture of negotiations, that the USW would have found the Employer's meeting with the Local to discuss contract terms in the International's absence to be objectionable.

⁹ D. Booth did not recall Asma saying anything at the start of the meeting about the purpose of the meeting.

¹⁰ Asma confirmed that on September 26, Johnson and Hall had a discussion in the hallway. Asma was not present for the discussion, but claimed he was told by Johnson that they talked

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Hall testified that, prior to the September 26 meeting, the Local officers had discussed breaking away from the USW, and becoming an independent union. Hall testified the purpose of the meeting with the Employer, "was to try and probe the Company to evaluate their seriousness about a six-year contract and to see if we could get some kind of feel for - based on the baseline supposal, whether there was movement. They, I think, used the term that we can move furniture and we were trying to get some kind of feel for what 'move the furniture' might have meant." Hall testified, "We wanted to have some assurances in our mind that the baseline proposal wasn't some kind of manipulative trick of the Company, you know. We wanted to feel them out if they had sincere belief that a six year contract was some how an option." Hall testified the Local's officers wanted a six year contract based on the feedback from the membership. Hall testified, "I guess the reason we didn't want the International Rep there is because he had quelled any talks on a six year contract. At the time we were weighing several options to where we were going to try and leverage the International to let us have a six year contract. Prior to leveraging the USW, we needed to know whether we were doing it in vain or if there was really a baseline secure supposal that we would get in return. We didn't want to go kick in the doors in Pittsburg and say, 'Give us a six year contract,' and then the Company say, 'It really isn't there.'"

Hall testified that he received assurances from Asma at the September meeting in the form of body language. He testified that, "They never said, 'We'll make it in the form of a proposal,' or anything like that, but just trying to read between the lines, as you do in negotiations, we felt like the Company was sincere, that there was a six year offer out there for somebody." Hall testified Asma did not cut off discussions during the September meeting, but they did move to other topics. Hall testified Asma stated, "Any response to what you've shared with us would be viewed in terms of negotiations, so I can't respond." Hall testified that was where the meeting shifted to other topics, including the extension of a 10 hour shift agreement, and the cost of wood. Hall testified that prior to Asma's remarks they talked about contract topics. Hall testified the Employer never responded to anything they said. Hall testified he had put together a list of topics to discuss. He testified the Employer's August supposal on wages included an alternating two percent raise, then one and a half percent raise, per year over the six year contract. Hall testified he did not think the membership would agree to that, and he wanted to know if the Employer would go to a straight line two percent raise. Hall wanted to know if the Employer was dead set that the first three years had to be identical to the last three years. Hall testified, "We would propose those sorts of things, but the Company wouldn't

about 10 hour shifts. Hall and Asma testified Asma did not say the Employer could not talk because they had received a complaint from the International. Given the evidence as a whole, I have credited D. Booth concerning Hall's remarks following Hall's discussion with Johnson. In this regard, it was Asma's testimony that he informed the Local Committee at the outset that the Employer was not there to negotiate. However, despite Asma's contention, Hall as reflected in Asma's testimony went on to present a new and detailed proposal to the Employer. Hall's actions do would not make sense if the Local understood from the outset the Employer would not respond. Moreover, Asma did not attempt to cut off Hall's presentation, rather he allowed it to continue for close to three hours, as reflected in Asma's typed notes made after the meeting. Moreover, both D. Booth and Hall testified Asma' attitude changed after the break in negotiations that day. In making this finding, I have considered the fact the USW did not present anyone from the International who testified they contacted the Employer. However, considering the facts overall, as well as the demeanor of the witnesses, and the fact that D. Booth was testifying against the position of his Employer, I have credited D. Booth's testimony, as set forth above.

respond to us.” Hall testified it was kind of frustrating. Hall testified, “We were just trying to read body mechanics. You know, tugging the shirt collar or something like that to see whether we were in the ballpark.”

5 Hall testified the Employer was open to the idea of a six year contract when the parties parted. Hall testified, “They didn’t say anything to indicate, yes, there’s a six-year contract, but, I mean, nobody said it’s not.” In addition to wages, Hall raised the issue of benefits. Hall testified there was a break in the meeting, and that after the break he thought the Employer had “bit of a change” in position or attitude. Hall testified that Asma told them, “What we had talked about was outside of what they could talk about.” Hall testified Asma said, “We told you up front this wasn’t a bargaining session, we were just having discussion. What you guys have talked about really is outside of anything we can talk about without International representation.” Hall testified as follows:

15 Q He indicated to you the possibilities - the proposals you had raised were available didn’t he? That was something that the Company could consider and do?

A He didn’t indicate that. I surmised from his behavior that that was possible.

20 Q That’s what led you later on when talking with employees during the election campaign in part to say you have assurances from the Company that a contract can be in place?

A I felt like the Company was sincere, that there was a potential for a six-year agreement sometime.

25 Q But during the course of the campaign when you made statements to employees about assurances from the Company you’re referring in part to the September meeting, am I not?

A That’s correct, but I didn’t make comments about assurances outside of the first two weeks after disaffiliation.

30 Q Did someone tell you to stop making those kind of statements, that it was improper for you to be making statements about assurances of a contract?

A No, I figured out for myself that it was spawning questions that I had to address. So, rather than talk about assurances I started talking about more directly what my beliefs were, that the actual indicators that the Company didn’t have any logical reasons to try and reconstruct the wheel.

35 Hall testified he did not attempt to talk to Asma or any other Employer official after the meeting about what the Employer could do. Hall denied talking to anyone from the Employer about celebrating a contract at the Employer’s Christmas party if there were an election.

40 Asma testified he began the September 26 meeting by stating he was not there to negotiate, but he was there to listen.¹¹ Asma’s typewritten notes of the meeting reveal it started at 9 a.m. Asma testified that, during the meeting, the Local Committee proceeded to lay out several requests that were different from the Employer’s off the record six year offer they had discussed on August 21 and 22. Asma testified after hearing the Local Committee out, they agreed to take a caucus break at 11:55 a.m. Asma testified they got back to the Local Committee at 3 p.m. that day. Asma testified, “I think the first remarks I had were that upon reviewing everything that they had presented in the morning, I found the magnitude of what they were asking for was of such a nature that anything I would say would be viewed as

50 ¹¹ Asma presented two sets of notes of the September 26, meeting, the first were handwritten notes which he testified were made during the meeting and the second set of notes were typewritten, dated October 1, and in more detail than the handwritten notes.

negotiations.” Asma testified he made no response to the changes the Local Committee had made in the morning session. Asma testified Hall and D. Booth were disappointed in Asma’s response. He testified, Hall, “I think, said some words like I either let him down or I don’t know the exact words, but they were disappointed.” Asma testified the meeting ended at 4:45 p.m.

5 Asma testified that during the September 26, meeting no one from Local Committee asked if the Employer would extend any contract offers if the employees at the mill disaffiliated from the USW. Asma testified there was no agreement reached that if the employees left the USW the Employer would reach a favorable contract with the new union. Asma testified disaffiliation did not come up at the September 26, meeting.

10 Asma testified he had the impression at the September 26 meeting that the Local Committee wanted to “see if anything could be moved around, minor changes, in a way that would keep the framework of the last thing we discussed in August 21, 22, sessions in some form that the USW and the company would - would agree to.” Asma testified he repeatedly

15 stated during the September 26, meeting that it was not negotiations. Asma testified in the Employer’s August supposal, the Employer included wage increases of 2% in the first year; \$35 across the board or 1½% in the second year; 1% or \$500.00 lump sum in the third year; 2% in the fourth year; \$1,000.00 lump sum in the fifth year, and 2% in the sixth year. Asma testified the Local Committee came up with a different formula, which was more costly in Asma’s view.

20 He testified, “I just looked at it and said no way.” Asma testified, “This was my analysis in between the morning session and when I responded back to them in the afternoon session. All I did in the morning was listen and record what they were proposing.” Asma’s notes reflect the Local Committee made proposals to make some changes to the health care plan. Asma testified the Local Committee also expressed a desire to increase the pension multiplier for years of service. The Employer’s August supposal was \$49, 50, 51, 52, 54, and 54 for a possible six year agreement. Asma testified the Local Committee came back on September 26, and wanted to increase it \$51, 51, 51, 54, 54, and 54.

25 Asma testified he did not respond to the local union’s proposals on September 26. He testified, “I made it very clear to them that, to me anyway, that what they had presented to me was significant and based on that significance, I needed our chief spokesman and their chief spokesman Brady present in any of these particular negotiation discussions.” Asma testified he was not the Employer’s chief spokes person, rather he was second in command. He was the top Employer official pertaining to negotiations at the September 26, meeting.

35 *D. The October 28 disaffiliation meetings*

40 D. Booth testified that after the September 26 meeting, the Local Committee went ahead with its plans to disaffiliate. He testified there was a special executive board meeting of the USW Local on October 24, to discuss whether a disaffiliation motion should be made to the membership. D. Booth was a member of the executive board. Notes of the October 24 meeting reveal, and D. Booth confirmed in his testimony, that the question was asked what would stop the Employer from saying that we do not have a contract. Hall said that was possible and D. Booth said that the Employer could say they want to start from scratch right now.

45 There were two USW Local membership meetings on October 28, at the Covington High School, one at 12:45 p.m. and one at 4:00 p.m. D. Booth attended both meetings. He testified based on the disaffiliation vote tally at the meetings there were a little less than 500 employees who attended. D. Booth testified the meetings were videotaped. D. Booth testified the reason

50 for the videotaping was not explained during the meetings. D. Booth testified he kept the tapes of both meetings for a while, and after a couple of weeks, CPU Office Manager Susan Fridley told D. Booth the attorneys needed the videos. D. Booth brought the videos to the CPU union

hall and gave them to Fridley, who placed them in the office safe.

5 D. Booth testified Hall did most of the talking at the October 28 meetings. He testified Hall was the president of the USW Local in 2007 before the October meetings, and Hall resigned that position around October 28, and he became president of the CPU. D. Booth testified that during the October 28, meetings, Hall said something, “along the lines of we have it on good authority that this contract offer will be there if we go through with this disaffiliation.” D. Booth testified Hall was talking about the six year supposal that had been made by the company during the August 22, session. D. Booth testified Hall did not directly mention the September 26
10 meeting on October 28. He referenced it indirectly by giving “the assurances that – that this offer would be there when we went back.” At the time of the October 28, meetings, D. Booth was an officer of the USW Local. After the votes were counted, the membership voted to disaffiliate and form the CPU. D. Booth supported the disaffiliation at the time.

15 The USW called other employees in addition to D. Booth to testify about what transpired at the October 28 meetings. These employees were USW supporters at the time of their testimony. Mike Lipes testified he saw someone videotaping the meeting. He testified no one explained why the meeting was being videotaped. This was the first video taping of a union meeting that Lipes had noticed. Lipes spoke at the meeting. There were two microphones set up for the audience, one for disaffiliation, and one against. The purpose of each mike was
20 announced by Hall at the beginning of the meeting. Lipes stood at the one against. No other employee stood up at the against microphone during that meeting. Lipes testified he said that at that time he did not know if he was for or against disaffiliation, but that he had a question.¹²

25 Hall testified he began to act as president of the CPU following the counting of the ballots at the October 28 meetings where the USW Local membership chose to disaffiliate from the USW. Hall resigned his position with the Steelworkers Local 8675 on October 29, 2007, which was the same day the CPU filed its election petition with the NLRB.¹³ Hall testified based on a motion that was placed on the floor at a union meeting held prior to October 28, they had
30 hired a law firm, to investigate disaffiliation. Hall testified it was he who retained the attorneys.

35 ¹² Shaun Vass testified he attended the 12:45 p.m. disaffiliation meeting. Vass testified Hall did the majority of the speaking at the meeting and Hall was strongly urging them to vote to disaffiliate from the USW. Vass testified Hall said “he had a contract in place with the Company, and that we would have a Contract by Christmas.” Margaret Smith testified she attended the meeting that began around 1 or 2 p.m. Smith testified Hall said they had a six year contract waiting and they wanted to have it signed by Christmas, or he felt like it would be signed by Christmas. Smith later testified that Hall “just – it eluded to the fact that he basically had a six
40 (6) year Contract waiting to be signed, and that – that it would be signed by Christmas if this disaffiliation moved forward.” Vass and Smith’s testimony appear to be their interpretations of what Hall actually said during the October 28 meetings. The remarks at issue were actually made and recorded in the video of the second meeting. The transcript of those remarks is set forth later in this decision. I have reviewed the video of both meetings, which appears to be complete. I find the transcript is a more accurate representation of Hall’s remarks than the
45 recollections of these two employees.

50 ¹³ At the time of the hearing, the officers of the CPU, included, as relevant to this decision: Hall, president; Rick Gibson, first vice president; Tony Markland, second vice president; Doug Persinger, west MEO committeeman; Bob Booth (R. Booth), secretary. Eric Paxton manages the CPU website. Hall testified Paxton is listed on the site as webmaster. The CPU employs Susan Fridley as office manager. Prior to working for the CPU, Fridley had been a long time employee of the USW Local and its predecessor locals.

Hall testified he conducted the disaffiliation meetings on October 28. There were two meetings, which were video taped. Hall requested the video taping. Hall testified, "I guess I just requested of our committee at the time that let's video tape this as we have our other meetings."

5 Hall testified that, prior to that time, they attempted to video anything they thought was significant because they were trying to build a new chapter in the Union's history. He testified that a day or two prior to October 28, they met with the executive board to discuss their position in favor of disaffiliation and the executive board voted unanimously in favor of advocating disaffiliation to the membership. Hall estimated there were between 300 to 375 employees at the first meeting, and about 100 to 150 at the second meeting.

10 The videos of both October 28, meetings were placed into evidence. A review of the videos reveals that at each meeting, Hall made the announcement that members of the audience would be recognized to speak only if they approached one of two microphones, one for disaffiliation and one against. All the employees who approached the microphones were videoed as they spoke. Only one employee, during the course of both meetings, approached the against disaffiliation microphone, and he stated he had a question, and had not made up his mind. Hall read a speech towards the beginning of each meeting, and then answered questions from the floor. After all of the questions were answered, the USW local officers, who were sitting on stage during the proceedings, came up to the microphone on stage and endorsed disaffiliation. USW International representative Brady spoke during the first meeting at the against disaffiliation microphone. There was a statement on the video for the second meeting that the USW international representatives did not attend that meeting.

25 During his speech in each of the meetings, Hall stated that, "During the time the election is being set up everything in Covington will in essence be placed under glass. All actions will be subject to the review and approval by the NLRB."¹⁴ During the second October 28 disaffiliation meeting, Hall stated in response to an employee question, as reflected in the video that:

30 We've done everything we can to get assurances short of getting it in writing because that's illegal. But we've got assurances from all the key places that... For instance, on the 43rd day, if the NLRB says 'we're certifying the Covington Paperworkers Union as the new bargaining unit representative,' on that 43rd day, the assurances have been that the company wants to go in and start from August 21st, when we left the table, and finalize the proposal, so we can present it to the membership and vote. There's a trust factor involved, as I spoke earlier, at this point, I trust, the... I don't trust the company, but have to extend them a little more trust than I do the international because I have hard facts to prove where they're going.

40 As reflected in the video of the second meeting, Hall later stated in response to a question from an employee:

Q. And you feel like they show us the same respect if we stay as a local?

45 A. Like I said earlier, I've talked to several key individuals, and us, it would be illegal for them to give us some kind of memorandum saying that they would, but the indication is that they want to start from August 21st and move forward. Obviously, there's a risk involved and I can't guarantee that, but we've every avenue to fight them now that we've

50 ¹⁴ There is no statement by Hall on either video of the October 28 meetings telling employees that they had met with management officials and had "a contract under glass" as alleged in objection 12. The videos appear to be complete coverage of each meeting.

had before.¹⁵

Hall testified he was referring back to the September 26, meeting. Hall testified he could not ask for a written guarantee of a six year contract during the meeting because that would be illegal. Hall testified they did every thing they could to try and investigate the situation. When asked why it would be illegal to get it in writing, Hall testified, "That would have been bargaining, soliciting a promise. I mean, I'm not a lawyer, but I know that it would be improper for me to try to get something in writing from the Company saying that there's a contract." Hall testified, "I thought it would be illegal to get promises period, whether you're doing it in writing, verbally or anything." Hall testified that, during the disaffiliation meetings, he referenced the fact that the Employer "seemed like they wanted to give somebody a six year agreement, but we never said that they - they had extended that offer to us if we would form an independent Union." Hall testified that during the October disaffiliations meetings, he stated the Employer had a six year supposal and the international Union would not let them pursue it.¹⁶

As shown in the video, Hall also stated, in response to a question during the second meeting:

All your benefits just like they are right now will be subject to bargaining. That is pretty much where having the courage and wisdom to make the right decision steps in. Obviously, the company could try to take advantage of us. I am not going to promise you they can't. Does it make sense for them to? I don't think so.

E. Statements by CPU officials following the October 28, meetings

The CPU filed the petition for election with the NLRB on October 29. Employee Michael Madison credibly testified to the following: In November 2007, Madison had a conversation with Hall at the CPU union hall. Only Madison and Hall were present. Madison asked Hall, "How can we fight this company an independent Union?" Hall told Madison that Hall had assurances. Madison testified that was basically what Hall said, and he kind of dropped it at that. Employee William Armentrout testified that about two or three days after the October disaffiliation vote, Armentrout went to the CPU union hall to sign up with the CPU. He credibly testified he had a conversation with Hall, and he asked Hall how long it would take them to get a contract. Hall replied "if the Labor Board didn't hold them up we could have one in place by Christmas." Armentrout testified that pretty much ended the conversation. Employee Edward Nelson credibly testified he had a conversation with Richard Gibson, a member of the CPU committee, on December 17 at work. Gibson told Nelson the Employer and the CPU were supposed to

¹⁵ Hall testified in reference to assurances from all the key places that a "key place that I felt had a very large impact on our viability in Covington was the fact that I had prior to that recently listened to what I believed was the second quarter webcast on Yahoo Finance." Hall testified he learned from the webcast that the Employer was going to join a land management group to try profit from land they had harvested for timber by developing the land prior to selling it. Hall testified, "I took that as a huge token that ...the Company was looking at keeping Covington viable and that that whole viability is dependent on the Covington workforce."

¹⁶ The video of the meetings reveals that Hall took issue with the USW International's position on subcontracting language, neutrality, and health care. This theme was repeated in CPU campaign literature. See P. Exh. 59, stating the USW has held up negotiations for over 2 months trying to negotiate a neutrality clause (at. 000049); "the International was forcing unreasonable terms into the bargain..." and cites the USW's position on the successor clause (at. 000051); and criticized the USW's health insurance proposal (at. 000054).

have a contract signed by Christmas, and that the Employer's Christmas party was kind of a party for the Company and the CPU for having a contract signed. Gibson stated this is what Hall had said. Nelson testified that Gibson said "he thought that there was probably a contract waiting when everything to be done – when everything was done and settled," Nelson testified, "That was the word around the mill when all this stuff had started, that we should have a contract by December." Nelson testified the rumor at the plant amongst employees was "that the CPU had thought that this would be, you know, a pretty quick deal, you know, and that they – that was the word that I heard, that they thought that there would be a contract in place by December."¹⁷

Hall testified that after CPU filed its petition for election with the NLRB there was an issue among employees as to what would happen with the current contract. Hall testified he told employees or CPU supporters that he had assurances from key places that the current contract would be ok. Hall testified he was referring to the fact the contract would not be changed during the course of the campaign. Hall testified that probably during the two weeks following the disaffiliation meeting when people were really active in trying to get information, he answered the question several times about assurances. When asked what employees asked him, Hall testified, "What assurances?" Hall testified he told employees about the Employer's webcast concerning the sale of harvested land. Hall testified he also told employees that the majority of the programs are in place at the mill that will take them into the future were voluntarily manned by employees. "So, for the Company to try and take advantage of us, if we were successful in an independent campaign, would be the same as biting your nose off to spite your face, because then they would be turned back on these same people that are going to take them into the next generation as far as efficiency and asking them to help them after they had attacked their well being." Hall denied telling people they would have a contract within a week after they won an election. Hall testified, "I told people that if the process went for forty-two (42) days, as at the time I believed it to take, that I felt like we'd be able to negotiate a contract and be on our merry way." Hall denied telling anyone that he had a contract in place with the Employer. Hall testified he had not worked out any contract with the Employer. Hall testified that, quite a few times, he stated there were no guarantees, that everything was subject to bargaining. Hall testified, "I made absolutely sure that nobody would think that there was any kind of guarantees, that there was definitely a risk involved." Hall identified a some CPU literature where bargaining was discussed, where the negotiation of a long term agreement was mentioned, and another distribution where the CPU states if the CPU wins the Employer cannot change the terms and conditions of employment until it engages in bargaining the with CPU.

Hall impressed me as a very thorough and cautious individual. He contacted the NLRB information officer, met with the Employer, hired an outside law firm, and obtained an injunction against the USW before moving ahead with the October 28, disaffiliation meeting. Nevertheless his recorded words on October 28 to the assembled employees were quite clear that "we've got assurances from all the key places that... For instance, on the 43rd day, if the NLRB says 'we're certifying the Covington Paperworkers Union as the new bargaining unit representative,' on that

¹⁷ Hall admitted using the term assurances to employees, when asked about the likelihood of a contract following the October 28 meetings. He testified he stopped using the term assurances about two weeks after the meeting because it raised too many questions. During the October 28, meeting Hall also used a 43 day framework stating that "on that 43rd day, the assurances have been that the company wants to go in and start from August 21st, when we left the table, and finalize the proposal, so we can present it to the membership and vote." Thus, bringing the contract finalization date close to Christmas as Nelson testified Gibson subsequently informed Nelson.

43rd day, the assurances have been that the company wants to go in and start from August 21st, when we left the table, and finalize the proposal, so we can present it to the membership and vote.” He went on to state, “I’ve talked to several key individuals, and us, it would be illegal for them to give us some kind of memorandum saying that they would, but the indication is that they want to start from August 21st and move forward. Obviously, there’s a risk involved and I can’t guarantee that, but we’ve every avenue to fight them now that we’ve had before.” Thus, despite his other explanations during the course of his testimony, he was clear at the October 28 meeting, that he had spoken to the Employer, that they wanted to finalize their August 21, proposal so that the CPU could present it to the membership. I credit the employees’ testimony, as set forth above, that Hall used the terms assurances to them with little or no explanation following the October 28 meeting, until Hall thought better of it, and ceased using the term entirely.

Retired USW representative Anglin credibly testified he talked to CPU Office Manager Fridley by phone around the week after the October 28 disaffiliation meeting. Anglin testified he asked Fridley how they intended to get a contract with the Employer, and she said the contract has already been assured. Anglin testified he told some of the USW staff and some of the USW local members of Fridley’s remark, including employees on the USW unification committee.¹⁸

F. The January 13, 2008, USW meetings

The USW advertised as early as November 30, to bargaining unit employees of a meeting with USW President Gerard and Chairman Jon Geenen. A flyer dated January 7, 2008, announced the meeting as an invitation to all the production and maintenance workers to attend with their families whether or not they supported the USW. It states it is important that all view points be heard. It states, “It’s our hope that we can discuss in a frank, open and orderly forum all of the issues that we face in Covington and in the complex global paper industry.”

On January 12, 2008, the USW conducted a meeting amongst its strongest supporters. The purpose of the meeting was to create a campaign video for the NLRB election. The attendees were told in advance the meeting was going to be videoed. Employee George Toombs credibly testified USW attorney Richard Breeden spoke at the beginning of the January 12, meeting and told the employees in attendance that if they were to be videoed, everyone had to approve and that it was illegal to video the employees without their full knowledge and consent. Toombs testified the January 12, meeting was videoed, and that everyone was asked if they approved of the videoing and everyone agreed. Employee D. Booth attended the January 12, meeting, and he confirmed the employee attendees knew they were being filmed

¹⁸ Fridley admitted to having conversations with Anglin. However, she denied telling Anglin that the CPU had been assured a contract with the Employer. Fridley testified there were rumors at the mill that “The Steelworkers were saying they had a contract under glass, whatever that means.” She testified the Steelworkers were putting the rumors out that CPU had a contract. Fridley was a strong advocate for the CPU. She had been a long time employee of whatever local union was representing the employees and made a career choice in leaving the USW Local to work for the CPU. As such, she was heavily invested in the outcome of these proceedings. Observing her demeanor and the content of her testimony, I did not find her to be the most reliable of witnesses. It is clear from this record that Hall started the rumor about assurances to a large number of employees at the October 28, meeting, and he admittedly repeated it for about two weeks following the meeting. I find it is likely that Fridley, who worked in the CPU office, heard the term assurances there in reference to the CPU obtaining a contract, and she repeated it to Anglin, as he credibly testified.

for campaign purposes. He testified “they explained what it was for and we agreed to it.” Michael Yoffee, USW director of organizing, also confirmed that on January 12, the employees were informed of their right to approve being videoed before the video was made. Counsel for the CPU also acknowledged, on the record, to receiving a portion of the video of the January 12, meeting where a USW attorney told the attending employees that it was voluntary to have a video made of them.

It was the CPU’s intent to establish a picket line at the January 13, 2008, USW meetings. The USW had filed unfair labor practices charges which served to block the NLRB election, and one of the objects of the CPU’s picketing was to pressure the USW to allow the election to go forward. Hall testified the CPU wanted picketers out front, “Because we wanted Leo Gerard to get our message that we want to vote.” Hall testified the CPU made a record of the event with photos. Hall attended the second half of the picketing on January 13, since he was working during the first half. Hall testified when he was not present on January 13, the other CPU officers, including, Gibson, Markland, Persinger, and Lowman were in charge of the picket line. Heather Williams took photographs on January 13, and published them on the CPU website. Williams testified she learned there was going to be picketing at the CPU union hall from Gibson, a vice president of the CPU. Williams helped make picket signs for the event.

Yoffee, USW director of organizing, attended both USW meetings on January 13, the first beginning at 12:30 p.m., the second at about 4 p.m. at the Covington High School auditorium. He estimated there were about 75 employees from mill attending the first meeting, and 60 attending the second. Yoffee testified this was the most important meeting of the campaign. The intent was to have Gerard, the USW international president; Geenen, vice president for the paper sector; and several other top international union officials meet with the bargaining unit employees to discuss the issues leading to the dispute and to open up a dialogue to see how it could be resolved. Yoffee testified the bargaining unit employees were notified of the meeting by a letter signed by Gerard, Geenen and staff representative Mendoza that was mailed to everyone’s homes, and there was publicity in the local newspaper about it. Yoffee credibly testified the USW did not video the January 13 meetings.¹⁹

Yoffee credibly testified to the following: When he arrived at the high school at about 12:15 p.m. as he was walking from the parking lot to the school entrance there was a group of 50 to 75 picketers holding signs, “kind of hooting and hollering and shouting and chanting.” The signs contained CPU emblems and slogans and derogatory remarks about USW president Gerard. Yoffee saw CPU officers there including Vice President Markland, Recording Secretary R. Booth, and at some point President Roy Hall. R. Booth had a video camera in one hand. The picketers were spread out on the street and across the street from the school. Some of the picketers could have been as close as 20 to 25 feet to the school entrance. When Yoffee first saw R. Booth he was located on the sidewalk adjacent to the school. Yoffee saw R. Booth panning the camera back and forth as Yoffee was walking alongside the school to go into the entrance. R. Booth was moving the camera in Yoffee’s direction and in the direction of people in front of Yoffee. As Yoffee turned, he saw there were some people behind him who were not USW staff members. Yoffee thought “they were workers from the Covington mill,” who were coming to the meeting. No one said anything to Yoffee as to why there was videoing.

During the meetings, Yoffee periodically went into the lobby where he could look outside

¹⁹ I found Yoffee, considering his demeanor, to be a credible witness. Yoffee’s recall was good considering the breath of his testimony, and he appeared to report events as he recalled them. D. Booth confirmed the USW did not video the January 13, meetings.

through the school's glass doors, or he went outside. Yoffee looked or went outside about 8 to 10 times. During those times, Yoffee saw the picketing and videoing continuing. Yoffee testified he saw R. Booth panning the video camera back and forth. Yoffee testified there is a porch area outside the entrance doors where people could stand and smoke. Yoffee testified people were going out and smoking, and having discussions during the meetings, "and the camera was focused on us. It was focused on me and the other people that I was out there with." Yoffee people went in and out during the course of the meetings. Yoffee testified it got dark around 5:30 or 6 p.m. Yoffee looked outside after dark and saw R. Booth and the videoing continued. R. Booth's camera was flipped 180 degrees so Yoffee could see the lighted display of the video screen. He testified the camera was pointed right at us at the entrance to the school. Yoffee testified, "I know that the camera was poised in a way that it gave me the impression. That the video tape was running." Yoffee testified when he was at the entrance he was with several of the USW staff, as well as bargaining unit employees including Alicia Gordon and Toombs. When the meetings ended, and Yoffee left the school auditorium CPU supporters were still there. He testified they were continuing to video, picket and hoot and holler and it was the same type of activity that had gone on all afternoon. When Yoffee walked to his vehicle to leave he saw the video camera focused on Yoffee, Gerard and USW official Tom Conway.²⁰

Yoffee testified that on January 13, there was an incident near the school entrance. He testified as follows: George Clinebell, a USW supporter, was walking to go into the meeting. Clinebell's brother Lannie Clinebell, a picketer for the CPU, went up to George and "cursed him in a way that was just - he just used every expletive that he could. Said, you know, you will never be in my family any more. I never want to be a part of, anything that you're a part of, you traitor, you piece of shit. I mean, just to see that and it was, it was done in just a loud way where the rest of us who were there and the rest of the picketers could have heard it. It was a pretty nasty exchange, and actually George didn't even respond."²¹ Yoffee testified he was also standing outside the door to the high school while employee Gordon, a USW supporter, was standing outside and Markland, the vice president of the CPU, made some derogatory comments shouting at her. Yoffee testified, "her response was, I'll show you my good side or something like that. It was some comment about, I think, what she was wearing."²²

²⁰ Yoffee testified the video the CPU produced, pursuant to subpoena, was an edited version. He testified, "It was not raw footage. There was - it was going back and forth between the day and evening, back to the day, back to the evening, different shots. So there was - Selective footage." Yoffee testified that following January 13, 2008, he saw a picture of USW supporters and employees Toombs and Gordon on the CPU website or on a link to the site. Yoffee testified there was significant footage after the January 13 meetings posted on the CPU site. He testified he saw video tape footage, as well as photographs. He testified there was footage of people going in and out of the meeting and on the picketing line. Yoffee testified it was on Utube and linked to the website.

²¹ George Clinebell was called as a witness, but did not testify about the January 13, picketing. I have still credited Yoffee's description of the incident, given the clarity of his recall at the time he described it.

²² Yoffee testified the USW filed unfair labor practice charges concerning the conduct of the CPU on January 13. The USW also communicated to the bargaining unit employees that the combination of the CPU picketing and the videoing, both inside and outside the meeting, was a violation of employees' Section 7 rights of National Labor Relations Act. Yoffee testified the USW withdrew the unfair labor practice charges and alleged certain matters contained in the charges as objections to the election. Yoffee testified USW Local 8-675 issued a newsletter to employees called the New Informer, dated January 23, 2008, talking about unfair labor practice charges, including allegations concerning the CPU's videoing at the January 13, meetings. The

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R. Booth testified it was possible on January 13, that he raised the camera with intentions of videoing, but did not actually take a picture. R. Booth described one incident when he had the camera raised and people thought he was filming but he was not. R. Booth testified he was viewing the screen, making a few adjustments, and Gordon was out front and she made the comment, "I hope you're getting my best side," assuming that R. Booth was filming her. R. Booth testified he was not. He testified the camera may have been facing her, but he was not pointing it at her. However, R. Booth testified there is some footage of Gordon in his video clips.

I have concluded that Yoffee and R. Booth described the same situation pertaining to Gordon in view of the similarity of her remark incorporated in their testimony. I have also concluded that R. Booth was correct that Gordon was responding to what she thought was his videoing her, given the content of her remark. I have credited Yoffee's testimony that Markland shouted some derogatory remarks at Gordon during the incident. I found Yoffee to be a credible witness with good recall. There was a lot going on that day, and Gordon, focusing on R. Booth with the camera, may not have noticed or heard Markland.²³

Gordon testified she attended both meetings on January 13.²⁴ Gordon testified she

January 23, newsletter told employees the CPU's behavior chilled free expression. Yoffee was not aware of any announcements by the CPU that they would not video or picket future USW meetings. Yoffee testified from the time the petition for election was filed there were USW members and staff visiting employees at home and other places. He testified the events at the January 13 meetings were part of the USW's subsequent discussions with employees. Yoffee testified, "I mean, the discussions about the, what I would call the fiasco of January 13th with the picketing and the video taping and the screaming and, and the yelling, and screaming at brothers, threatening to get into a big fight, it was just - it was a fiasco. People were talking about this for a long time and it was, it was a turning point in the situation at Covington." Yoffee testified "it was disseminating itself. It didn't need directives. It naturally got disseminated." Yoffee also testified, "that at various meetings at which the membership and other bargaining unit employees could attend, we discussed the, what we believed to be the intimidating and coercive nature of what, all of the things that occurred at the, surrounding the January 13th meeting with Leo Gerard."

²³ Gordon did not address the remarks Yoffee described by Markland towards her. Gordon described another situation when she went up and talked to men picketing and tried to give them USW handouts. She testified they asked her to leave stating they were not interested in anything she had to handout or say. She testified they did not talk to her in a nasty fashion, and she did not feel intimidated.

²⁴ I do not credit Gordon's testimony, made for the first time on rebuttal, that at the beginning of the first and second meeting on January 13, Gerard made it clear the meetings would not be videoed. There was no mention of this announcement on the part of Gerard in Gordon's January 28, 2008, pre-hearing affidavit. Gordon also testified at the hearing that Yoffee made an announcement during the January 12, meeting that the January 13, 2008, meetings would not be videoed. However, counsel for the Intervenor stipulated there was no statement by Yoffee on the January 12, video that the January 13, meeting would not be videoed. Gordon's testimony was admittedly somewhat confused on this point and her prehearing affidavit appears to state that Yoffee made the no video announcement at the start of the first meeting on January 13, rather than January 12, as she testified at the hearing. Either way, Yoffee, who testified extensively at the hearing made no claim that he ever made such an announcement at either meeting, or that Gerard made such an announcement. Thus, I do not credit Gordon's testimony that either Gerard or Yoffee made a no video announcement. This testimony was not

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was outside at least three times on January 13, that is, before the first meeting started, during the break between the two meetings, and at the conclusion of the second meeting. Gordon saw two individuals with cameras in the beginning taking photographs. She did not know if it was a video or a still camera. She testified she could see R. Booth taking photos with the picketers' backs to the school so the school was in the background. Gordon testified at the end of the second meeting when it was dark, she saw R. Booth with a video camera. Gordon identified herself in a picture taken outside the meeting that was produced by the CPU in response to a subpoena. She testified she was standing against the wall and speaking to employee Eddie Toombs. (See P. Exh. 41(q)). She testified it was in the area she stood when she came outside in the morning for about 30 to 45 minutes. Gordon testified she was told there was a picture of her posted on the CPU website on the Utube.

Toombs, a USW supporter, credibly testified that he looked at the CPU website the week following the January 13, meeting and saw pictures on the site of people, including Toombs, going into the meeting. Toombs testified there was a picture of him and Gordon standing out front of the school on the site. It was a wide angle picture showing 5 to 10 other people. He testified there was a retiree from the mill in the picture handing out documents. The picture was of the front doors of the school where everybody went in for the meeting. The picture was taken from the street looking at the school. Toombs was standing there talking to Gordon. Toombs testified he did not give CPU permission to post his picture on the site. He testified it angered him that they posted his picture. Toombs testified "looking at what they were doing out there, and then thinking that they would post pictures of everybody. What was their purpose in putting a picture of me on their website?" Toombs testified, "They were picketing us. Their brothers and friends and family." Toombs testified he did not see anyone taking pictures and "I didn't know my picture was being taken."

D. Booth testified when he left the January 13, meeting he saw a large group of CPU supporters outside the school holding signs telling Gerard to go home. D. Booth testified that on his way to his vehicle, "I got shouted at and called some pretty – pretty bad names." D. Booth testified he recalled employee Roger Stover coming into the meeting and Stover stating his wife was uncomfortable about coming in with all the people hollering and everything. D. Booth testified employee Clinton Phillips said he could not believe what he was seeing outside.

Employee Margaret Smith attended both meetings on January 13. Smith testified that

corroborated by anyone else who testified about the January 13, meeting, except for Robyn Forbes who was only called on rebuttal by the USW. Forbes testified Gerard made an announcement at the start of the first meeting on January 13, that the meeting would not be videoed. However, given the circumstances of this record, I do not feel that the Intervenor established that either Yoffee or Gerard made such an announcement based on Gordon or Forbes' testimony. Rather, I have concluded that the Gordon and Forbes' confused the events on January 13, with the USW meeting on January 12, 2008, where an attorney for USW informed employees the January 12, meeting could not be videotaped without their consent.

It should be noted, Forbes was called to testify in violation of the sequestration order in that she had previously sat in for a portion of the hearing. She was called to the stand by Intervenor counsel O'Brien. Ms. O'Brien was aware that Forbes had breached the sequestration order, but made no such announcement to me before calling Forbes to the stand. In fact, notification to me of the violation of the order was only brought about by opposing counsel. I caution Ms. O'Brien that this practice should not occur in the future. Having heard representations as to the testimony Forbes witnessed during the hearing, as well as the substance of the testimony to be drawn from Forbes, I allowed her to testify over the objections of opposing counsel.

when she was walking into the afternoon meeting there was a man across the street with a video camera. The man was with the picketers and he had a CPU hat on and she thought he was also wearing CPU shirt. Smith testified he was pointing the video camera in the direction of the people that were walking in and standing on the stoops of the school. Employee Carla Arritt attended the first meeting on January 13. When she arrived there were about 50 to 60 CPU supporters standing along the sidewalk picketing and holding signs. Arritt testified that one of her co-workers had called Arritt prior to the meeting and told Arritt that she was not going to go because of the picketing. Arritt testified that someone took her picture as she was walking into the meeting. She testified she did not like having her picture taken, and that she did not think they had a right to take her picture. Arritt testified no explanation was given as to why her picture was taken. Arritt did not recognize the photographer. She testified it was a man, and he took a still photo. When Arritt left the meeting the picketers were still there. She testified a man yelled out to her that she should hold her head down that she should be ashamed. She testified this made her angry.

Employee Jeffrey Kirk brought his wife to the meeting. Kirk testified when they arrived there were a lot of CPU picketers and it was pretty calm when they went in. Kirk testified, "we came out it was pretty heated and I was actually a little bit scared when we left the place." Kirk testified there was one police officer and "a mob of maybe a hundred (100) people or more." Kirk testified, "That's what I call when you have an unruly bunch that's hollering at people and blowing air horns up in the foyer of the building and disrupting the meeting." Kirk testified, "When I came out it was like it had really built, you know, and I guess a lot of adrenaline and stuff like that and they had all concentrated right there in that area." He testified they were about 20 yards from the exit door. Kirk testified that one of them had an air horn and from the sound of it, "He had to have been actually opening the door to the building and blowing it in the building. I still don't understand why the police officer didn't take that from him." Kirk testified he was blowing the horn during the meeting, disrupting the meeting. Kirk testified you could hear the horn inside the meeting, "it'd make you jump, startled you, you know, it was pretty annoying." Kirk testified he was blowing the horn pretty regularly, "it wasn't just a one time thing, sir."²⁵ Kirk testified that CPU supporters asked questions at the meeting. He testified that some of the questions were valid. However, he testified, "I really felt like the Steelworkers should have limited the questions or something. At least, you know, give other people opportunities and stuff. I mean, it was just my opinion, my gut feeling, that it was intentionally just to tie the meeting up the way they did some of the meetings - some of the questions and stuff. Just a continual relentless thing."

Hall testified the January 13 meeting was a big event for the USW, stating, "Of course, they had invited employees, families, public, I think he wanted the whole town of Covington to converge there." The top official from the International was to attend. Hall testified it was an important event in the campaign for both sides. Hall testified the CPU wanted the picketers out front, "Because we wanted Leo Gerard to get our message, we want a vote." Hall testified they made a record of it with photos. Hall testified they were seeking a vote, "Because the United Steelworkers had filed labor charges that eventually were going to be dismissed, if not withdrawn. We wanted a vote. Let us vote for representation, move forward, get a contract and restore the lives of the thousand (1,000) families that are held hostage by this process." The USW's unfair labor practice charges were, at the time, blocking the processing of the CPU's petition for election.

²⁵ R. Booth, the CPU recording secretary, confirmed that there was a bullhorn going off during the rally. R. Booth described it as a large plastic straight tube about three feet long with a bell that is blown into. R. Booth testified he heard it blown about 20 times throughout the day.

Hall testified he was present for the second half of the picketing on January 13, as he was working during the first half. Hall testified while he was not there, the other CPU officers were in charge of the picket line, including Rick Gibson, Tony Markland, Doug Persinger, and Bruce Lowman. Hall testified the event was organized to be a CPU rally. Hall estimated there were about 100 CPU supporters outside. Hall did not go inside the meeting.

Hall testified he thought there was filming and still photography outside the January 13, meeting. Hall saw it going on, and did not tell anyone not to take pictures. Hall was aware of three or four people taking pictures. When asked if any CPU officers were taking pictures, Hall named R. Booth, recording secretary, and Eric Paxton as Webmaster. Hall denied that they were taking pictures of people coming in and out of the meeting, stating they were "taking pictures of our activities outside." However, Hall testified he did not tell the photographers not to take pictures of employees coming and going to the meeting. Hall testified there were photographs and video recordings on the CPU website pertaining to the January 13, meeting. Hall testified not all of the postings were done by CPU officials in that there is a message board on the site open to anyone who is registered to place postings including pictures on the site. Hall did not review any of the photos prior to their being posted on the CPU's website. He testified mill employee Heather Williams posted January 13 pictures on the CPU message board and Hall did not review those.

Williams, an employee and CPU supporter, testified she learned at the CPU union hall that there was going to be picketing on January 13. Williams was told by Gibson, a vice president of the CPU. Williams helped make picket signs for the event. She also took photographs outside the meeting on January 13. Williams testified that no one asked her to take the pictures. She testified she took the pictures because she maintains a scrap book and likes to archive information. Williams testified there were CPU officers there and they did not ask her to stop. Williams testified she was the only person she saw taking still pictures and that R. Booth had a video camera. Williams testified she was not sure if any CPU officer saw her taking pictures. However, she then testified that she and R. Booth, a CPU officer, were on opposite sides of the street, and were trying not to obstruct each others shots.

Williams arrived at the event around 12:30 to 12:45 p.m., and she started taking pictures upon her arrival. Williams testified when Gerard arrived she put her camera back in the van, and went inside the school to take notes of the meeting. Williams testified that when she went into the school there were about 130 to 140 picketers. Williams testified the first meeting started at 12:45. Williams only took pictures in the morning before the first meeting. Williams testified she posted all of the pictures she took that came out on the CPU website except one with Gerard and Persinger. She testified the pictures were posted on the website on January 14, 2008. Williams testified she did not know how long her pictures were posted on the CPU website, but she testified the site was not cleaned until after the March 12, election. Williams testified R. Booth's video was also posted on a link on the CPU website. Williams identified the pictures she took as P. Exhs. 41 (a) to (gg). She testified of all the pictures taken only 41 (e) and (q) contained pictures of employees who were USW supporters. One of the pictures included Gordon, and the other Toombs and Gordon standing in the background by the front of the school. Picketers were in the foreground of the pictures. Williams testified anyone, who is a member, can post materials on the CPU site. Williams did not ask for CPU's permission before posting the pictures, and no one from the CPU asked her to put them there.

Williams remained outside, during the second meeting, until all of the picketers went home. Williams saw CPU officers R. Booth, Persinger, Loman and Wright. Williams testified the CPU did not designate anyone in charge of the picketing. However, the picketers were told

by word of mouth not to stop anyone from going into the building, that they had to be peaceful, and that they could not place anything on the picket signs derogatory to their co-workers.²⁶

5 Employee R. Booth is the recording secretary for CPU and on its executive board. R. Booth attended the event on January 13. He arrived around noon. R. Booth brought a video camera and two digital still cameras. He took video of events outside the school auditorium. R. Booth estimated that there were 120 picketers out there at one time. During the course of the day there could have been 150 to 200 picketers. R. Booth testified he took the video because it was a historic event, and R. Booth wanted to document if the USW International did anything of
10 interest that would have value down the road.²⁷ R. Booth testified he wanted to film the USW

²⁶ Williams testified she had been in contact with USW Official Lloyd Walters, prior to the January 13, meetings, asking him if the meetings could be videoed for workers in her department who could not attend the meetings. She testified Walters called her back and told her they were checking into the legalities of recording it. Williams testified Walters came to her during the January 13, meeting and told her the USW was going to tape it. However, Williams did not know if the USW made a video of the January 13, meeting and she testified she did not see anyone from the USW recording the meeting. Considering her demeanor, I do not credit Williams' testimony that Walters told her on January 13, that the USW was going to tape the meeting. Williams is a strong adherent for the CPU, she wrote articles for the CPU newsletter the Barking Dog, and helped make CPU picket signs for January 13. Williams took pictures of the picketing and posted them on the CPU website in support of the CPU's cause. On the other hand, the evidence is clear that the USW's attorney informed employees attending the January 12, meeting that they would not be videoed at that meeting absent their consent. Moreover, CPU webmaster Paxton's video tape made during the second January 13, meeting reveals that Walters, when trying to get Paxton to stop filming, told Paxton, "Here's the problem. We didn't get permission from everybody here to video. You understand. If we had that that, It would've been ok. But some of the people said they'd rather us not to video..." Additionally, Yoffee and D. Booth credibly testified the USW did not make any videos of the January 13, meetings. I credit their testimony that no USW video was made, and based on considerations of demeanor and the record as a whole have concluded that Walters never informed Williams on January 13, or at any other time that the USW had made a decision to video the January 13 meetings.

²⁷ R. Booth testified there were prior occasions when he videoed and took photographs of USW Local events. R. Booth took pictures of picketing by the USW Local at the Employer's parking lot on November 13, 2006, and again in 2007. The latter picketing was to protest the pace of negotiations. R. Booth testified the first union event he videoed was during 2001 negotiations relating to an informational picket line that was canceled by PACE, the international union at the time. R. Booth identified videos of one of the USW Local's rallies held on the Employer's parking lot in 2006. There were two different rallies that day set up around the shift change. R. Booth testified Paxton videoed the first rally, and R. Booth the second.

Hall testified the membership rejected contract offers in December 2006, January and June. During a December 2006 meeting, there was a strike authorization vote, and the meeting was videoed by Hall's wife. Hall testified Michael Harrison, an international representative from the USW was present for the meeting. Harrison said, prior to the meeting, that Hall's wife, "had a good seat and would be able to get a good video." Hall testified international representatives Brady and Mendoza were present for the October 28, meetings. He testified they spoke at the meeting, and it is recorded on the video. Hall testified they did not say anything about video taping. The actual videos reflect that only Brady spoke at the first meeting, and there was a statement on the video at the second meeting that representatives from the USW did not attend that one. The CPU introduced video footage of the parking lot rallies and the strike authorization vote. The CPU introduced photos of the November 13, 2006, and May 21, 2007 parking lot

Continued

representatives as well as CPU supporters. He testified he did not intend to film any employees exiting or leaving the building and he did not intend to film employees who were not actively supporting the CPU. R. Booth testified he produced all clips in response to the subpoena except for one two second clip where the camera was pointing into the grass.²⁸

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R. Booth reviewed his video of the January 13, rally, during the course of his testimony at the hearing. Early on in the video were people participating in the CPU rally, including a picture of Heather Williams, who R. Booth testified took pictures that day. R. Booth testified at 1:35 count on the film is a picture of the entrance to the school. R. Booth testified he could not tell who the people were at the front of the building.²⁹ At 1:37 of the video, R. Booth identified Gerald Pullen, a retiree, who was handing out CPU literature to people entering the meeting. R. Booth testified he did not intend to capture the other people at the door, that he was just panning the camera. He testified he could not say whether they were employees or union officials because the view was far off. Pullen appears again at 2:10 on the film. He has white hair and is wearing an orange hat and a green jacket. R. Booth testified he took a close up of the door because he was supporting Pullen supporting the CPU. R. Booth testified he thought it was a mixture of CPU and USW supporters in the picture. R. Booth testified he was trying to film Pullen and not the employees at the time.

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R. Booth testified that, at 2:11, the woman standing by the wall is Alicia Gordon, a USW supporter. He testified the woman on the far right is wearing a jacket that appears to have a USW logo. R. Booth did not recognize her due to the lack of clarity of the picture. R. Booth testified the man in brown could have been wearing work clothes. At 2:20, R. Booth zoomed in on Pullen. He testified it was possible Mendoza was in the picture as well as Williams and CPU supporter Steve Terry. He could not identify anyone else in the video. R. Booth testified he videoed by using the monitor LCD screen. He testified the screen shows an image even when he is not recording. At 2:21, R. Booth testified it was Pullen handing out CPU literature. R. Booth testified he was about 40 yards from the front entrance. He testified he could see people going in and out and they would be able to see him while he was taking pictures. R. Booth testified part of his reason for filming was to make the film part of the election campaign. He testified, "at the time I had no idea what I was going to capture. I'd videotape it and see if it

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picketing.

²⁸ As Yoffe testified, the video R. Booth produced of the footage taken on January 13, was somewhat disjointed in that the clips were supplied out of order of the actual pictures taken. R. Booth testified he used a digital camera that has a hard drive to make the video. He testified each time you start and stop the camera it saves the recording on an individual file in the hard drive. R. Booth testified the video he produced in response to the subpoena is about 7 and ½ minutes long and not in chronological order. He testified he just took random converted files from a folder in his computer and dropped them into the video. He testified there was nothing to prevent him from placing the film in chronological order. In contrast, R. Booth made a carefully edited and detailed video pertaining to Gerard's entrance and exit of the January 13, event for posting for campaign purposes on the CPU's website. Thus, the haphazard nature in which R. Booth produced the video in response to the subpoena, lends credence to Yoffe's testimony that the subpoenaed video was incomplete, or, at a minimum, tendered in such a fashion to obfuscate what transpired.

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²⁹ R. Booth's affidavit dated, January 24, 2008, reads "In one of the clips I recall that there is one clip where some employees, maybe about five, were standing near the Steelworkers Representatives." He testified at the hearing that he signed off on the affidavit so it was clearly a statement he agreed to. R. Booth testified at the hearing that, "I would say that most likely I was referencing or meant employees that were supporters of the Steelworkers."

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would be useful. Campaign purposes would be part of it, yes.” R. Booth testified that at 3:40, the employee in pink might be Margaret Smith, a mill employee who is a USW supporter. R. Booth could not identify the man at the left of the screen at 3:41. At 3:55 the camera was still on Mendoza. There are four people on the screen. R. Booth testified to the best of his knowledge none of them were employees. At 6:42, there is Heather Williams who he testified appears to be taking a photograph. At 7:18, there are three people in front of the school. The one to the left is facing the screen is Mike Yoffee. R. Booth did not know who the other two people were. He testified to his knowledge they were not mill employees.

R. Booth testified he edited the video shortly after the January 13, meeting, and posted three portions of the edited video on Utube so he could associate it with the CPU website. R. Booth posted the videos by January 15. He testified he posted the video so people could see the goal of the picketing was they wanted to vote. R. Booth placed some captions on the edited video. At point 0.07 the screen says, "Leo Gerard receives a hearty CPU welcome." At 1.06, it states, "All we want is our vote." At 1.10 it says "Now." The next clip begins with "Leo exits Covington High School." It says, "Hey, hey, hey, good-bye." R. Booth testified he titled the message, "Leo Arrives and Leo Exits". He testified he received a lot of comments about the posting in the mill, but no complaints. R. Booth testified the posting was attributed to him. At the end of the video, is a similar message, "Let us vote."³⁰

Eric Paxton, the CPU website manager, also had a video camera at the January 13, meetings. Paxton admittedly videoed inside the USW meeting. He testified he did not video outside the meetings. However, Paxton testified, concerning his video camera, that while he was outside, "I'm either holding it to see if something might happen or else I've got it in my pocket. There were times when I just, Luis or somebody would come out and I would just get it out of my pocket to see if there was any kind of confrontation or anything." When asked if he was expecting a confrontation, he testified, "I wasn't expecting it, but, I mean, at this point in time there's so much tension you never know what's going to happen, so I just wanted to make sure I had documentation if anything did happen." Paxton had the camera out of his pocket during certain points, and he was moving around up and down the sidewalk.

1. CPU Web Manager Paxton videos inside the second January 13, 2008, USW meeting

Yoffee testified that around 4:45 p.m., just a few minutes into the second meeting, Yoffee was sitting in the front of the auditorium listening to the opening remarks of USW official Geenen. Yoffee heard a commotion behind him, and he turned around and saw someone videoing the meeting. Yoffee testified he got up and "darted to the back of the room." Yoffee testified he was able to identify the individual as Paxton, the website administrator for the CPU. Yoffee testified USW staff member Sheila Harris asked Paxton to stop videoing, but he refused. Then USW official Mendoza asked him to stop, and another USW official Walters asked him to stop. However, Paxton did not stop. Yoffee testified the USW officials were trying to get in his way to get him to stop. Yoffee testified Paxton was moving the camera to the left and right, and was not just focusing on the front of the auditorium. He testified Paxton responded, "I'm not stopping." Yoffee told him he was more than welcome to stay and attend the meeting, but he needed to turn the camera off. Yoffee testified, "He ignored me." Yoffee testified he was videoing for five minutes. Yoffee testified the camera "was pointed at the crowd that was in the

³⁰ Several videos were introduced into evidence in this proceeding. These videos were apparently copied on a computer. They are all functional, but some could not be played using a standard DVD player, but could only be played on a computer using computer software.

meeting.” That is the employees who were attending. Yoffee testified that, “by this time there was enough of a commotion where people were turning around so you weren’t just getting the backs of heads, you were getting faces and so, you were seeing, you know, people, you know, as we were having this discussion, I wouldn’t say the meeting stopped, but there was clearly a
 5 commotion going on. People were turning around, wondering what was going on and the - he was, Paxton was moving the camera in whatever direction he could get an open shot, and so the camera was not fixed in one position. It was - it was moving along the crowd. It was pointed to the front of the auditorium.” Yoffee testified, “I clearly remember people turning around wondering what was going on.” Yoffee testified Paxton did not stop when Yoffee asked
 10 him to stop. Then Mendoza left and he came back with CPU official Persinger, who asked Paxton to leave with him and Paxton left.³¹

Yoffee testified that, in reviewing Paxton’s film of the meeting, there were shots of the backs of peoples’ heads and there were also shots of people turning around, and you could see
 15 their faces. Yoffee testified there were people sitting in the last rows of the auditorium so they were surrounded by employees. Yoffee testified, concerning employees, “I know that at one point Robin Forbes and Margaret Smith, had been in the area, and they had notified Luis of what was going on and I - I think they were kind of hanging around in the area.” Yoffee testified there was a lot commotion and they were thinking about calling the police. He testified, “it was a pretty tumultuous five minutes.” Yoffee testified the police were at the meeting, but not in the
 20 auditorium. He testified they did not want to call them in, because they did not want to break the

³¹ Several employees testified they saw Paxton videoing inside the meeting. D. Booth testified he was sitting about eight rows from the back and he heard some commotion. D. Booth
 25 looked back and he saw Paxton had his camera pointing at the stage. D. Booth saw Mendoza and two or three other people from the USW International speak to Paxton telling him he could not record there. Paxton continued recording, and Mendoza went outside and got Persinger, who was on the CPU committee. D. Booth testified that until Persinger arrived Paxton “wasn’t planning on going anywhere.” Toombs testified he saw someone taking a video at one of the
 30 meetings. He testified, “I saw somebody come in at the back of the room and start video taping and then he was confronted by one of our members. Then he was escorted from the premises.” Smith testified that, during the second meeting, Paxton, the web keeper for CPU, stood in the back of the auditorium with a video camera. Smith told USW official Sheila Harris, and Harris told Yoffee, and they went around and told him to shut his camera off and that he was not
 35 allowed to video the meeting. He refused several times to shut it off, and then finally they asked him to leave. Smith testified she thought the video taping of the meeting was very intimidating. Smith testified, “just from the picketers, the videotaping and everything, the whole situation was very intimidating.” Gordon saw Paxton video taping inside at one of the meetings. Gordon was seated and he was several rows behind her standing against the wall. Gordon heard him being
 40 asked to leave. Gordon turned around to look at Paxton and she saw Yoffee talking to him. Gordon testified she knew Paxton had the ability to enter information into the CPU website. Gordon testified people sitting behind her were turning around watching what was going on. Gordon saw 20 or more people turned around. Gordon testified from Paxton’s vantage point with the camera, he could see the audience and the speaker. Gordon identified herself and
 45 employee Toombs on Paxton’s video. Robyn Forbes testified she had not yet sat down, when Paxton attempted to video the second meeting. Forbes was standing in the back in the doorway from the auditorium to the foyer when she saw Paxton. Forbes looked for Mendoza to tell him about Paxton. Forbes testified she could not find Mendoza so “we got Sheila Harris.” Harris went over to Paxton and put a paper in front of the camera and tried to get him to stop.
 50 At some point, Mendoza came over and talked to Paxton for a little bit and then left. Forbes testified, “I assume that’s when he went and got Doug (Persinger) to come back in.”

meeting up and disrupt things. Yoffee testified people were turning around to see what was going on and they were not paying attention to what was being said in the front of the room. The meeting lasted over an hour after Paxton left and there were questions and answers. Yoffee testified he could not say any employees left the meeting as a result of the incident.³²

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The USW prepared a transcript of the conversation contained in Paxton's January 13, 2008, video recorded inside the USW meeting. I have reviewed the video of the meeting, and have found the transcript to accurate, except as set forth below where I made one addition to the transcript. The transcript, with one corrected insertion, reads as follows:

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Approximately 1 minute into the video:

Sheila Harris (USW) Rep.): You can't be videoing...

Paxton: Why not? It's an open meeting?

Sheila Harris: No it's not.

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Paxton: This was advertised as an open meeting.

Harris: No, but no video. You need to leave.

Paxton: This was advertised as an open meeting. You can't stop recording.

Luis Mendoza: You can't video tape, brother.

Paxton: This was advertised as an open meeting.

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Mendoza: But it was also advertised as no video and no recording.

Paxton: It wasn't advertised. Where was that advertised at?

Mendoza: I don't want to have to ask you to leave. You know what I'm saying. We're doing this in a peaceful manner. Come on... shut it off please.

Paxton: I'm not shutting' it off.

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Paxton: This was advertised as an open meeting.

Walters: But not for video. You're certainly welcome to participate. But let's don't have any problems. Please just cooperate with us. We would with you guys.

Paxton: If you don't have anything to hide, then you shouldn't have to worry about recording it.

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Walters: You see. Here's the problem. We didn't get permission from everybody here to video. You understand. If we had that that, It would've been ok. But some of the people said they'd rather us not to video because...(if we video they did not feel comfortable asking questions) (inaudible) video. So we just ask to please cooperate.³³

Paxton: If you got nothing'...

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Unidentified Covington Worker: What's wrong? Roy and them Chicken shit? Or won't come in here to hear what they got to say? You gotta film it to take it to him?

Paxton: Nope. Just make sure they're telling' the truth. That's all.

Worker: Huh?

Paxton: Make sure their telling the truth. That's all.

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³² I have reviewed Paxton's video of the meeting. It showed at least seven people who appeared to be employees who were seated in the auditorium but had turned around to see the cause of the commotion and whose faces could be clearly seen on the video. It showed at least another seven people who were seated, who appeared to be employees, had turned around to see the commotion, whose faces were caught on the video, but whose faces were not clearly identifiable. There were about seven people standing in the back of the auditorium who appeared to be a mixture of union representatives with some employees whose faces were clearly caught on the video. Additionally, the video scans those seated in the auditorium, revealing to the viewer the number of employees in attendance at the meeting.

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³³ In listening to the video with headphones, I was able to hear the bracketed portion of Walters' remarks, which were not picked up in the USW's transcription.

Walters: We're going to have to ask you to leave. Welcome to stay. But, you know, we're not going to violate people's rights and privileges. We wouldn't do this at your meeting.

Paxton: It was advertised as an open meeting...

5 Walters: Well, open meeting means... (inaudible) can't video the meeting.

Paxton: If there's nothing to hide...then...

Walters: What's your problem? Why can't you be like everybody else?

Paxton: We are like everybody else.

10 Yoffee: We're going to ask you (to) stop. If you don't stop, we're gonna have the police come in and have you... you can stay in the meeting, but the camera cannot stay on.

Paxton: Was this not advertised as an open meeting?

Yoffee: You're welcome to stay here, just not with the camera on. Just turn the camera off.

Paxton: It's an open meeting. You can't restrict people from...

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Hall was at the January 13, meeting outside the school when Paxton went inside the auditorium and videoed. Hall testified he spoke to Paxton before Paxton went inside the meeting. Hall testified, "Before he went in he said that he wanted to go in. I told him, well, it's an open meeting I can't tell you not to. It's not like he was asking my permission." Hall testified, 20 "He told me he wanted to go in and video the meeting. I told him, well, it's an open meeting. My understanding an open meeting, I guess you can I don't know, but he wasn't looking for my approval. He was just telling me that's what his position was, that's what he was wanting to do." Hall testified he did not tell Paxton not to take the video. In terms of Paxton leaving the meeting, Hall testified he thought USW representative Mendoza came out and asked a CPU official to go 25 get Paxton. Hall testified Persinger went inside the school to get Paxton. Hall testified when Paxton exited the meeting, he opened up the camera, and played what he recorded. Hall testified he was not part of the group that watched the video. Hall knew Paxton took video during the meeting. Hall testified, "everybody that was there heard. It became a commotion when Luis come outside."

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Paxton is 6 feet two inches tall and a large individual. Paxton testified he is the web administrator for the CPU.³⁴ Paxton testified as follows concerning his videoing a portion of the second January 13 meeting:

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Q Did you ask permission from the CPU if you could film?

A No, I did not.

Q Did you notify them that you might film?

A No.

JUDGE FINE: Did you talk to anybody from the CPU before you went in?

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THE WITNESS: There was - of course, there was a big crowd out front. I mean, I was standing there talking to people before I actually physically went into the meeting.

JUDGE FINE: Did you talk to any CPU officers and tell them you were going to go in?

THE WITNESS: I don't know if I specifically addressed them, they may have been

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³⁴ Paxton testified he was not appointed web administrator by the CPU stating, "I did that totally on my own." Paxton testified he pays for the CPU website. The site includes a CPU logo, as well as a listing of the names and titles of the CPU officers. It lists Paxton as "Website Administrator." It states at the bottom of the page "Copyright © 2006-2008 Covington Paperworkers Union Local 675/ All Rights Reserved." CPU campaign literature was posted on 50 the site, including the Barking Dog. Paxton posted the literature. There was a message board on the site where members or the general public could post things.

standing there when I said that I was going to go in and try to film it.

BY MR. MUNRO:

Q So, you did tell somebody before you walked in that you were going to go in to film?

A Yes.

5 JUDGE FINE: Did you talk to Mr. Hall?

THE WITNESS: I can't recall if he was standing there. I mean, there was just a big circle of people standing there.

JUDGE FINE: So, you didn't have a conversation with him?

THE WITNESS: As far as talking to him about if I could go in and video, no.

10 JUDGE FINE: You were just standing with a circle of people and said, "I'm going in and do -", what did you say?

THE WITNESS: Basically, yes. We were just standing around and I said, "I'm going to go in and video tape the meeting."

JUDGE FINE: Did anybody tell you not to?

15 THE WITNESS: No.

Paxton then testified he may have told Hall he was going to go in to video. Paxton testified there was a crowd of people standing there, and "I said, 'I'm going to go in and video tape it.'"

20 I do not credit Paxton's claim that he had no conversation with Hall or that he failed to recall it. Hall is the president of the CPU, and he testified to a direct conversation with Paxton before Paxton entered the building. On the other hand, Paxton at first denied he even notified anyone from the CPU that he was going in. Moreover, the CPU organized the picketing, and I have concluded that Paxton intentionally notified Hall that he was going inside the meeting to video to make sure that Hall, as the president of the CPU, had no objection to his doing so. I also do not credit Hall's claim that Paxton was not seeking Hall's approval. Moreover, I have concluded that Hall, as president of the CPU, gave such approval when he was notified of Paxton's intent, and voiced no objection to it before Paxton entered the meeting.

30 Paxton testified he went into the January 13, meeting with his video camera because, "I wanted to document - there was a lot of what I felt was propaganda at that time. Stuff that I didn't feel was truthful and I wanted to - I think my position has always been people have a right to make whatever decision they want to make, but I want them to make the decision based on truth. That was my purpose at that time, because I wanted to document what they were saying and have something to refer back to." He testified he was referring to what the USW representatives were saying at the meeting, specifically Gerard and Geenan. Paxton testified he had seen advertisements of the meeting and flyers handed out by the USW stating the meeting was an open meeting and anyone could attend. There was an advertisement in the paper telling people to bring their family. Paxton testified, "as far as I knew it was just an open public meeting." Paxton testified he did not see anything that said no video, and that he did not go into the meeting intending to film employees stating, "That was not my intention whatsoever."

45 Paxton testified that, once in the meeting, he made a video inside the auditorium of a portion of the meeting, and the video was less than 5 minutes in length. Paxton testified, "I just walked in the door. I stood right at the very back of the auditorium." Paxton testified he turned the camera on and he stood there holding the camera pointing it, "Right at the stage." Paxton testified he did not ask permission of anyone to start filming. Paxton testified the camera was not turned off from the time he started taking the video until the time he stopped.

50 Paxton reviewed and discussed the video during his testimony. As reflected in his testimony: At 0:00, the beginning of the video was focused on the stage. Mendoza was at the podium. At 0:22, the video continued to be focused at the stage, showing USW officials

Geenan and Gerard. At 1:05, the camera went black because a woman, who was USW official, came over and threw a folder in front of the camera and told Paxton that he could not film. When the woman threw the notebook up, Paxton pulled the camera down towards the floor. At 1:24, the woman left and Paxton pulled the camera back up to continue filming. Paxton saw
 5 Mendoza coming and he knew Mendoza was coming to tell him to leave. At 1:29, Paxton identified a mill employee on the video as Mr. Skidmore. Paxton did not know if he was a USW supporter. There was a man behind him with glasses, who Paxton did not know whether he was an employee or USW official. When the USW officials walked up, Paxton pulled the camera beside him trying to capture what was being said to him, and he was not trying to film
 10 anyone. He testified he had no idea who he was filming. At 1:43, the woman wearing the USW shirt was the person who initially came to talk to him and placed the folder in front of the camera. Paxton could not tell if the person behind her was an employee or union official. Paxton testified he did not turn off the camera because, "I felt like I had a right to be there. I felt like I had a right to video it. I mean, it's a high school auditorium. It's advertised as an open
 15 meeting. I mean, it's a public forum. I couldn't understand why I didn't have a right to video."

Paxton turned the camera at 2:04, because there was someone coming up to talk to him. He testified he was not intending to film anyone in the audience. However, Paxton testified the man appearing on the film with the orange hat is A.J. Wolfe, a mill employee. At
 20 2:06, a USW international official was talking to Paxton. He was not in the picture. Paxton testified it looked like about three or four people were looking at him from the audience. He testified a couple of faces he recognized as mill employees. Paxton testified that, at 2:07, it looked like two people in the audience turned around. He testified it was very possible they could be employees. Paxton testified one of the people could have been Alicia Gordon, an
 25 employee. He testified that at 2:59, it looked like three people turned around to look at him.³⁵ At 2:21, the camera caught the side of the head of a man who is a USW official. Paxton testified that, "I think he just made the statement that we didn't get permission from all these people to film or something like that. I assumed he was talking about filming the meeting." Paxton testified the man was stating the USW did not get permission to film, and "I think I just
 30 kept repeating that it was an open meeting."

Paxton testified that, at 2:34 an employee asked Paxton, if the CPU committee and Hall were "too chicken crap to come in and listen to whatever they've got to say." He said you have
 35 got to film it and take it to them. Paxton's response was, he was just there to document it and make sure they were telling the truth referring to Geenan, Gerard, and the USW speakers. Paxton heard someone say he could not stay there and keep filming because it was a violation of people's rights. Paxton testified that he kept filming. Paxton testified he had been told two to four times to stop filming by the USW. At 3:31, Paxton testified the frame has people in the audience and the camera is moving around. Paxton testified he was trying to get back to
 40 videoing the stage, but people kept coming up to him. At 3:41, Yoffee is walking toward Paxton. At 4:01, Yoffee told him that if he did not leave the police will come and get him, that Paxton could stay, but he could not have the camera. Paxton did not turn off the camera. Paxton testified, "I wasn't really worried. I didn't feel like I was doing anything illegal. I didn't see any reason why they could throw me out, but I guess it was getting tense to the point where - I don't
 45 know, at that point I probably was just about ready to leave." At 4:01, the camera is again

³⁵ In fact, as set forth above, a review of the video reveals, that during the course of the video several members of the audience turned around to view the commotion in the back of the room, and their faces were captured on the film. Moreover, the camera had panned a good
 50 portion of the auditorium during the filming showing the attendance level at the meeting for any interested party who reviewed the film.

pointed to people in the audience, because Paxton had pulled the camera back to capture who was talking to him. At 4:20, the camera went dark, Paxton testified he saw Persinger, a CPU committeeman and officer, coming in the door, waving Paxton to come out. Paxton testified, "So, I just dropped the camera and walked out." Paxton testified he listened to Persinger because, "I guess he had a point of view that I didn't. I felt like if he was coming in to tell me that I'd better leave, then maybe I'd better leave." Paxton testified he did not post the video on line. Paxton testified when he walked out of the school on January 13, he showed people what he had filmed. He testified there were a couple of groups standing out there, including he thought R. Booth and R. Hall. Paxton testified he thought Hall looked at the video with him. Paxton testified he showed the video to CPU Official Markland at that time. He also showed it to Markland a couple of days later at the union hall; he testified there may have been some other people in the union hall at the time.

G. The surreptitious recording of an employee's conversation with USW officials, and CPU Office Manager Fridley listens to USW voice mails

1. Hall offers a recording device to an employee to record his conversation with USW representatives

Robert Howard works for the Employer as the hourly paid safety director. He has worked at the mill for 25 years. Howard credibly testified as follows: Around the first or second week in November, Howard had a conversation with Hall at the CPU hall. Howard stated the USW had brought international reps in and they were occupying the USW hall. Howard told Hall that Howard would go there and give them a piece of his mind. Howard said he wished he had a tape recorder, that Howard would let Hall hear what he had to say to them. Hall said he had an MP-3 player that could record. Hall gave Howard the MP-3 player and showed him how to record with it. Howard went to the USW union hall and there were two USW representatives there. Howard vented some feelings to them. Howard testified, "it was a very emotional time, there was a lot of anger close to the surface." The recorder was in Howard's pocket and it was not visible during the conversation which lasted around 20 to 30 minutes. Howard returned to the CPU hall and played the conversation for Hall. Howard thought employee D. Booth was also there and listened. Howard left the MP-3 player with Hall.³⁶ When Howard returned to the CPU hall, it was just Hall, D. Booth and Howard present. Howard testified that since that time, he has not heard anything else about the recording.

D. Booth testified around mid-November, he stopped by the CPU hall, and Hall showed D. Booth a device that looked like an I-Pod. D. Booth asked Hall what it was, and Hall said, "Well, I fixed Rob up to see what was going on down there", referencing the USW union hall. D. Booth testified Rob Howard is Hall's friend. D. Booth testified he put earphones on, and he heard Howard's voice. D. Booth testified, "since he said it was down at the USW Hall, I figured that's who it was because they was asking questions about like 'where have you been when we needed you' and 'why are you here now'." D. Booth listened to about 5 minutes of the conversation. D. Booth testified he gave the device back to Hall, and someone else came in, Hall offered it to them to listen to it.

³⁶ Howard did not have a position with the CPU. Howard has an elected position with the USW, which is safety officer. Howard was the only local officer of the USW who did not resign his position at the time of the disaffiliation because he felt being in a safety position superseded any political issue. Howard testified he was a USW officer at the time of he recorded the conversation.

Hall acknowledged giving an MP3 device to make a recording during the election. When asked why he gave it to the employee Hall testified, "Because he said he wanted it." Hall testified that other than that incident, he never listened to any other recordings of conversations.

5 2. Fridley opens USW voice mails

Employee Albert Wolfe testified he met with Fridley at the CPU union hall on about October 31, or November 1. At that time, he overheard Fridley state to someone that she had the password to the answering machine at the USW hall and she was still receiving messages there. Wolfe testified there were a lot of people in the CPU hall at the time. Wolfe testified that while he was at the CPU hall, Fridley dialed up the USW answering machine.

Fridley had been the office manger for the USW Local following the disaffiliation, until she began working for the CPU on around November 6 as office manager. Fridley testified that, after she went to work for the CPU, she called the USW hall and checked voice mails on that phone. She testified she asked Mendoza to remove her message off the recorder, but he said her voice sounded better than his, and they left it on there until about a month prior to the hearing. Fridley testified she called the USW voice mail the first week, after leaving the USW, to see if she had any messages and then she quit doing it. Fridley denied hearing messages that she told employees about, stating most of the messages were people cursing out the USW.

H. Campaigning during working time

25 1. The testimony of USW witnesses concerning CPU stickers and postings at the plant

Employee Margaret Smith testified that since the October disaffiliation meeting through the election, there were CPU bumper stickers on almost all of the maintenance golf carts in the mill. The stickers had CPU in three to four inch letters. Smith testified they were "either on the front, the back, the sides. It's usually all over." She testified there around 15 to 20 maintenance carts with stickers on them. Smith testified all the supervisors saw them driving the carts, and that there were four supervisors in her area alone. Smith testified she also saw employees wearing USW stickers on their clothes, backpacks and lunch buckets. Smith saw CPU and USW supporters wearing hats and shirts that supported their respective unions at the mill.

Julie Brown works as a janitor cleaning the GMS&S and Power House Departments. Brown testified around the beginning of March 2008, she saw at least 10 golf carts at work with CPU stickers and handmade signs taped to the windshields. The CPU signs were 11 by seven 7 inches. Brown testified a lot of the signs were still on the golf carts at the time of the hearing. Brown testified that the people driving the golf carts had stickers on their hard hats and other things too. Brown testified she has seen USW stickers on lockers, hard hats, and lunchboxes.

Employee Thomas Buzzard testified that as he walked through the maintenance shop he saw several golf carts with CPU insignia and slogans. He testified it was like sun shades on the windshield, between six and 12 inches wide and the length of the windshield of the golf cart. He also saw CPU bumper stickers on the carts. Buzzard testified he saw CPU literature in the golf carts stacked 6 to 12 inches high. Buzzard did not see anyone handing out the CPU material stacked in the golf carts. Buzzard has seen USW stickers at the mill on hard hats and personal gear. Buzzard had seen CPU and USW stickers on doors at the mill.

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2. The distribution of CPU literature during working time

a. The USW's witnesses

5 On February 22, 2008, Mark George, the Employer's vice president of operations issued a memo to all employees announcing the NLRB election was going to be held on March 22, 2008. The memo states the Employer is neutral in the process. George stated in the memo:

10 The company respects the rights of all employees to engage in union activities on Mill property, but we also want to remind all employees to follow the Mill rules when doing so. We follow the simple rule that working time is for work and, therefore, employees may engage in solicitation, passing out related materials, and circulating petitions only during non-working time. Examples of non-working time include approved meal periods, break periods, and as employees are coming and going before and after work. Non-
15 working time includes the time of the person soliciting as well as the time of the person being solicited. We also want to remind everyone that Company copiers or fax machines are not to be used to reproduce campaign materials or flyers.³⁷

20 Employee Carla Arritt works in the lab at the mill. Arritt testified that in the first week of March 2008, a maintenance employee, who was identified to her as R.J. Reynolds, drove up in a golf cart as Arritt stepped out of the lab on the way to collect some samples. Reynolds handed Arritt some CPU literature and asked her to take it to the lab for people to see. Reynolds then went to employees on paper machines 1 and 2 and was talking to them while handing out materials. This took place around 7 p.m. Arritt did not know if Reynolds was on
25 break. Arritt also saw Reynolds walk over and talk to employees working on the winder. She testified Reynolds was talking to employees for at least 45 minutes. Arritt testified she did not see Reynolds doing any work.³⁸

30 Employee Jeffrey Kirk works in Waste Treatment at the mill. Kirk testified the mill did not have a policy, to his knowledge, about campaigning on work time until George issued his February 22, 2008, memo. Kirk credibly testified he saw two employees campaigning on working time, the Tuesday morning before the Wednesday, March 12, 2008, NLRB election. Kirk testified it just after midnight when maintenance employees Bill Tolley and Steve Hall, Jr. came into the control room.³⁹ Kirk was getting ready to go out the door on a job. Tolley said he
35 had a document for them that was very important. The operator Randy Pritt told Tolley that they would take it. Tolley said he had been all over the mill that night. Kirk was not on a break and Pritt was working at his station. Tolley, S. Hall, Kirk, and Pritt were the only ones in the control room. Kirk testified they are self directed on the 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m. shifts, in that there are no supervisors on those shifts. Kirk testified the USW had previously
40 distributed a notarized document stating what could happen if they went to a different union, that they could start from scratch on their contract negotiations. The CPU document distributed by

45 ³⁷ During the hearing, counsel for the USW took the position that, prior to the February 22, memo, employees supporting both the CPU and the USW were campaigning on work time. It was the USW's argument that the Employer disparately enforced the February 22 memo by allowing the CPU to campaign on working time.

³⁸ Arritt is a member of the USW unification committee. She testified she has taken USW material to work and left it in her work area for employees. Arritt did not hand it to employees. Arritt left it on tables in the work area where union and other materials were placed.

50 ³⁹ The record disclosed that Steve Hall, Jr. is Roy Hall's brother. Roy Hall is referred to as Hall on the record. Steve Hall, Jr. is referred to as S. Hall. S. Hall did not testify.

Tolley and S. Hall responded to the USW document. Kirk testified the USW document was laying on the top of a desk in the control room when Kirk arrived at work that day. Kirk did not know who put it there. He testified the control room was his work area, but Kirk also eats his lunch in the control room. He did not have a separate break area.

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Kirk testified there is a glass door at the mill you walk through on the way in to work that has a USW sticker on it. The USW sticker was there before the election and remained there at the time of the hearing. Kirk testified there were a couple of USW stickers about the size of a quarter on the dump trucks at the mill, which drive to the landfill. Kirk testified the trucks drove about halfway across the mill going to the landfill and back about nine times per shift. Kirk testified you have to get right up to the vehicle to see the stickers. Kirk testified employees were constantly receiving campaign materials at the gate from both unions. He testified he sometimes brought materials into the mill and read it while he was at work. When Kirk was done with it, he laid it on the counter or threw it away. Kirk testified this was going on throughout the election period.

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William Armentrout works in the Power Department. Armentrout credibly testified he saw people campaigning on work time at the mill. Armentrout testified that early Tuesday morning, the day before the election, two maintenance employees came and handed out literature at Power Department control room. Armentrout testified he was working and Jim Spivey was present, as well as some other employees. Armentrout did not know how the maintenance employees got to the area. He saw them coming through a door into the control room. Armentrout testified, "Mr. Tolley just come over and handed us CPU literature." He said, "I'd appreciate it if you all would look at this." Armentrout testified that Tolley did not do any work in the department at that time. Tolley came in, handed them the papers, and went back out. Armentrout testified the individual with Tolley was identified to Armentrout by Spivey as Roy Hall's brother. Armentrout testified they were there about two minutes. He testified they came into the department between 1 and 1:30 a.m. Armentrout saw a USW handout from an attorney Richard Brean in the control room earlier that evening. Armentrout testified the control room is their work area, but it is also where they take their breaks.

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Employee Mike Lipes works on the number 2 paper machine. He testified there is a loading department downstairs where Lipes is usually located. Lipes testified the Monday night going into Tuesday morning before the election he saw maintenance employees S. Hall and Tolley campaigning on work time. They came into Lipes' area between midnight and 1 a.m. and laid some information on a table then left. The literature they laid on the table was the CPU response to the information the USW handed out by USW Attorney Rich Brean stating what could happen if the CPU won the election. Lipes saw S. Hall and Tolley drive up in a golf cart. Lipes testified employees Roger Meresbaugh and Matt Vass were in the break room. Lipes testified he was working when this occurred. Lipes thought S. Hall and Tolley were on working time. He testified, "I mean they work shift work just like I do and it was after, at least two hours or more after shift change. So I feel like they were on work time." Lipes testified he does not have structured times for his breaks. Rather, he takes brakes as work allows. Lipes did not know if it was the same for the maintenance employees, so he did not know whether S. Hall and Tolley were on break. Lipes testified he first saw the Brean handout at the USW hall, and it was in the mill that night Lipes arrived for work. The USW document was in Lipes' area in the break room. Lipes did not see who put it there.

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Employee Shaun Vass (referred to in the transcript as Bass) works on the number 2 paper machine, which he testified is as large as an air craft carrier. Vass testified that between midnight and 2 a.m. the night before the election a couple of maintenance employees entered the loading department. Vass did not know the identities of the maintenance employees at the

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time, but he was told by his co-workers it was S. Hall and Tolley. Vass testified they drove a company golf cart and then went into the break room. Vass was loading paper at the time. He testified about 10 minutes passed and they left. After Vass he finished loading paper, he went into the break room and discovered they were handing out CPU literature. Vass testified they had laid CPU literature on the table, talked to a couple of employees then left. Vass testified the CPU literature was in response to a USW Steelworker notarized distribution that came out the prior day.⁴⁰ Vass learned from talk around the mill that maintenance employees were generally CPU supporters. Vass testified there were about 300 employees in maintenance. They work all over the mill using golf carts for transportation.

Vass testified he first saw the USW notarized document at the USW union hall estimating it was late in the afternoon on March 10. Vass estimated the USW document was distributed the shift before the CPU response document. Vass testified there are two break rooms for people who work on the number 2 machine, one is upstairs and one is for loading. Vass testified he had placed the USW distribution in the loading break room where maintenance employees had placed the CPU response. Vass asked employees to read the USW document. He testified he had just walked in the break room at the time unpacking his lunch when he placed it in the break room. He testified he was on the clock when he placed it in the break room. He testified they clock in at the gate, in that "you scan your card, you walk in." He testified he had not started working yet. Vass testified that he had a break that night, and he went upstairs and handed the USW document out. Vass testified he had handed a few out in the break room, and he laid a few out on the table. Vass testified he did not hand it to anyone out on the floor. Vass testified in his department the employees decide when to take breaks.

Employee Albert Wolfe testified campaign handouts were everywhere in the mill on bulletin boards, desks, tables, locker rooms, and break rooms. He testified people were given handouts out on the work floor by both sides during work time. Wolfe testified Mendoza came in and posted things on the bulletin board. Wolfe testified he would get a USW "Informer" from the USW hall and bring it to work. Wolfe worked in the control room. He testified he could not leave his work area, but people would come in and he would hand them an Informer. Wolfe testified, "And the same thing with CPU. People come by and – a maintenance come back on tower, like I say everybody knew that the boiler house was mainly USW. So, I mean, we didn't get very much up there at the boiler house. But I mean there's some people, especially the week before the – the vote, people really started hammering us pretty hard." Wolfe testified its on the work floor, both sides during work time. Wolfe testified he saw stickers every where on hard hats, lockers, and doors for both sides.

Employee Julie Brown testified she saw Clarence Daniels, a carpenter at the mill, campaign. She testified Daniels came to her department with a CPU pamphlet and Daniels sat down next to her and several other employees and was reading the information to them. This was during their lunch break between 12 and 12:30 p.m.. Daniels was there for 15 minutes. Brown testified there were at least six employees there. Brown testified her supervisor Danny Baker came out of the office after Daniels had been there for about 10 minutes, and asked one of the men in her department to get Daniel's back to work. Daniels left and went back to work. Brown did not know if Daniels was on a break when he came to her department. Baker was called as a witness by the Employer. He testified the incident took place around two weeks before the election, and he ordered Daniels to leave the area at the end of the employees' lunch

⁴⁰ Vass testified there were 10 employees in the break area that he spoke to who reviewed the CPU literature. Vass was not aware that any supervisors knew that the CPU supporters placed the materials in the break room.

break. Based on the testimony presented, I do not find that it was established that Daniels engaged campaign activity during working time. As there was no evidence that Daniels was not on break, and the employees he discussed the pamphlet with were on break.

5 Employee Buzzard testified that around the night of March 10, Buzzard brought in a letter from USW attorney Brean to the break room in his work area. He testified employees were sitting in the break room and were on break. Buzzard testified, "I just put it down and then one person asked me about the hand out, and I said, it's what it - you just need to read it." Buzzard testified the time was 6:30 or 7 p.m. Buzzard came on to the property and brought the literature in when he was not on the clock. Buzzard testified he was not aware of any company policy that prevented him from coming in when he was not on the clock. Buzzard testified he only took the handouts to the area where he worked. There were no supervisors there at the time. The USW representatives did not tell him to bring it into the mill. Buzzard obtained the Brean handout during a union meeting the same day he brought the literature into the mill.

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b. The CPU's witnesses

20 Roy Hall testified he was aware the Employer issued a memo on February 22, prohibiting campaigning during working time. Hall testified the CPU constantly told people during informational meetings to campaign in break areas on break time, and to not talk about it on the job. Hall estimated that 95 percent or more of the maintenance employees supported the CPU. Hall estimated that at the time of the hearing there were a little less than 200 maintenance employees. Hall is a maintenance millwright in the tour maintenance area. Hall testified that as a mechanic, he has access to the entire mill. Employees use golf carts to travel around the mill. It is the predominant form of transportation for maintenance employees.

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Hall testified he witnessed USW electioneering inside the mill. He testified that on March 11, during the pre-election conference, they were going to different polling locations. Hall testified that after leaving the last polling location, Hall saw USW International Representative Lloyd Walters take CPU campaign literature from a bulletin board at the plant. Hall testified the NLRB representatives did not see it, but it was brought to their attention.⁴¹

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Hall credibly testified he has seen USW stickers and signs in the mill. He described a USW sticker on a set of glass doors at the number eight finishing loading area, as well as another USW sticker on a set of glass doors down the hallway about 200 feet away. Hall testified there was a USW sticker on a tank in the starch kitchen. Hall testified there was a USW bumper sticker on the R8 building on blue cinder blocks. Hall testified that in the Waste Treatment area, there is a USW bumper sticker on the side of the number two primary clarifier. Across from that, there are three pumps called deep well pumps. The first pump to the left has a USW bumper sticker on it. Hall testified three weeks before the election, Hall saw at the entrance to the five and eight loading area two signs one approximately four feet by four feet, stating "USW all the way and USW, the only way to go." Hall testified he saw CPU stickers on about 12 golf carts.

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45 Heather Williams works in GMS&S at the mill. She testified there are golf carts used in that area with USW stickers on them, including one on the foreman's golf cart. The latter sticker had been removed. Williams testified there are USW stickers on a fork truck. She testified the

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50 ⁴¹ Walters did not testify and therefore did not deny Hall's claim, which I credit. However, I do not find this to be the type of campaign activity by employees that was placed at issue by the USW's objections.

stickers were on the golf carts prior to the election.

5 Doug Moses works in stock and additives in north and south side coating. Moses testified he has witnessed on the job campaigning by USW supporters. Moses testified that he and co-worker walked in to the loading area, number one and two paper machine, and they saw Robin Forbes passing out papers by the conveyor belt that loads out brown paper rolls. Moses testified they were working D tower, it was around 2 p.m., "so I assume that she was working." It was outside the break area. Moses testified he thought he and his co-worker took one of the papers from Forbes and she was giving them to who ever was walking by. Moses testified he was going from the parking lot to his job at the time he received the materials. Forbes handed Moses material as he was going to work. This took place around November 2007. Moses testified he remembered reading a February 2008 memo from the Employer stating what they could and could not do, and it was Moses estimate that the incident with Forbes took place around three months before the memo. Moses testified concerning Forbes, that at the time, "I didn't know that no one was allowed to hand papers out inside the mill, so I didn't think it was an issue."⁴² Moses has seen USW stickers at the mill. He testified the GMS&S fork trucks have USW stickers which went on the trucks around a month before the election.

20 Employee Ruben Noel testified that Tim Boggs tried to talk to Noel about campaign issues at work on one occasion. It was on March 11, 2008, around 1:30 p.m. when Boggs called Noel on the phone where Noel was working and stated Noel needed to vote for USW because if Noel did not, "if the Covington Paper Workers Union got in, that the mechanics and the millwrights and all that were going to go on strike and leave." Noel testified it is not unusual to get calls at the plant in that someone will call you to tell you something that is going on. Noel testified, "it's work related and not work related." Noel testified that it is common to converse with co-workers at the plant while they are working about non work related topics.

30 Paul Johnson works at the Unbleached Pulp Mill. Johnson testified the day before the election on March 11, 2008, there was electioneering by USW supporters. Johnson testified that around 11:00 a.m., Johnson was called by Bill Collins on the mill's phone. Collins told Johnson if CPU won the election maintenance was going to take them out on strike and that Johnson needed to make sure that he told everyone. Johnson was not on break at the time. Johnson testified that Collins was also working because they work 8:00 to 8:00, with no breaks. After Collins finished the call, he then called right back with a work call to Johnson. Johnson testified it was not unusual for Collins to call him at work and discuss work and non work related matters. Johnson testified there was no rule against talking at work about non work related matters as long as they were doing their job. Johnson testified he has made personal calls on the company phone to other workers.

40 I do not find that Noel or Johnson's testimony relates to activity covered by the February 22, memo. As Asma's testimony reveals, employees were allowed to talk at work about non work related topics as long as their work was not interrupted. Noel and Johnson testified this commonly went on at the facility. There was no showing that either Noel, Bogg, Johnson, or Collin's work was interrupted by the phone calls described above, that anyone left their work area to engage in the conversations, or that phone calls were any different than non work

42 I do not find Moses' testimony established Forbes engaged in activity in contravention of the February 22, 2008, memo. First it pre-dated the memo by several months and was at a time when Moses thought it was ok to campaign during working time. Second, Moses was not working, but was only on his way to work when Forbes gave him the literature. Finally, Moses only assumed that Forbes was not on break.

related phone calls that were a regular occurrence at the mill.

5 Garnett Ratliff works on the Number 1 paper machine. Ratliff testified that on March 5, 2008, employees were in the ERP room training waiting for a class to start. Dwayne Seal, a USW supporter, came in with a stack of USW New Informers and distributed them to the employees in the class, including Ratliff. Ratliff testified the employees in the class were not on a break at the time as they had just come to work. There were about 20 employees in the room. Ratliff testified everyone was sitting down waiting for the class to start and they were on the clock. However, Ratliff testified the employees did not have a regular break time. He testified, 10 "You take a break you're on the clock. If you eat lunch or something, you're still getting paid because we're on the clock." Ratliff testified the speaker had not started at the time Seal handed out the documents. It was at the beginning of the class and employees were just sitting and talking to each other. I do not find this conduct by Seals violated the spirit of the February 22, memo, which allowed distributions "when employees are coming and going before and after work...". This group of employees did not have a scheduled break time, and as Ratliff testified 15 they were not working, but were just talking amongst themselves waiting for a meeting to start.

20 Gary Wilkerson works in the Recovery Department. Wilkerson testified he has witnessed USW supporters campaigning inside the mill. He testified he thought it was on February 22. He testified that George Catlett and Alicia Gordon walked around handing out USW leaflets. Wilkerson was working the 3:00 p.m. to 11:00 p.m. shift that week. Wilkerson testified he thought it was on a Friday. He testified, "I'm just guessing that was the exact day, I'm not exactly sure, but that's not the only instance. I've seen them bringing stuff around other days, too." However, he testified he had not noticed any instances since that time. Wilkerson 25 testified he is the shift leader and they came in and laid it on his desk and wanted him to read it and talk about it. Wilkerson declined. He testified then they tried to force it so he threw them out of the office. Wilkerson testified he was working at the time. They then went the control room and talked to employees about their information. Wilkerson saw them hand it to 6 of the 11 employees. At the time, Wilkerson was filling out people's time, which was part of his job. 30 Wilkerson acknowledged that he did take breaks at his desk.

35 Gordon was asked a leading question as to the date as to whether she passed out USW literature on February 22 in the Recovery Department, and her response was that it was not on working time. She testified she passed some literature at 2:30 or 3 p.m. and that she was off the clock. She testified she was already at the mill and that her shift had ended. She testified she walked to the area, and that she was delivering documents. Gordon testified she had been engaging in this activity since she had started working and no one had told her she could not. She testified she had not left the plant and come back. Gordon testified she worked a standard 8 hour shift and her shift was over. Gordon testified her regular shift time is 7 to 3 40 p.m. but that she had come in at 6 a.m. that day. She then testified her regular shift time is 7 a.m. to 3:30 with a half hour lunch break.⁴³

43 The record is somewhat confused here. Wilkerson testified he was at his desk working, and that the other employees who received the documents from Gordon were working. He 45 testified the shift was 3 p.m. to 11 p.m. Gordon testified her shift was over, and that while it normally ended at 3:30 p.m., she had come in an hour early. If Gordon's testimony is credited, then she passed out the literature at 2:30 or 3 p.m., which means she was giving it to employees before or at the very the start of their shift. Wilkerson testified he along with the other recipients were working, but he did not specify the time of day Gordon distributed the 50 documents, other than to state it was on the 3 to 11 p.m. shift. Gordon would have had a better reason to recall the time she was there, and I have credited her testimony on this point.

Continued

Andrew Adcock is a pipe fitter in tour maintenance, which is located in the west mill pipe shop. In that job, Adcock works all over the mill. Prior to March 12, Adcock, saw stickers or signs at work depicting USW support. He testified as follows: On the waste treatment door that goes into the control room there is a USW bumper sticker about 12 inches by 3 inches. There were a couple of golf carts from the GMS&S that had the USW stickers on them. GMS&S travels around the mill. The breezeway they walk through to go to their locker room and to the west mill shop has a set of glass doors containing a USW sticker that were there prior to the election. Adcock testified he has also seen CPU stickers on golf carts.

Brian Hirt works on the number 1 paper machine as a millwright. During the week prior to the March 12, election, Hirt saw USW stickers at the top of the stairs near the winder. There is a partition around the computers that the winder operator works from, and there was a USW bumper sticker on the glass on the window. Hirt testified that behind the glass at the control room on number 1 machine somebody had written on a piece of white paper "CPU Chicken Plucking Union."

James Parker works for GMC pipe general maintenance and construction, and he works all over the mill. Prior to the election, Parker saw USW stickers at the mill in five different places. He testified at the number 1 winder, there is a partition wall containing several USW stickers on it, and they are about 11 to 12 inches long and three to four inches high. There was also a USW sticker on the tallies alley glass doors near the maintenance shops number eight machine. There was one on a mirror at first aid. Parker testified there was one on the convex mirror for employees who are coming in and out of old timekeeping area. Parker testified it is highly visible to a lot of the plant traffic. The sticker was there before the disaffiliation and throughout the election. Parker testified there is one on the front of an oiler's golf cart when it was parked across from the maintenance shops, it was on the windshield and it was 11 to 12 inches long by three to four inches high. There was also a small USW sticker on the tailgate of the golf cart. Parker testified he had seen CPU stickers on golf carts. Parker testified there is one on his golf cart. Parker did not know who put it there. Parker testified there are about 20 golf carts in his shop, and about 10 of them have CPU stickers on them.⁴⁴

Therefore, I do not find the record establishes she engaged in campaign activity during working time. Moreover, the record also fails to establish that the incident occurred after the distribution of the February 22, memo as Wilkerson's testimony as to the date was hazy at best, and Gordon merely agreed to a date that was suggested to her.

⁴⁴ Christopher Myers works at the mill as a pipefitter. Myers testified that around four weeks before the March 12 election, Myers was going to the East Mill gate to the locker room. At the exit from the locker room there is a lobby with two benches. There were some copies of the CPU Barking Dog on the benches. Myers went through a double glass door to go towards the gate when he saw Mendoza coming with a Westvaco guard. Mendoza went into the locker room, and Myers testified he watched Mendoza take the CPU literature off the two benches, and leave with the literature. The guard did not enter the locker room with Mendoza. Myers testified he did not see Mendoza place any USW literature on the bulletin board above the benches, or on the benches themselves.

Mendoza was called as a rebuttal witness and he denied picking up any CPU literature in the mill. Mendoza testified he recalled seeing Myers. Mendoza testified he was putting up a plant posting about a meeting that was going to be conducted at the USW union hall. Mendoza testified that prior to entering the plant, he usually called Asma, who arranged for a security guard to escort Mendoza through the facility.

If Myers were to be credited, Mendoza's sole purpose in entering the plant was to confiscate

Continued

c. The Employer's witnesses

5 Mark Asma is the human resources manager at the mill, a position he has held for about six years. Asma came to Covington facility in 1993 and has worked there since in labor relations. Asma testified he sent a memo to mill management on October 29, declaring the Employer's neutrality in the election proceedings, as well as some highlights they were to observe, including they were not to offer or permit use of company facilities or equipment such as copy machines, meeting rooms, fax machines or computers for the purpose of engaging in
10 campaign activities.⁴⁵

Asma testified he conducted a power point and training session on November 6, for mill supervision. Asma testified it was explained to the supervisory staff that employees were not to be soliciting during work time. The power point chart states, "Do not allow employees to
15 abandon or be relieved of their work to engage in campaigning activities to support one side or another during working time." It states, "do not use company facilities or equipment such as copy machines, meeting rooms, fax machines or computers...". It states, "As long as people are doing their job, people can talk about whatever they want."

20 Asma received a letter dated November 7, from Mendoza informing Asma that all the officers of the USW Local had resigned their positions. In the letter, Mendoza asked for a suspension of the time limits pertaining to the contractual grievance procedure during the pendency of the petition for election filed with the Board. Asma responded by letter dated November 12. He stated therein the Employer did not agree to waive the 60 day time limit for
25 filing a grievance, but did agree to review, on a case by case basis, any failure to process a grievance on a timely basis through the remaining steps of the grievance procedure due to a lack of a steward or union officers.

Asma testified that following the disaffiliation the Employer also cooperated with the
30 USW in several other ways. By correspondence dated November 7 and 12, Asma provided Mendoza with lists of bargaining unit employee names, addresses, phone numbers, and shift schedules. Asma testified Mendoza informed him the USW needed this information as part of its campaign efforts to make home visits and to contact employees when they were not sleeping due to the multi shifts run at the mill. Prior to the disaffiliation, the USW Local posted notices on
35 mill bulletin boards by having the recording secretary, who was a mill employee, post the notices. After the disaffiliation, Asma agreed to Mendoza's request, for Mendoza to post USW notices in the plant, and Asma arranged for a guard to escort Mendoza through the plant to post notices at different times during the pre-election period. Asma testified this arrangement

40 CPU literature, as Myers testified he did not see Mendoza place any USW literature on the benches, or post any on a bulletin board. On the other hand, Mendoza acknowledged seeing Myers and Mendoza credibly testified he was there to post USW literature, which he did. He testified in a credible fashion in his denial of removing CPU literature, and I do not have a sufficient basis to discredit Mendoza's testimony. Accordingly, I do not find that it has been
45 established the Mendoza removed CPU literature from the mill.

⁴⁵ Asma identified Article II, Section 1, of the collective bargaining agreement between the Employer and the USW, which states, "there shall be no solicitation of membership or other Union activities on Company time, except as otherwise provided in this Agreement." Asma testified that in the first or second week of November, Mendoza asked Asma what the solicitation policy was at the mill. Asma testified he explained to him the policy was specified in
50 the referenced provision of the contract.

continued from November 12, and was still in effect at the time of the hearing.⁴⁶

5 By letter dated, November 7, from Asma to Mendoza, Asma granted Mendoza's request to allow non-employee USW representatives to participate in communicating with employees at three of the Employer's employee gates. Asma testified this continued for the entire campaign, on and off. Asma sent Hall a letter on January 28, 2008, concerning a request he had received from the CPU to have access to the Employer's main gate. Asma's letter allowed the CPU to have access to three gates to communicate with employees by CPU representatives employed by the Employer.

10 Asma testified the USW made several requests over a period of time for non-employees of the Employer to have access to the Employer's training facility, and initially, a room in the Employer's firehouse for the purpose of communicating with employees. Asma testified they accommodated USW requests. By letter dated November 26, Asma provided Mendoza with a schedule covering six days beginning November 27 and ending December 6 where the USW was given access to two rooms at the Employer's facility during specified time periods to be able to meet with employees. By letter dated December 5, Asma granted Mendoza's request for an additional three days use of the training center room on December 11, 12, and 13.

20 On January 12, 2008, the CPU brought 578 pages of signed documents by employees to Asma's office, with the top page being a cover letter indicating the CPU had majority status. Asma testified he concluded, based on an internal review, the Employer had received signatures from the CPU representing 59 percent of the work force. However, the Employer continued to recognize the USW as the representative of its employees believing that an NLRB election was the right way to determine who should be the legitimate bargaining agent. Asma's notes reveal that during the week of January 14, 2008, Mendoza called Asma and reported he had received word the CPU maintenance employees were distributing a petition in the mill specifically in the areas of the 1 and 2 paper machines. The notes reflect that Mendoza asked Asma to investigate. Asma's notes reveal his investigation included contacts with maintenance supervision at various levels, and "we found no evidence of any 'petition' or employees distributing such." The notes state, "This was reported to Luis and at the time I informed him that we would endeavor to educate our supervision as to the proper ways to handle this type of concern that he expressed."

35 By letter to Mendoza, dated January 23, Asma denied Mendoza's request for further use of the training room. Asma's documents show the USW was last given access to the training center on January 10. In declining further usage to the USW, Asma testified, "I was concerned; at that point, it was getting to the level of where it would appear that the company was favoring the Steelworkers." Asma testified the CPU never requested access to the training center and the Employer never offer the CPU its use.⁴⁷

45 ⁴⁶ Asma testified there were contract clauses allowing the International representative to be on the premises to administer the contract. The CPU never asked Asma for the names, addresses, and phone numbers of the employees. Asma did not provide the CPU an Excelsior list prior to the time the NLRB required. Asma did not provide the CPU any other information about the employees, and never provided the CPU with the employees' phone numbers. Asma did not allow any non-employee representatives of the CPU on the Employer's property to post notices on the bulletin boards.

50 ⁴⁷ Asma also identified a series of documents Asma provided to Mendoza from December, 2007, through March of 2008, of long term absence records of employees covered by the bargaining unit. Asma testified Mendoza made requests for information on about December 10,

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On February 22, 2008, George issued the memo to employees setting forth the Employer's solicitation policy, as described above. Asma testified George conducted a power point training session on February 28, 2008, for all salaried employees at the Covington operation. The power point display again reminded the supervisors about the Employer's policies concerning campaign activity during working time.

Asma testified that, after February 22, the Employer received complaints from Mendoza about allegations of improper campaign activities being conducted by CPU. Asma sent Mendoza an email on March 4, 2008, with item one referencing a call Asma received from Mendoza on March 3, concerning activity in the Power Department that morning that Mendoza wanted Asma to investigate. Asma testified Mendoza mentioned employee Steve Terry having carried a document from his work area to the Power Department. Asma testified Mendoza also mentioned that some maintenance employees had gone into the control room in the Power Department handing out CPU leaflets. Asma identified an email dated March 4, 2008, from Neal Dressler, who stated he talked to Terry at 2 p.m. on March 4, and according to Dressler asked Terry if he had been in the Power Department earlier today, to which Terry answered no. Dressler stated Terry mentioned a phone call with A.J. Wolfe about an article he had written in the "Barking Dog" newsletter, and Dressler stated he reminded Terry that union business should not be handled while doing his job. Asma testified they determined that Terry had not gone to the Power Department as alleged. Asma testified they were not able to confirm that maintenance employees had entered the control room and were handing out CPU literature during working time. Asma testified he had asked but Mendoza but did not know the names of the individuals.

Asma testified that when they went in the power room, they discovered that George's February 22, memo had not shown up there. Asma asked the superintendent, at the time, to post the memo. Asma testified the maintenance supervisor also met with the power maintenance department employees and reviewed the memo with them, and reminded them of what the Employer expected. Asma identified a March 5, 2008, email he sent to Tony Spraker, the then superintendent in the Power and Recovery Department, requesting that Spraker post the February 22, memo on the bulletin boards in the Power Department.

Asma identified an email dated March 10, 2008, to Thomas Hardy, the Employer's director of labor relations. In it Asma stated:

Luis called me one evening and I told him what I was doing to check into this. He was concerned and said "he did not want anyone to get into trouble". The following day we discovered maintenance employees had been talking to one Power department clean up person – the Lead Janitor for that area in a break room. We concluded there could have been reason for the maintenance employees to be in that room at the time as they were maintenance employees who are assigned to power and as such routinely work and go through many of the areas in Power. In addition we were told that it likely was this same group of four (4) that had passed on the questioned handout. We decided to re-post the February 22nd memo from Mark George in areas throughout the Power department since it was not observed by me in our walk through on Friday, February 29. I chose not to confront each of the maintenance employees in this situation since it could

February 29, and March 4, 2008, to facilitate home visits, and the later documents were requested with respect to the election to enable the USW to help employees who were out from work to be able to vote. Asma testified the Employer did not provide a similar list to the CPU.

not be verified with certainty that anyone of them had distributed a leaflet to anyone in power department.

5 Asma testified the allegation about maintenance employees handing out material in the Power Department was in early March. Asma testified it was never reported to him that CPU supporters approached employees while they were working on March 11, and passed out campaign literature. Asma testified he never received a complaint of improper campaigning by either side which he failed to investigate.

10 Asma testified the mill is 4.7 square miles. At the time of the hearing, there were about 77 supervisors in the mill. Asma testified the goal of the February 22, 2008, memo was to remind employees what was expected, and that was the only one memo issued to employees during the campaign. All the other memos were internal guidance to supervisors. The Employer had obtained knowledge of the election date by February 22, and issued the memo to
15 employees to make sure they were doing what they should be doing. Asma testified they did not expect to achieve 100 percent compliance given the size of the plant and the limited number of supervision. Asma testified he was trying to keep employees focused on their jobs, so the mill would not be impacted from a performance standpoint. Asma testified he did not favor either union in the enforcement of the solicitation rule. Asma testified several departments,
20 including Tour Maintenance, operate under self direction on certain shifts. There is no supervision on the 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m. shifts for those departments.

Asma testified he inspected the mill on February 29, to ensure there was nothing that would unfairly affect the election. Asma testified that on the bulletin boards there was an equal
25 amount of CPU and USW propaganda. He also saw a lot of CPU and USW stickers on lockers, tool cabinets, etc. Asma testified they were not just union stickers; there were race car stickers, and other paraphernalia. Asma testified the Employer did not make any effort to limit sticker postings on tool boxes, cabinets, lockers, hard hats or bulletin board postings during the campaign. He testified, "We had never made an issue of people having stickers on things in the
30 past, such as hard hats, tool boxes and the like, and I saw no reason to do it through this effort." Asma testified the Employer took no action to make people remove pro union CPU or USW stickers from golf carts or fork trucks. He testified, "We had allowed stickers in the past on this equipment. During the contract negotiations, they certainly had stickers on these things. Well,
35 at that time, it was USW stickers, but there's other stickers that people put on these things, and we just never made a big issue out of it." Asma testified prior to the election campaign he had observed race car stickers and Virginia Tech type stickers on golf carts and fork trucks.

George testified he issued the February 22, memo to remind employees to keep their
40 minds on working safely, and that they were expected to do their jobs. George testified the memo was not a new rule in that the Employer always held the position that work hours are for working. George testified he was involved in training on February 28, and that he conducted meetings with all salaried employees. During the training, George told the salaried employees if they see anything was irregular they were to notify human resources. George testified it was a
45 big mill as they have 1000 hourly employees and four hundred salaried employees. He testified everything was running well and they met their production goals and had no serious injuries.

James Thomas is the assistant maintenance superintendent in the Power and Recover
50 area. Thomas manages supervisors and planners in the maintenance work force in that area. Thomas testified in response to a leading question, that the first week of March 2008, it was mentioned at our morning meeting that there was possibly an issue with some campaigning that may have involved maintenance employees. Thomas testified his manager informed him that there was possibly some campaigning that had gone on in the power plant, but did not tell him

when it took place, who made the complaint, or who might have been involved. Thomas testified he asked his supervisors if they were aware if anything that had occurred, and they said they were not. Thomas brought George's February 22, 2008, memo back to post it in both shops and handed it to supervisors to make sure they were aware of the Employer's position.

5 Thomas did not talk to hourly employees about the February 22, memo. Thomas never spoke to any maintenance employee about engaging in union activities on working time.

1. The use of the Employer's fax machine and other equipment

10 Thomas Buzzard, at the time of the hearing, worked for the Employer in the Carbon Warehouse. On Friday, February 29, 2008, Buzzard was working in the tour grader lab, a different part of the facility from his usual work location. Buzzard heard the fax machine operating in the lab and saw about 10 pages of CPU literature being faxed in. He testified it was the CPU's newsletter the Barking Dog and other articles concerning the CPU. Buzzard reported

15 to the tour grader lab again the following Monday, and he saw that more CPU material was being faxed in. He saw CPU literature come in on the fax machine about three times that week. Buzzard did not see a cover sheet for the faxes, and he did not write down the phone number that was on the fax. Buzzard did not see any supervisors see the faxed material coming in.

20 Jeff Crawford works in the recovery department. Crawford testified he had written an article in the CPU's "Barking Dog" stating that after the vote was over, that we needed to reconcile and become one again. Crawford testified "one of my co-workers called and referenced that he had wrote an article stating the same thing and he wanted me to – to let me know that he had used my name after the fact, that – in his article." Crawford testified the co-

25 worker who placed the call was George Catlett. Crawford testified Catlett is a USW supporter stating he is the webmaster for the USW local. Crawford testified he was at work when the call came on the Employer's phone. Hank Reed and Ricky Givens were also present at the time of the call. Crawford testified, Catlett "referenced to them something that he could send it to the computer there in our work area." Crawford testified Catlett has access to a computer at work

30 and it was the Employer's computer. Crawford testified Catlett sent the article the day before or the day the article issued in the USW's New Informer. The article appeared in the USW's "New Informer", dated February 13, 2008. Crawford testified Catlett sent the article, and one of his co-workers either Reed or Givens placed it as an icon on the desk top of the company computer in their work area in the control room. He testified the icon remained there at the time of the

35 hearing, and that if you clicked on the icon the article would come up.

Crawford testified that it was he who took the call from Catlett. However, Givens and Reed testified it was Reed who took the call from Catlett. Reed testified that in February he received a call at work on the Employer's phone. Reed testified the phone call was several

40 days to a week before the USW issued the February 13, New Informer. The phone had an internal ring indicating the call was initiated from within the plant. Reed answered the phone. George Catlett, the webmaster for the USW local, was on the line. Catlett told Reed that the new edition of the New Informer was out and that Crawford's name was in an article that Catlett had written, and he wanted them to take a look at it. Catlett told Reed he was going to put it in a

45 thirty (30) day folder and for Reed to go there and retrieve it. Reed went to the thirty (30) day folder on the area computer and made a copy of the article and pasted it on computer's desktop. The thirty (30) day folder is part of the Company's computer network. It is a folder people use throughout the mill to store information on a temporary basis. The reason Catlett gave for posting the article is was going to mention Crawford a CPU supporter, and he wanted

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Crawford to know that he was being mentioned in this article ahead of time.⁴⁸

*J. Hall leaves trucks festooned with CPU signs overnight
in February and March in the Employer's main parking lot*

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1. The USW witnesses

10 D. Booth testified that, about six weeks before the election, he saw a black Dodge pick-up truck sitting in the Employer's main parking lot that resembled Hall's truck. The signs were on each side of the truck and were about eight (8) feet long and four (4) feet high with the CPU slogans on them. The vehicle sat in the lot for about eight days right in front of the watch box and the training center. It was on the end of a row where it was easily visible to anyone coming to or leaving the mill or driving by on the street outside. D. Booth testified, "It really – it stuck out like a sore thumb there." D. Booth testified the main gate to the mill is located there. He testified that about 500 or more people go in and out of the mill there every day. The parties stipulated to a picture of Hall's truck as black pick up containing signs the length of the truck bed, with the words "CPU is YOUR UNION" written in large letters across the sign. The sign also had a CPU insignia on it. D. Booth called Mendoza about the truck about the third or fourth day it was there, and told him the CPU truck had been there several days, and every time D. Booth came to and left work it was there. D. Booth testified there are no assigned parking spaces; it is first come first serve. D. Booth testified it offended him seeing the truck in the same place every day, and he did not think it was right for it to be there. D. Booth testified when he called Mendoza, Mendoza said they were going to get rid of it. D. Booth testified that "probably a few days later I might have called and let him know it was still there."

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30 D. Booth testified that around two weeks before the election, there was a little white pick up truck sitting in the Employer's parking lot. It did not have billboard signs on it, but it had lettering all over it reading "CPU" and slogans for the CPU on the front and back and both sides. D. Booth testified the white truck was parked in the same spot in the lot for around four or five days. The parties stipulated into evidence a picture of Hall's white truck emblazoned with CPU signs.⁴⁹ D. Booth testified he spoke to Mendoza about it, and Mendoza told D. Booth that he had talked to Asma and it was supposed to be moved that day. Booth testified the next day it was still there, and D. Booth called Mendoza and told him it was still there.

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40 D. Booth testified his son R. Booth drove a vehicle with CPU signs on it, and a few others did too. Booth testified those vehicles were not in the parking lot consistently. Booth testified R. Booth drove the truck to work and then he drove it home at the end of his shift. D. Booth testified he did not complain about it. He testified, "I know that's not an issue when you bring it in and bring it out. When you leave it there for days, I consider that a problem."

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45 ⁴⁸ Givens testified Catlett's call was on February 12 or 13, and that Reed, Givens and Crawford were in the Recovery Department. Givens testified Reed took the call. Givens did not speak to Catlett, but he did see the icon on the computer. Givens was sitting beside Reed and heard him talking during the call. Givens testified after Reed hung up the phone there was an icon that said USW Informer. He testified they clicked on the icon and up came the New Informer on the computer. He testified the icon was there when the two of them walked over to the computer, and it had not been there before.

50 ⁴⁹ The picture of the white truck stipulated into evidence did not contain billboards. Rather, it contained CPU signs written all over the body of the truck, including two CPU signs the length of the truck bed written on the body of the truck, as opposed to signs attached to the truck.

Employee Toombs saw two trucks parked at the mill that had a CPU signs on them. One of them was parked almost directly across from the main watch box. The other one was just down from the main watch box. The trucks were parked at different times. The trucks were parked less than 60 yards from the main gate. One truck was a dark colored pick-up truck that had CPU signs on both sides, which were the length of the truck bed. It was a full size pick-up. Toombs saw the truck there on a couple of occasions in the same spot stating it was there for more than one day. The truck was parked there sometime between January 13 and March 12, 2008. It was visible from the main gate, and from the street.

Toombs testified the second truck he saw was a full sized white pick up and it had a CPU sign the full length bed sign on both sides. Toombs saw this truck during the same time period. Arritt testified she saw CPU bill boards on a white truck parked in a company parking lot. The signs went the length of the truck bed on both sides, stating something like CPU is your union. Arritt saw it parked in the same spot two days in a row. Similarly, Smith testified there was a white truck parked on the main parking lot going into the mill. It had about a four foot by six foot billboard down each side of the truck. It was parked in the lot in about the same spot every day for about a week. The billboard said "Vote CPU". The truck was in the main parking lot going into the main entrance. Smith testified "if you see it all the time and it's out there, and we were getting – a lot of people were getting the feeling that it was being left out there without just cause I guess, like it was in the same spot all the time, and that's – I don't know if there's a policy, but I don't – that's not a normal occurrence for a vehicle to be parked in the same way, you know that kind of stuff. So." Smith did not know if the Employer has a policy about parking on the lot. She estimated this was probably the middle of February. Smith did not know who owned the truck.⁵⁰

Smith testified that, during the period of October 29, 2007 to March 12, 2008, Smith saw cars parked in the lot with USW bumper stickers on them. Smith testified she has two in her windshield, and she parked her car in the lot every day. Smith testified she only left her car over night in the lot with the USW stickers on it when she was working the night shift, which was 11 p.m. to 7 a.m. Smith testified other people had cars in the lot with USW stickers on them. The stickers on Smith's car were six inches by four inches.

Alicia Gordon had been working for the mill for around 5 years at the time of her testimony. She testified there was an occasion in the spring of 2004, when she left her car on the main mill lot adjacent to the Training Center for two days. Gordon testified there was a note on her windshield after the conclusion of her next scheduled shift that said her vehicle had been unattended and she was not scheduled to work and it should not be left there. The note was not signed, but it said at the bottom "SECR". Gordon testified she left the car there for 48 hours because she had worked a sixteen (16) hour shift, her husband was getting off his shift and Gordon was too tired to drive, so he said leave the car and they would go home together.

2. The CPU's witnesses

Hall testified to the following: During the election period from October 29, 2007, to March 12, 2008, Hall owned two trucks. Hall left a truck in one spot in the Employer's parking lot, and the longest period of time he had done so was about a week. Hall left it parked adjacent to the

⁵⁰ These employees appeared to have confused Hall's white truck with the black one, only the latter of which had billboards. In this regard, both Hall and D. Booth credibly testified Hall's white truck had CPU signs on the body of the truck but did not have bill boards, while the black truck did have billboards.

training center which was about 30 yards from the main entrance to the plant. It was a black Dodge truck with two billboards on the back stating, "CPU is your Union". The signs were 20 inches tall and the length of the eight foot truck bed on each side of the bed. Hall testified, "Actually, I moved it a couple of times. Similar location, but it did move a couple of times." After a couple of days, Hall was coming out of the mill and the gate guard told him, "You've got to get your truck off the lot." Hall responded that he would, but that he would have to arrange it with his wife. The guard told Hall that he could move it tomorrow. However, Hall did not move it the next day. Hall testified Randy Tucker, of plant security, contacted Hall and stressed the importance of getting Hall's truck off the lot. Tucker asked if there was some mechanical failure that Tucker could assist him with. Hall responded there was no mechanical problem and Hall would attend to it. Tucker gave him a day, but Hall did not move the truck. Asma then contacted him and told Hall that he should move the truck, and Hall moved it. Hall testified it was left there for a six or seven day period. Hall testified, "Several other vehicles had sat there longer than that, so –"

Hall testified he left a small white Nissan truck with CPU signs in a similar spot in the parking lot for around four or five days. Hall testified, "That one didn't make it so long. It got more attention." Hall testified he left the black truck "probably sometime in February and then the white one was the first part of March." Hall testified he moved the white truck to upgrade his spot, during the time it was parked there. Hall testified the white truck did not have a billboard. Rather, the white truck had stickers on it stating CPU and various slogans. The phrases were about three feet by four inches in size. There was also an emblem about 24 inches in diameter in the middle of the hood with "CPU Local 675 with the solidarity fist and the word Union." Hall testified Mark Asma told him to remove the white truck. Hall testified when Asma told him to move it, he moved it. Hall received no discipline concerning either truck. Hall testified in his 14 years working at the plant, he had never seen anything posted that the employees could not leave vehicles at the facility.

Trenia Critzer has a vehicle that she drives to work at the mill. She testified she has left her vehicle for more than one night. Critzer testified she does not drive in the snow, and if it snows while she is at work, her husband will pick her up, depending on the roads. Critzer testified she has worked at the plant for 15 years and she has probably left her vehicle more than one night during each of the 15 years. Critzer testified the main time she leaves it over night is if it snows, but she has also done it if her husband is meeting her in town for dinner or they are going out. She testified she has left the vehicle there, "at least four and probably as much as seven days." No one from the Employer has ever asked why she left the car there, and no one from the Employer has asked her to move the vehicle. However, Critzer did not park the in main parking lot. When asked when she left the vehicle for a week due to snow, Critzer testified, "We had a blizzard. I can't remember what year that was." She testified, it happened for the week long period between five and ten years ago, "but as far as leaving it there for anywhere from two to four days, it happens every year." Critzer testified she was not aware of a written policy from the Employer that prevents her from leaving the car.

Thomas Stanley has worked in the mill for about 42 years. Stanley has left his vehicle parked more than one day at the Employer's parking lot. He testified he would leave it from about May to October for the last six or seven years. Stanley rode a motorcycle to work in the summer and he left his truck in the lot when he rode the bike in case it rained at which point he would drive the truck home. Stanley testified he left his truck overnight in the main parking lot. Stanley testified he has left the truck there as much as three weeks to a month. Stanley testified he never heard of a policy that you are not supposed to leave your vehicle at work more than one day. He testified one time he parked his truck in a parking space right beside the motorcycle shed for about two weeks. Stanley drove his motorcycle to work one day and a

guard called him over to the shack and asked him to move his truck. The guard said someone had complained. Stanley testified he drove the truck home that day, and then he drove it back the next day and again left it for extended periods of time. Stanley testified he never heard anything else from the Employer about it.

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3. The Employer's witnesses

Asma testified that, prior to the CPU filing the petition for election; the USW had used mill parking lots to conduct union activity. Asma testified he remembered seeing several
10 handmade signs in the windows of employee vehicles pertaining to contract negotiations, including a pick up with a billboard on the back stating "Greedwestvaco." Asma testified the USW held a rally on the Employer's parking lot very close to the start of the October, 2006, negotiations. Asma testified the Employer has no formal rule about parking lot issues like the one with Hall's trucks. Asma testified, "We have a rule of thumb, and that rule of thumb is if a
15 vehicle is in the parking lot for a week or longer and somebody complains, we will inquire with the owner of the vehicle as to the reason why the vehicle is in the lot, or in some cases, if a guard happens to notice a vehicle in the lot for an extended period of time, we will inquire about the vehicle." Asma testified there are several reasons why a vehicle might remain in the lot for periods of time, including: employees doing customer visits, employees going off site for
20 training, employees visiting the Employer's Richmond location, and employees becoming sick and unable to move the vehicle. Asma testified, "We don't want vehicles stored on our lot. I mean, that's not the purpose of the parking lot. So we do follow up and we will check if something looks out of the ordinary or if something is brought to our attention."

Randall Tucker is the Employer's risk management supervisor, a position he has held since 2002, and he has worked for the Employer since 1995. Tucker testified the Employer does not have a formal written policy as to how long a vehicle can remained parked in the same spot in the lot before the Employer asks them to move it. Tucker testified there has been a past
30 practice since 1995 concerning the amount of time a vehicle can sit in the lot. He testified, "We've always allowed for it to be for a week, and a week being seven days, before we do anything about one." Tucker testified the week time period has been allowed because certain things come up for employees, including: employees visiting other mills, vehicle breakdowns, car pool schedules, overtime, or a maintenance outage. Tucker testified they never had towed a vehicle since he has been with the mill. He testified they had one vehicle that sat on the lot for
35 over three months because the employee was out on an injury. Tucker testified there is no assigned parking in Lot Number 1 at the mill. Tucker testified the Employer does not have a parking policy. However, Tucker testified "in keeping with our past practice what we would do we allow no vehicle - Mr. Hall's or anybody else's - knowingly to remain on our parking lots."

Tucker testified that in February 2008, they received a complaint from employee John Anderson about a truck belonging to Hall parked in the same space for several days. Tucker identified written documentation of the complaint received at 4:27 p.m. on February 4, 2008. The complaint stated Anderson "is complaining about a truck belonging to Roy Hall has been
45 parked in No. 1 lot in the same space never being moved for several days. The truck has been parked there since Thursday Jan. 31, 08." Tucker testified that Security Tour Leader Kenny Dressler had mentioned he had observed it parked there for the first time on January 31. Tucker testified that upon receipt of the complaint on the evening of February 4, he had a time check performed to see if Hall had been working. It was determined from the time check that Hall had worked several 16 hour shifts. Upon learning that, Tucker thought Hall may could have
50 moved his truck after the 11 p.m. to 7 a.m. shift and been back the next morning for work before Tucker's crew came back to work their 12 hour shift. Tucker testified that since a complaint was filed Tucker instructed guard Robert Mauck to contact Hall to see if his truck had been left in the

lot. Mauck contacted Hall on February 4, 2008, and told him there was a complaint and he was not supposed to leave his truck in the parking lot. Hall said he would have it moved. It was 10:30 p.m., and they agreed that he could move it in the morning.

5 Mauck's notes of his exchange with Hall show that the conversation took place at 10:18 p.m. on February 4. Mauck wrote, "I stopped Roy Hall/maint. And told him per Randy Tucker that he is not supposed to leave his truck parked in the lot, while he drives another vehicle to and from work. Roy laughed and said that he expected to be told that and that he would remove his truck from the parking lot. Roy said that would call his wife and have her come out
10 tonight but I told him that since it was almost 10:30 p.m. that he could take care of it later. I called W44 and informed him of our conversation." Tucker testified the next day when he came to work and saw the vehicle still there, Tucker contacted Asma, told him it as still there, and asked if he could make a phone call to have it removed. Tucker testified after that it was removed. However, Asma sent an email to Hardy on February 8, stating "The infamous CPU
15 truck was moved yesterday without issue." Thus, the Employer's records reveal Hall's truck was parked at the lot at least from January 31, to February 7, 2008, for a total of 8 days.

Tucker testified about a month later, he received a complaint at Number 1 Watch Box from employee Lennie Bazzery that a truck had been sitting in the parking lot for several days or
20 about a week. Tucker testified he spoke to Dressler, who said it was the third day he had seen the truck. Tucker checked to see if Hall was working at the time that day and he was not. Tucker called Hall and told him if he was not working he needed to move the truck. Hall said he would be back that afternoon and he would remove it. On the bottom of this complaint it says, "The vehicle was removed from the lot at 1900 by Roy Hall." The complaint was received on
25 March 4, and the vehicle was removed the same date.

Asma testified Hall parked one of his trucks with large CPU signs in the bed of the truck and that the truck stayed in the mill parking lot for about a week. Asma testified he thought this took place in the first week in February 2008. Asma received a call from security that a
30 complaint had been made and that Hall had been contacted and he agreed to move the truck. Asma discovered around the middle of the week that the truck had not been moved. Asma testified he contacted Hall and asked him why it had not been moved, and Hall said he was sick and unable to move it the day he had committed to move it to the security chief. Asma testified he asked him to get the truck moved on that particular day, which Asma thought was February
35 7. Asma testified he discovered the next day, the truck had been moved.

Asma testified he noticed Hall's vehicle on his own, prior to being notified by security, because of the big signs it had on it. He testified Hall's truck was near the entrance and would be hard to miss. Asma testified, "I saw no reason to react to what I saw with regard to
40 Steelworker signage during the course of negotiations." Asma testified, "I didn't know necessarily what vehicle was there for whatever period of time, but I was not, during this campaign, denying anyone their right to have signage on their vehicle. I have seen pro USW stickers during the campaign on bumpers of vehicles." Asma testified he did not take any action to have Hall's truck moved before a complaint was filed or a week had passed because
45 historically he had never made an issue of USW paraphernalia and signage during the contract negotiations period. He testified he questioned whether he should make an issue of CPU or USW signage on vehicles during this particular period of the campaign. Asma testified, "So I guess I concluded that somebody could argue that they had a right to do that, and at the same time, as I was getting complaints, I was reacting to them." Asma testified, "We didn't want
50 someone storing the vehicle on the parking lot, but at the same time, with that particular issue, we had never dealt with it before. I did believe I was put between a rock and a hard place as how to react to it." Asma testified the Employer has never had a policy about a vehicle being on

the Employer's lot with signage on it. Asma testified he talked to Hall one time about removing his truck and that was in February. Asma testified he reacted concerning the truck when he received a complaint, "but at the same time, I saw no wrong in why the truck was there. The reason I reacted to the complaint was because it was there for such a long period of time."

5 Asma testified if he had not received a complaint he would have taken no action.

Asma testified there was a second complaint in early March where a different vehicle owned by Hall was parked in a particular location in the parking lot and Asma thought it was there two or three days. An employee and Mendoza contacted Asma about that vehicle. The security chief contacted Hall, asked him to move the vehicle, and it was moved.

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Tucker testified security has seen many items posted on vehicles. Tucker testified they observed vehicles in the parking lot with signs supporting the USW written on cardboard, or like, stuck in the side or back windows. Tucker testified he saw employee vehicles supporting both the CPU and the USW in the parking lot leading up to the March 12, election. One was a truck parked next to Tucker's office at the firehouse and it had USW printed on just white paperboard that was posted on the side of the truck. The Employer never had those vehicles removed. Tucker testified they did not remove vehicles with union postings. Tucker testified if they stayed more than a week or approximately a week, they would have talked to the employee, but the vehicles were everywhere.

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K. CPU receives and publicizes the receipt of contributions from area businesses

D. Booth testified that while he was an officer of the CPU, he was in the hall one day when Robert Floyd, the owner of Commonwealth Arms, was there making a donation to the CPU of what D. Booth thought was \$100. Connie King is the president and owner of Chapman Plumbing, Heating and Air Conditioning (Chapman) located in Covington. Chapman has seven hourly and two salaried employees. King testified she made a \$250 contribution to the CPU issued on a Chapman check. King issued the check on November 6, and she gave the check to Fridley at CPU's office. King's husband and her son in law are hourly employees at the Employer. King made the donation because she felt something had to change in contract negotiations. King testified the Employer did not ask her to make the contribution, and that her company does not perform work for the Employer.

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Richard Breeden is the owner of Log Cabin Farms, the vice president of Low Moor Investments, the vice president of LMI Materials Handling Company (LMI), and he is involved in the management or ownership of Salterini Warehouse. Salterini handles materials for and leases a warehouse to the Employer. The warehouse is fairly close to the Employer's mill. LMI handles paper and stores it for the Employer. Breeden testified he has trucks that ship the material. LMI employs 25 employees. Salterini employs three employees. Low Moor Investments has a business relationship with the Employer. Log Cabin Farms does not have a business relationship with the Employer. As Vice President of Low Moor and of LMI, Breeden deals with the Employer's officials from time to time in terms of negotiations for a contract. Breeden is the warehouse manager for Salterini Warehouse. Breeden also owns a Covington Truck Shop that sometimes performs work for the Employer. Around a year prior to the hearing, the Employer gave notice to Breeden that it was building its own warehouse facilities and will be terminating all of its business relations with Breeden's enterprises.

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Breeden made a \$50 contribution to the CPU on behalf of Log Cabin Farms. Log Cabin Farms does not have any employees. Breeden testified he made the contribution because an adjoining landowner Andy Rowan asked Breeden if he would make a donation to the union hall.

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Breeden made out the check to CPU on February 7, 2008. The check was issued on Breeden's Log Cabin Farms account. Rowan used to work for the Employer but has been retired for about 12 to 15 years. Breeden testified he made the donation as a favor to Rowan. Breeden testified he was not involved in the dispute between USW and CPU and no one from the Employer asked Breeden to give CPU money.

Employer employee Buzzard went to the CPU office on one occasion and saw a poster listing businesses that had contributed to the CPU on the window. The parties stipulated it was a 41 by 26 inch poster. Breeden's name as well as Log Cabin Farms was listed on the poster. Buzzard testified he knew Breeden owned the Getting Place, a store that sells work boots, jackets, and other items which employees can purchase with safety and other awards from the Employer. The employees can also redeem these certificates at other stores in addition to the Getting Place. Buzzard testified that, prior to the election, it came up that Breeden was a CPU supporter, and that he had something to do with the Salterini Warehouse, but Buzzard was not sure of the relationship.⁵¹ Buzzard testified he could not say for certain that the contribution had anything to do with MeadWestvaco, and he did not spread rumors about it. He testified the sign the CPU just stated, "Rick Breeden Log Cabin Farms."

Hall testified that prior to the March 12, 2008, election, the CPU placed information in the CPU's newsletter the Barking Dog about receiving support from businesses and individuals. The Barking Dog was distributed at the mill as well as posted on the CPU website. Hall testified, "I think we had a list of names of local businesses, individuals, who had made some sort of contribution to us." Hall testified they also posted the list at the CPU offices on a poster in the CPU's office window about four or five weeks prior to the election. It listed those who made a contribution in some form, not necessarily monetarily. Hall testified the Salvation Army was listed although they did not make a donation, but they helped Fridley find a table that fit the CPU's needs. Hall estimated that four or five businesses made a financial contribution. The money went into the treasury of the CPU and was used for operating expenses. Hall testified the window sign was taken down the week of the election, after the CPU learned that Dixie Fuel, a contributor, was taking exception to its posting. Hall talked to the president of Dixie Fuel was told by a USW supporter that they were going to organize a boycott of his operation because he supported the CPU and he asked that Hall take the sign down.⁵²

The March 10, 2008, issue of the Barking Dog stated the CPU "would like to recognize and thank the following businesses and individuals for their support Rooklins, Michael's Pizza, Chapman Plumbing, Commonwealth Arms, Salvation Army, Dixie Fuel, Log Cabin Farms (Rick Breeden), Mt. Pleasant Farms (Denny Miller), Covington Farm & Fuel,..." The names of the listed businesses, as well as Belly Up Café, where also posted on a sign on the window of

⁵¹ Buzzard testified that, after the election, he did research on Breeden at the hall of records and Buzzard discovered Breeden has something to do with the Salterini Warehouse which the Employer sends carbon copy to on a daily basis. Buzzard testified he was curious who owned Salterini Warehouse because anytime he pulled up the address it came up as MeadWestvaco.

⁵² Hall was present when Breeden testified. Hall testified he did not know of Breeden's relationship with the companies Breeden described, and he thought Breeden was just a farmer. Hall testified the first time he learned Breeden was the vice president of the other businesses was when Hall read the USW objections. Hall testified he learned from Breeden's testimony that some of the other businesses have a business relationship with MeadWestvaco. The CPU's receipts show donations from the following businesses: Michael's Pizza; Commonwealth Arms, Chapman Plumbing, Covington Farm and Fuel; and Log Cabin Farms. The donations ranged from \$50 to \$250.

CPU's office facing the street. There were two signs reading in combination "COVINGTON PAPER WORKERS UNION SUPPORT The Following," followed by a listing of named individuals and the described businesses. Hall testified mill employees frequented the CPU office on a daily basis and on an informational meeting day there could be 60 to 100 employees at a meeting. Employees who attended informational meetings did not have to be CPU members. Hall testified they held informational meetings every Thursday and business meetings attended by members only every other Thursday.

L. CPU Office Manager Fridley assists employees with USW disability plans, and tells employees they have to join the CPU to receive disability benefits

Albert Wolfe, Jr., has worked for the Employer for about 14 years. He is a member of the USW, and has been for most of his employment. Wolfe became a member of the CPU, the first week in October 2007, after the disaffiliation took place. Wolfe remained a member of the CPU for about one month. Wolfe has been a shop steward for the USW for about 5 years. He thought he was a shop steward for the CPU also for a period of time.

Wolfe testified that around a week or two after the October disaffiliation vote, Wolfe went to the CPU hall to turn in employee membership and dues forms. While at the CPU hall, Wolfe spoke to Fridley, the office manager for the CPU. Wolfe testified Fridley brought up the long and short term disability plans, and stated the people were going to have to realize they were going to have to be a member of the CPU to be a part of the long and short term disability. Wolfe testified, as shop steward, the next day he reported Fridley's remarks to about 40 to 50 employees in his department. At the time he spoke to Fridley, Wolfe had delivered the applications for 40 to 50 new members for the CPU. Wolfe later returned to the CPU hall with about 5 to 10 more applications forms.

Wolfe testified in late October the long term and short term disability policies merged into one policy with Allison Brock as the administrator. Wolfe testified that in January or February 2008, he had separate conversations with Yoffee and Mendoza telling them of employees' concerns about retaining long and short term disability coverage should either the USW or CPU win the election. Wolfe testified he told Yoffee about Wolfe's conversation with Fridley. Wolfe testified that as a result of his conversations with Yoffee and Mendoza, the USW issued a distribution to employees in January or February 2008, stating if the employees stayed with the USW they would retain their long and short term disability benefits, and that the benefits were under contract with the USW. He testified the USW distribution was passed out throughout the mill, but that he did not necessarily know who to believe. Wolfe testified he passed out the USW distribution to his co-workers and let them make the decision for themselves. Wolfe testified there was never a CPU paper saying they were handling short term disability, rather there was something to the effect that they would handle it if they won the election and became the certified collective bargaining representative.

Employee Margaret Smith was injured on the job on November 30, 2007, and as a result was placed off work for about a month. Robin Forbes, a co-worker, picked up disability forms at the USW hall for Smith. Smith filled out the forms and sent it to Shenandoah Life, which at the time was the insurance carrier. Smith testified the next thing she heard was she was contacted by Forbes who told her Fridley was looking for Smith, and Fridley needed to know when Smith's first day of disability began for the insurance company. Fridley had been the office manager for the USW local union, but at this time, she held this position for the CPU. Smith contacted USW representative Yoffee, and asked why she needed to contact Fridley. Yoffee said he did not know. Smith then called Fridley and asked her why she was dealing with it when she no longer worked for the USW. Fridley said she was the person they had always dealt with, but that if

Smith did not want her helping, that was fine, Smith could do it on her own. Fridley told Smith that Shenandoah had called Fridley because the union is listed as the employer on the short term disability policy.

5 Smith testified the short-term disability program is a supplemental disability program. Smith also had primary disability through the Employer. The USW is considered the employer for the supplemental program, and they are the ones the policy was issued through. Smith testified that after an employee is off work for seven days, they can file their claim. Smith testified she thought the employee could file the claim themselves, but everyone has always
10 taken it to the union and Fridley has always helped fill it out. Smith testified the disability plan is optional, and the employee's contribution is taken out of their pay check by the Employer.

Fridley, the current office manager for the CPU, started working for unions as office
15 manager in Covington in 1972. First the UPIU, then with PACE, and then with the USW local. When the USW local leadership decided to decided to disaffiliate, Fridley went to the CPU. Fridley testified she began working for the CPU on November 6, and officially went on the CPU's payroll on November 7, which was the first day she reported to the CPU's new office. Fridley testified that, as office manager, she dealt with long term disability insurance since 1987,
20 and short term disability since it started in 2000. At the time of the hearing, Allison Brock was the administrator of the short term and long term disability program. They served as the administrator for long term since 1987 and they took over short term on December 1, 2007. Prior to December 2007, Shenandoah Life insured the short term policy and Liberty Mutual the long term. Shenandoah Life's policy ended November 30, and Liberty Mutual took over as the short term carrier on December 1.

25 While Fridley was the USW office manager if someone had a short term disability claim they would come to the union hall. Fridley then filled out one form as the Employer and she gave the employee another form for their doctor to fill out. They returned the doctor's form to Fridley, who faxed it to Shenandoah Life. Fridley testified that since Liberty Mutual took over as
30 the short term carrier on December 1, the employee does the filing and Fridley just provides the employee with an 800 number. Fridley testified the policy for the short term and long term plan was issued through USW Local 8675, which is defined the group. However, she testified the disability policy would have been in effect for which ever union won the election. Fridley testified if the USW had won it would be their plan and if the CPU had won would eventually
35 become the CPU's plan.

Fridley testified she filled out a couple of Shenandoah Life forms for people after she
40 started working for CPU. Fridley testified she was almost positive that she processed Margaret Smith's initial disability claim, and Smith called back a couple of times while Fridley was with CPU and asked Fridley to check on why Smith had not received her check.⁵³ Fridley testified Shenandoah Life called and asked Fridley for Smith's last day at work. Fridley testified she tried to call Smith, but she was not at work. Fridley called Forbes and asked Forbes to have Smith to call Fridley. Fridley testified when Smith called, "she said what are you doing take care of this? You're not Steelworkers any more. So I said, fine, let the Steelworkers handle it and I don't
45 think I've handled a thing since then for them." Fridley testified this was in December.

50 ⁵³ I do not credit Fridley's testimony here. Smith credibly testified she was not injured until November 30. Fridley had started working for the CPU as early as November 6. Given Smith's complaint to Fridley about Fridley's being involved with the claim because Fridley was working for the CPU, I find it unlikely that Smith sought any assistance with Fridley for Smith's claim as Smith credibly testified.

5 Fridley testified CPU did not attempt to negotiate a group disability plan with Allison Brock or anyone else. Fridley testified, "Everybody is still covered under the plan, as long as they're a member of one of the Unions." Fridley testified that quite a few people asked her about disability after the switch over on December 1. She testified she handed them a form giving them an 800 number to call, and that she brought these forms to the CPU office. She testified she told them when they called the 800 number they needed to say USW Local 8675. She denied telling people to say CPU because CPU was not a part of it.

10 Fridley testified she continued to help people with disability until December 1, because she had been helping them for so long she did not think to do otherwise. She testified she helped three or four people with disability forms after she left the USW, but before December 1, but later stated it was four or five people. Fridley testified that, at that time, she gave the employees the forms to take to their doctor and she filled out the Employer form. She also
15 faxed it to Shenandoah Life. Fridley testified while she was assisting people with forms at the CPU, she did not have any contact with the Employer since the Employer had nothing to do with the forms. Employees would phone Fridley or they would come by the office. Then she would assist them and submit the forms to the insurance company. While Fridley testified she stopped helping employees with disability after December 1, Fridley posted on the CPU website on
20 January 8, 2008, a memo stating, "YES I am still taking care of the health and dental insurance, workman's compensation, pension, death notification, short term and long term disability and anything else that a union member asks me to do. I will continue to do my job and am proud to say that I work for you- the newly formed CPU Local 675."

25 Fridley did not recall having any conversations with Wolfe about disability. Fridley testified that about 20 or 30 employees asked her after disaffiliation what happens to disability. Fridley testified she told them, "That whoever wins the election, that if it's USW, they continue with it. If it's CPU, then the policy will be transferred to whoever the bargaining agent was." Fridley testified she just assumed the policy would be transferred as it was Local 675's policy,
30 not the USW's policy. She testified the certified bargaining unit is the defined the group. At the time of the hearing, the policy said the Employer was USW Local 8675. Fridley testified if the CPU won the election then CPU would have to contract for the policy. Fridley testified employees were concerned it would not be done away with. Fridley testified she was not told by the CPU officers a decision had been made to continue the plan. She just assumed they would.
35 Fridley had no discussions with Hall about long and short term disability.⁵⁴

40 ⁵⁴ Hall testified he had a conversation with Sam Allison, Hall's contact person with Allison Brock. Hall told Allison there was a question following the election as to what would happen as to disability coverage. Allison stated the current policy was a group rate based on the local union being an insurable interest, and following the NLRB election, if USW Local 8675 was no longer the bargaining unit, then that insurable interest would no longer exist; and there would be options for the CPU to amend the policy to follow the insurable interest if the CPU became the
45 bargaining agent. The CPU would have the opportunity to choose to negotiate a new short and long term policy with Allison Brock or another agent. Hall denied telling anyone, prior to the election, that they had to come to the CPU to get disability coverage. Hall testified USW Local 8675 were the sponsors of the long and short term disability. It is not a CPU plan and it is not controlled by the Employer. Hall testified that right after disaffiliation a lot of people were getting out of dues check off. Hall testified that at some point after that, the USW International decided
50 they would not require dues from any one, that every one would be a member in good standing with no dues. Hall testified the disability benefits were not terminated for any employee.

5 Fridley denied telling employees they needed to join the CPU to get coverage. She testified, "I think I probably explained that once all this was over with, which I thought it was going to be over with sooner, which it hasn't, but I said that probably there would be a 60 or 90 day window that you did need to be a Union member of something." Fridley testified she just assumed there would be a 60 to 90 cooling off period after one of the unions won, and admitting she made that up.

10 Fridley testified she had nothing to do with assisting employees with long term and short term disability in January through March of 2008. She testified a couple of employees may have called and she gave them the 800 number to call. However, Fridley testified that, while working for the CPU, if someone asked Fridley if she was still handling long and short term disability claims, she would have told them yes. Fridley testified employees were very concerned about it. Fridley testified that to her knowledge none of the employees who withdrew from the USW have been terminated from the disability benefits. Fridley testified that, at the
15 time of the hearing, the USW was processing the claims for the plan and that no one was paying dues check off because the USW said no one had to pay dues check off until a contract was negotiated.

20 Asma testified his notes reflect that he first learned Fridley resigned from the USW and went to work for the CPU on November 5. Asma was aware that Fridley had previously handled disability claims under the USW sponsored disability plan. Asma testified that he was aware that after Fridley went to work for the CPU that she called a member of Asma's department and asked for information concerning a disability claim. Asma testified the Employer did not provide the requested information to Fridley. Asma identified an email dated January 8, 2008, he sent to Tom Hardy relaying a message Asma had received from one of his employees in his
25 department, Rosa Barger, asking for some guidance concerning a conversation one of Asma's staff members had with Fridley. Asma stated in the email that Fridley contacted one of the timekeepers at the Employer wanting information on an employee to administer the USW supplemental short term disability plan. The email states, "When we contacted her back saying we could not provide since it was a USW matter she informed my folks that Luis Mendoza has asked her to continue to administer this. I will be having Rosa Barger contact Luis to get his comment on this and we will be making notes accordingly." In a subsequent email dated
30 January 8, Asma stated that Barga spoke to Mendoza. Asma stated, "Luis has not delegated this responsibility to Suzie Fridley. I have advised Rosa not to call Suzie back at this time."

35 Asma testified he learned that Fridley was posting on the CPU website the assertion that she was still claiming to handle long and short term disability. Asma testified once he received word from Mendoza, the Employer no longer contacted Fridley. Asma testified he believed the employees would have discovered the person to contact. Asma testified, "Having already talked to Mendoza by our representative, Rosa Barger, I left it up to them to deal with the details of
40 who the individual was." Adam testified he understood the Employer's role in the long and short term disability program was to take deductions and forward them to Allison Brock.

45 I did not find Fridley to be a very credible witness. As set forth above, I did not credit her claim that employee Smith originally sought Fridley's assistance in processing Smith's disability claim. Fridley also testified she stopped assisting employees with disability on December 1, and the while working for the CPU she never contacted the Employer regarding disability claims. However, Fridley published an article on the CPU website in early January 2008, notifying employees that she was assisting them with their disability claims, and Asma's memos reveal
50 that in January 2008, Fridley was still contacting the Employer to obtain information for an employee to process a disability claim. On the other hand, I found Wolfe to be a credible witness. He had been a long time steward. I find that he took that responsibility seriously and

he recalled and reported to employees just what Fridley had told him; that employees were going to have to realize they were going to have to be a member of the CPU to be a part of the long and short term disability.

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M. Analysis

1. Legal principles

In *Delta Brands, Inc.*, 344 NLRB 252, 252-253 (2005), it was stated that:

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It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Id.* Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Kux Mfg. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (internal citation omitted). The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit, *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of alleged coercive incident), See *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999), and had a reasonable tendency to affect the outcome of the election. *Id.*

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During the post petition and pre election period known as the critical period, conduct that creates an atmosphere rendering improbable a free choice by employees warrants invalidating an election. See *General Shoe Corp.*, 77 NLRB 124 (1948). Only in very limited circumstances will the Board consider prepetition conduct in determining whether to set aside an election. That is, when prepetition conduct lends meaning and dimension to postpetition conduct or assists in evaluating it. See, *Teamsters Local 705 (K-Mart)*, 347 NLRB 439, 445 (2006); and *Dresser Industries*, 242 NLRB 74 (1974). The test for setting aside an election is an objective one, which considers the conduct's reasonable "tendency to interfere with employees' freedom of choice." *Hopkins Nursing Care Center*, 309 NLRB 958, 958 (1992). "In determining whether conduct is objectionable, the Board does not inquire whether an employer's actions were intentional or actually affected the results of the election." *Lake Mary Health & Rehabilitation*, 345 NLRB 544, 545 (2005). The Board has held that objections must be more carefully scrutinized in close elections. *Id.* at 545-546 (2005). See also, *Picoma Industries*, 296 NLRB 498, 500 (1989); and *Teamsters Local 705 (K-Mart)*, *supra.* at 445.

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Objection 1

In *Randell Warehouse of Arizona*, 347 NLRB 591 (2006), (*Randell II*), the Board issued a supplemental decision on remand from the United States Court of Appeals for the District of Columbia.⁵⁵ The Board majority stated in *Randell II* at 591 that:

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Upon reconsideration, we find that the *Randell I* Board erred in its initial disposition of this case. Prior to *Randell I*, Board precedent established that "absent proper

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⁵⁵ See, 252 F.3d 445 (D.C. Cir. 2001), for the court's decision remanding the case. The Board's initial decision in the matter can be found at *Randell Warehouse of Arizona*, 328 NLRB 1034 (1999) (*Randell I*). The rationale in *Randell I* went to the D.C. Circuit by way of an appeal by the employer of a Section 8(a)(1) and (5) finding pertaining to the refusal to bargain following the issuance of *Randall I*. See *Randell Warehouse of Arizona, Inc.*, 330 NLRB 914 (2000).

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justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate.”^[FN3] The Board, concerned with the potentially intimidating nature of the conduct, rather than the identity of the party photographer, did not distinguish between employer and union photographing.^[FN4] The *Randell I* majority overruled that precedent, but only as to union photographing of employees engaged in Section 7 activity, which the Board held to be nonobjectionable conduct unless accompanied by an express or implied threat or other coercion. The *Randell I* majority retained the rule that employer photographing was presumptively coercive, even if it was not accompanied by an express or implied threat or other coercion.^[FN5]

By adopting different standards for union and employer photographing of employees engaged in Section 7 activity, the Board's decision in *Randell I* marked a significant departure from established precedent. After due consideration, we have concluded that the *Randell I* rationale cannot withstand careful scrutiny. To the contrary, the rationale for finding that unexplained photographing has a reasonable tendency to interfere with employee free choice applies regardless of whether the party engaged in such conduct is a union or an employer. Thus, the disparate treatment embraced by the *Randell I* Board cannot be squared with the Act's fundamental principles. Accordingly, we overrule *Randell I* and restore the appropriate standard, i.e., that in the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer. (Footnotes omitted.)

The Board majority in *Randall II* went on to state, “we find that the unexplained union videotaping or photographing in each case was objectionable even if not accompanied by any threats or other coercive conduct.” *Id.* at 594. The Board majority stated:

We hold that these premises also apply when a union photographs employees engaged in Section 7 activity. In the context of an election campaign, the union seeks to become (or remain) the representative of the unit employees. To achieve this goal, the union must convince a majority of employees to vote in its favor. A reasonable employee would anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union's efforts to enlist support, just as an employee would anticipate that an employer would not be pleased if he or she rebuffed the employer's solicitation to reject union representation.

Likewise, there is no substantial basis for finding that the photographing of employees responding to efforts to enlist their support reasonably tends to create a fear of reprisal when done by an employer but not when it is done by a union. In either case, employees know that they are being recorded by a party to the election. The permanent recording suggests an intent to take the employees' response into account. While that may not trouble an employee who supports the photographer's position in the organizing campaign, it is likely to raise reasonable concern among nonsupporters or open opponents that their pictures could be used against them in the future. See *Overnite Transportation Co. v. NLRB*, 294 F.3d 615, 624 (4th Cir. 2002) (“We have little doubt that there will be some instances of union photography that will be inherently restraining or coercive of the right of employees to exercise their Section 7 rights.”). *Id.* at 594.

The Board majority stated, “The very presence of a union photographer recording Section 7 activity would tend to induce employees unsympathetic to the union to accept its proffered literature simply to avoid being permanently recorded as antiunion and becoming identifiable as such on sight.” *Id.* at 596. The Board majority stated:

Applying these principles to the facts of this case, we conclude that the Union engaged in objectionable conduct by photographing employees as they were being offered literature by union representatives. For the reasons explained above, such photographing is presumptively coercive. Moreover, the Union did not adequately explain its purpose for the photographing. The one explanation offered to a single employee—"It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run"—was ambiguous at best. It did not establish a legitimate justification for the photographing. Accordingly, the photographing reasonably tended to interfere with employee free choice, and the election must be set aside. *Id.* at 598.

In *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), a Teamster's Local Union established a rally in front of an employer's premises on the day before an election. There were 11 union representatives in attendance at the rally. The secretary treasurer of another Teamsters local and a trustee of the joint council of Teamsters brought and operated a video camera at the rally. The camera operator did not testify and no other union official offered any legitimate justification for having the video camera at the rally. Two drivers testified they thought they were being video taped, and they testified that as they were exiting the employer's premises, individuals approached their vehicles and handed them union leaflets, and the video camera appeared to have been pointed in their direction. The Board stated the following:

Applying the proper standard, we find that the election must be set aside. Here, it is undisputed that on the day before the election a union representative appeared to videotape at least two employees as they exited the Employer's premises and were handed union leaflets. No legitimate explanation for the videotaping was offered to the employees at the rally, and none was proffered at the hearing. Under these circumstances, we find that the videotaping intruded on the employees' section 7 right to refrain from any or all union activities, including the union rally then in progress. Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the Union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice in the election. Further more, the conduct cannot be dismissed as isolated or de minimis. The incident was disseminated among employees in the unit, and a change in only one vote would have altered the election's outcome. Accordingly, we find that the election held May 22, 1987, must be set aside and a new election held. (Footnote omitted) *Id.* at 736-737.

In *Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487, *fn. 2* (1993), the Board addressed mass picketing in the context of an organizational campaign. The administrative law judge found that when a union authorizes a picket line it is responsible for the actions of the pickets. The Board approved this finding noting that agents of the union were present on the picket line when the acts of misconduct occurred.⁵⁶ In that case, the union

⁵⁶ See also, *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997), *enfd.* in pertinent part 188 F.3d 508 (6th Cir. 1999), (unpublished decision), where the Board set forth the following standard for assessing agency:

It is well established that apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988).

Thus, in determining whether statements made by individuals to employees are attributable

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staged a demonstration at the employer's facility, with 100-150 demonstrators and at least one demonstrator carrying a union placard. The judge found the demonstrators engaged in acts of blocking of ingress of the Employer's employees to the employer's facility in violation of Section 8(b)(1)(A) of the Act. The evidence also established that photographs were taken of the employees of the employer by a photographer at the scene of the demonstration. Four of the union's agents were within three feet of the photographer and did not stop him from taking pictures. The judge went on to state:

Respondent argues that the photographs taken were mostly of employer officials, and were made to counteract photos being taken by such officials of the demonstration. It is true that some photographs were taken of employer officials; nevertheless, many pictures were taken of Cablevision's rank-and-file employees. The photos were taken in a context which was coercive—a large demonstration involving large numbers of shouting, cursing individuals. The intimidating nature of the photography is clearly seen in employee Wilson's refusal to have his picture taken, putting his hand in front of the lens, and the photographer then threatening him with physical violence.

In addition, employee Gonzalez after driving through a gauntlet of cursing, leaflet-throwing demonstrators, was told to come out as they were going to beat him. He then picked up a pipe and threatened any demonstrator who would approach him. A demonstrator then took a photograph of him and told him to “watch [his] back.” This photograph, too, was taken in an intimidating manner. It was accompanied by a warning that Gonzalez should be concerned for his safety. It cannot be said that the photograph or warning was justified because of Gonzalez' threat, because that threat was only made after he was told to leave the warehouse to be assaulted.

I accordingly find and conclude that the photography was calculated to instill fear of retribution among the employees, and that it and the threats of physical harm violated Section 8(b)(1)(A) of the Act. *Laborers Local 383 (Carter-Glogau Labs)*, 260 NLRB 1340, 1343 (1982). *Electrical Workers IBEW Local 3 (Cablevision)*, supra at 492.

In *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 815 (2001), enfd. 50 F. Appx. 88 (3rd Cir. 2002), the Board found the videotaping and photographing employees as they reported to work by picketers was violative of Section 8(b)(1)(A) of the Act. The videotaping of the employees was accompanied by derisive remarks. The respondent union also engaged in repeated broadcasts that reached coercive volume levels. The Board majority found that, “Under these circumstances, we find that the Respondent's actions went beyond what the judge viewed as simple harassment. Instead, we conclude that the Respondent actually intended to intimidate the Smucker employees and to provoke their fear of retribution for working behind the picket line.” The union's conduct was found to reasonably tend to restrain and coerce employees in the exercise of Section 7 rights in violation of Section 8(b)(1)(A) of the Act.

The instant case involves a two unions campaigning for a large bargaining unit in which 465 ballots were cast for the CPU and 451 cast for the USW. There was only a 14 ballot difference between the two labor organizations out of the 916 combined ballots cast for both, or less than a two percent difference in votes. The January 13, 2008, USW meetings, as described by Yoffee, the USW director of organizing, and Hall the president of the CPU, in

to the employer, the test is whether, under all the circumstances, the employees “would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management.” *Waterbed World*, 286 NLRB 425, 426-427 (1987).

which Gerard, the president of the USW was the main speaker, was a major event for both unions in the campaign. It was well publicized by the USW by mailings and distributions, and well as in the local newspaper. The CPU planned to picket the meetings, and the picketing was organized at the CPU union hall, where signs were made.

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Hall testified the CPU made a record of the January 13, event through photos. He testified when he was not present for the picketing, CPU officers Gibson, Markland, Persinger and Lowman were in charge of the picket line. There were two USW meetings on January 13, starting at 12:30 p.m. and the other at 4 p.m., each held in the Covington High School auditorium. Yoffee estimated about 75 employees attended the first meeting, and 60 attended the second. When Yoffee arrived at the school at around 12:15 p.m. there were about 50 to 75 picketers shouting, chanting, and carrying CPU signs. Yoffee saw R. Booth, recording secretary for the CPU, with a video camera, and he was panning the camera back and forth. Yoffee exited the auditorium throughout the day, and he continued to see R. Booth with the video camera focused on the front of the school where USW officials as well as some employees were taking breaks. Specifically, Yoffee testified employees Gordon and Toombs, who were USW supporters, took breaks on the porch area where R. Booth's camera was pointed.

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R. Booth is an employee of the Employer, the recording secretary of the CPU, and a member of its executive board. He testified and described one incident where he had his camera raised and Gordon thought he was filming her, and she responded with a remark to him, although he claimed he was not actually filming at the time. Gordon testified she saw two people operating cameras at the beginning of the picketing. She saw R. Booth taking pictures of the picketers with their backs to the school, with the school in the background. Gordon identified a picture of her produced by the CPU in response to a subpoena, and she testified she was told the CPU had posted a picture of her on the CPU website following the January 13, meetings. Employee Toombs, a USW supporter, testified he saw pictures on the CPU website of people, including Toombs, going into the meeting, and there was a picture of himself and Gordon standing in front of the school posted on the CPU website. Toombs testified he did not know his picture was taken and that it angered him that his picture was posted on the site. He noted, during his testimony, that they were picketing us, and asked what their purpose was in posting his picture on their site. Employee Smith testified when she was walking into the afternoon meeting, she saw a man with a CPU hat on with a video camera, who was pointing the camera in the direction of the people walking into the meeting, and who were standing on the stoops of the high school. Employee Arritt, a USW supporter, testified a man with a still camera took her picture as she walked into the meeting. She testified she did not like having her picture taken, and did not think they had a right to do it. Arritt testified no explanation was given as to why her picture was taken.

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R. Booth brought a video camera and two digital cameras to the January 13, meetings. He arrived at noon. R. Booth reviewed video he took on January 13, during the course of his testimony. He identified Heather Williams, an employee and CPU supporter, in the video, stating she also took pictures that day. R. Booth testified he had a shot of Williams taking a picture in the video. R. Booth identified Gerald Pullen, a retiree, who appeared at multiple points in R. Booth's video, stating Pullen was handing out CPU literature to people entering the meeting. R. Booth testified he was filming Pullen because he was supporting Pullen supporting the CPU. He testified at one point there was a mixture of CPU and USW supporters in the picture. At other points, he could not identify the individuals in the shots with Pullen or in other shots near the school entrance. R. Booth testified USW supporter Gordon was pictured in his video, at another point he thought employee and USW supporter Smith was in the video. R. Booth testified in his pre-hearing affidavit that at one point in the video there were about five employees standing near the USW representatives. R. Booth testified at the hearing that he

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was referring to employees who supported the USW.

Williams, an employee and CPU supporter, took pictures prior to the first meeting on January 13. While not a CPU officer, Williams helped make CPU picket signs for the event at the CPU union hall, where she learned there was to be picketing. She testified that she saw R. Booth taking pictures and they were trying not to obstruct each other's shots. On January 14, Williams posted her pictures on the CPU website, which included two pictures of USW supporters Gordon and Toombs. The CPU website includes a CPU logo, as well as a listing of the names and titles of the CPU officers. It contains a copyright statement attributed to the CPU. The CPU campaign newsletter the Barking Dog was published on the site. Williams was an author for the Barking Dog. Williams published her pictures on the site on a message board open to members. R. Booth also published video of the January 13, event on the CPU site, and the video was attributed to R. Booth. Hall specifically testified that CPU officers, including him, were in charge of the picket line. Williams testified the participants received instructions as to how to conduct themselves on the picket line. CPU Recording Secretary and Executive Board Member R. Booth also took videos at the same event as did CP Web Administrator Paxton. R. Booth specifically testified he saw Williams taking the photos. In these circumstances, I find the CPU was responsible for Williams taking photographs on January 13, 2008, and for her subsequent posting of those photos on the CPU website. See, *Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487, fn. 2 (1993); and *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997), enf. in pertinent part, 188 F.3d 508 (6th Cir. 1999) (unpublished decision).⁵⁷

Around 4:45 p.m., on January 13, at the start of the second USW meeting, CPU Web Administrator Paxton, entered the Covington auditorium with a video camera pointed to the

⁵⁷ The CPU cites *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 267 (DC Cir. 1998), for the proposition that contrary to R. Booth and Paxton, who were union officials, that the CPU was not responsible for William's conduct here. There the court stated, "The simple fact that a union official stood nearby while a pro-union employee took pictures is not enough to confer apparent authority on the employee, particularly where there was no evidence that union officials made or attempted to make use of the photographs or videotapes or even viewed the tapes and photographs." The court went on to state, "It is well-settled that when a union pickets an employer, it empowers picketers to act on behalf of the union, ... ,if the union fails to control the line, it can be held responsible for those in attendance,..." Id 267 at. Fn. 2. (citations omitted.) In finding the union there was not responsible for the activities of the participants in the rally in question the court found the rally did not constitute a picket line. The court stated, "Here, there was no evidence that a union official directed the activities of or assigned responsibilities to those who attended the gathering and engaged in the complained of activity." In the current case, Williams learned of the picketing at the CPU union hall from union vice-president Gibson. Williams helped make picket signs at the union hall, and the participants received instructions as to how to conduct themselves at the picket line. CPU President Hall testified the CPU wanted picketers out front, "Because we wanted Leo Gerard to get our message that we want to vote." Hall testified the CPU made a record of the January 13, event through photos. He testified when he was not present for the picketing that CPU officers Gibson, Markland, Persinger and Lowman were in charge of the picket line. Moreover, union officials R. Booth and Paxton also engaged in videoing at the event, and Williams photos along with R. Booth's videos were published on the CPU's website. Clearly, this case is distinguishable from *Overnight Transportation Co.*, supra., and for the reasons set forth above, I find Williams was a picketer, that the CPU was responsible for her actions on January 13, 2008, and that the CPU by its own conduct clothed her with apparent authority when she photographed employees and then published the photos on the CPU's website.

stage and he started filming the speakers on the stage. Paxton was standing in the back of the auditorium facing the stage. Prior to entering the auditorium, Paxton consulted with CPU president Hall telling Hall that Paxton wanted to go in and video the meeting. Hall testified, “I told him, well, it’s an open meeting.” Employee Forbes, a USW supporter, saw Paxton videoing the meeting. Forbes was standing in the back of the auditorium at the time. She testified that she looked for USW representative Mendoza to tell him about Paxton. She testified she could not find Mendoza, so “we got Sheila Harris”, another USW official.

Paxton’s video reveals that he was confronted by USW official Harris, then Mendoza, then Walters, and then Yoffee. With each telling him he could not video the meeting. Each time, Paxton refused the request to shut off the camera. Walters specifically told Paxton that the USW did not get permission from the participants in the meeting to video tape. He told Paxton, “some of the people said they rather us not video because if we video they did not feel comfortable asking questions ...”. He asked Paxton to please cooperate. Paxton continued to video. Paxton responded to an employee’s remarks protesting Paxton’s videoing, that Paxton was there, “Just to make sure they’re telling the truth.” Walters then told Paxton that they were going to have to ask him to leave, that he was welcome to stay, but “we’re not going to violate people’s rights and privileges. We wouldn’t do this at your meeting.” Paxton still refused to stop. Yoffee then threatened to call the police, while stating that Paxton was welcome to stay, but he had to turn the camera off. Paxton still refused to stop. While this was going on, Mendoza went outside and consulted with CPU officials about removing Paxton from the meeting. R. Booth captured Mendoza’s discussion with the CPU officials on video. Following Mendoza’s entreaties, CPU Committeeman Persinger entered the auditorium, and waived Paxton out, at which time, he stopped filming and left the auditorium.

In addition to Forbes, several other employees who were USW supporters testified they saw Paxton videoing the meeting, including D. Booth, Toombs, Smith, and Gordon. Smith also reported the incident to Harris. Smith testified it was very intimidating, stating “just from the picketers, the videotaping and everything, the whole situation was very intimidating.” Gordon testified she saw 20 or more people sitting behind her turning around from their seats and watching the incident with Paxton. She testified she was aware Paxton had the ability to publish the information on CPU’s website. Yoffee confirmed that employees turned around from their seats to view the incident with Paxton, and that employees’ faces were caught on Paxton’s video. Gordon identified herself and employee Toombs caught on Paxton’s video. Paxton, reviewing the video during his testimony, identified mill employees Skidmore, Wolfe, and Gordon as appearing on his video. He testified several other people he could not identify appeared on the video. My review of the video reveals that several members of the audience turned around to view the commotion and their faces were caught on Paxton’s film.⁵⁸ The camera also panned the audience showing the attendance level at the meeting.

When Paxton left the meeting, he immediately showed the video to a couple of groups of people standing outside. He testified he showed the video the video to CPU official Markland at the time, and that he thought Hall also looked at it. Paxton testified he also showed the video to Markland at the CPU hall a couple of days later, and that he thought some other people were in

⁵⁸ My review of the video reveals that at least seven members of the seated audience were turned around and can be clearly seen and identified on the video, at least another seven members of the seated audience turned around and their faces were captured, and there were at least another seven people in the back of the auditorium who appeared to be a mixture of employees and USW representatives whose faces were clearly captured and could be identified on the video.

the hall at the time. Hall testified when Paxton exited the meeting, he opened up the camera and played the video. However, contrary to Paxton's testimony, Hall denied watching the video. Hall did testify that everyone that was there heard Paxton had taken the video. Hall testified it became a "commotion" when Mendoza came outside the meeting to solicit help in having Paxton removed.⁵⁹

CPU supporter Williams testified when she entered the school to attend the first meeting there were about 130 to 140 picketers, and that the number of picketers increased and decreased during the day. R. Booth testified there about 120 picketers out there at a time, and during the course of the day there could have been as many as 150 to 200 picketers. Yoffee described an incident when George Clinebell, a USW supporter, was walking to attend the meeting, and was cursed by his brother Lannie Clinebell, a CPU supporter for attending the meeting. Yoffee described another incident when CPU Vice President Markland shouted derogatory comments to Gordon, a USW supporter standing outside the meeting. D. Booth, a USW supporter, testified on his way home from the meeting he was shouted at and called some "pretty bad names." Arritt testified one of her co-workers informed her that she was not going to attend the meeting because of the picketing. Kirk attended the meeting with his wife. Kirk testified when he arrived, things were calm, but when they were leaving it became pretty heated, and that he was a little scared when he left the place. Kirk testified there was only one police officer and a mob of a 100 or more people. Kirk testified they were unruly in that they were hollering at people and blowing air horns into the foyer of the building disrupting the meeting. Kirk testified he could hear the air horn inside the meeting and that it would startle you and make you jump. Kirk testified that while at the meeting, CPU supporters asked questions in a manner which appeared to be an attempt to disrupt the meeting.

R. Booth described the air horn as a large plastic device and he testified it was blown about 20 times throughout the day. Paxton testified that while he did not take pictures outside of the meeting, he held his camera up poised to do so, in case something might happen in case "there was any kind of confrontation." Paxton then claimed he was not expecting a confrontation, but stated "at this point in time there's so much tension you never know what's going to happen, so I just wanted to make sure I had a documentation if anything did happen."

I sustain objection 1. The evidence disclosed that the January 13, 2008, picketing of the USW meetings was arranged and coordinated by the CPU. Hall's testimony reveals the CPU's officers attended the picketing and were in charge of the picket line, and therefore at they were responsible for the conduct of the picketers. *Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487, fn. 2 (1993). During the course of the picketing, R. Booth, the recording secretary of the CPU took videos of CPU's picketers. However, R. Booth also took pictures of employees who were USW supporters who were attending the meetings as they were standing near the entrance way to the building. More specifically, R. Booth videoed Pullen, a retiree and CPU

⁵⁹ Curiously, while R. Booth videoed Mendoza seeking assistance from CPU officials to have Paxton removed from the auditorium; R. Booth testified he did not film Paxton displaying the video to Markland and Hall, and other CPU supporters when Paxton exited the building. I have credited Paxton's testimony over Hall's here, and find that Hall did view the video, along with the others, when Paxton exited the building. Hall spoke to Paxton before he went into video the meeting, and Hall was aware that Mendoza came out to have Paxton removed stating everyone was aware of it. Yet, Hall gave no explanation as to why he would not have viewed the video with the others when Paxton displayed it. Hall appeared to be walking a tightrope throughout his testimony in attempting not to cross the line to assume responsibility for acts in which he participated.

supporter as he was handing out literature to employees near the entrance of the school while they were proceeding to enter the building.⁶⁰ The Board has held this type of videotaping of employees without their being given a valid explanation for their picture being taken has a tendency to intimidate employees, and constitutes objectionable conduct. *Randell Warehouse of Arizona*, 347 NLRB 591 (2006), (*Randell II*), and *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988).
 5 Indeed, employees Toombs and Arritt complained about having their pictures taken during the course of their testimony. Williams also took still pictures of the picket line, but her shots included pictures of USW supporters Toombs and Gordon. Williams posted those pictures on the CPU website on January 14, 2008. Williams a strong CPU supporter testified she and R.
 10 Booth took pictures at the rally, and acted in such a fashion as to not obstruct each other's shots. R. Booth, a CPU, official admitted to seeing Williams photographing the event. In fact, R. Booth engaged in similar behavior, and also posted portions of his video of January 13, 2008, on the CPU website. Neither R. Booth nor Williams gave any explanation to employees for photographing them.

15 CPU Web Administrator Paxton informed Hall that he intended to go inside and video the second USW meeting. Hall's response was, "it's an open meeting." Paxton then went in with his video camera held high recording the speakers on the stage. Two employees reported Paxton's presence to USW officials. Thereafter, Paxton was told separately by four different
 20 USW officials that he could not video the meeting. Paxton, a large individual, repeatedly refused their request to stop videoing, although he was twice told by USW Official Harris that there was a concern that the videoing was a violation of the rights of the employees attending the meeting. During this time, Paxton kept his camera recording although it was no longer facing the stage. In fact, Paxton captured the faces of many of the employees, who attended
 25 the meeting, who had turned around as a result of the disturbance. Paxton's camera also swept the auditorium so a determination could be made as to the number of employees who attended the meeting. Paxton only left when a CPU Committeeman entered the meeting and waived him out. Immediately upon leaving the meeting, Paxton displayed the video to CPU officials including Hall and Markland as well as to others standing in the immediate area. Hall's
 30 testimony revealed Paxton's actions created a big commotion on the picket line.

The only explanation Paxton gave for his videoing was to one employee at the meeting who objected to Paxton's actions. Paxton replied he was there to make sure they were telling the truth, referring to the USW speakers. I do not find this to constitute a valid explanation.
 35 First of all it is doubtful that it could be heard by all of the employees who witnessed Paxton's actions. Secondly, CPU supporter Williams had sat in the first meeting and taken notes pertaining to the comments of the USW speakers so she could provide the information to her co-workers. Thus, there were other less invasive ways of determining the content of the meeting, without it being videoed by the web administrator of a rival union. Moreover, while
 40 Paxton stated his purpose was to video the USW officers, the meeting was advertised as an open meeting where all views could be heard. Thus, it is apparent that employees would have been given an opportunity to speak during the meeting, and if Paxton had remained as he intended their remarks would have been captured on his video. Regardless of his intent, Paxton did not turn the video camera off when he removed its focus from the stage, and while
 45 continuing to video he captured several employees on film. See, *Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487, 492 (1993).

⁶⁰ R. Booth's actions in pointing the camera in Pullen's direction while Pullen was distributing CPU's materials, would have reasonably tended to coerce employees who saw R.
 50 Booth into accepting Pullen's distributions, whether or not the employees were actually captured on the video.

Paxton's videoing was an invasive act by the CPU into the meeting of another union. I find that in the context of the large numbers of picketers, chanting and hollering, repeatedly blowing a bull horn at a loud volume designed to interrupt the meeting, as well as leveling
 5 derisive remarks to employees who chose to attend, that Paxton's video taping was calculated to intimidate employees who chose to attend the meeting, and coercing them away from choosing the USW to remain their collective bargaining representative. See, *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 815 (2001), *enfd.* 50 F. Appx. 88 (3rd Cir. 2002); and *Electrical Workers IBEW Local 3 (Cablevision)*, *supra*. Regardless of Paxton's
 10 intent, he gave no valid explanation to the employees subjected to his actions, and I have concluded he along with R. Brooks and Williams engaged in objectionable conduct which was authorized and condoned by high level officials of the CPU.

The videoing and photographing employees, along with other conduct exhibited at the picket line on January 13, 2008, was witnessed by large numbers of the Employer's employees. Yoffee estimated about 135 employees attended the USW meetings on January 13, and there was an estimate of as many of 200 CPU picketers attending the event. The event was well publicized, and both Hall and Yoffee testified it was a central event pertaining to the close
 15 election. I have concluded that the CPU's actions on January 13, warrant the setting aside of the March 12, 2008, election.⁶¹ I have considered the fact that January 13, was close to two months prior to the March 12, election. However, the CPU never disavowed the videoing or its other actions that date, which could have adversely impacted attendance at or scheduling of future USW events. The CPU's actions were visible to large numbers of employees who voted

⁶¹ The USW also contends that the videoing during the October 28, 2007, disaffiliation meeting constituted objectionable conduct. However, the election petition was not filed until October 29, therefore the October 28, meeting was outside of the critical period for the determination of election objections. The CPU was not in existence on October 28. Rather, the USW local's officers held the meeting in which they unanimously endorsed disaffiliation from the International. During the two meetings on October 28, Hall announced that there were two
 25 microphones for audience participation, one for and the other against disaffiliation. The meeting was videoed as were the employees who spoke at each microphone. Only one employee spoke at the opposed mike, and even he said he had not made up his mind. Under the standards set forth in *Randell Warehouse of Arizona, (Randell II)*, *supra.*, and *Pepsi-Cola Bottling Co.*, *supra.*, the video recording at these meeting constituted coercive conduct by then USW local officials whose intent was to disaffiliate from the USW and form the CPU. While it was outside the critical period, it serves to lend meaning and dimension to the video recording and photographing on January 13, 2008, as a repeated pattern of conduct. See, *Teamsters Local 705 (K-Mart)*, 347 NLRB 439, 445 (2006); and *Dresser Industries*, 242 NLRB 74 (1974).
 30 The CPU points to the USW local's videoing of past events such as USW picket lines and a strike vote as evidence of past practice and that the employees would not have been coerced by its current actions. I reject this argument. First, the USW Local's officers who carried out those prior acts are the same individuals who formed the CPU. Second, parking lot rallies voluntarily attended by the participants are not akin to videoing meetings to vote to determine
 35 whether to disaffiliate where the video would have a tendency to suppress views of those opposing the disaffiliation; and they are certainly distinguishable from filming employees attending a meeting of a rival union during the critical period of an election campaign. I need not rule on the propriety of past videoing of the unrelated events cited by the CPU to determine that the CPU's videoing on October 28, 2007, was coercive, and that its videoing and
 40 photographing on January 13, 2008, along with the CPU's other activities on that date constitute objectionable conduct.
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in a close election. The CPU also kept its January 13, actions current by maintaining pictures and video footage of that event on the CPU's website during the course of the pre-election period.

5 The CPU relies on *Nu-Skin International*, 307 NLRB 223 (1992), in support of its contention that its conduct here did not constitute objectionable conduct. In *Randell Warehouse of Arizona*, 347 NLRB 591, 598, fn.26 (2006), (*Randell II*), the Board majority distinguished *Nu-Skin International*, supra, stating that in that case there was "no objectionable conduct when union photographed employees who voluntarily attended a union picnic away from work and were told their pictures would be used to memorialize the occasion." In *Nu-Skin* the Board distinguished *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), where on the day before an election a union rally was in progress in front of the employer's premises and a union representative appeared to videotape at least two employees as they exited the employer's premises and were handed union leaflets, with no explanation being offered. The Board stated in *Nu-Skin* at 224 that "While photographing the activities present in *Pepsi-Cola* and *Mike Yorosek* might readily suggest retaliatory purpose, the Union's photographing of employees enjoying a voluntarily attended picnic does not reasonably suggest any such purpose."

20 I find that the events here are more akin to *Pepsi-Cola* and *Randall II* where the conduct was deemed to be objectionable or otherwise coercive. The employees who supported the USW and were photographed by CPU officials and adherents did not voluntarily participate in the CPU rally. Rather, they were attending a USW meeting, where the CPU had amassed a large number of pickets who were engaged in loud chanting against the USW, repeated blowing of a loud horn designed to disrupt the USW meeting, making derisive remarks to USW supporters, and where R. Booth in particular focused a portion of his video on Pullen's activities at the entrance of the school building where he was passing out CPU literature to employees attending the USW meeting.

30 Similarly, I do not find that *NLRB v. Lakewood Engineering & Mfg.*, 28 F.3d 1216 (7th Cir. 1994) (nonpublished), cited by the CPU where the court upheld the Board and hearing officer's finding that photographing of employees at a union rally did not warrant the setting aside of an election justifies the CPU's conduct here. The court in *Lakewood* stated the hearing officer concluded that the subjects of the photographs were all union supporters attending a rally and the pictures were taken for the purpose of publication in the Union's newsletter. The court stated that allegedly the sole exception was the single photograph of the two employees in a darkened tool room, neither of whom testified they felt threatened or concerned from the photography. The court specifically stated it was troubling that the union failed to offer an explanation for the photography at the time the pictures were snapped. Nevertheless, the court deferred its decision to the Board in concluding the election should not be overturned. The court stated, "Although we affirm the Board's conclusion that under the circumstances it would be inappropriate to set aside the election, we wish to make it clear that photography that intimidates, coerces, or influences voters in labor elections will not be tolerated."

45 From the tenor of its decision in *Lakewood Engineering*, the court was not happy with the Board's result, but concluded that it would defer to the Board's ruling. In *Randall II*, supra, the Board expressly found a union's photographing employees must provide a valid timely justification to the employees for photographing them. In the instant, case between R. Booth, Williams, and Paxton a large number of non CPU supporters were caught on video and film. No valid justification for the photographs was provided to the employees who were not supporting the CPU. I do not find justifications announced at the hearing which took place after the election to be timely. Similarly, I reject arguments in the CPU's brief that the R. Booth's posting portions of the of video on the internet constituted a substitute for a timely explanation to the employees.

R. Booth's posted video was composed of anti USW propaganda made from the event, and would not reasonably serve to remove USW supporters of fears of retaliation by the CPU when their pictures were taken by that the CPU during that event.

5

Objection 12

Once a union serves as an exclusive bargaining representative, this "exacts the duty to treat with no other." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-684 (1944). It was further stated in *Medo* that, "orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation. And it is the fact here, as found by the Board, that the employees did not revoke their designation of the union as their bargaining agent at any time while they were themselves negotiating with petitioner, and that they left the union, as they had promised petitioner to do, only when petitioner had agreed to give them increased wages. *Id.* at 685. The Board has held that, "Direct dealing need not take the form of actual bargaining." It stated that, "Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions, . . . , plainly erodes the position of the designated representative." The Board stated the "question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode 'the Union's position as exclusive representative.'" See, *Allied Signal, Inc.*, 307 NLRB 752, 753-754 (1992). In *Permanente Medical Group*, 332 NLRB 1143 (2000), the Board set forth criteria for assessing a "direct dealing" allegation, as follows:

1. That the Respondent was communicating directly with union-represented employees.
2. That the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining.
3. Such communication was made to the exclusion of the Union.

In *Weather Shield Mfg.*, 292 NLRB 1, 2 (1988), enf. denied on other grounds 840 F.2d 52 (7th Cir. 1989), the Board stated:

We agree with the judge that the promises to maintain existing pay and fringe benefits made by the Respondent's president, Schield, and superintendent, Selk, at its meetings with groups of employees were nothing more than a promise to maintain the status quo and, hence, were neither objectionable or nor violative of Section 8(a)(1). *Crown Chevrolet Co.*, 255 NLRB 826, fn.3 (1981); *El Cid, Inc.*, 22 NLRB 1315 (1976)⁶²

In *Fabric Warehouse*, 294 NLRB 189, 192 (1989), enfd. 902 F.2d 28 (4th Cir. 1990), in finding that an employer engaged in unlawful direct dealing by meeting with employees at their request and offering them a better benefit package than either at its non union facilities or than that contained in its union contract, the Board stated as follows, "We agree with these exceptions. It is undisputed that the Respondent had never proposed any of the improved benefits it offered to the employees at these meetings during bargaining with the Union and that it did not notify any of the Union's officials who were authorized to bargain with it of these meetings. This constitutes unlawful direct dealing that is inconsistent with the Respondent's duty to bargain only with the Union as the exclusive representative of these employees." Conversely, in *Putnam Buick, Inc.*, 280 NLRB 868, (1986), affd. 827 F.2d 557 (9th Cir 2987), the Board held an employer did not engage in unlawful direct dealing when it met with employees and communicated to them the terms of its bargaining proposals it had previously made to a union.

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⁶² See also, *Crown Electrical Contracting, Inc.*, 338 NLRB 336, fn. 3 (2002).

5 In *Midland National Life Insurance Co.*, 263 NLRB 127, 131-133 (1982), it was held the Board would not set aside elections because of a party's misleading campaign propaganda, except in cases of forgery that preclude employees from recognizing campaign propaganda for what it is. In *Cedars-Sinai Medical Center*, 342 NLRB 596, 606 (2004), it was stated citing *Midland National Life Insurance Co.*, that the Board would not set aside an election because of misrepresentations unless the misrepresentations involved misuse of the Board's election process or forged documents. Even misrepresentation of NLRB action is not a basis to set aside an election so long as a Board document has not been altered to give the impression that the Board endorses an election party. In *U-Haul Co., of Nevada, Inc.*, 341 NLRB 195 (2004), 10 the Board overruled the employer's objection to an election where a union had circulated a document, "guarantee[ing] it is illegal for the company to close or threaten to close the plant" if the Union won the election. The Board stated the statement did not constitute an objectionable misrepresentation under *Midland National Life Ins. Co.*, supra., or under *Van Dorn Plastic Machinery, Inc., v NLRB*, 736 F.2d 343, 348 (6th Cir. 1984). It was stated in *U-Haul Co., of Nevada, Inc.*, supra at 195 that:

20 The Board does not probe into the truth or falsity of parties' campaign statements and will not set aside an election on the basis of misleading campaign statements, except in cases of forgery that preclude employees from recognizing campaign propaganda for what it is. See *Midland National Life Ins. Co.*, supra at 131-133. In other words, the Board will not set aside an election because of the substance of the representation, but may do so because of the deceptive manner in which it was made, a manner that renders employees unable to evaluate a forgery for what it is. The Sixth Circuit Court of Appeals has endorsed the *Midland* approach, but has carved out a narrow exception requiring an election to be set aside, even if no forgery is involved, "where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth." *Van Dorn Plastic Machinery, Inc. v. NLRB*, supra at 348. See also *Dayton Hudson Dept. Store v. NLRB*, 987 F.2d 359, 365 (6th Cir. 1993) (explaining that *Van Dorn* is a "narrow" limitation on *Midland*).

30 With regard to the "guarantee" document, forgery has not been alleged or shown. Accordingly, we cannot say that voters would have been confused as to the nature or origin of the Union's message. Thus, it does not rise to an objectionable misrepresentation under *Midland*. In our judgment, the language also does not run afoul of *Van Dorn*. While the document arguably reflects an erroneous reading of Board law, 35 the document plainly emanated from the Union 2 days before the election. We agree with the hearing officer that voters reasonably would see the document as union propaganda and treat it as such. Indeed, the full hearing on this issue did not reveal any convincing evidence of voter confusion, much less any confusion that would affect the result of the election. Accordingly, we find that the document contained, at most, a 40 misstatement that was neither so pervasive nor so artful that it left employees unable to separate truth from untruth. *Van Dorn*, 736 F.2d at 348.

45 In *Albertson's, Inc.*, 344 NLRB 1357, 1360-1361 (2005), the union tendered a forged letter to employees which appeared to be printed on the Employer's letterhead. The Employer informed employees during the election campaign that the letter was a forgery both during mandatory meetings, and tendered to the employees a rebuttal letter stating such that it had sent to the union. The Board stated:

50 Although the Employer's efforts to dispel the effects of the forgery cannot be discounted, because we are dealing with distribution by a party, we must look more closely at all the circumstances to determine if those efforts would reasonably have

caused employees to assess the forged letter for what it was, and thus recognize it as campaign propaganda. In the circumstances of this case, we find that this standard has not been met.

5 First and foremost, the hearing officer did not credit Myers' claim that he believed the letter was genuine. He found that Myers, an experienced union organizer who was familiar with Albertson's operations, should have been suspicious, at the very least, of the letter and its authenticity. Nevertheless, Myers himself initiated the distribution of the letter, and union agents continued to distribute the letter on home visits.

10 Moreover, the Union never acknowledged or advised unit employees that the letter was a forgery, even after the Employer asked it to do so. The Union's choice to remain silent, despite receiving clear evidence that the letter was not authentic, unnecessarily added to employees' confusion, especially because a simple union acknowledgement of the forgery would have helped to dispel such uncertainties. Even though the Employer met with employees and claimed that the letter was a forgery, a reasonable employee could have been confused by the authentic-looking document in the face of the Union's
15 silence, and may have doubted the Employer's attempt to reveal that the letter and its contents were false.

20 In sum, employees were being told by the Employer that the letter was a fake, but the Union was distributing the letter to the employees as real. Faced with conflicting views from the two party antagonists, the employees were "unable to recognize propaganda for what it [wa]s."

25 The Board, in setting aside the election, found that under all the circumstances the Employer's attempts reveal the letter as a forgery were insufficient to mitigate the effects the forged letter had on employee free choice. The Board stated, "The nature and contents of the letter, the Union's role in its distribution, and the Union's decision to remain silent rather than inform employees of the forgery all prevented employees from reasonably recognizing the letter as a forgery, despite the Employer's efforts."

30 In the instant case, the Employer had been negotiating with representatives of the USW Local and the USW since October 2006, resulting in contract offers being turned down three times by the bargaining unit. The Employer and the USW Local last met with the USW International for bargaining on August 22, at which time the Employer presented a "supposal" for a six year agreement. The International had previously conditioned a six year agreement on
35 its inclusion of the International's health plan for all of the Employer's plants, new subcontracting language, and neutrality language for the USW International to organize the Employer's other facilities. The Employer's six year supposal did not include these requirements by the International, which the Employer found objectionable. The members of the Local bargaining committee were interested in the Employer's supposal, and also not supportive of the
40 aforementioned demands of the International. It was agreed by the parties that the Employer's committee would present the August 22 supposal to corporate headquarters and the International Representative would present it to USW officials in Pittsburgh. Both the Local and the Employer thought the International Representative would get back with them shortly as to the Internationals' position concerning the Employer's supposal. However, the testimony was
45 the International never responded leading to frustration by the Employer as well as the Local Union officials.

50 The Employer committee met on the Employer's premises with the USW's Local Committee on September 26, without the presence of the Employer's chief negotiator, or the International Representative. The International was not informed of the meeting by either the Employer or the Local. The September 26, meeting was held at the request of the local union officials. Both Hall and D. Booth, then officials of the USW Local, testified the Local had

discussed the possibility of disaffiliation with the USW International prior to the September 26, meeting. In fact, D. Booth credibly testified that he hinted to Employer official Asma that the Local was considering the possibility of disaffiliation during a phone call setting up the September 26, meeting. In this regard, D. Booth credibly testified he told Asma the Local Committee was not going to have an International Representative present, and if they went
5 ahead with what they were thinking about, they did not want the International Representative to be there. During the morning session on September 26, the Local Committee presented a counter proposal to the Employer's August 22, supposal. The Local Committee's presentation took close to three hours, covered multiple areas of the contract, including requested increases
10 in wages and pension contributions to what the Employer had tendered in its August 22, supposal. Following a three hour break in the session, Asma, who headed the Employer committee at this meeting, returned and stated he was not there to negotiate, and would not respond to the Local's proposals. The discussion then turned to other topics unrelated to bargaining a new contract. At that time, Hall and D. Booth expressed disappointment at the
15 Employer's response. D. Booth credibly testified that as soon as the meeting was over, the Company left the room. While the Local Committee was getting ready to leave, Employer official Johnson stuck his head in the door and asked to talk to Hall outside alone. After a while, Hall came back in and said the International Union found out about the meeting and had called the Company's corporate headquarters and told the Employer not to talk to the Local Committee
20 any more about contract items.

Hall testified that he received assurances from Asma about the Employer's August 22 supposal at the September meeting in the form of body language. He testified that, "They never said, 'We'll make it in the form of a proposal,' or anything like that, but just trying to read
25 between the lines, as you do in negotiations, we felt like the Company was sincere, that there was a six-year offer out there for somebody." Hall testified the Employer never responded to anything they said. However, Hall testified the Employer was open to the idea of a six year contract when the parties parted. Hall testified, "They didn't say anything to indicate, yes, there's a six-year contract, but, I mean, nobody said it's not." Hall testified he did not attempt to
30 talk to Asma or any other Employer official after the meeting about what the Employer could do.

Following the September 26, meeting, the Local Union's executive committee met and decided to recommend disaffiliation from the International to the Local's membership. Hall hired
35 outside counsel and obtained an injunction against the International's preventing the Local Union's meeting with the membership. The Local Union then held two meetings with the membership on October 28. Hall conducted the meetings, along with members of the Local's executive board, who along with Hall were on the stage of the Covington High School auditorium. Hall estimated there were between 300 to 375 at the first meeting, and about 100 to
40 150 at the second meeting. Hall announced at the outset of the meetings, there would be two separate microphones for audience participation, one for those in favor of disaffiliation, and the other against. Hall gave a speech at the outset of each meeting in favor of disaffiliation, following which he opened the meeting to questions. Each of the meetings was videoed. The videos included the employees who spoke and raised questions at the designated microphones. The reason for the videoing was not explained to the employees. During the meetings, only one
45 employee spoke at the against disaffiliation microphone. Even he only posed a question, stating he had not made up his mind. Following the questions, all of the Local Union officers on stage gave short speeches endorsing disaffiliation.

During the second October 28, meeting, Hall responded to a question by an employee
50 by stating the following:

We've done everything we can to get assurances short of getting it in writing because

5 that's illegal. But we've got assurances from all the key places that... For instance, on the 43rd day, if the NLRB says 'we're certifying the Covington Paperworkers Union as the new bargaining unit representative,' on that 43rd day, the assurances have been that the company wants to go in and start from August 21st, when we left the table, and finalize the proposal, so we can present it to the membership and vote. There's a trust factor involved, as I spoke earlier, at this point, I trust, the... I don't trust the company, but have to extend them a little more trust than I do the international because I have hard facts to prove where they're going.

10 Hall later stated in response to a question from an employee at the second meeting:

Q. And you feel like they show us the same respect if we stay as a local?

15 A. Like I said earlier, I've talked to several key individuals, and us, it would be illegal for them to give us some kind of memorandum saying that they would, but the indication is that they want to start from August 21st and move forward. Obviously, there's a risk involved and I can't guarantee that, but we've every avenue to fight them now that we've had before.

20 Hall also stated, in response to a question, during the second meeting,

25 All your benefits just like they are right now will be subject to bargaining. That is pretty much where having the courage and wisdom to make the right decision steps in. Obviously, the company could try to take advantage of us. I am not going to promise you they can't. Does it make sense for them to? I don't think so.

30 The CPU filed the current petition for election with the NLRB on October 29. The credited testimony reveals the following: In November 2007, employee Madison had a conversation with Hall at the CPU union hall. Only Madison and Hall were present. Madison asked Hall, "how can we fight this company an independent Union?" Hall told Madison that Hall had assurances. Around two or three days after the October disaffiliation vote, employee Armentrout went to the CPU union hall and had a conversation with Hall. Armentrout asked Hall how long it would take them to get a contract. Hall replied "if the Labor Board didn't hold them up we could have one in place by Christmas." Employee Nelson had a conversation with CPU Vice President Gibson on December 17 at work.⁶³ Gibson told Nelson the Employer and the CPU were supposed to have a contract signed by Christmas, and that the Christmas party was kind of a party for the Company and the CPU for having a contract signed. Gibson stated this is what Hall had said. Gibson said "he thought that there was probably a contract waiting when everything to be done – when everything was done and settled," Nelson testified, "that was the word around the mill when all this stuff had started, that we should have a contract by 35 December." Nelson testified the rumor at the plant amongst employees was "that the CPU had thought that this would be, you know, a pretty quick deal, you know, and that they – that was the word that I heard, that they thought that there would be a contract in place by December."

45 Retired USW representative Anglin credibly testified he talked to CPU Office Manager Fridley by phone around the week after the October 28 disaffiliation meeting. Anglin asked Fridley how they intended to get a contract with the Employer, and she said the contract has already been assured. Anglin told some of the USW staff and some of the USW local members

50 ⁶³ Gibson was selected as vice president of the CPU as part of a resolution presented to the membership on November 3, 2007. He was also part of the former USW Local negotiation committee that attended the September 26, meeting with the Employer.

of Fridley's remark, including employees on the USW unification committee. I have credited Anglin over Fridley's denial that she told him contract was assured. However, Fridley did admit that there were rumors at the mill that the USW was saying the CPU had a contract under glass, and that the USW was putting out rumors that CPU had a contract. I have concluded, as Fridley
 5 as admitted there were rumors at the Mill that the CPU had a contract, but that they emanated from Hall's comments at and following the October 28, meeting.

The two union's addressed the status of negotiations in their campaign literature. In the USW's March 7, 2008, distribution, it stated, "Negotiations with the CPU would not have to pick
 10 up where they left off with the USW in 2007. Collective bargaining is a test of economic strength. If the Company thinks that CPU is weaker than USW because it lacks a multi-million dollar strike fund and is isolated from other USW MeadWestvaco local unions, it would be able to make a worse contract offer to CPU than it did to USW and to bargain in good faith for a contract worse than that which it would have agreed to with USW."⁶⁴ In one CPU distribution it was stated, "Although the USW is not 'lying' when it says the company can propose worse
 15 terms that it has already, it fails to admit that the company can do the same thing to the USW, or pull out altogether." In another distribution the CPU stated, "federal law guarantees that after an election that names the CPU 675 as the new representative, the company also can not change the terms and conditions of our employment until the CPU 675 and the company engage in
 20 bargaining." The CPU then went on to quote the USW as follows: "The company has the legal right to propose a completely different package to the new stand-alone organization." CPU's response was, "The company could do that to the USW also. But if they do it to either union, they will likely run afoul of the requirements to bargain in good faith with an NLRB-certified, elected representative."
 25

a. Positions of the parties

The USW argues that pre-petition conduct constituting unlawful assistance under Section 8(a)(1) and (2) of the Act for one of two competing unions is an appropriate basis to set
 30 aside an election. It is contended that pre-petition conduct will be considered when the conduct continues during the post-petition period. It is argued that Hall met with the Employer as a de facto agent of the CPU, excluding USW from the meeting and either got assurances from the Employer or lied about it to the employees to the effect that CPU had an inside track to the Employer, and a promise that the Employer would put a contract in place as soon as CPU
 35 replaced the USW. It is contended that the Employer's bypassing the USW, and the CPU's assurances of a contract and an inside position constitute an unlawful promise of benefit based on unlawful Employer assistance and warrants a new election.

The CPU asserts that, during the October 28, meetings, Hall explained his reasons
 40 regarding the term assurances as inductive analysis and not guarantees, that during the second meeting, Hall said he had several reasons to believe the Employer would be more concerned with negotiating a new contract than restructuring the whole agreement, and that he trusts the Employer right now more than the International Union, because the Employer understood the only way to get a contract ratified would be for the Local Committee to get the membership to
 45 endorse it. The CPU also points to campaign literature from both unions, making it clear that a new contract would have to be negotiated after the election, whichever union won.

The Employer argues the USW never contends that Employer made assurances to the

⁶⁴ The USW made similar statements in campaign literature dated, November 12, and
 50 December 4, 2007.

CPU, and the direct testimony of the witnesses, refutes any such contention. The Employer argues that even accepting that Hall made statements pertaining to assurances, they do not provide a basis for overturning the election, when the evidence proves that the Employer never communicated any type of assurances of a contract to Hall, the CPU, or anyone else. The Employer argues that under *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), the Board will not “probe in to the truth or falsity of the parties’ campaign statements’ except where a party forges documents rendering the voters unable to recognize propaganda for what it is.” The Employer argues in response to Hall’s vague statements about assurances, the USW expended considerable efforts citing its campaign literature to convince the employees there were no assurances. The Employer argues that the Board will not overturn an election simply because one side exaggerates the benefits it can obtain.

b. Conclusion

Considering the evidence and the positions of the parties, I sustain objection number 12. The evidence indicates that following the parties’ August 22 bargaining session, Hall and the members of the then USW Local’s bargaining committee were in opposition to certain demands being made by the International Union, which the Local Committee members saw as an impediment to reaching a contract for the Covington plant. When the International delayed, without explanation to the Local, responding to the Employer’s August 22 supposal, the Local Committee met and discussed disaffiliation from the International. The Local Committee also sought a meeting with the Employer, without the presence of the International Representative. The Employer agreed to the meeting, which took place on September 26. The Employer’s committee listened for 3 hours as members of the Local presented a detailed counter proposal to the Employer’s August 22, proposal. Following a 3 hour break, the Employer’s committee returned and to the disappointment of the Local Committee stated they could not respond because that would constitute negotiations in the absence of the International. However, as the Local Committee was packing up to leave, Hall was called out into the hall by Employer official Johnson. When Hall returned he announced to the Local Committee members that the International Union found out about the meeting and had called the Company’s corporate headquarters and told the Employer not to talk to the Local Committee any more about the contract items.

While the Employer argues there is no evidence the Employer gave Hall any assurances about a contract, what was said between Johnson and Hall, and Hall and Asma in subsequent calls following the meetings is unknown at this preceding. However, this argument misses the point. An obvious concern raised by employees in deciding whether to disaffiliate was whether an independent union would have the resources and strength to deal with the Employer. In fact, that question was posed at least twice to Hall by employees during the October 28, disaffiliation meetings, and in conversations with employees during the critical period following the meetings. Hall responded, at the October 28 meeting, that they had done everything they could to get assurances short of getting it in writing because that would be illegal, but they had assurances “from all the key places” that if the CPU is certified on the 43 day of the election processes that the Employer wants to go in and start from the Employer’s August 21st proposal, when they left the table, and finalize the proposal so the CPU could present it to the membership for a vote. In repeating that he had received assurances from the Employer, Hall later stated, during the meeting, “Like I said earlier, I’ve talked to several key individuals, and us, it would be illegal for them to give us some kind of memorandum saying that they would, but the indication is that they want to start from August 21st and move forward.” While he qualified his statements that there was a risk involved, by his statements Hall had informed a large number of the USW’s membership before they engaged in the disaffiliation vote that he had engaged in direct dealing with the Employer. Hall’s statements went beyond telling employees that the Employer had said

existing benefits would remain in place if they shed the USW, or the Employer's just discussed an outstanding contract offer to the USW with Hall, which under Board law would have been permissible.⁶⁵ Rather, Hall stated he had spoken to several key individuals from the Employer, and that the Employer had given him assurances that it would extend the August 21 supposal it had made to the USW, to the CPU should it become the certified representative. The Employer's August 21 and 22 proposal contained a promise of a wage increase and other benefits beyond that in the existing collective-bargaining agreement.⁶⁶

The duty to bargain collectively includes the obligation to treat with no other. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-684 (1944). Yet, Hall made statements to about 160 employees of assurances of a contract offer from the Employer to the CPU should the CPU become the collective bargaining representative thereby replacing the USW, a union that had fashioned proposals that the Employer found objectionable. Hall's statements constitute an admission by the future president of the CPU to have engaged in direct dealing with the Employer as a quid pro quo for the replacement of the USW. I find Hall's statements to have gone beyond campaign propaganda of the type found permissible in *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982). These statements are not typical promises or misstatements that can be countered during the campaign. Rather, they went to the heart of the Employer's collective bargaining relationship with the USW, and could have only been remedied by a direct retraction by Hall of his "assurance" assertion to all of the employees in the unit. Benign campaign responses by the USW or even the CPU that the Employer was not required to start where it left off in bargaining if the CPU was certified do not serve to counteract Hall's statement to employees that an offer had been assured or cooked with key Employer officials if the CPU was certified. See, *Albertson's, Inc.*, 344 NLRB 1357, 1360-1361 (2005). While Hall's statements at the October 28, meeting, predated the critical election period by one day, employees Madison and Armentrout's credited testimony reveals that Hall repeated his assertion of assurances or made similar remarks within the critical period.⁶⁷ Employee Nelson was told something similar concerning an assured contract by CPU Vice President Gibson during the critical period, and Gibson attributed his remarks as to the status of a contract directly to Hall. Nelson credibly testified, "that was the word around the mill when all this stuff had started, that we should have a contract by December." Nelson testified the rumor at the plant amongst employees was "that the CPU had thought that this would be, you know, a pretty quick deal, you know, and that they – that was the word that I heard, that they thought that there would be a contract in place by December." CPU Office Manager Fridley confirmed that there was a wide spread rumor at the mill that the CPU had a contract.

I have concluded that Hall's statement pertaining to assurances from the Employer pertaining to its last contract offer made during the disaffiliation meeting to large number of employees colored and explained remarks Hall and CPU officials made to employees and

⁶⁵ See, *Weather Shield Mfg.*, 292 NLRB 1, 2 (1988), enf. denied on other grounds 840 F.2d 52 (7th Cir. 1989); and *Putnam Buick, Inc.*, 280 NLRB 868, (1986), affd., 827 F.2d 557 (9th Cir 2987) as discussed above.

⁶⁶ In fact, the Employer never made a formal offer of its August supposal to the USW, although it can be concluded from this record that the USW was not interested in accepting it by its failure to respond.

⁶⁷ Hall himself admitted using the term assurances pertaining to a contract during the first two weeks following the disaffiliation vote. I do not credit Hall's claim as to detailed explanations he gave to employees about the term assurances, as Madison and Armentrout's testimony reveals there were no detailed explanations given when it was discussed with them or anything varying from that what Hall had specifically stated during the disaffiliation meeting.

others shortly thereafter during the critical period. See, *Teamsters Local 705 (K-Mart)*, 347 NLRB 439, 445 (2006); and *Dresser Industries*, 242 NLRB 74 (1974). I have concluded that Hall's remarks and the follow up statements during the critical period undermined the USW and created an atmosphere rendering improbable a free choice by employees. See *General Shoe Corp.*, 77 NLRB 124 (1948); and *Hopkins Nursing Care Center*, 309 NLRB 958, 958 (1992).
 5 Accordingly, I sustain objection 12.⁶⁸

Objection 2

10 Employee Howard's credited testimony reveals that around the first or second week in November, Howard had a conversation with Hall at the CPU's union hall. Howard told Hall the USW had brought international reps in who were occupying the USW hall. Howard told Hall that Howard would go there and give them a piece of his mind. Howard said he wished he had a
 15 tape recorder, that Howard would let Hall hear what he had to say to them. Hall said he had an MP-3 recorder, which he gave Howard and showed him how to use it. Howard went to the USW union hall and surreptitiously recorded his conversation there with two USW international representatives. The conversation lasted around 20 to 30 minutes. Howard returned to the CPU hall and played the conversation for Hall. Howard testified he thought employee D. Booth was there and listened to the recording. Howard left the MP-3 player with Hall. Howard did not
 20 hold a position with the CPU, rather he held the position of safety director for the USW at the time he recorded the conversation. Howard was not aware of what, if anything, Hall did with the recording after Howard left the CPU hall the day of the incident.

25 D. Booth testified around mid-November, he stopped by the CPU hall, and Hall showed D. Booth a device that looked like an I-Pod. D. Booth asked Hall what it was, and Hall said, "Well, I fixed Rob up to see what was going on down there", referencing the USW union hall. D. Booth testified Rob Howard is Hall's friend. D. Booth testified he put the earphones on, and he heard Howard's voice. D. Booth understood the recording to be a conversation at the USW Hall. D. Booth he listened for five minutes. D. Booth testified he gave the device back to Hall,
 30 and someone else came in, and Hall offered it to them to listen to it.

Hall acknowledged giving Howard an MP3 device to make a recording during the election. When asked why he gave it to the employee Hall testified, "Because he said he wanted it." Hall testified that other than the one incident, he never listened to any other
 35 recordings of conversations.

Employee Wolfe testified he met with CPU Office Manager Fridley at the CPU union hall on about October 31, or November 1. At that time, he overheard Fridley state to someone that she had the password to the answering machine at the USW hall and that she was still receiving
 40 messages there. Wolfe testified there were a lot of people in the CPU hall at the time. Wolfe

68 I have also found the unexplained videoing of employees at the October 28 meeting to constitute coercive conduct. This was not just a union meeting or event voluntarily attended by employees. It was a meeting where employee positions were taken regarding disaffiliation from the USW, a position which was endorsed by Hall and the Local's executive committee. The unexplained videoing of employees under these circumstances could only have the foreseeable effect of limiting or eliminating dissent from Hall's position and ending free debate. Moreover, Hall's remarks that he had received assurances from the Employer would give the obvious impression that the Employer was working with the CPU in the ousting of the USW, and
 45 combined with the videoing of employees could have only served to further undermine any
 50 dissent at the meeting.

testified that while he was at the CPU hall Fridley dialed up the USW answering machine.

5 Fridley testified she did not become the CPU office manager until November 6. While I have credited Wolfe about the location and contents of what was said, I have concluded he was mistaken as to the date, and that the conversation occurred sometime soon after Fridley began working for the CPU. Fridley acknowledged that after she left the USW Local to work for the CPU, that she continued to check voice mails on the USW phone. She testified USW representative Mendoza left Fridley's voice on the recording answering calls for the USW's voice mail message, despite her asking him to remove it. She testified when she first left the USW, she called the USW voice mail that first week to see if she had any messages and then she quit doing it. Fridley denied hearing any messages that she told employees about. She testified most of the messages were people cursing out the USW.

15 I find that Hall, as president of the CPU, condoned and ratified Howard's recording of his conversation with the USW representatives. Hall was aware of Howard's plan. He provided him the equipment, showed him how to use it, and then listened to the recording after it was completed. D. Booth testimony reveals that Hall played the recording for him, and that Hall offered another unidentified individual the opportunity to listen to the recording. While Howard retained his status of USW safety director at the time, he was clearly aligned with the CPU at the time he made the recording. I have concluded that Hall's actions were inappropriate, and would tend to quell free discussion at the USW meetings for employees who became aware of the possibility that the CPU would surreptitiously record their discussions. I similarly find Fridley, as office manager of the CPU, engaged in similar inappropriate conduct by listening to the USW's voice mail and informing employees she was doing so. Fridley could have asked USW officials if she had any messages rather than logging into the voice mail of an organization for which she no longer worked, and for which she was aware employees were leaving messages for a rival union. Fridley went beyond merely to listening to the messages at the USW. She stated in Wolfe's presence that she was doing so thereby informing him if he left a message for the USW, it might be eavesdropped by Fridley. I do not hold the USW completely blameless for the Fridley's ability to invade their voice mail. They did not change the message code when she left their employ, and left her voice to answer callers despite her request for them to change it. Nevertheless, in the circumstances of election campaign between rival unions I find her conduct to be improper. However, there was no showing that knowledge of either Hall or Fridley's conduct here was sufficiently wide spread amongst unit employees to impact on the results of the election. Accordingly, I overrule objection 2.⁶⁹

Objections 3 and 4

40 Asma testified the mill is 4.7 square miles. At the time of the hearing there were about 77 supervisors in the mill. Asma testified Stock and Additives, Environmental Services, and the Tour Maintenance Departments do not have supervision on the 3 to 11 p.m. shift, and 11 p.m. to 7 a.m. shifts. On October 29, Asma sent a memo to the mill's management team, declaring the Employer's neutrality in the election proceedings, as well as some highlights they were to observe, including they were not to offer or permit use of company facilities or equipment such

45 _____
 50 ⁶⁹ The USW also cites testimony of employee Williams, where at a CPU meeting, she testified she jokingly said she could hide a video camera in her baby carriage and take the baby in to the Gerard meetings so no one would think she was recording the meeting, or was being put up to it. I do not find this statement to constitute objectionable conduct. First, there was no basis to conclude Williams was acting as an agent for the CPU when she made the remark. There was also no evidence she that she secretly recorded the January 13, 2008, meetings.

as copy machines, meeting rooms, fax machines or computers, for the purpose of engaging in campaign activities. Asma identified Article II, Section 1, of the collective bargaining agreement between the Employer and the USW, which states, “there shall be no solicitation of membership or other Union activities on Company time, except as otherwise provided in this Agreement.”⁷⁰

5 Asma testified that in the first or second week of November, Mendoza asked Asma what the solicitation policy was at the mill. Asma testified he explained to him the policy was specified in the referenced provision of the contract. Asma conducted a power point training of the supervisory staff on November 6, which included the statement, “Do not allow employees to abandon or be relieved of their work to engage in campaigning activities to support one side or another during working time.” It stated, “do not use company facilities or equipment such as copy machines, meeting rooms, fax machines or computers...” for campaign purposes. It stated, “As long as people are doing their job, people can talk about whatever they want.”

15 In view of the resignation of the local officers of the USW in November, Asma granted USW official Mendoza’s request, in part, by agreeing to review on a case by case basis the failure to process a grievance under contractual time limits due to a lack of union steward or other union officers. Asma also provided the names, addresses, phone numbers and shift schedules to Mendoza in response to Mendoza’s requests for information, which would serve as an aid in the USW’s campaign activities. Asma agreed to Mendoza’s request to post USW notices in the plant and upon notification by Mendoza, Asma arranged for a guard to escort him through the plant so he could do so. Asma granted requests by both the USW and the CPU to distribute literature at three gates that were on Employer property. Asma also granted Mendoza’s requests to use the Employer’s training facility and another room on the Employer’s premises to meet with employees on certain specified dates. Asma last allowed Mendoza’s use of the training room on January 9 and 10, 2008.

25 On January 12, 2008, the Employer received a request for recognition from the CPU based supplied employee signatures claiming majority status. However, the Employer continued to recognize the USW as the representative of its employees opting to settle the matter through an NLRB election. During the week of January 14, 2008, Mendoza called Asma and asserted that CPU maintenance employees were distributing a petition in the mill in area of the number 1 and 2 paper machines. Mendoza asked Asma to investigate. Asma’s notes reveal the Employer investigated and found no evidence to support Mendoza’s claim.

35 On February 22, 2008, George, the Employer’s vice president of operations, issued a memo to all employees announcing the NLRB election was going to be held on March 22, 2008. The memo states the Employer is neutral in the process. George stated in the memo, “that working time is for work and, therefore, employees may engage in solicitation, passing out

40 ⁷⁰ The Board has held that no solicitation rules prohibiting solicitation on “company time,” are presumptively invalid. See, *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994). I make no findings as to the cited provision in the USW and Employer’s collective bargaining, since this is not an unfair labor practice proceeding and the credited testimony reveals that the employees were not aware it was being enforced. Moreover, the February 22, rule that was publicized to employees and at issue here proscribes solicitation during “working time,” which is lawful. It is not the contention before me that the February 22, rule was unlawfully adopted, rather the USW contends it was discriminatorily applied.

45 The Employer argues at page 10 of its brief that USW witness Buzzard admitted distributing USW materials to others while they were working. However, Buzzard only testified that he came into the plant after the end of his shift, and gave materials to employees while they were on break. (Tr. 683-4; 690-1).

related materials, and circulating petitions only during non-working time. Examples of non-working time include approved meal periods, break periods, and as employees are coming and going before and after work. Non-working time includes the time of the person soliciting as well as the time of the person being solicited. We also want to remind everyone that Company copiers or fax machines are not to be used to reproduce campaign materials or flyers.” Asma testified George conducted a power point training session on February 28, 2008, for all salaried employees at the Covington operation. The power point display again reminded the supervisors about the Employer’s policies concerning campaign activity during working time.

USW supporter Kirk, who works in the Waste Treatment, credibly testified that prior to February 22, 2008, he was not aware of a policy at the mill that prohibited campaigning during working time, or prohibiting the use of fax machines or copiers for campaign purposes. CPU supporter Moses also testified he was not aware distributing campaign literature at the plant was problem until he saw the February 22, memo.

Asma testified that, after February 22, the Employer received complaints from Mendoza about allegations of improper campaigning activities by the CPU. Asma testified Mendoza mentioned that some maintenance employees had gone into the control room in the Power Department handing out CPU leaflets. Asma testified the Employer was not able to confirm that maintenance employees had entered the control room and were handing out CPU literature during working time. Asma testified he had asked Mendoza for names, but he did not know the names of the individuals. Asma identified an email dated March 10, 2008, to Hardy, the Employer’s director of labor relations. In it Asma stated he had received a call from Mendoza concerning employee campaigning. The email stated, “The following day we discovered maintenance employees had been talking to one Power department clean up person – the Lead Janitor for that area in a break room. We concluded there could have been reason for the maintenance employees to be in that room at the time as they were maintenance employees who are assigned to Power and as such routinely work and go through many of the areas in Power. In addition we were told that it likely was this same group of four (4) that had passed on the questioned handout. We decided to re-post the February 22nd memo from Mark George in areas throughout the Power Department since it was not observed by me in our walk through on Friday, February 29. I chose not to confront each of the maintenance employees in this situation since it could not be verified with certainty that anyone of them had distributed a leaflet to anyone in power department.” Asma testified the allegation about maintenance employees handing out material in the Power Department was in early March.

Employee Buzzard testified that on Friday, February 29, 2008, Buzzard was working in the tour grader lab, which is a different part of the facility from his usual work location. Buzzard discovered that CPU literature was being faxed into the fax machine operating in the lab. He credibly testified it was the CPU’s newsletter the Barking Dog and other articles concerning CPU. It was about 10 pages. Buzzard reported to the tour grader lab again the following Monday, and he saw that more CPU material being faxed in. He credibly testified he saw CPU literature come in on the fax machine about three times that week. Buzzard did not see a cover sheet for the faxes. There was a phone number on the fax, but Buzzard did not write it down. Buzzard did not see any supervisors see the faxed material coming in, and he did not know whether the Employer was aware of it.

Employee Carla Arritt, who works in the lab at the mill, credibly testified in the first week of March a maintenance employee, who was identified as R. J. Reynolds, drove up to her in a golf cart as Arritt stepped out of the lab on the way to collect some samples. Reynolds handed Arritt some CPU literature and asked her to take it to the lab for the employees there. Reynolds then went over to employees on paper machines 1 and 2 and was talking to them while handing

out materials. She also saw Reynolds talk to employees working on the winder. This took place around 7 p.m. Reynolds was talking to employees for about 45 minutes. Arritt did not know whether the conversation was job related, but she did not see him doing any work. She did not know if Reynolds was on break. I find that it was unlikely that Reynolds was on break for
5 45 minutes, that he handed materials to Arritt when she was not on break, that he similarly handed out materials to employees on the number 1 and 2 paper machines during working time in violation of the Employer's February 22, 2008, posting.

Employee Kirk works in Waste Treatment. Kirk testified he saw someone campaigning
10 on working time, the Tuesday morning before the Wednesday March 12, 2008, election. It was just after midnight when maintenance employees Bill Tolley and Hall's brother S. Hall came into the control room. Along with Kirk was employee Pritt. Tolley gave campaign literature to Pritt. Both Pritt and Kirk were working at the time. Tolley told Kirk he had been all over the mill that night. Employee Armentrout works in the Power Department. He testified early Tuesday
15 morning the day before the election, Tolley and S. Hall came to the Power Department control room and handed out literature. Armentrout was present with employee Spivey and some other employees. Tolley handed them some CPU literature and asked them to look it over. Tolley and S. Hall were there for about two minutes and arrived between 1 and 1:30 a.m. Armentrout was working at the time. Employee Mike Lipes works on the number 2 paper machine. He
20 testified on the Monday night going into the Tuesday morning before the election, between 12 and 1 a.m., S. Hall and Tolley came into the area and laid literature on the table. The literature was the CPU 's response to a recent USW handout. S. Hall and Tolley drove up in a company golf cart. Lipes testified he was working when this occurred and he thought S. Hall and Tolley were on working time, but he had no way of knowing whether they were on break. Similarly,
25 employee Vass, who works on the number 2 paper machine, saw two maintenance employees identified to him as S. Hall and Tolley drive up in a golf cart and enter the loading department break room. They were there for about 10 minutes then left. When Vass entered the break room, he discovered CPU literature that had not previously been there.

Based on the credited testimony of Kirk, Armentrout, Lipes, and Vass, I find that on the
30 Tuesday morning before the March 12, 2008, election, maintenance employees Tolley and S. Hall drove a company golf cart throughout the plant and distributed a CPU response to USW literature that had been distributed earlier that day. I find that they distributed the CPU
35 document to employees while those employees were working, and that in view of Tolley's statement to Kirk that he had been all over the mill that night, and the number of areas the testimony established they visited that both Tolley and S. Hall delivered the CPU literature while they were also on working time. I find that Tolley and S. Hall's activities were in violation of the Employer's February 22, announcement. Asma credibly testified it was never reported to him that CPU supporters approached employees while they were working on March 11, and passed
40 out campaign literature.

Employee Smith testified that after the October 28, disaffiliation meeting there were CPU stickers on almost all of the maintenance golf carts in the mill. She estimated there were 15 to
45 20 maintenance golf carts with stickers on them. She testified the supervisors saw maintenance employees driving the carts, and which had CPU in three to four inch letters. Employee Brown testified in the beginning of March 2008, she saw golf carts with 11 by 7 inch CPU signs, stating such things as vote for CPU. Brown estimated she saw the signs on at least 10 carts. Employee Buzzard testified that after February 22, when he walked through the maintenance shop, he saw several golf carts with CPU insignia, including displays between 6 and 12 inches
50 wide and the length of the windshield of the golf cart, and on the back of the carts were CPU bumper stickers. There was also stacks of CPU literature in the carts that were 6 to 12 inches high. CPU witnesses employees Adcock and Parker confirmed seeing CPU stickers on

maintenance golf carts. Parker, who works in maintenance, confirmed that around 10 of the 20 maintenance carts had CPU stickers on them.

Smith testified she saw USW and CPU stickers on employees' clothes and lunch boxes.
 5 Brown saw USW stickers on employees' lockers, lunch boxes, hard hats and other items. Buzzard saw USW stickers in the mill on hard hats, personal gear, and on doors at the mill. Kirk testified there is a glass door at the mill the he passes through on the way to work that has a USW sticker on it. He testified that the employees in his shop wore USW items at work. He testified there were a couple of small USW stickers on dump trucks that drive through the mill.
 10 Employee Wolfe testified he saw stickers on hard hats, lockers and doors for both sides.

CPU witnesses also testified they saw USW stickers in different locations in the plant. Williams saw USW stickers on golf carts in the GMS & S area at the plant, and one on the area fork truck. Employee Moses has also seen USW stickers on the GMS & S fork trucks.
 15 Employee Adcock saw a USW sticker on waste treatment door, and on a couple of GMS & S golf carts. Adcock named a couple of other plant locations where he saw USW stickers. Employee Hirt saw USW stickers on a glass door near the winder. He also saw an anti-CPU sticker behind the glass at the control room at the number 1 paper machine. Employee Parker named multiple locations at the plant where he saw USW stickers posted. Hall also credibly
 20 testified as to several locations in the plant where there were USW stickers and signs.

Asma testified he inspected the mill on February 29, to ensure there was nothing that would unfairly affect the election. Asma testified that on the bulletin boards was an equal amount of CPU and USW propaganda. He also saw a lot of CPU and USW stickers on lockers, tool cabinets, etc. Asma testified they were not just union stickers; there were race car stickers, and other paraphernalia. Asma testified the Employer did not make any effort to limit sticker postings on tool boxes, cabinets, lockers, hard hats or on bulletin board during the campaign. He testified, "We had never made an issue of people having stickers on things in the past, such as hard hats, tool boxes and the like, and I saw no reason to do it through this effort."
 25 Asma testified the Employer took no action to make people remove pro union CPU or USW stickers from golf carts or fork trucks. He testified the Employer allowed stickers in the past on company equipment, including during contract negotiations when there were USW stickers.
 30

a. Conclusion

35 I have concluded that USW objections 3 and 4 should be overruled. The Employer operates a large facility with a large work force, with a relatively low supervisor to employee ratio including some shifts that are not supervised. The Employer in the past allowed employee postings at the plant, including USW stickers in different areas supporting the USW's contract dispute with the Employer. The employee witnesses testified as to a significant amount of paraphernalia worn by employees supporting each union during the campaign, as well as
 40 stickers by each union posted on internal company vehicles, doors, glass windows, and lockers all owned by the Employer. There is no claim that the Employer required anyone to remove the postings from any vehicle or anything else. While there was a significant amount of postings on the golf carts used by the maintenance employees, most of whom supported the CPU, I do not
 45 find that in the circumstances here it can be established the Employer disparately enforced any rule concerning campaign paraphernalia being posted at the facility.

I have found that on two occasions that maintenance employees supporting the CPU
 50 campaigned on company time in contravention of the February 22, memo. Employee Arritt's testimony establishes that maintenance employee Reynolds drove up in a company golf cart during the first week in March, handed her CPU literature while she was working and then

proceeded to spend 45 minutes talking to and handing out materials to employees working on the 1 and 2 paper machines, and the winder. More significantly, on the Tuesday morning prior to the election, the credited testimony of employees Kirk, Armentrout, Lipes, and Vass reveals maintenance employees Tolley and S. Hall drove a company golf cart throughout the plant and distributed a CPU campaign response to USW literature that had been distributed earlier that day. They distributed the CPU document to a significant number of employees while those employees were working, and in view of Tolley's statement to Kirk that he had been all over the mill that night, and the number of areas the testimony established they visited, I have concluded that Tolley and S. Hall delivered the CPU literature while they were also on working time. I have found that Tolley and S. Hall's activities were in violation of the Employer's February 22, announcement. I do not view this as a small matter, particularly noting that S. Hall is the brother of CPU President Hall, that they were using company equipment in this venture and that it was close in time to the election. On the other hand, there was no testimony that the Employer's supervisors were aware, authorized, or otherwise condoned this conduct. See, *Raley's*, 348 NLRB 382, 384 (2006); and *Taylor Forge Division, Gulf & Western*, 227 NLRB 696, 698-699 (1977). I would also note in concluding that this conduct does not warrant setting the election aside the election in circumstances here, that the CPU literature was responding to USW literature which the testimony established was also recently widely distributed throughout the plant, and that the Employer had given Mendoza access to the plant to post literature throughout the campaign. Mendoza's access was not limited as it was to employees to non working time. Rather, his access was by appointment, and he was escorted throughout the facility to post USW notices

I also overrule USW objection 4. The only evidence presented pertaining to this objection was the faxing into the plant copies of CPU campaign literature into the mill on one of the Employer's fax machines on four separate occasions, in violation of the February 22, memo pertaining to the use of fax machines. However, the source of faxing of the CPU literature was never identified, and there was no showing that the Employer was aware its fax machine was being used for this purpose, or otherwise condoned this activity. See, *Raley's*, supra.; and *Taylor Forge Division, Gulf & Western*, supra.

I have recommended in this decision the election be set aside by sustaining objections 1, 7 and 12. Should there be a re run election, the Employer is now on clear notice that some maintenance employees were using its golf carts to travel the plant and campaign during working time. If this conduct were to repeat in the second election, while the Employer maintains its February 22 rule, it would possibly be viewed differently by any reviewing authority as to whether the Employer would now be condoning such activity in terms of whether second election should be set aside. This is particularly so here where in March 2008, the Employer had notice of the possibility that four maintenance employees were campaigning on working time, but chose not to directly advise those employees that they should not engage in such activity. Similarly, the Employer is now aware that at least one of its fax machines has been used to fax CPU material into the plant in contravention of its February 22, posting.

Objection 5

The credited evidence reveals that Hall parked a full size black pick up truck in the Employer's main parking lot beginning January 31, 2008, until he removed the truck on February 7, 2008. The truck had two pro CPU signs the length of the truck bed, and was clearly visible from the main entrance to the plant. Asma admitted to seeing the truck early on when it was parked in the lot. The Employer's security force received a complaint from an employee about the truck being parked in the same space on February 4, 2008. Guard Mauck contacted Hall on February 4, and asked him to move the truck. Mauck's report reveals Hall laughed and

5 stated he expected to be told to move the truck. Mauck told Hall he could move it on February 5, due to the lateness of the hour. Tucker, a supervisor in security, saw the truck was not moved on February 5, and he called Asma and asked him to have Hall move the truck. Asma testified he called Hall on he thought February 7, and asked him why the truck had not been moved, and Hall said he was sick. Asma asked him to move it and Asma's notes reflect it was moved on February 7. Hall testified and never claimed there was a mechanical failure in his truck or that he did not move it due to illness. He never claimed he told Asma that he did not move the truck due to illness, and I do not credit Asma's claim that Hall gave him such an excuse, which was not reflected in any of the Employer's records.

10 Tucker testified they received a complaint from an employee about a second vehicle parked in the Employer's lot on March 4, 2008. Tucker spoke to a guard, who informed him that the guard had seen the truck parked there for 3 days. This truck was also owned by Hall and was festooned with CPU signs painted on the body of the truck. Tucker testified he called Hall and told him to remove the truck and it was moved on March 4.

20 Employee Gordon testified in the spring of 2004 she parked her vehicle in the Employer's lot for two days in a row, and on the second day received a note from security to remove the vehicle. While employee Critzer testified she had left her vehicle parked in the Employer's lot for days at a time over a 15 year period when there were snow storms because she did not like to drive in the snow. However, Critzer did not park in the main lot. Employee Stanley testified he would leave his truck parked in the Employer's lot for the last six years for extended periods of time when he drove a motorcycle to work during the summers. He testified he left the truck in the main lot, and only received a complaint about the truck on one occasion, at which point he moved it that day and then reparked for extended periods it thereafter. Both Stanley and Critzer testified they never heard a policy where they were not supposed to leave their vehicle for more than one day.

30 Asma testified the Employer has allowed the USW to use the parking lot in the past to mount protests against the Employer, and the credited testimony was the Employer allowed both USW and CPU signs to be posted in vehicles during the campaign. The issue here is the length of time the Employer allowed Hall's vehicle to remain in one space, particularly in an area close to the main entrance of the plant which was considered to be a prime parking spot by the employees. Asma testified the rule of thumb is if someone is in a spot for a week or longer and someone complains, or if a guard notices a vehicle in the lot for an extended period, the Employer will inquire about the vehicle. Asma gave a variety of reasons as to why the Employer will allow a vehicle to remain in the lot for more than one day. He also testified the Employer did not want vehicles stored in the lot, so they will check if something looks out of the ordinary or is brought to their attention. Tucker testified there is a past practice that a vehicle can sit in the lot for a week before the Employer will do something about it. Tucker also gave reasons as to why a vehicle can remain in the lot, and he testified the Employer had never had a vehicle towed from the lot. He testified they allowed one employee who was out sick to leave his vehicle parked in the lot for about a month.⁷¹

45 ⁷¹ I do not credit Hall's testimony that he moved either the black or white truck during the time periods at issue prior to his finally moving each of the trucks at the Employer's request. In this regard, there is no contention that he informed the guards or Asma that he had moved the trucks. Similarly, I do not credit Asma and Tucker's testimony that there was a rule of thumb policy that the Employer would allow a truck to remain for a week before questioning the owner. I find this testimony to be more of an after the fact justification for allowing Hall's truck to remain in the lot for around a week in February 2008. Rather, I find that the evidence establishes the

Continued

In *International Business Machines Corp.*, 333 NLRB 215, 219-221 (2001), enfd. 31 Fed. App. 744 (2nd Cir. 2002), two employees placed signs on their vans in an employer's parking lot soliciting employees to support a union at IBM. One sign was 4 feet by 8 feet and the other was 2 feet by 4 feet. There the Board affirmed the judge's findings that the employer violated Section 8(a)(1) of the Act by informing the employees that the display of their signs contravened company policy. Thus, Hall's display of signs here constituted protected activity. I do not find that the USW has established that the Employer had a fixed policy concerning the use of its parking lot that was contravened by Hall's actions here, or that the Employer administered the parking lot in a discriminatory fashion between unions here. Gordon's testimony about one instance in 2004, certainly does not support a finding that there was an established past practice. Accordingly, I overrule objection USW objection 5.

Objection 7

The CPU distributed campaign literature at the mill called the Barking Dog during the course of the election campaign, and the Barking Dog was also posted on the CPU's website. The March 10, 2008, issue of the Barking Dog stated the CPU "would like to recognize and thank the following businesses and individuals for their support Rooklins, Michael's Pizza, Chapman Plumbing, Commonwealth Arms, Salvation Army, Dixie Fuel, Log Cabin Farms (Rick Breeden), Mt. Pleasant Farms (Denny Miller), Covington Farm & Fuel,..." The names of the listed businesses and the Belly Up Café were also posted on a sign on the window of CPU's office facing the street. There were two signs reading in combination "COVINGTON PAPER WORKERS UNION SUPPORT The Following," which was followed by a list of named individuals and the above described businesses. Hall testified mill employees frequented the CPU office on a daily basis and on an informational meeting day there could be 60 to 100 employees at a meeting. Employees who attended informational meetings did not have to be CPU members. Hall testified they held informational meetings every Thursday and business meetings attended by members only every other Thursday. Hall testified the posting included the names of individuals and local businesses who made contributions to the CPU.

Hall testified the sign was posted at the CPU's office window about 4 or 5 weeks prior to the election. The contributions were not necessarily monetary in nature, as the Salvation Army just helped the CPU find a table that fit the CPU's needs. Hall estimated that four or five businesses made a financial contribution. The money went into the treasury of the CPU and was used for operating expenses. Hall testified the window sign was taken down the week of the election, after Hall learned Dixie Fuel, a contributor, was taking exception to its posting. Hall talked to the president of Dixie Fuel who was told by a USW supporter that they were going to organize a boycott of his operation because he supported the CPU and he asked that Hall take the sign down. The CPU's receipts show donations from the following businesses: Michael's Pizza; Commonwealth Arms, Chapman Plumbing, Covington Farm and Fuel; and Log Cabin Farms ranging from \$50 to \$250.

D. Booth's testimony reveals he was present at the CPU Hall when the owner of Commonwealth Arms made a \$100 contribution to CPU. King, the owner of Chapman, testified she made a \$250 contribution on a check from Chapman to the CPU because her husband and son in law work for the Employer, and King felt there needed to be a change in status of contract negotiations with the Employer. Chapman has seven hourly employees, but conducts no business with the Employer. Breeden made a \$50 donation to CPU on a check issued from

Employer had no set policy as to how long a vehicle could remain in the lot.

his Log Cabin Farms account. Log Cabin Farms has no employees and does not have a business relationship with the Employer. Breeden credibly testified he made the donation at the request of his neighbor, who was also a farmer. Breeden was also the vice-president of LMI, the vice president of Low Moor Investments, and involved in the management or ownership of Salterini Warehouse, which handles materials for and leases warehouse space to the Employer. Low Moor has a business relationship with the Employer concerning the warehouse. LMI handles paper and stores it for the Employer. LMI employees 25 employees, and Salterini employees 3 employees. Breeden also owns a truck shop that sometimes performs work for the Employer. As part of the operation of these businesses, Breeden will from time to time engage in contract negotiations with the Employer's officials. Employee Buzzard testified that he was aware that Breeden owned a business called the Getting Place, which was one of several businesses that provided safety boots and other items to employees which were purchased through rewards won at the Employer based on employee work performance. Hall credibly testified that, at the time of the events in question, Hall did not know of Breeden's relationship with the companies Breeden described. Hall thought Breeden was just a farmer.

a. Positions of the Parties

USW argues in its brief the receipt of payments by employers to the CPU to fund its operating expenses during an organizing drive sends the message that CPU is being supported by employers. It contends it does not matter if an employer payment was \$50 or \$250 or that the employer payments were made because the principals of that employer supports the workers. It asserts that employers are not allowed to make payments to a union to support an organizing drive against another union. The USW argues that CPU exploited the contributions it received from Employers by publicizing those contributions. The USW argues that without a "bright-line" test by the Board against acceptance of employer contributions, the Board will condone and encourage third party employers to make or unions to seek contributions from employers. The USW argues CPU's receipt and publication of the third party employer contributions constitutes per se objectionable conduct. The USW asserts that, "It tells prospective voters that CPU had particular influence with employers, including MWV customers, and that these employers demonstrated their support with cash, although arguably illegal, suggesting the CPU has power, influence, money and is above the law, all of which misleads employees and taints the election process."

The CPU argues in its brief that eight local businesses or individuals made contributions to the CPU ranging from \$50 to \$250. One contributor, Breeden, was listed in the CPU newsletter and office sign, along with Log Cabin Farms, wrote a check for \$50, although Breeden had several businesses, one of which had an apparent lessor relationship with the Employer, neither Breeden individually or Log Cabin Farms had any connection to the Employer, nor did Breeden make the donation for any reason connected to the Employer. There was no connection between any of the money donated and the Employer, or evidence that any employee had a perception of any connection prior to the election, or that it had any discernable impact on the election.

b. Conclusion

In *Guardian Armored Assets, LLC*, 337 NLRB 556 (2002), involving a decision and direction of election, the Board majority declined review of the Acting Regional Director's decision that the petitioner was qualified to represent the employer's employees and thereby allowed the election. The Board majority held there was no inherent conflict between the petitioner representing the employer's guards in the private sector and representing police in the public sector. The Board majority went on to state:

5 Our colleague also raises an additional reason for granting review of the Acting Regional Director's Decision and Direction of Election: that the Petitioner's practice of soliciting contributions from employers covered by the NLRA raises serious issues under Section 302 of the Labor Management Relations Act, 29 U.S.C. Sec. 186. Our colleague asserts that, on the record, there is reason to believe that the Petitioner "would admit to membership" employees of employers covered by the NLRA within the meaning of Section 302(a)(2), and that its solicitation activities may therefore fall within the strictures of that Section. (FN2) Further, he suggests that, to the extent the record is unclear on 10 this issue, the fault lies with the Petitioner's failure to respond to the Employer's subpoenas for information about the Petitioner's membership requirements and fundraising practices.

15 Our colleague, however, cites no Board or court precedent holding that a union's violations, or potential future violations, of Section 302 are a basis for denying certification of the union as bargaining representative. It is true that the Board has considered Section 302 in deciding whether an unfair labor practice has been committed. See, e.g. *OXY USA, Inc.*, 329 NLRB 208 (1999);⁷² *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), *enfd.*, 798 F.2d 849 (5th Cir. 1986). However, the Board has not considered Section 302 in other contexts.

20 In any event, we need not, and do not, decide at this point whether Section 302 would provide a basis to deny the Petitioner the benefits of certification. The Employer has not raised the Section 302 issue, and thus our denial of the Employer's request for review clearly does not by itself foreclose the Employer from raising that issue in subsequent proceedings. If the Employer does seek to raise the issue, either at the 25 objections stage or in any subsequent unfair labor practice proceeding, we will address at that point whether the issue is properly raised and/or whether Section 302 is a basis to deny or revoke certification of the Petitioner. Cf. *Handy Andy*, 228 NLRB 447 (1977) (allegations of race, sex or other invidious discrimination by a labor organization are appropriately raised as a defense in appropriate unfair labor practice proceedings rather than offensively in representation proceedings).

30 The Board majority stated in *Guardian Armored Assets, LLC*, *supra*, at 556, fn. 2 that:

35 It is by no means clear whether the Petitioner's fundraising would entail payments of the kind addressed by enactment of Section 302. See, e.g., S. Rep. 187, 86th Cong., 1st Sess., at 13 (1959), reprinted in 1 Legislative History of the LMRDA 409; *U.S. v Percora*, 798 F.2d 614, 621-623 (3d Cir. 1986, cert. denied 479 U.S. 1064 (1987)); and *U.S. v. Cody*, 722 F.2d 1052, 1058-1059 (2d Cir. 1983), cert. denied 467 U.S. 1226 (1984).

40 In his dissent in *Guardian Armored Assets, LLC*, *supra*, at 557, Member Cowan stated:

45 The record in this matter shows that the Petitioner regularly and systematically solicits contributions from Employers engaged in commerce within the meaning of Section 2(2) of the National Labor Relations Act. These solicitations are undertaken by a fundraising company under contract with the Petitioner and produce between 1/3 and

50 ⁷² However, in *OXY USA, Inc.*, *supra*, the Board solicited and deferred to an opinion of the Department of Justice (DOJ) as to whether a particular collective bargaining provision proposed by an employer was violative of Section 302 of the LMRA. In doing so, the Board noted authority to restrain violations of Section 302 is vested in the district courts, and DOJ has the responsibility of enforcing Section 302 of the Act.

2/3 of Petitioner's annual revenues. As long as the Petitioner remains a union dedicated to representing employees in the public sector, this solicitation of private employers does not present an issue. However, once the Petitioner determines that it will admit to membership and seek to represent employees of employers under the National Labor Relations Act, this practice of soliciting and receiving funds from private sector employers raises serious issues of criminal conduct under Section 302 of the Labor Management Relations Act, 29 U.S.C. Sec. 186.

Section 302 of the Labor Management Relations Act is a broad prohibition on payments by employers to unions, and/or the solicitation or receipt of such payments, subject to very limited restrictions specifically enumerated in Section 302 (c) of the Act. Under Section 302 (a) & (b) of the Act, each payment by an employer, each solicitation by or on behalf of a union, and each receipt of any such payment by a union is a felony subject to a fine of up to \$15,000.00 and imprisonment of up to five years. Moreover, violations of Section 302 are predicate acts which may be used to prove the existence of a racketeering enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Sec. 1961 et seq., which could result in significant additional criminal or civil liability.

Member Cowan went on to state:

Notwithstanding the inadequacy of the record, however, it is clear that the Petitioner is now seeking to represent employees of the Employer in this matter. In addition, a representative of Petitioner testified there are no restrictions on who may become a member of Petitioner. Thus, there is reason to believe that this Petitioner would accept into membership employees of employers under the National Labor Relations Act. Although such a willingness is certainly a prerequisite to seeking certification as the representative of employees under Section 9 of the Act, that same willingness to admit to membership employees of employers under the National Labor Relations Act also risks converting Petitioner's historic funding practices into a criminal enterprise that systematically violates Section 302 of the Labor Management Relations Act.

Section 302(a)(2) of the of the Labor Management Relations Act states in pertinent part:

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interests of any employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

For the following reasons I sustain objection 7.⁷³ The Employer is a large Employer in a rural area, employing close to 1000 employees alone in the bargaining unit at issue. The day before the CPU filed its petition for election, Hall informed a large number of employees that he had received assurances of a contract offer from the Employer. Thereafter, the CPU received contributions monetary and otherwise by several area businesses. The CPU broadly publicized

⁷³ I do not find it necessary to determine whether there has been a violation of the LMRA here. My responsibility is to determine whether the conduct at issue has a reasonable tendency to interfere with employees' freedom of choice in the Board's election processes. See, *Hopkins Nursing Care Center*, 309 NLRB 958, 958 (1992).

the support of these businesses to the Employer's employees during the time leading to the election. The CPU's statements, although naming one of the contributors as a farm, also named the individual who made the contribution. The named individual headed several local businesses some of which maintained contractual relations with the Employer. Thus, the CPU
 5 did not just receive financial contributions from area businesses it publicized them in a highly visible sign on its office front for an extended period and the sign was exposed to a large number of employees. The businesses listed included, Rooklins, Michael's Pizza, Chapman Plumbing, Commonwealth Arms, Salvation Army, Dixie Fuel, Log Cabin Farms (Rick Breeden), Mt. Pleasant Farms (Denny Miller), Covington Farm & Fuel, Dixie Fuel and Belly Up Café. The
 10 CPU also publicized the support of most of these businesses in its newsletter shortly before the election, and placed that newsletter on its website.

The CPU's receipt of and publication of area employer support had such an impact upon the Employer's employees that Hall conceded he had to pull the sign from the union hall
 15 because of a threatened boycott to one of the employer's on the list by employees supporting the USW. While the amounts contributed by the area businesses appeared to be small, the bargaining unit employees would have no way of knowing the size of those contributions or the nature of the support. I find that by its actions, the CPU interjected area businesses into the election process sending a signal to employees that the CPU was funded by the area business
 20 community. These actions would tend to interfere with employees' freedom of choice because it signals to employees that CPU was not acting as an independent labor organization in the election campaign, that it was supported by area employers, with the possibility that those employers had business relations with their Employer, thereby undermining the independence that is necessitated by an employees collective bargaining representative, and sending a signal
 25 a signal to employees that their vote had ramifications beyond their immediate employment relationship.

Objection 14

30 The credited evidence reveals that in November, around a week or two after the disaffiliation vote, union steward Wolfe went to the CPU hall to turn in forms relating to membership and dues deduction. While at the CPU hall, Fridley, the office manager for the CPU and the prior office manager of the USW local, brought up the long and short term disability plan, and stated the employees were going to have to realize they were going to have
 35 to be a member of the CPU to be a part of the long and short term disability. Wolfe, a shop steward, reported Fridley's remarks to about 40 to 45 employees in his department. Wolfe told the employees that to be able to keep their long and short term disability they had to be a member of the CPU.

40 Wolfe testified he learned in January or February, sometime before the election that the CPU was not handling disability. He learned it from distributions handed out at the gates at the plant that the USW was handling it. He testified he did not necessarily know who to believe. Wolfe testified he passed out the USW distributions to his co-workers and let them make the decision for themselves. Wolfe testified there was never a CPU paper saying they were
 45 handling short term disability, rather there was something to the effect that they would resume handling it if they won the election and became the certified collective bargaining representative. Wolfe testified he talked to Mendoza about disability, and Mendoza showed him some documents showing it was through the USW. Wolfe testified he had told USW Official Yoffee of Fridley's remarks and the USW responded with the January or February 2008 distribution to
 50 employees.

The evidence revealed that, as the prior office manager for the USW local, one of

Fridley's functions was to help employees process their supplemental disability claims. The USW was the contractor with the insurance companies for the supplemental disability insurance. The Employer had provided the service of taking payments from employees for the insurance by way of payroll deduction, and providing Fridley with information pertaining to employees claims such as dates of injuries. Fridley testified that, while working for the CPU, she continued to assist employees in processing claims until at least December 1. However, on January 8, 2008, she posted an article on the CPU website stating she was still performing that function. Moreover, Asma's records reveal that Fridley was still seeking information from the Employer to process these claims as late as January 2008, at which point, the Employer denied her request for information.

The Board has held that, in certain circumstances, the threat by a union to terminate health and welfare benefits constitutes objectionable conduct. In *Bell Security*, 308 NLRB 80 (1992), the threat was made by an official of an incumbent union that if the union petitioning for the election won the employees would have no health and welfare benefits for 2-1/2 years until an appeal of the petitioning union's status was ruled on. In finding the conduct objectionable, the Board noted that the employees had reason to believe the incumbent union had the ability to carry out the threat, that the leaflet containing the remark was distributed on the eve of the election so the petitioner did not have the opportunity to respond, and that the outcome was only determined by three votes. See also *Willey's Express, Inc.*, 275 NLRB 631 (1985), where in similar circumstances and objection to an election was sustained.

I do not find the cited cases to be controlling for the circumstances here, accordingly, I overrule Objection 14. First, Fridley's remarks were made in November 2007, and the election was not held until March 12, 2008. The USW was the incumbent union and learned of Fridley's remarks in January and was able to issue a timely response. Moreover, the insurance was issued and controlled by the USW, and aside from her status as office manager for periods of time for both unions, there was no reasonable basis for employees to believe that Fridley had the ability to carry out such a threat. Accordingly, while I do not condone Fridley's conduct, I do not find its rises to the level objectionable conduct concerning the March 12, 2008 election. See, *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).⁷⁴

CONCLUSIONS

Based on the forgoing, I have sustained Intervenor's Objections 1, 7, and 12. Because I have sustained these objections the election must be overturned.⁷⁵ The case is remanded to the Regional Director to hold a new election. The notice for the new election shall include a statement of the reasons for the new election. See *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110, fn. 3 (1998).

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic

⁷⁴ Objection 15, a catch all objection is denied since, the conduct I have found objectionable has been addressed in the objections specifically enumerated as set forth above.

⁷⁵ The remainder of the Intervenor's objections have been denied for the reasons set forth herein, or withdrawn.

5 strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military service may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote on whether they desire to be represented for collective bargaining by the Covington Paperworkers Union Local 675; or the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO; or have no union representation.

15 To ensure all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

25 Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by February 13, 2009. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director of Region 11. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.

35 Dated, Washington, D.C., January 30, 2009

40 _____
Eric M. Fine
Administrative Law Judge