

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MESKER DOOR, INC.

and

Cases 10-CA-35863
10-CA-36270
10-CA-36422

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

and

10-CA-35938
10-CA-36284
10-CA-36372

ROLLIE POWELL, AN INDIVIDUAL

and

10-CA-36363

CECIL HERREN, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

Administrative Law Judge Keltner W. Locke issued a Decision and Recommended Order in this matter on November 13, 2007. The administrative law judge found and concluded that Mesker Door, Inc., herein the Respondent, violated the National Labor Relations Act, herein the Act, by certain conduct including: (1) mid-September 2005 and mid-October 2005 statements during collective bargaining negotiations by Respondent's Attorney and lead negotiator William F. Kaspers, Esq. that the Respondent would withhold raises from employees in the recently certified bargaining unit because the United Steelworkers of America, AFL-CIO, CLC, herein the Union, had filed charges under the Act; (2) Attorney Kaspers' effectuation on Respondent's behalf of a suspension of Rollie Powell, an employee member of the Union's negotiating committee, because Powell had assisted the NLRB field Agent in investigating the charge; and (3) the May 4, 2006 remarks of General Manager George Roth in a plant-wide speech that certain employees should quit their employment rather than continuing to engage in Union and other concerted protected activities.¹ However, the administrative law judge declined to find that certain other remarks during General Manager Roth's May 4, 2006 speech violated the Act. The administrative law judge recommended dismissal of the allegations that the remarks threatened employees that the filing of charges under the Act was futile and threatened employees that the filing of NLRB charges and employees' other protected activities were costing the Respondent money that could have otherwise benefited employees, as alleged in the complaint. Further, the administrative law judge found that a petition of disaffection, signed by only about 17 employees in a 65-employee bargaining unit during its circulation between April 27 and May 4, 2006, but signed by about 18 additional employees in the days immediately following the May 4 speech,

¹ The administrative law judge found that the Respondent committed other violations as well, but the brief will not discuss these other findings, as they have no special bearing on these exceptions.

was untainted by the Respondent's unfair labor practices and therefore furnished a proper basis for the Respondent to withdraw recognition on May 8, 2006.

The General Counsel's exceptions require legal analysis of the prepared remarks which Roth read to the assembled employees on May 4, as the Board's extant precedent requires a conclusion that the remarks unlawfully threatened employees that filing charges with the Board was futile and unlawfully threatened that the filing of charges with the Board and employees' protected activities were costing the Respondent money that could have otherwise benefited employees, as alleged by the complaint.²

The General Counsel's exceptions also present the issue of whether the record demonstrates a causal nexus between the specific unlawful conduct that occurred May 4, 2006 and the flood of signatures on the petition of disaffection during the four days immediately after the speech, tainting those signatures. The remaining of the Counsel for the General Counsel's exceptions address legal conclusions as to the propriety of the withdrawal of recognition and certain unilateral changes; these depend on the Board's answer to the other issues.

This brief will urge the Board to modify the administrative law judge's decision to find (1) that the May 4, 2006 speech contained two unlawful threats in addition to the unlawful inviting of employees to quit rather than persist in protected activities; (2) that the May 4, 2006 violations reasonably tended to cause disaffection from the Union, tainting the post-May 4, 2006 signatures; (3) that the withdrawal of recognition therefore violated the Act; and (4) that the unilateral changes the Respondent effectuated post-withdrawal of recognition therefore also violated the Act.

² These other findings are urged in addition to the administrative law judge's finding that the remarks unlawfully invited employees to quit their employment rather than engage in protected activities.

STATEMENT OF THE ISSUES

I. Did General Manager George Roth's May 4, 2006 remarks violate the Act by threatening employees that filing charges with the Board was futile and by threatening employees that the filing of charges with the Board and employees' protected activities were costing the Respondent money that could have otherwise benefited employees?

II. Did the Respondent's unlawful conduct during the May 4, 2006 speech taint the petition of disaffection?

III. Did the withdrawal of recognition therefore violate the Act?

IV. Did the unilateral changes therefore violate the Act?

This brief will advocate that the Board should answer each of these questions in the affirmative.

STATEMENT OF FACTS

The Respondent manufactures metal doors and door frames at its facility in Huntsville, Alabama. In December 2004, employees commenced a campaign to secure representation by the Union. (Transcript, herein “Tr.” 29-42). The Respondent learned of the campaign in January 2005, and the Union filed charges in Cases 10-CA-35419 and 10-CA-35489, alleging that the Respondent violated Section 8(a)(1) and 8(a)(3) of the Act in opposing the campaign. (Respondent’s Exhibits, herein “R. Exs.” 1A, 1B). The Union won a Board-conducted election in the unit on March 10, 2005, by a vote of 38 to 29.³ During the objections period, the Union and the Respondent entered a non-Board settlement agreement pursuant to which: (1) the Respondent rescinded a discipline it had issued to Union supporter Rollie Powell, (2) the Union amended all allegations, other than as to the discharge of Nathan Vereen, out of its charge in Case 10-CA-35489, and (3) the Respondent agreed not to file any objections to conduct affecting the results of the election. (R. Exs. 1B, 1C; Tr. 40-41). Certification issued March 22, 2005.⁴ (Tr. 1522-23).

On March 23, 2005, the Union filed a charge in Case 10-CA-35540 regarding alleged post-election coercive statements and unilateral changes by the Respondent. (R. Ex. 1D). During hearing on the allegations of Cases 10-CA-35489 and 10-CA-35540 in August 2005, the parties entered an all-party informal Board settlement agreement, which Administrative Law Judge Michael A. Marcionese approved on August 10, 2005. (R. Ex. 1G; Tr. 136-37).

On September 9, 2005, the Union filed the first of the charges consolidated into this proceeding, Case 10-CA-35863. (General Counsel’s Exhibits, herein “G.C. Exs.” 1(a), 1(b)).

³Tr. 29-42. Case 10-RC-15502.

⁴ Respondent and the Union held 22 bargaining sessions following the election certification until May 2006, but did not reach a contract during that time. Tr. pp. 330, 648-49; 678-79.

While this charge was pending initial investigation by the Board's field office, the Respondent's attorney and lead negotiator, William F. Kaspers, Esq., advised the employee members of the Union's negotiating team at bargaining sessions in September and October 2005 that the Respondent would withhold raises from the unit because they had filed the charge. (Administrative Law Judge's Decision, herein "ALJD," 9-13). Attorney Kaspers' statements in this regard constituted unlawful threats, as found by the Administrative Law Judge. (ALJD, pp. 9-13, 50). Additionally, in October 2005, again while the parties were assembled at the bargaining table, Attorney Kaspers effectuated an unlawful suspension of an employee member of the Union negotiating team, Rollie Powell, because of his participation in facilitating the NLRB Agent's investigation in Case 10-CA-35863. (ALJD, pp. 27-38). The Administrative Law Judge's decision herein makes a finding and conclusion that that the suspension was undertaken in violation of Section 8(a)(1), (3), and (4) of the Act. (ALJD, p. 50, lines 32-34).

During December 2005, employee Shawn Vernon⁵ circulated a petition among unit employees stating that the employees did not wish to continue being represented by the Union. (Tr. 1158-67; R. Ex. 7A2). Nineteen employees signed, including one who later equivocated and crossed out his name, but then on further reflection signed again. (R. Ex. 7A2).

On December 15, 2005, the Regional Director for Region Ten of the Board issued an Order Consolidating Cases and Consolidated Complaint in Cases 10-CA-35863 and 10-CA-35938. (G.C. Ex. 1(u)). This Consolidated Complaint alleged, inter alia, the September and October 2005 threats by Respondent's Attorney Kaspers described above and the October 2005 suspension of Rollie Powell that Attorney Kaspers effectuated. (G.C. Ex. 1(u)). On December 29, 2005, the Director noticed the Consolidated Complaint for hearing on February 6, 2006.

⁵ Mr. Vernon's full name is William Shawn Vernon, and it appears as such on the employer's payroll records and formal signings of his name; however the testimony of other employees during the administrative record identified him exclusively as "Shawn."

(G.C. Ex. 1(x)). However, on January 26, 2006, the Director issued an Order indefinitely postponing the scheduled February 6, 2006 hearing. (G.C. Ex. 1(z)).

While the Consolidated Complaint in Cases 10-CA-35863 and 10-CA-35938 was pending for hearing, the certification year expired. Roughly a month later, on April 27, 2006, employee Alan Frazier began circulating another petition of disaffection. (Tr. 1249-50; R. Ex. 7A). Frazier explained that he told several employees that if they signed the petition and rid the Respondent of the Union, the Respondent would give raises. (Tr. 1287-88). Frazier explained that a number of employees, including Robert Galloway, Michael Putnam, James Rose, Michael Parker, and others, whose identities he could not remember, declined his initial solicitations that they sign. (Tr. 1275-76). During the period April 27, 2006 until May 4, 2006, Frazier confined his solicitation of signatures for the petition to break and lunch periods, although he accepted employee signatures during work if they approached him about it. (Tr. 1290). By May 4, 2006, about seventeen unit employees, representing 26% of the unit, had signed the petition. (Tr. 1290, 1697-98; R. Ex. 7B).

On May 4, General Manager George Roth held a plant-wide meeting. Roth read from a prepared text and stated in part:

“Good news! We hit the bonus numbers again last month. The bonus checks for last month will be about \$100.00 per person. ...

... Since interest in the Steelworkers surfaced a little more than a year ago, they have either filed or supported the filing of dozens of allegations with the National Labor Relations Board. The NLRB has yet to find the Company guilty of any of the alleged violations. Admittedly, several of the charges were settled last August – not because the Company had done anything wrong, but instead because it would have cost more to proceed with the defense than it cost to ... end those proceedings.

The only person who wins when charges are filed with the NLRB is the Company’s lawyer. ...

Since the Steelworkers came in a year ago, the Company has paid the Company's lawyer over \$200,000 to protect the Company's interests against the charges that they and others have made or threatened to make. \$200,000 that otherwise could have gone into improving life here in the plant. That's nuts.

The only thing that filing charges with the NLRB does, other than make the Company's lawyer rich, is continue to foster an adversarial us-versus-them attitude. ...

What doesn't work, however, and never will, particularly in competitive times when we're competing against doors made in China, is the adversarial us-versus-them environment that they are attempting to foster with all of the charges they file with the NLRB. That old saying, "a house divided cannot stand" certainly applies to an industrial setting. I'm not saying that the union or the employees who supported it are solely to blame for the adversarial us-versus-them environment. However, it all has to stop, because it's negative, counterproductive, and very detrimental to the long term viability of this operation and this Company.

... I expect that as soon as I finish talking, they will say that I'm all wet and that they know what's best. My idea of what's best is when we can leave the us-versus-them attitude on the sideline and be productive enough that we can share monthly bonus checks of over \$300. We're all in this to make a living and feed our families."

(G.C. Ex. 19; Tr. 816).

Immediately after the conclusion of Mr. Roth's remarks on the afternoon of May 4, 2006, a great sense of urgency overcame Mr. Frazier regarding the need to secure signatures on his petition. He testified as follows:

"I decided I was just going to hit the floor running with it because I had had enough. Everybody else had had enough. It was time to do something. That's our livelihood there and even now I feel like it's been kind of took away from us. And I still don't understand it. There is three or four people that stirred this whole thing up and it's coming to this. And I don't understand it. All I want to do is work and making a living.

And it's like our livelihood has almost been yanked away from us and we don't understand it." (Tr. 1290-91).

Frazier testified concerning the change in attitude which coincided exactly with Mr. Roth's speech. In response to a question as to whether something went off in him after he heard the speech, he explained:

"I knew that in my mind, it was over with. I'm just the type of person who, you know, I am an individual and I have had enough."

(Tr. p. 1291).

The next morning, Friday May 5, 2006, Frazier renewed and redoubled his efforts to get employees to sign the petition. During a flurry of solicitations beginning the morning of May 5, Frazier disregarded his assigned job duties to walk the floor asking for signatures, told several employees they would get wage increases if the petition got rid of the Union (Tr. 1287-88; 1823), promised another employee who was close to the dischargeable attendance limit under Respondent's "points" system that if he signed he would be given three points of grace, (Tr. 1822-23, 1831-32) and revisited numerous employees who had previously declined his entreaties that they sign the petition. (Tr. 1275-76; 1836-37; R. Ex. 7A).

On Monday May 8, Frazier presented the petition to Roth. The petition purported to be signed by 34 of the 65 employees in the unit.⁶ (R. Ex. 7A, 7B; Tr. p. 1480). That afternoon, Respondent withdrew recognition from the Union. (R. Ex. 1T). Respondent then implemented a series of unilateral changes, including a plant-wide thirty cents per hour wage increase effective May 15, with larger increases at that time for certain of the employees; (Tr. p. 970), modification of the attendance policy, awarding all employees 2 ½ points "grace" effective June 6, 2006; (Tr. 975-976; G.C. Ex. 21A, 21B), and altering the bonus system effective July 1, 2006, incorporating profit as a factor. (Tr. 971-74; G.C. Ex. 20). In December 2006, Respondent

⁶ The Administrative Law Judge credited testimony that a 35th employee, Cecil Herren also signed the petition and before May 8, 2006. ALJD, p. 41, lines 43-44. Mr. Herren's signature does not appear on the document though, possibly obfuscated by later markings on the page or else Herren secretly used disappearing ink as Frazier suspected. Tr. 1257.

unilaterally implemented an additional twenty-five cents per hour across the board wage increase. (Tr. 970). These unilateral changes are alleged to be unlawful by paragraphs 21, 22 and 23 of the Third Amended Consolidated Complaint and greater details regarding their specifics are included in the parties' stipulations on the record with accompanying Exhibits. (Tr. pp. 970-76; G.C. Exs. 20, 21A, 21B).

ARGUMENT

I. GENERAL MANAGER ROTH'S MAY 4, 2006 REMARKS VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING THAT FILING CHARGES WITH THE BOARD WOULD BE FUTILE AND THAT THE FILING OF CHARGES AND EMPLOYEES' PROTECTED ACTIVITIES WERE COSTING THE RESPONDENT MONEY THAT WOULD OTHERWISE HAVE BENEFITED EMPLOYEES.

This section will separately discuss each of the threats contained in the May 4, 2006 speech.

A. The Threat of Futility

Statements which communicate that filing charges with the Board is futile violate Section 8(a)(1). 7UP Bottling Co., 261 N.L.R.B. 894, 902 (1982) (employer told employee who had filed Board charges that he was costing him thousands of dollars, and to file all the charges he wants because they won't stick); S.E. Nichols, Inc., 284 N.L.R.B. 556, 584-86 (1987) (employer mocked the employees' resort to the Board calling the charges filed ridiculous, and boasted about how it had only settled cases with the Board because it was less expensive). The remarks of George Roth in his May 4, 2006 speech expressed that filing charges with the Board would be of no use to employees. To wit, Roth advised employees that only the Respondent's Attorney would benefit from NLRB charges being filed, and that the only other effect of the filing of

charges would be fostering an “us-versus-them” attitude, which Roth told the employees was detrimental and “has to stop.”

Specifically, Roth told the employees “the only person who wins when charges are filed with the NLRB is the Company’s lawyer.” Later in his remarks, Roth told the employees that: “the only thing that filing charges with the NLRB does is, other than make the Company’s lawyer rich, is continue to foster an adversarial us-versus-them-attitude.” Roth cautioned employees that “what doesn’t work, however, and never will, particularly in competitive times when we’re competing against doors made in China, is the adversarial us-versus-them environment that that they are attempting to foster with all of the charges they file with the NLRB.” While noting that other factors might also have contributed to such attitudes at the plant, Roth went on to explain that the adversarial us-versus-them attitude “has to stop because it’s negative, counterproductive, and very detrimental to the long term viability of this operation and this Company.”

The complaint alleged that these remarks violated the Act by threatening the employees that filing charges with the Board was futile. In analyzing the remarks, the Administrative Law Judge found it significant that Roth “did not use the word ‘futile’ at all.” (ALJD, p. 15, lines 39-40). The observation is very astute but it is also very irrelevant to the analysis. “Futile” and “futility” are sophisticated words that the Board and reviewing courts use to describe very specific types of federal labor law violations and in other contexts where such elegant terminology is well suited. However, neither “futile” nor “futility” tends to be an ordinary part of the vernacular of a shop floor; rarely, if ever, has anyone actually used the word “futile” or “futility” to communicate what the Board has later found to constitute a “threat of futility.”⁷ The

⁷ During 4th quarter 2007, the Board adopted findings of threats of futility in six (6) cases; each of them involved statements to the effect that a given protected activity, employees securing union representation, would be of no use

essence of a “threat of futility” violation is a communication that some protected activity, such as securing union representation or filing charges with the Board, will be of no practical use or benefit and so it would not be worthwhile to undertake.

Roth’s remarks did exactly that when he said “the only one who wins when charges are filed with the NLRB is the Company’s lawyer.” Notably, at the very moment that Roth uttered these remarks, a complaint was pending against Respondent regarding, among other things, that attorney’s coercive threats at the bargaining table in September and October 2005 that the Respondent was withholding wage increases because of the filing of charges, and the October 2005 suspension of Rollie Powell for assisting the NLRB investigation in Case 10-CA-35863 that the subject attorney effectuated. In the context of his other statements that afternoon, Roth clearly communicated the Respondent’s willingness to pay the Respondent’s attorney, a lawbreaker in his own right as found herein by the administrative law judge, extravagant sums of money to insure that no practical benefit could result to employees from their efforts to have the Board bring Respondent into compliance with the Act.

The administrative law judge as much as confirmed that Roth’s words “do imply that the person filing the charge does not ‘win,’ or benefit from that action” and reasoned that “[a]rguably, an employee could infer that, since a person filing a charge could not ‘win,’ filing a

or practical benefit to employees. In none of these cases did the perpetrator use the word “futile” or “futility.” Sprain Brook Manor Nursing Home, LLC, 351 N.L.R.B. No. 75, slip op. at p. 25 (December 26, 2007) (statements by manager that no one was going to tell him how to run his nursing home constitute threat of futility); Amersino Marketing Group, LLC, 351 N.L.R.B. No. 58, slip op. at p. 11 (November 19, 2007) (statements by manager that he would never accept the union and that the union would come in “over his dead body” constitute threats of futility); Spirit Construction Services, Inc., 351 N.L.R.B. No. 56, slip op. p. 4 (November 16, 2007) (statements by manager that CEO would close operations in the state if employees unionized constitutes threat of futility); Windsor Convalescent Medical Center of North Long Beach, 351 N.L.R.B. No. 44 slip op. at p. 14 (September 30, 2007) (supervisor’s statement that the facility was non-union constituted threatened futility where union was in fact 9(a) representative of the employees); The Earthgrains Company, 351 N.L.R.B. No. 45, slip op. at pp. 5-6 (September 29, 2007) (employer’s statement that employer would not give the facility’s employees a particular retirement plan it had negotiated with the union regarding another facility, even if they unionized, constituted threat of futility); Internet Stevensville, 350 N.L.R.B. No. 94, slip op. at p. 1, n. 4 para. d, p. 44 (September 17, 2007) (supervisor’s statement that plant was non-union and was going to remain that way constituted threat of futility).

charge was “futile.” (ALJD, p. 16, lines 19-21). However, the administrative law judge declined to find a violation, postulating that “[s]uch reasoning requires drawing an inference from an implication and thus is quite tenuous.”⁸ (ALJD, p. 16, lines 23-24). The administrative law judge additionally found that the statement was an expression of “opinion” protected by 8(c) of the Act regardless of whether the opinion was correct. (ALJD, p. 16, lines 24-26).⁹ In the 7UP Bottling Co. and S.E. Nichols cases, employer representatives similarly expressed that pending NLRB charges “would not stick,” similarly boasted that they had entered previous settlements only because it was cheap, and similarly communicated that the Board’s efforts at effectuating the Act would be no match for their fancy and high-priced attorneys. The Board found that these remarks were threats of futility, not 8(c) expressions of opinion. 7UP Bottling Co., 261 N.L.R.B. at 902; S.E. Nichols, 284 N.L.R.B. at 584-86. The same result is warranted here.

One factor that exacerbates the coercive character of Roth’s remarks is that the attorney portrayed as the sole beneficiary of the filing of charges with the NLRB, Mr. Kaspers, was the very perpetrator of the majority of unfair labor practices plead in the complaint already pending at that time. Attorney Kaspers’ personal involvement in perpetrating the unfair labor practices alleged in the then pending complaint, and the subject of findings herein, makes it all the more clear that Roth’s remarks disclosed a willingness by the Respondent to continue paying its attorney to commit violations and to deploy threats and retaliation in the hopes of coercing employees from accessing the Board. Whereas in 7UP Bottling Co. and S.E. Nichols, the employers portrayed their respective counsel as adept at deflecting any efforts by the Board to

⁸ It really is not such a complicated feat of logic to proceed from “the only results that action x will accomplish is undesirable results a and b” to “action x will not do any good, action x is a waste of time.” The Board’s futility case law generally and the futility of filing charges with the Board case law in particular are premised on a presumption that workers covered by the Act possess the basic ability to discern ordinary meaning from plainly spoken words.

⁹ The Administrative Law Judge did not examine whether Roth explicitly deployed the word “opinion” in reaching this conclusion.

effectuate the Act, there was no indication in either of those cases that the attorneys themselves perpetrated any violations.

Roth's remarks that only Respondent's attorney will benefit from the filing of the charges framed an unsavory choice for employees between accepting Attorney Kaspers' violations of their Section 7 rights, or filing charges on the point with it being a known certainty that the Respondent would pay him even more to concoct defenses to his conduct. Roth's remarks advised that the Respondent had already paid \$200,000 to its attorney and that the money could have been used instead to improve life at the plant. Under these circumstances, the clear message was that the employees would be powerless to champion their Section 7 rights before the Board against the might of the highly paid attorney, and that the sole effect on their own well being would be diminished quality of life at the plant.

Roth's remarks were as direct a way as any of saying that going to the NLRB would not do employees any good. This is the essence of the violation and his words were far more comprehensible and apt to convince the factory employees in his audience than if he would have urbanely uttered something to the effect of "our attorney will stridently counteract any efforts to secure compliance with the Act, rendering them an exercise in futility."

The administrative law judge's suggestion that Roth's remarks actually gave encouragement to file charges by implying that even meritless charges might garner a "nuisance value" payment from the Respondent is a tortured reading of the speech. (ALJD, p. 16, lines 10-16). The administrative law judge reached his conclusion relying on an assumption that "[a] typical employee, without much knowledge of the Act, might hesitate before filing a charge, suspecting that it would be a waste of his time, or in other words futile." (ALJD, p. 16, lines 13-14). Thus, the administrative law judge presupposed that employees think of resorting to the

Board to remedy violations of the Act as a waste of time and then he proceeded to examine whether the remarks reinforced that expectation of futility or disputed it. It is more appropriate to presuppose that employees would expect the Board to evaluate allegations objectively and to rectify any instances of unlawful conduct born out by credible evidence. However, Roth's remarks here disabused employees of this notion by assuring them that the Respondent would gladly pay more to the coffers of its attorney, whom the Administrative Law Judge herein has found repeatedly violated the Act during the Fall of 2005, so that only that attorney would "win."

The remarks vilify those who have filed and supported charges, blaming them for the enrichment of Respondent's counsel, rather than the \$200,000 paid to him being spent toward "improving life here in the plant." The remarks plainly communicate that the charges will not do employees any good or impart any practical benefit to anyone, other than the very perpetrator of numerous violations that were the subject of the then pending Consolidated Complaint, Attorney Kaspers. The Board should reverse the Administrative Law Judge's recommended dismissal of paragraph 13 of the Third Amended Consolidated Complaint, and it should find that Roth's remarks did threaten that the filing of charges with the Board was futile in violation of Section 8(a)(1) of the Act. 7UP Bottling Co., 261 N.L.R.B. at 902; S.E. Nichols, Inc., 284 N.L.R.B. at 584-86.

B. The Threat that the Filing of Charges and Employees' Protected Activities were Costing the Respondent Money that Would otherwise have Benefited Employees

The Board has found unlawful employer statements that imply that the employees would benefit financially from fewer or no charges filed with the Board.¹⁰ Such unlawful expressions

¹⁰ See, e.g., RTP Co., 334 N.L.R.B. 466 (2001) (employer letter to employees suggested that it was the union's prior unfair labor practice charge that prevented their increase in pay in violation of Section 8(a)(1)); Great Western

serve to impress upon employees that union charge filing reduces employee benefits. An employer statement that the employer was not getting any money from the charges filed, the employees were not getting any money, only the lawyers were getting money violated Section 8(a)(1) because it unlawfully conveyed the message that the charges were costing the employer money that would have gone to the employees.¹¹

Respondent offended these principles in its May 4 speech. Mr. Roth said that the Union has filed or supported dozens of charges and the Board has yet to find the Respondent guilty; that Respondent settled several of the charges, not because it did anything wrong, but because it was less expensive; and that the only person who wins when charges are filed is the company's lawyer. Roth stated that it is paying the lawyer \$200,000 that could go to improving life at the plant. Roth added that what doesn't work is the adversarial us-versus-them environment that "they" (the Union adherents) are attempting to foster with all of the Board charges, and that what is best is when we can leave the us-versus-them attitude and be productive enough to share monthly bonus checks of over \$300. This language clearly implies that the charges filed and supported by the Union are keeping the employees from monthly bonus checks of over \$300, three times the amount that Roth had announced at the May 4 meeting. Thus, Roth's statements convey the message that filing charges costs the Respondent money that could have been used to benefit the employees, in violation of Section 8(a)(1).

Produce, 299 N.L.R.B. 1004 (1990); Davis Electric Wallingford Corp., 318 N.L.R.B. 375, 382 (1995) (company president told employees that the union rep. was costing the company \$20,000 in legal fees with all the charges he was filing and to "wait until next contract time and see what happens"); M.K. Morse, 302 N.L.R.B. 924, 930 (1991) (company vice-president told employees that the cost of filing NLRB charges does not come out of his pocket but rather "it comes out of your raises and future incomes").

¹¹ See Great Western Produce, 299 N.L.R.B. at 1023 (reference to union charge filing as "money lost to the lawyers is essentially a statement saying that the unionization process was costing the employees money, for it would have gone to them had they not begun the process").

The administrative law judge found Roth's remarks to be "not unlike" a memorandum considered by the Board in Children's Center for Behavioral Development, 347 N.L.R.B. No. 3 (2006). In Children's Center for Behavioral Development, the Board considered allegations that the memorandum denigrated the union by blaming the union for interfering with the employer's relationship with United Way, a funding provider, by stating its disagreement with the union's representations to employees that a contract was in effect, and by stating that the union's decision to litigate certain matters were costing the employer money it could not afford. 347 N.L.R.B. No. 3, slip op., at p. 1. Here, the complaint alleges that the Roth's remarks threatened employees that their working conditions were diminished because of the filing of NLRB charges and the Union activity generally; there is no denigration allegation. The memorandum in Children's Center for Behavioral Development contained no indication that protected activity had influenced prevailing working conditions in any way. Thus, Roth's remarks were unlike that memorandum in that his remarks threatened employees that their working conditions or "life in the plant" were diminished because of the charge filing and other protected activities and implied that the specific financial benefit of \$300 bonus checks instead of \$100 bonus checks was dependent on "stopping" the us-versus-them attitude allegedly fostered by employees' filing of NLRB charges. The memorandum in Children's Center for Behavioral Development gave no such indications. To be sure, merely advising employees that an employer will retain counsel to represent it in matters pending before the Board, is an expression protected by Section 8(c). Here, however, the Respondent's statements went beyond this by telling the employees that they were paying for it, and the context exacerbates the matter as the person identified as the recipient of the \$200,000 that otherwise could have improved life in the plant was the perpetrator of numerous violations.

II. THE RECORD PROVIDES SPECIFIC PROOF OF THE CAUSAL RELATIONSHIP BETWEEN THE MAY 4, 2006 UNLAWFUL STATEMENTS IN A PLANT WIDE SPEECH AND EMPLOYEES' PRECIPITOUS SIGNINGS OF THE PETITION OF DISAFFECTION IMMEDIATELY THEREAFTER, DURING THE TIME PERIOD FROM MAY 5 THROUGH MAY 8, 2006.

“The Board has long held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union.” RTP Co., 334 N.L.R.B. 466, 468 (2001) (citing Olson Bodies, 206 N.L.R.B. 779, 780 (1973)). The test is an objective one rather than a subjective inquiry into the reasons why any particular employee came to reject the union. Id.; Saint Gobain Abrasives, Inc., 342 N.L.R.B. No. 39 slip op. at 1 fn. 2 (2004); Wire Products Mfg. Corp., 326 N.L.R.B. 625, 627 fn. 13 (1998); Hearst Corp., 281 N.L.R.B. 764, 765 (1986), *enfd.* 837 F.2d 1088 (4th Cir. 1988). The Board considers four (4) objective factors to determine if particular unremedied unfair labor practices have a likely nexus to the disaffection: 1) the length of time between the unfair labor practices and the withdrawal of recognition; 2) the nature of the violations; 3) the tendency of the violations to cause employee disaffection; and 4) the effect of the unlawful conduct on employees' morale, organizational activities and membership in the union.¹² Although the Board's has deployed the terms “causing” or “specific cause” at times without explicitly noting the standard is an objective inquiry into the likelihood of causation,¹³ numerous cases reaffirm

¹² Master Slack Corp., 271 NLRB 78, 81 (1984).

¹³ This analysis is akin to the Board's assessment of coercive statements, where statements are considered coercive if it reasonably tends to coerce and there is no inquiry as to the intent of the speaker or the reaction of any particular listener. Scripps Memorial Hospital Encinitas, 347 N.L.R.B.No. 4 (2006).

that the four factors are analyzed objectively, and testimony of individual employees as to why they choose to reject the union is irrelevant.¹⁴

Here copious objective evidence demonstrates that the speech itself, and its unlawful content in particular, have a close nexus to the petition of disaffection. The petition began circulating on April 27, a week prior to the speech. By May 4, the day of the speech, the petition contained only 17 signatures, roughly half of the signatures needed to decertify the Union.¹⁵ The petition continued to circulate after Roth's speech, garnering an additional 17 to 18 signatures. When the petition was finally presented to the Employer only four days later, on May 8, it purported to contain 34 signatures, a bare majority of the 65 employee unit. Respondent immediately notified the Union that it was withdrawing recognition and implemented substantial raises shortly thereafter.

With respect to the first factor, length of time, the Board has found a temporal proximity between unremedied unfair labor practices and the disaffection that led to the withdrawal of recognition where the unfair labor practices, the anti union petition, and the withdrawal of recognition all occurred within two months of each other.¹⁶ Here, Roth's May 4 unlawful statements were contemporaneous with the renewed circulation of the decertification petition and particularly noteworthy is that the signatures only comprised about 26 percent of the unit before the speech, despite a week of pre-speech circulation. Thus, the close temporal proximity between Respondent's unfair labor practices, the decertification petition, and the withdrawal of

¹⁴ Saint Gobain Abrasives, Inc., 342 N.L.R.B. No. 39 slip op. at 1 fn. 2 (2004); Wire Products Mfg. Corp., 326 N.L.R.B. at 627 fn. 13; Hearst Corp., 281 N.L.R.B. at 765.

¹⁵ In a 65 employee unit such as this, 32 signatures would not show a loss of support by the union, but 33 signatures would. Thus, 16.5 was half the number of untainted signatures that would be necessary to facilitate a lawful withdrawal of recognition.

¹⁶ RTP Co., 334 NLRB at 468 (2001); Fruehauf Trailer Services, Inc., 335 NLRB 393, 394 (2001).

recognition, strongly favor finding a causal nexus between Roth's unlawful May 4 comments and a purported majority of employees signing onto the petition.

With respect to the second factor, the nature of the violations, Roth's speech (1) invited employees to quit their employment rather than engage in protected activities; (2) conveyed the unlawful message that the charges filed and supported by the Union were futile; and (3) communicated that the charges and employees' adherence to the Union also cost Respondent money that could have gone to benefit the employees. This message, conveyed to all the employees, put the employees on notice that outspoken Union activists were persona non gratis who should "leave the rest of us the hell alone," stated that the Union's efforts to secure vindication of Section 7 rights through the Board's processes would be frustrated by the Respondent's high priced attorney; and asserted that it was the Union charges that were preventing the employees from receiving benefits, and that the employees would be better off without union representation.¹⁷ Such a widespread message, conveyed to all employees, would reasonably tend to have a lasting negative effect on employees and their relationship with the Union.¹⁸

Employees who heard their co-workers publicly told that they were not wanted because of their Union and charge filing activities, would be naturally hesitant to refrain from signing a petition of disaffection that they reasonably expected the Respondent would ultimately view. The administrative law judge's reasoning that telling employees to choose between filing charges and working for the Respondent will have little effect on employees' morale, organizational activities, or union membership more generally (ALJD p. 48, lines 26-38) is an unsound

¹⁷ See RTP Co., 334 NLRB at 469 (letter sent by employer suggested that it was union's fault the employees did not receive an annual raise and conveyed to employees they would receive more without the union).

¹⁸ Id.

sylllogism, which ignores the dependent relationship between the free exercise of any Section 7 right and the need to have access to the Board's processes to vindicate the right. Hostility toward the filing of charges with the Board strikes at the very premise of Section 7, and any employee witnessing the excoriation of a fellow worker for exercising THAT right would surely have diminished expectation that his employer would respect free exercise of less central rights, such as the right to refrain signing a petition of disaffection. If one can not freely vindicate rights by resort to the Board, then the "rights" are illusory. That a number of employees declined to sign the petition before the speech, but then added their signatures to the petition after hearing the remark, reaffirms the notion that such statements would tend to cause disaffection. The violation found by the administrative law judge has a nexus to the disaffection under factor two of the Master Slack test.

The other violations within the speech urged herein on exceptions similarly demonstrate a causal nexus to the disaffection under factor two. The impact of Roth's unlawful speech is underscored by the conduct of the employee who circulated the petition. Immediately after hearing the speech, that employee was emboldened to redouble his efforts to get signatures on the anti-union petition. He explained that on hearing the speech, it struck him that his "livelihood" was affected, a conclusion that flows directly from coercive statements which communicated that the charge filing and protected activities of co-workers have diverted funds to the Respondent attorney instead of toward improving life at the plant. The nature of these Employer violations thus favors finding a causal nexus between Roth's unlawful conduct and the loss of employee support for the Union.

With respect to the third factor, Roth's speech reasonably tended to cause employee disaffection from the Union.¹⁹ Whereas only about 17 employees signed the petition during its first week of circulation, approximately 18 additional employees signed the decertification petition within the four day period following the speech.²⁰ The last employee to sign before the withdrawal of recognition, Ryan Jones, explained that he believed the Union was trying to help employees by representing them in negotiations, but he finally decided to sign when Frazier promised him three attendance points in addition to wage increases Frazier had earlier promised. Frazier, the solicitor, confirmed that he told several employees that wage increases would ensue if enough employees signed the petition. Such a promise made before the Employer's unlawful speech could have been disregarded as mere puffery. However, such a promise would be bolstered and validated when made after the Employer's speech which carried the same message. Thus, Frazier's promise of more money without the Union, supported by Roth's unlawful speech expressing the same message, would reasonably tend to cause those employees who signed the petition after the speech to become alienated and disaffected from the Union. The Board has found that where, as here, the employer accuses the union of preventing benefits and improvements to the plant, employees become alienated from the Union and there is a negative impact on Union support.²¹

With respect to the fourth factor, unfair labor practices that convey a message that employees will financially benefit if they abandon the Union, and that humiliate employees by

¹⁹ See Wire Products Mfg. Corp., 326 N.L.R.B. at 627 (reasonable to infer that violations contributed to employee disaffection).

²⁰ It took an entire week for that many employees to sign the petition prior to the speech.

²¹ See Id.

inviting them to go work somewhere else and “leave us the hell alone” because they support the Union have a negative impact on organizational activities.²²

Analyzing Roth's speech under all four factors, there is a causal connection between the unlawful speech and the contemporaneous decertification petition on which Respondent relied to withdraw recognition. The overall message of these violations was then repeated by Frazier while soliciting signatures with the full force of the Employer's unlawful speech behind him. Thus it is reasonable to infer that the Employer's unlawful speech contributed to the employee disaffection expressed in the petition. Respondent therefore could not rely on the decertification petition to withdraw recognition from the Union on May 8.

III. THE WITHDRAWAL OF RECOGNITION VIOLATED SECTION 8(a)(5) OF THE ACT

Where, as here, a causal nexus exists between an employer's unlawful conduct and a union's loss of majority support, the employer is not privileged to withdraw recognition, and Respondent's conduct of doing so on May 8, 2006, therefore violated Section 8(a)(5) of the Act. RTP Co., 334 N.L.R.B. at 468.

IV. THE UNILATERAL CHANGES VIOLATED SECTION 8(a)(5) OF THE ACT

The parties stipulated that the Respondent implemented unilaterally certain changes to employees' pay, bonus plan, and attendance points system following the withdrawal of recognition. The Respondent provided the Union neither advanced notice of these changes nor opportunity to bargain over them, and in fact the changes occurred at a time when the

²² See Fruehauf Trailer Services, Inc., 335 N.L.R.B. at 394-95.

Respondent had withdrawn recognition and was refusing to recognize the Union. Because an employer may not make changes to represented employees' terms and conditions of employment without first providing the bargaining representative notice and an opportunity for bargaining regarding changes to terms and conditions of employment, this conduct violated the Act.

CONCLUSION

The Board should answer each of the five questions listed in the Issues Presented Section affirmatively. The Board should find and conclude:

1. That George Roth's May 4, 2006 remarks violated Section 8(a)(1) of the Act by threatening employees that filing charges with the Board was futile and that the filing of NLRB charges and employees' protected activities were costing the Respondent money that otherwise could have benefited employees.
2. That the May 4, 2006 unlawful conduct tainted the approximately 18 signatures on the petition of disaffection gathered only after the speech.
3. That the May 8, 2006 withdrawal of recognition violated Section 8(a)(5) of the Act.
4. That the post May 8, 2006 unilateral changes violated Section 8(a)(5) of the Act.

The Board should appropriately modify the Administrative Law Judge's recommended Order.

Respectfully submitted

A handwritten signature in black ink that reads "John D. Doyle, Jr." with a stylized flourish at the end.

John D. Doyle, Jr.
Counsel for the General Counsel

Birmingham, Alabama
January 7, 2008

STATEMENT OF SERVICE

I, John D. Doyle, Jr., Counsel for the General Counsel, hereby affirm that I have accomplished, as indicated below, service of the foregoing Counsel for General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge upon the following parties by the methods indicated:

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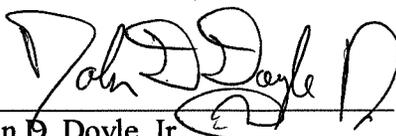
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