

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

METROPOLITAN REGIONAL COUNCIL OF
CARPENTERS, SOUTHEASTERN
PENNSYLVANIA, STATE OF DELAWARE,
AND EASTERN SHORE OF MARYLAND,
AND ITS AFFILIATED LOCAL,
CARPENTERS UNION LOCAL 2012

and

Case 4-CB-10520

FORCINE CONCRETE & CONSTRUCTION
CO., INC.

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS**

Date: June 14, 2011

Respectfully submitted,



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I. INTRODUCTION

Judge Arthur J. Amchan issued his Decision on May 18, 2011. He concluded that the Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania, State of Delaware, and Eastern Shore of Maryland (the Union) restrained and coerced the employees of Forcine Concrete & Construction Company, Inc. (Forcine) when four Union agents trespassed onto a construction site where the employees were working, interrupted their work, and interrogated them concerning their immigration status. Judge Amchan further found that the Union's agents posed as inspectors, bullied the employees and videotaped the interrogations, in "a very intimidating manner." (ALJD p. 3, lines 15-16) In addition, Judge Amchan noted that the Union ordered the unwitting employees to retrieve documentation showing they were legally in the United States and giving them 30 minutes to do so, and found that this further required employees to stop working. (ALJD p. 3, line 30-34) Notwithstanding these findings, Judge Amchan concluded that the Union did not violate Section 8(b)(1)(A) of the Act, because (by his reasoning) the coerced employees were not faced with a choice of whether to support, or to refrain from supporting, the Union. He recommended dismissal of the Complaint.

Judge Amchan cited no case support for his proposition that an employee must be faced with a choice in order to be coerced under Section 8(b)(1)(A) of the Act and misapplied case law cited in his Decision which supported the opposite result from the one he reached. Accordingly, Counsel for the Acting General Counsel respectfully requests that the Board reverse the Decision and find that the Union violated Section 8(b)(1)(A) as alleged in the Complaint.

II. PROCEDURAL HISTORY

Forcine filed the charge in this proceeding on July 28, 2010. Complaint issued on January 20, 2011. The Complaint alleges that the Union violated Section 8(b)(1)(A) by its June 4, 2010 conduct on the aforementioned job site and by posting videotape of this site visit on the Internet. (General Counsel's Exhibit (GX) 1) The parties stipulated to a number of facts and other matters. (Joint Exhibit (JX) 1) Judge Amchan held the hearing in Philadelphia, Pennsylvania on March 28, 2011.

III. ISSUE

The issue here is whether the Judge erred by concluding that the Union's coercive conduct did not violate the Act because the coerced employees were not presented with a choice as to whether to support the Union or not.

IV. STATEMENT OF FACTS

As Judge Amchan found, the Union launched a salting campaign aimed at placing some of its members, business agents or organizers, with Forcine, a nonunion concrete construction company doing business within the Union's jurisdiction. The salting campaign came to include an elaborately planned and coordinated intrusion onto a construction site where Forcine was working.¹ (Transcript (T) 27-29, 31, 37-38) That plan was put into effect on June 4, 2010.

On that day, Union agents Robert Burns, Michael Griffin, Richard Rivera, and William Dyken walked onto the site unannounced, uninvited and unauthorized. They wore matching

¹ Forcine was a subcontractor for Whiting-Turner, the general contractor. The project was the construction of an assisted living facility for Presbyterian Inspired Living facility. (JX 2)

“uniforms” -- blue nondescript polo shirts, matching khaki pants, and matching white nondescript hardhats. (ALJD p. 2, lines 40-41) They purposefully concealed their true identity and conveyed the appearance and authority of official investigators. Rivera, who speaks Spanish fluently, videotaped the event and served as the narrator and translator. Dyken was the chief Union spokesperson.

The video (JX 2) opens with Rivera’s announcement that the Union agents were at the Whiting-Turner job site. It shows the agents climbing a ladder to the second deck of the project where some 12 to 14 of Forcine’s employees were preparing rebar tension fittings for a concrete pour. The Union representatives did not identify themselves or mention the Union or unions. (ALJD p. 3, lines 13-14) They interrogated employees in a very intimidating manner. The Union agents bullied the employees and prevented them from working. (ALJD p. 3, lines 15-19)

Forcine’s employees repeatedly tried to escape interrogation. One badgered employee was visibly shaken.² Each time the employees tried to move away and resume work, the Union’s agents prevented them. At one point, Dyken said to employees, “Come here fellas. We don’t want anybody to walk away.” At another point, he told employees, “Fellas, we’re not done.” And, again, “We’re not through.”

Burns interrogated Forcine’s employees in furtherance of the Union’s salting campaign. He sought to learn when the employees were hired, who hired them and how they were hired. Burns planned to use the information he obtained during the intrusion to support his unfair labor

² This employee is shown biting his nails, catching his words, and asking for a drink of water.

practice charge against Forcine in Case 4-CA-37560. (T 43) Burns submitted the video to the Region in an effort to show that Forcine had recently hired nonunion employees, rather than Union applicants who applied earlier. (ALJD p. 3, lines 36-38)

Throughout its intrusion onto the site, the Union's agents intentionally dodged identifying themselves.³ One Forcine employee is heard asking if the agents were from OSHA, to which Dyken replied, "No, we are not from OSHA." An employee is heard saying that he will get his boss, but Dyken responded: "No, we want to talk to you guys." Forcine's Safety Facilitator/Crane Operator Thomas Romano repeatedly asked the Union agents for identification, but to no avail. Whiting-Turner's Project Manager Charles "Chip" Cinamella also asked the Union agents for identification. The first time Cinamella asked, Dyken angrily told him: "I'm not getting interrogated. We're going to finish this." (JX 2) Conversely, the Union agents relentlessly demanded identification from the employees. They specifically demanded proof of the employees' legal immigration status. When some employees could not readily produce identification, the Union agents threatened to return in a half-hour and ordered that employees present proper identification at that time or face unspecified reprisal. (JX 2) As Judge Amchan observed, this would have required some employees to stop working and leave the second floor to obtain such papers, if they had them. (ALJD p. 3, line 32-34)

After questioning employees on the deck, the Union's agents confronted additional employees on the ground, again disrupting the employees' work. The Union agents surrounded

³ Of course, their identity is known now, and would have become known to employees at least by the Union's public broadcast of its conduct, distribution of the video, and the public documents and hearing in this case.

one particular employee until he fully answered their questions. Ultimately, the Union's agents coaxed some employees to give the sense that they were undocumented workers. At this, Dyken exclaimed, "This is a blatant violation." He directed his colleague Griffin to write down the names, phone numbers, and addresses of Forcine's employees. (Dyken himself is shown with a pad and pen). Dyken proclaimed to employees: "We're going to need your name and phone number. We're going to need you to testify."

At ground level, when Cinamella again asked the agents for identification, Burns jabbed his finger at Cinamella in the presence of employees and angrily told him, "I am not going to tell you again. Don't interfere with our investigation." (JX 2, T 31) The videotape ends with Rivera asking Cinamella, "Now that you know Forcine carries illegal workers, what is your next step?" Cinamella walked away without answering.⁴

Following the Union's June 4 intrusion, Burns distributed copies of the videotape to the Board Agent investigating Case 4-CA-37560 and to certain elected public officials. There is no evidence that the Union ever brought the video or the information it possessed to the attention of federal immigration authorities. Union agent Michael Tapken, Assistant to the Union's Executive Secretary-Treasurer Edward Coryell, edited the long-form video and posted on YouTube his edited version, interspersed with written editorial comments. The editorial comments include a request for viewers to pressure Forcine by calling its customer Presbyterian Inspired Living. (JX 3)

⁴ According to Burns, since this June 4 incident, Union agents have visited other sites involving other employers and conducted similar investigations. (T 30)

The YouTube video, which runs for 4 minutes, 24 seconds, had received 28,961 “views” as of March 9, 2011, as well as more than 211 public comments, many of which were vitriolic. (JX 3, GX 4). Carpenters Local 2012 (Local 2012) President John Brown, an agent of both Local 2012 and the Union, linked the YouTube video to Local 2012’s Facebook page.

V. THE JUDGE’S DECISION

As noted above, Judge Amchan described in some detail the Union’s misconduct at the job site. He concluded that such conduct restrained and coerced Forcine’s employees:

“The [Union’s] interrogations of Forcine’s employees could only have been calculated to discourage them from working for Forcine and had a reasonable tendency to do so. Regardless of whether or not Forcine’s employees were in the United States legally, the conduct of Respondent had a reasonable tendency to restrain them from continuing their employment with Forcine.” (ALJD p. 5, lines 12-15)

Nevertheless, Judge Amchan did not find a violation of the Act, because (in his view) Forcine’s employees were not exercising any right guaranteed in Section 7 of the Act when the Union confronted them. He acknowledged the Section 7 right of employees to refrain from union activity, but he deemed it insufficient in these circumstances to support an 8(b)(1)(A) violation, because Forcine’s employees were not confronted with a “choice between engaging in protected activity or not.” (ALJD p. 5, lines 16-17) He cited no case authority for this requirement and misapplied the cases which support finding a violation.

VI. CONTRARY TO THE JUDGE'S FINDING, RESPONDENTS

VIOLATED 8(b)(1)(A)

Judge Amchan's finding that the Union's "interrogations of Forcine's employees could only have been calculated to discourage them from working for Forcine and had a reasonable tendency to ... restrain them from continuing their employment with Forcine" should have been enough to find a violation. See *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740, 752 (2004) (the Board upheld an Administrative Law Judge's finding that the union violated Section 8(b)(1)(A) merely by interfering with an employee's Section 7 right to carry out his job free of union interference). In opposition to this precedent, and misinterpreting its essential holding, Judge Amchan imposed an additional element, namely that the coerced employees be confronted with "a choice between engaging in protected activity or not." Contrary to the Judge's analysis, it is sufficient that the Union's coercive conduct had a tendency to restrain Forcine's employees in the exercise of their Section 7 right to work free from Union interference, especially since the Union employed its coercive conduct in an effort to organize the Employer.

As to the facts, Judge Amchan correctly listed almost all of the coercive parts. However, he omitted certain indisputable facts that would have painted an even more accurate and outrageous picture. Specifically, the Judge omitted how the Union agents bullied those who sought to learn their identity (most notably, the Whiting-Turner project manager); wrote the names, addresses, and phone numbers of employees being interrogated on a notepad; badgered at least one employee to the point of tears; created a human barrier around employees to prevent them from escaping their interrogations; and intentionally concealed their identity. (See

Exception 1) It is respectfully submitted that the Board consider all of these facts in order to fully appreciate the severity of the Union's misconduct.

As to the applicable law, the Judge misconstrues the employees' Section 7 rights involved here. (*See Exceptions 2 & 3*) As stated above, Section 7 grants employees the basic right to carry out work functions free of union interference. *Electrical Workers Local 98 (MCF Services)*, supra at 752; *Electrical Workers Local 98 (Tri-M Group, LLC)*, 350 NLRB 1104, 1105, 08 (2007); *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059, 1060 (2003). This construction of the Act is consistent with the Congressional intent behind Section 8(b)(1)(A). When Congress enacted this provision in 1947, it was most expressly concerned about situations such as the one in the instant case -- union coercion during organizing campaigns involving nonunion employees. *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 286 (1960); *Randell Warehouse of Arizona (Randell II)*, 347 NLRB 591, 595 (2006) (photographing employees engaged in protected concerted activities, absent proper justification, violates the Act because it has a tendency to intimidate). Congress sought to ensure that strikes and other organizational activities were carried on by labor organizations using persuasion and propaganda, not by physical force or by threats of force or economic reprisal. *Furniture Workers Local 140 (Brooklyn Spring Corp.)*, 113 NLRB 815 (1955) (Section 8(b)(1)(A) violated when nonunion, non-striking employees refused to stop working and were pushed into cars bound for the union hall); *Painters District Council No. 6 (The Higbee Co.)*, 97 NLRB 654, 665 (1951). Accordingly, Section 8(b)(1)(A) outlaws such restraint and coercion as would prevent people from going to work if they wished to work.

Judge Amchan particularly misread the significance of the *Local 98* cases to the present case. In *Electrical Workers Local 98 (MCF)*, Judge Alemán, in a Decision adopted by the Board, wrote: “Clearly, the right of an employee to carry out his job functions free of union interference, restraint and coercion is no less protected than the statutory right of employees to cross a picket line without similar union interference.” 342 NLRB 740 at 752; See also, *Longshoremen’s & Warehousemen’s Union Local 6 (Sunset Line & Twine Co.)*, 79 NLRB 1487, 1505 fn. 27 (1948). Judge Amchan overlooked this fundamental principle. Instead, he attempted to distinguish *Local 98 (MCF)* from the present case by suggesting that the coerced employee in *Local 98 (MCF)*, apparently in contrast to the employees in our case, “would have reasonably connected the Union’s conduct to its solicitation of [the involved employee’s] support.” However, this is not a necessary factor for finding a violation and is not mentioned at all in Judge Alemán’s rationale. In fact, the basic principle enunciated by Judge Alemán and adopted by the Board does not depend on the existence of an open labor dispute or on the choice of any employee.

Judge Amchan also misconstrued the rationale for finding an 8(b)(1)(A) violation in *Local 98 (Tri-M)*, supra. In that case, Judge Buxbaum, affirmed by the Board, concluded that Local 98 violated Section 8(b)(1)(A) by blocking for a 30 minute period an employee who was attempting to perform his job function. Consistent with Judge Alemán’s rationale in the prior Local 98 case, Judge Buxbaum found an 8(b)(1)(A) violation merely because the union interfered with the nonunion employee’s desire to complete his job function. Nowhere in Judge Buxbaum’s Decision is the inference ascribed to it by Judge Amchan -- that the union (Local 98)

“coerced the employee into assisting it in its labor dispute with his employer.” (ALJD p. 5, lines 8-9)

Notwithstanding his misreading of the Local 98 cases, Judge Amchan acknowledged that employees have a protected right to work for a nonunion employer. (ALJD, p. 4, lines 27-28) What he missed was that this protection comes from Section 7 and is precisely the right being exercised by Forcine employees in the instant case. While exercising this right, the Forcine employees were caught in the crosshairs of the Union’s organizing campaign against their employer.⁵

Furthermore, contrary to Judge Amchan’s reasoning, there is no requirement that employees affirmatively assert a Section 7 right before they are entitled to protection from coercion. Indeed, many contexts indicate otherwise. See e.g., *Carpenters (Society Hill Towers Owner’s Assn)*, 335 NLRB 814, 815 (2001); *Teamsters Local 890 (Basic Vegetable Products)*, 335 NLRB 686, 687 (2001) (a union’s photographing or videotaping license plates and/or occupants of vehicles crossing picket line, coupled with abusive remarks or other conduct has reasonable tendency to instill fear of retribution in the minds of replacement or crossover employees); *Culinary Workers Local 226 (Casino Royale)*, 323 NLRB at 148 (1997); *Soft Drink Workers Local 812 (Sound Dist. Corp.)*, 307 NLRB 1267 (1992) (union violated the Act by

⁵ The Supreme Court long ago observed that the Act was “designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.” *Electrical Workers Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB 101, 106 (2004), quoting *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 40 (1954).

placing nails on the road to damage cars driving into employer's facility); *Flatbush Manor Care Center*, 287 NLRB 457, 458 (1987) (union's pre-election payments to employees, including those who had no contacts with the union, violated Section 8(b)(1)(A)); *Plumbers Local 250 (Murphy Bros.)*, 311 NLRB 491 (1993) (Union's request that employer lay off otherwise legitimately employed union travelers violated 8(b)(1)(A)).

In the examples from the cases cited above, there is no evidence that the coerced employees were confronted with a choice, nor is there such discussion in the analysis. In cases involving violent acts, such as when a union is placing nails on the road in *Soft Drink Workers Local 812*, the affected employees are not required to make a choice. With respect to the union travelers in *Plumbers Local 250*, they were members of other local unions and had no reason to believe that a choice was demanded of them. Notwithstanding the absence of a "choice" in these case, Section 8(b)(1)(A) violations were proven. The union's bad act was the critical factor, not the employee's supposed dilemma.

Indeed, the law does not require that an employee even be the target of coercion, let alone that he be confronted with a "choice." For example, a union's conduct directed towards non-employees, such as guards and supervisors, and outside the presence of employees, can reasonably be expected to coerce employees who hear about it, because they would regard it as an indication of what might befall them if they failed to support the union. See e.g., *Auto Workers Local 695 (T.B. Wood's)*, 311 NLRB 1328 (1993); *Furniture Workers Local 140 (Brooklyn Spring)*, 113 NLRB 815, 822 (1955). Furthermore, it is not necessary to show that more than one employee has been coerced. *Hoisting Engineers Local 101 (Herrman's*

Excavating), 209 NLRB 59 (1974) (one employee who refrained from leaving the job site picketed by a union was coerced).

To accept Judge Amchan's rationale regarding "choice" is to place the burden for establishing a violation of 8(b)(1)(A) of the Act on the coerced employee. It would require the coerced employee to establish that he or she was aware of a choice to engage in Section 7 activity. Arguably, under this rationale, the only employees coerced in violation of the Act would be those fluent enough in labor law to understand Section 7 and to know when a Section 7 right is before them, one such right – the one involved herein -- being the right to work for a nonunion employer free of union coercion. Instead, when a union coerces employees, the focus of Section 8(b)(1)(A) is on the wrongdoer's action, not on the coerced employee's reaction.⁶

The specific conduct in this case may be unorthodox, but the Union's end game is not novel. The Union's tactic was simply a new way of exerting labor pressure. Rather than picketing at the entrance to the construction site, which is confrontational conduct, the Union's conduct here was direct bullying of employees at a face-to-face level.⁷ If anything, this conduct

⁶ It is obvious by the reactions of the employees caught on video that the Union's conduct had the intended coercive effect. These employees obviously feared retribution by the Union's agents, who threatened to report them to Immigration authorities. How else to interpret the Union agents' flurry when they believe the employees are illegal? Once the magic words were uttered (at least according to Dyken), the Union agents started writing down names, phone numbers, and addresses to show the "blatant violation." It is well established that a union unlawfully coerces employees when it threatens to report them to Immigration or to have them deported if they do not support the Union. *Local 300, Cosmetic and Novelties Workers' Union*, 257 NLRB 1335, 1339 (1981); *Teamsters Local 748 (J.R. Wood)*, 246 NLRB 758 (1979).

⁷ The fact that the Union did not shut down the job or produce a job vacancy for salts to fill does not relieve it of liability here. See e.g., *United Mine Workers Local 7083 (Grundy Mining Co)*,

was more coercive than picketing or other traditional forms of labor pressure. The Union's corraling of employees and intimidating interrogations more likely undermined their Section 7 rights to work free from such coercion and their right to refrain from assisting the Union in its labor dispute with Forcine.⁸

Furthermore, the Union's motive here supports the finding of a violation. *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB at 148. As in *Local 98 (Tri-M)* and *Local 98 (MCF)*, the Union here directed action against these particular employees for the sole reason that they worked for a nonunion employer it hoped to organize. The Union agents here did not choose to "investigate" the employees of just any employer; they chose to "investigate" the employees of an employer with whom it had a labor dispute.

Finally, the public policy implications of Judge Amchan's decision warrant consideration. In essence, the Judge's decision would permit the Union to escape liability *because* the Union agents concealed their identity. Based on the Judge's reasoning, it may be assumed that if the employees knew it was the Union confronting them, their participation or non-participation in the interrogations would raise Section 7 implications. Conversely, because the Union concealed its identity, the conduct did not raise Section 7 implications, at least according to Judge Amchan. Under this reasoning, the deception saved the Union. This is

146 NLRB 176, 181, fn. 7 (1964) (The Act does not require proof that coercive conduct had its desired effect).

⁸ On this point, it is particularly noteworthy that the Union videotaped employees while berating them and seizing on potentially self-incriminating statements, and then took down names, addresses, and phone numbers. In these circumstances, Forcine's employees could only fear and anticipate that the intruders would pursue their aims until the union's objectives were realized – i.e. when Forcine capitulated.

illogical, since the coercion is no less connected to the labor dispute whether the Union identifies itself or not. Again, it is not the subjective view of the coerced employee that matters. Misconduct has no less of a tendency to coerce the reasonable employee in the exercise of Section 7 rights whether the Union hides its identity or not. See e.g., *Auto Workers Local 695, (T.B. Wood's)* (The clandestine nature of union pickets did not excuse the union from responsibility for its unlawful action). The Judge's decision would give the Union carte blanche to coerce employees of nonunion employers they wish to organize so long as Union agents concealed their identity.⁹

Assuming *arguendo* that Judge Amchan correctly concluded that Section 7 rights attach only when employees are faced with a choice to engage in protected activity or not, it is respectfully submitted that Forcine's employees were indeed faced with a choice when confronted by the Union agents at the job site. Section 7 grants employees the right to engage in union activity, including the right to assist labor organizations, *or to refrain* from doing so. The Union's agents here were gathering information to assist their labor organization in furtherance of its campaign against Forcine. How else to explain Union Agent Dyken's proclamation to employees: "This is a blatant violation ... We're going to need you to testify?" Consequently, Forcine's employees were pressured by the barrage of questions on immigration, wages, and other matters *to assist the Union* in its activities (emphasis mine). Yet, at each moment when Forcine's employees attempted to work peacefully without Union coercion and resist assisting

⁹ Of course, given that the Union publicly broadcast its conduct via the internet and the notorious nature of the Union's misconduct, the identity of the Union agents would not have stayed concealed for long.

the Union, the Union blocked them from doing so. The employees tried, but were unable, to freely exercise their right not to assist the Union. They tried, but were unable, to resist answering questions that were designed to help the Union gain evidence to malign Forcine. They tried, but were unable, to resist helping the Union with its salting campaign by answering question about terms and conditions of employment. Although he acknowledged employees' right to refrain from assisting a labor organization, Judge Amchan improperly failed to find that the employees were refraining from assisting the Union – i.e., by haltingly and reluctantly answering the Union agents' questions. In sum, to the extent Forcine's employees needed to make a choice, they resisted doing what the Union wanted them to do, but the Union did not honor their choice. Instead, it restrained and coerced them in violation of Section 8(b)(1)(A).

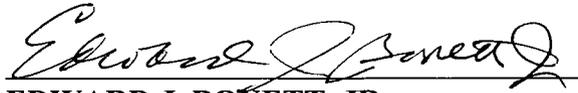
It follows logically that the Union also violated the Act by broadcasting its coercive conduct to a wider audience of employees via the Internet.¹⁰ (*See Exception 4*) The Union's posting of the construction site intrusion video on YouTube and Facebook perpetuated the coercion. *American Postal Workers Union, Local 735 (U.S. Postal Service)*, 340 NLRB 1363, (2003); *Electrical Workers Local 501, (Samuel Langer) v. NLRB*, 181 F.2d 34, 39 (2d Cir. 1950). Carpenters Local 2012 likewise violated the Act by linking the video to its Facebook page.

¹⁰ See *Allegheny Ludlum Corp.*, 333 NLRB 734, 741 (2001), enfd. 301 F.3d 167 (3d Cir. 2002) (an employer's dissemination of a videotape that explicitly or implicitly conveys an employee's position in a labor dispute without the employee's consent or other safeguards infringes on that employee's Section 7 right to engage in or refrain from union activity); *Sony of America*, 313 NLRB 420, 429 (1993); See also, *Smithfield Packing Co.*, 344 NLRB 1, 4-5 (2004), enfd. 447 F.3d 821 (DC Cir. 2006) (pressuring employees to make observable choice concerning participation in election campaign).

VII. CONCLUSION AND REMEDY

For the above-stated reasons, Counsel for the Acting General Counsel respectfully submits that the Board find that the Union violated the Act by its conduct during the site intrusion and follow-up Internet postings. Counsel further recommends that the Board find that Local 2012 violated the Act by its own Internet posting. As a remedy, in addition to any other relief found appropriate by the Board, the Respondents should be ordered be to remove the video footage of the site intrusion from YouTube and Facebook and post appropriate Board Notices on these sites.

Respectfully submitted,



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