UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

GENERAL DIE CASTERS, INC.		
	CASE NOS.	**8-CA-37932**
		8-CA-38277
and		**8-CA-38278**
		8-CA-38306
		8-CA-38358
TEAMSTERS LOCAL 24 a/w		**8-CA-38390**
INTERNATIONAL BROTHERHOOD OF		**8-CA-38464**
TEAMSTERS		**8-CA-38253**
		8-CA-38546
		8-CA-38549
		8-CA-38568
		8-CA-38600
		8-CA-38623
		8-CA-38707
		8-CA-38916
		8-CA-39165

ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE BOARD IN RESPONSE TO RESPONDENT'S EXCEPTIONS

Susan Fernandez, Esq.
National Labor Relations Board
Region 8
1240 East 9th Street, Room 1695
Cleveland, Ohio 44199
Counsel for the Acting General Counsel

Ronald Mason, Esq.
Mason Law Firm
425 Metro Place North, Suite 620
Dublin, Ohio 43017
rmason@maslawfirm.com

John R. Doll, Esq.
Doll, Jansen, Ford & Rakay
111 West First Street, Suite 1100
Dayton, Ohio 45402-1156
jdoll@djflawfirm.com

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ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE BOARD IN RESPONSE TO RESPONDENT'S EXCEPTIONS

This matter is before the Board based upon a decision issued by Administrative Law Judge Mark Carissimi on May 2, 2011. On October 1, 2010, the Regional Director for Region 8 issued a Third Order Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing alleging that General Die Casters, Inc. committed numerous violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the Acting General Counsel submits this Answering Brief in response

to Respondent's exceptions and argues that the record evidence and cited case law fully support Judge Carissimi's analysis and conclusions.

A. PORTIONS OF RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS SHOULD NOT BE CONSIDERED BECAUSE THEY GO BEYOND THE SCOPE OF THE EXCEPTIONS

Respondent has made certain claims in its supporting brief under the heading "Statement of the Case" which go beyond the scope of its exceptions, thereby making the claims inappropriate for consideration by the Board. Pursuant to Section 102.46(2)(c), the brief in support of the exceptions cannot contain any matter "not included in the scope of the exceptions." The statement of the case should contain "all that is material to the consideration of the questions presented." (Section 102.46(2)(c)(1)).

1) Respondent's claim that the Union engaged in menacing and intimidating behavior during negotiations should be precluded from consideration by the Board.

Respondent claims in its brief that since the outset of negotiations, the Union engaged in a systematic negotiation ploy encompassed by threatening and intimidating behavior. (Resp. Br. 1). Respondent then refers to unspecified allegations in the charges that it filed against the Union in Case No. 8-CB-11183 and 11184 and asserts that those charges reflect only a small portion of the menacing behavior it has been suffered to endure during the course of negotiations. (Resp. Br. 1). The salient point is that none of Respondent's exceptions claim that the ALJ erred with respect to a finding or conclusion regarding the Union representatives' behavior during negotiations. Accordingly, this argument is not appropriate for consideration because it exceeds the scope of Respondent's exceptions. While Respondent refers to the settled CB allegations throughout its Brief in Support (which will be specifically addressed at later points in this brief), the meritorious settled CB allegations dealt only with the Union's alleged failure to meet at reasonable times and places and conditioning further negotiations on the

presence of a federal mediator. (Jt. Exhs.5, 6, 8, and 9). The meritorious allegations did not include any supposed threatening or menacing behavior by Union representatives. (Jt. Exhs. 5, 6, 8, and 9).

2) Respondent's assertion regarding its rule that requires machine operators to rotate among the various die cast machines should be precluded from consideration by the Board.

Respondent contends that one of the 8(a)(5) and (1) unilateral change violations at issue on appeal includes a rule promulgated by Respondent on April 6, 2009 which requires all machine operators to rotate working among various die cast machines. (Resp. Br. 2). The ALJ did conclude that the Respondent's unilateral implementation of this rule violated Section 8(a)(5) and (1) of the Act. (JD 27, 28, 78). However, Respondent did not file any exception regarding the ALJ's finding with respect to this allegation. Pursuant to the Board's Rules and Regulations, this matter also exceeds the scope of the exceptions and should not be given any consideration.

I RESPONDENT'S FIRST EXCEPTION DOES NOT MEET THE REQUIREMENTS SET FORTH IN SECTION 102.46(b)(1)

Respondent's first exception should be struck as it is overly broad and does not comport with the requirements set forth in Section 102.46 (b)(1) of the Board's rules and regulations. Exception I reads as follows: "Respondent opposes Judge Carissimi [sic] credibility resolutions throughout his Decision. Respondent will address the particular credibility resolutions in its supporting brief attached hereto." (Resp. Br. viii). In the argument section of its brief in support of Exception I, Respondent provides one example with regard to GC witness Jerome Ivery's credibility and refers to his testimony spanning 200 unspecified pages of transcript. (Resp. Br. 39). Respondent cites one instance where the ALJ *does not* credit Ivery's testimony. (Resp. Br. 39 referring to JD 71).

Section 102.46(b)(1) provides that exceptions shall identify that part of the administrative law judge's decision to which objection is made, designate the precise page of the record relied upon and concisely state the grounds for exception. Respondent's Exception I does not meet the above requirements and the corresponding argument found at Resp. Br. 39 does not identify that part of the ALJ's decision to which objection is made with regard to Ivery's testimony. While Respondent asserts in the argument section in support of Exception I at Resp. Br. 39 that it will address further credibility issues in particular detail under the appropriate section, Exception I does not met the requirements set forth in Section 102.46(b)(1) and this exception should not be considered.

II THE ALJ CORRECTLY FOUND THAT RESPONDENT UNILATERALLY IMPLEMENTED A 2009 WAGE FREEZE

Respondent's CEO, Jim Mathias admitted that management failed to bargain with the Union when it chose to implement a wage freeze in February 2009. (Tr. 2078, 2079, 2082). In the spring of 2009, Teamsters Local President and lead negotiator Travis Bornstein learned from employees that they were not receiving wage increases. (Tr.1263). The Union confronted the Respondent about the issue and at the June 16, 2009 negotiating meeting, Respondent's attorney, Ron Mason, confirmed that the Respondent was not granting the customary annual wage increases. (GC Exh. 24). Mason told the Union that Respondent had implemented a wage freeze based on economic conditions. (Tr. 1264., GC Exh. 24).

The crux of Respondent's argument in support of its actions is two-fold. Respondent claims that at the time it unilaterally implemented the wage freeze it did so because the company was losing orders at a "frighteningly rapid pace." (Resp. Br. 39).

Respondent also asserts that it has frozen wages in the past.

To support its argument regarding a drop in orders, Respondent offers adjectives but little in the way of evidence beyond a general assertion by Mathis that the company experienced a 40% drop in orders. (Tr. 2079). Mathias asserted at trial that when he made the decision in February, 2009 not to grant wage increases the company experienced a 40% drop in business. This assertion contradicts what Respondent's attorney told Union representatives in March, 2009 at the time of the first layoff at the Twinsburg plant in March, 2009. Mason informed the Union that it was laying off employees due to a 20% drop in business. (Resp. Exh. 174, Bates No. 00489). Respondent did not introduce documentary evidence at the hearing to support either claim.

Respondent asserts that it was merely following past practice when instituting the wage freeze. The ALJ applied the correct analysis with supporting Board law in determining that indeed, Respondent was obligated to bargain with the Union over the decision to freeze wages. (JD 12). It is axiomatic that wages are a mandatory subject of bargaining. Verizon New York, Inc., 339 NLRB 30 (2003). Periodic wage increases become a condition of employment if they are an established practice that is regularly expected by employees. Jensen Enterprises Inc, 339 NLRB 877 (2003) citing Daily News of Los Angeles, 315 NLRB 1236 (1994) enfd. 73 F 3d. 406 (D.C. Cir. 1996). In L&M Ambulance Co., 312 NLRB 1115 (1993), the Board relied on the employer's acknowledgement that it granted annual wage increases two years in a row.

Relevant factors include the number of years the program/practice has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine if an employee will receive a raise. Rural/Metro Medical Services, 327 NLRB 49 (1998). The Board in Daily News determined that the employer had a

duty to bargain with the union as 80% of bargaining unit employees received wage increases in the three years prior to union representation. The fact that the amount of the wage increases varies or that there is an element of discretion, does not excuse the employer's duty to bargain. Id. In finding that an employer withheld wage increases in violation of Section 8(a)(5) of the Act, the Board concluded that the employer's specific intent for withholding the annual adjustment is immaterial. Id.

The record evidence supports the ALJ's determination that annual wage increases for Respondent's employees had become a condition of employment. (JD 11). A review of Respondent's wage records reveals that prior to the 2008 organizing campaign, most employees received annual wage increases. (GC Exh. 66 and 67). For those employees who worked for Respondent during 2003 to 2007, approximately 59 of 82 employees received annual wage increases in each year or in four of the five years, which represents 71% of that group.

Several employees testified that they typically received wage increases on an annual basis, including Arthur Brown and Kevin Maze. (Tr. 348, 626). According to Brown, Respondent gave wage increases of up to 4%. (Tr. 348).

Consistent with Respondent's past practice, at the January 14, 2010 negotiating meeting, Respondent's attorney, Ron Mason, proposed annual wage increases ranging from .5% to 3%. (Tr. 1132, Resp. Exh. 591). At this meeting, Mason informed the Union that Respondent had resumed giving employees annual wage increases in December 2009. (Tr 1131, 1132). Mason told the Union that the 2009 wage increases would also range from .5% to 3%. (Tr. 1132, 1133).

In the present case, annual wage adjustments had a fixed timing tied to employees' annual review. Wage increases topped out at 3.5% to 4%. The Respondent's wage records in evidence reveal that the decided majority of employees who worked for

Respondent during 2003 to 2007 were granted wage increases every year or every year except one. (Resp. Exh. 66 and 67). The record evidence thus establishes that employees had a reasonable expectancy that they would receive an annual wage increase.

The fact that the Respondent regularly granted wage increases is also evident in Peninsula Plant Manager Brian Lennon's February 14, 2008 e-mail to HR Manager SeAnna Huberty and GDC President, Tom Lennon. (GC Exh. 7). In the e-mail, Lennon stated that he was not aware that the Respondent had stopped giving wage increases as soon as it found out about the Union organizing campaign. Brian Lennon further noted in the e-mail that while some employees had already received their increases, going forward employees would be evaluated but would not be granted wage increases. (GC Exh. 7).

At the hearing, Brian Lennon initially denied that the 2008 wages were halted when the Respondent learned of the organizing campaign. (Tr. 39). After being presented with GC Exh. 7, Lennon conceded that is was CEO Jim Mathias' call to halt the 2008 wage increases.

The record evidence supports the ALJ's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by instituting a unilateral wage freeze.

III THE ALJ CORRRECTLY FOUND THAT RESPONDENT UNILATERALLY ALTERED THE TIMING OF EMPLOYEE PERFORMANCE EVALUATIONS

Respondent combined its argument in support of this exception with Exception II. (Resp. Br. 41). Respondent asserts, with no supporting details, that wage increases are determined at "different intervals". (Resp. Br. 40). The evidence indicates otherwise. Employees were granted wage increases at approximately the same time each year. (Resp. Exh. 66 and 67). In 2009 Respondent, once again ignoring the Union, changed the timing of the performance evaluations and thus when employees would learn if they were going to receive a wage increase.

The ALJ discussed in detail the record evidence he relied upon to determine that Respondent violated its duty to bargain with respect to these matters. (JD 10, 11). Moreover the ALJ noted that Teamsters 24 Local President Travis Bornstein and Teamsters Joint Council Representative Rick Kepler testified without contradiction that Respondent did not notify the Union of any changes in the evaluation process during ongoing contract negotiations. (JD 11.)

Peninsula plant employee Mark Albright testified that in the past, Respondent informed employees during their annual evaluations if they were going to get a wage increase that year and the amount of the increase. (Tr. 1000). Albright stated that in 2008 he received a 45 cent wage increase. At the time of his November, 2009 evaluation, Chuck Long told him that he would get back to Albright if he was going to be granted a wage increase. Two months later, Albright received a wage increase. (Tr. 1003).

Former Peninsula plant employee Dennis Ormsby received an evaluation in February, 2009. This was not an annual evaluation. If an employee changes job classifications, they receive an evaluation after 6 months in the new job classification. (Tr. 460). Ormsby had performed machine duties at the Twinsburg plant. In August, 2008 he transferred into a die casting position at Peninsula. Id.

HR Director Judy Varner and Plant Superintendant, Chuck Long, gave Ormsby his 6-month evaluation. They informed him that a few changes were going to be made regarding the evaluation procedure and wage increases. Varner stated that Respondent was going to go back to giving employees their evaluation on their anniversary date. (Tr.460, 461). Ormsby's anniversary date is in March. (Tr. 461, 462).

During the meeting, Varner told Ormsby that employees would now have to wait 30 days after their evaluation to learn if they were going to receive a wage increase. (Tr. 462). Varner said that all wages increases had to be approved by CEO Jim Mathias.

Ormsby said that in the past, if you were told during your evaluation that you were going to get a wage increase, the increase appeared in your paycheck a short time later. Id.

Arthur Brown and other employees corroborated Ormsby's testimony about the change in Respondent's policy. Brown's evaluation month was February. Tr. 364, 365. In February 2009, Brown asked Twinsburg plant manager Keith Kish when he was going to receive his evaluation. Kish informed Brown that the Respondent was going back to the practice of evaluating employees on or near their anniversary date. (Tr. 346, 347). Brown said that due to the change, he would have to wait an additional 8 months (February-October) to receive his annual evaluation (20 months total between evaluations). (Tr. 347). Brown was laid off several months before his anniversary month. (Tr. 335, 347). Long time Peninsula plant employee Willie Smith testified that for the five years prior to 2009, he received his annual evaluation in June. (Tr. 427). In 2009, he was evaluated during his anniversary month in December. Id.

Leonard Redd, was a 32 year employee who worked at the Peninsula plant at the time of the trial. (Tr. 834). Redd received an evaluation in February, 2009 from supervisor Mike Jordon and Chuck Long. (Tr. 843). Long told Redd that Respondent had a new policy and he was going to have to wait two months to find out if he was going to get a wage increase. (Tr. 843, 844). Redd testified on direct and cross examination that in the past, you were informed at the time of your evaluation if you were going to receive a wage increase. (Tr. 844, 850).

Peninsula plant employee Jay Quarterman testified that when he received his evaluation in November 2009, Chuck Long told him that he would have to wait up to two months to learn if he was going to receive a wage increase. (Tr. 886, 887). In the past, according to Quarterman, employees were told at the time of their evaluation if they were going to receive a wage increase. (Tr. 887). Again, Long did not explain why the

Respondent was deviating from its established past practice. (Tr. 887).

The record evidence establishes that Respondent violated Section 8(a)(5) of the Act when it unilaterally changed the timing of evaluations and the granting of wage increases. These unilateral actions had a detrimental effect on when employees received their wage increase. As observed by the ALJ, Board law requires that Respondent bargain with the Union over the timing of wage increases. (JD 12). The Board in Onetia Knitting Mills, 205 NLRB 500 fn. 1 (1973) observed that after an exclusive bargaining representative is selected, the employer no longer has unilateral discretion over wage increases. The employer is required to maintain the pre-existing practice.

IV THE ALJ CORRECTLY FOUND THAT RESPONDENT UNILATERALLY LAID OFF EMPLOYEES IN MARCH 2009 AND IMPLEMENTED ONE-DAY PLANT SHUTDOWNS IN MARCH AND APRIL 2009

A. Respondent can not rely upon purported past practices in defending its actions.

Respondent claims it was following past practice when it instituted one-day shutdowns on March 5, 2009 at the Twinsburg plant and again on April 10 at the Twinsburg and Peninsula plants. (Resp. Br. 42). Respondent further asserts that with respect to the March 2009 layoffs, it followed a procedure used once before in 1995. (Resp. Br. 42). CEO Mathias admitted that Respondent did not bargain with the Union over these matters. (Tr. 2086).

Section 8(a)(5) and Section 8(d) of the Act obliges an employer to bargain with the representative of its employees in good faith and with respect to "wages, hours, and other terms and conditions of employment. NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); Fiberboard Corp. v. NLRB, 379 U.S. 203 (1964). It is well established that an employer's decision to layoff employees based on economic considerations is a

mandatory subject of bargaining. Plastonics, Inc, 312 NLRB 1045 (1993); Lapeer Foundry & Machine, 289 NLRB 952 (1998). Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in wages, hours, and conditions of employment before imposing such changes without first giving the union notice and an opportunity to bargain about them. NLRB v. Katz, 369 U.S. 736 (1962).

The ALJ correctly found that despite Respondent's assertion of following past practice, it was obligated to bargain with the Union over these matters. (JD 18, 20). The ALJ relied, in part, upon Adair Standish Corp., 292 NLRB 890 (1989) enfd. in relevant part, 912 F. 2d 854 (6th Cir. 1990) where the Board rejected a defense of past practice when instituting economic layoffs. As also noted by the ALJ (JD 18), Respondent can not rely a single layoff occurring 14 years before the Union became the bargaining representative to argue that it was privileged to circumvent the bargaining process.

The same holds true for the one-day shutdowns/layoffs. Former Twinsburg employee Arthur Brown testified that during the 10 years he worked at the Twinsburg plant, there had not been a similar one-day shutdown. (Tr. 344). Mathias testified regarding plant shutdowns in conjunction with holidays as well as the annual one-week maintenance shutdown. (Tr 2084, 2085). He did not assert that these shutdowns were based on economic considerations. Mathias made a vague reference to declaring a shutdown day if Respondent does not have anything to ship but offered no specific evidence.

The Board recently issued Palm Beach Metro Transportation, LLC, 357 NLRB No. 26 (2011) where it determined that the employer failed to show a past practice of reducing employees' hours and days of work. (Tr. 2085). The Board noted that while there were a few past instances of reducing work hours in response to fluctuations in available work, the employer failed to establish that they ever resulted in a comparable

reduction of hours and days of work. The party asserting the existence of a past practice bears the burden of proof and the evidence must demonstrate that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. Eugene Iovine, Inc., 353 NLRB No. 86 (2008) reaff. 356 NLRB No. 134 (2011).

Respondent states that it notified the Union's attorney, John Sivinski, on March 5 of the Respondent's intent to layoff employees. (Resp. Br. 9, GC Exh. 85). The letter does not fulfill the Respondent's obligation to bargain. While the parties had discussed some aspects of a layoff provision such as department versus plant-wide seniority, Bornstein protested the short notice of the Twinsburg layoff and demanded that the Respondent bargain with the Union over the layoff. (Tr. 1250, Resp. Exh. 174, Bates No. 00492, 00493).

Respondent had no intention of bargaining with the Union. With regard to the March Twinsburg layoff, Mason gave Bornstein a document on March 5 entitled "Layoff and Recall Procedures: (Last Layoff in 1995)" setting forth the layoff procedure the Respondent followed in 1995. (GC. Exh. 81). Respondent's bargaining notes indicate that before the parties had any discussion of substance about the Twinsburg layoff, Mason referred to the 1995 layoff procedure document and stated "This is what we have done in the past and this is what we are going to do." (Resp. Exh. 174, Bates No. 00489). Peninsula employee and Union negotiating team member Mark Albright also recalled Mason making this statement. (Tr. 1147, 1148). As the ALJ noted, the Union was presented with a fait accompli and Respondent was merely informing the Union of what it intended to do the following day. (JD 19). On March 6, Respondent provided the Union with the names of the 6 Twinsburg employees selected for layoff. (GC Exh. 55). Indeed, on the same day, Respondent had begun the process of notifying some of these

employees about their layoffs. (GC Exh. 70, 71, and 73).

Respondent did not afford the Union meaningful notice and opportunity to bargain. Under these circumstances, Respondent failed to fulfill its duty to bargain. Brannan Sand and Gravel Co., 314 NLRB 282 (1994); Ciba-Ceigy Pharmaceutical Division, 264 NLRB 1013, 1017 (1982) enfd. 722 F. 2nd 1120 (3d Cir. 1983).

B. Respondent's claim of economic exigency to justify its actions is without merit.

As reflected in Respondent's March 5 bargaining notes, at the time of the one-day shut down and the March Twinsburg layoff, based on the information Respondent was receiving from customers, it was anticipating a 20% drop in orders. (Resp. Exh. 174, Bates No. 00489). At trial, CEO Mathias claimed that the March shutdowns and layoff were necessitated by a 40% drop in orders (Tr. 2083). This assertion is contradicted not only by Mason's March 5 bargaining notes, but also by Mason's April 7 bargaining notes. On April 7, Joint Council 41 Teamster Organizer Rick Kepler attended his first GDC negotiation meeting. (Tr. 1253). Travis Bornstein was not present. (Tr. 1253). Mason told Kepler that at the time of the March layoff, Respondent estimated it was going to experience a 20% drop in business. (Resp. Exh. 177, Bates No. 0052). As the ALJ noted, Respondent did not introduce documentary evidence to support the claim of a drop in orders. (JD 19).

The ALJ applied the correct analysis when considering a defense to a unilateral action based on economic exigency and found that the Respondent came up short. (JD 20). The Board has recognized that the party relying on this exception bears a heavy burden. Our Lady of Lourdes Health Center, 306 NLRB 337, 340 fn. 6 (1992). (economic exigency excused the employer's unilateral layoff of employees after a hurricane caused a city-wide evacuation and damaged the employer's plant); Portland

Printing AD and Specialties, 351 NLRB 1269 (2007).) In RBE Electronics, 320 NLRB 80 (1995), the Board articulated a lesser economic exigency standard for situations which are not serious enough to excuse notice and opportunity to bargain but where prompt action is required. An employer will satisfy its statutory obligation by providing the union with adequate notice and opportunity to bargain. If it provides the required notice and opportunity to bargain, the employer may implement the change if the union waives its right to bargain or the parties bargain to impasse over the matter. The Board noted in RBE Electronics that absent a dire financial emergency, operation at a competitive disadvantage, loss of significant accounts, or supply shortages do not excuse the duty to bargain. In Pan Am Grain Co., 343 NLRB 318 (2004), the Board determined that the employer had a duty to bargain with the union regarding a layoff that was necessitated by economic reasons, including a substantial decrease in production and sales. In the present matter, Respondent offered vacillating and unsubstantiated claims that do not meet the standard articulated in the applicable cases. Accordingly, Respondent can not avail itself of the economic exigency defense to excuse its failure to bargain.

V. THE ALJ CORRECTLY DETERMINED THAT RESPONDENT UNILATERALLY EXPANDED A WORK RULE AND DISCHARGED KEVIN MAZE PURSUANT TO THE EXPANDED WORK RULE

A. The record evidence, including credited testimony, supports the ALJ's determination that the April 3, 2009 memo announced an expanded rule and did not reiterate an existing, established policy.

Kevin Maze was terminated pursuant to what the General Counsel contends is a unilaterally expanded work rule regarding defacement/destruction of company property which was posted in the plant on about April 3, 2009. Tr. 1794, GC Exh. 16. The memo states in pertinent part:

> General Die Casters has listed below some examples of offenses that are outside the scope of your employment and may be considered to be serious enough to result in disciplinary action, up to and including termination. Specific situations

> covered here may lead to disciplinary action, up to and including termination when, in the Company's judgment, they are harmful to the rights of other employees, safety, or the efficient operation of the Company. Leniency in any instance will not be a waiver to impose discipline at any other time.
>
> **Destruction or damage of property belonging to the Company**, or its employees, customers, or visitors.
>
> Stealing, misappropriating, or **intentionally damaging property belonging to the Company**, or any of its employees, customers, or visitors.
>
> Please note that placing any personal items (examples stickers, outside advertisements) of any kind, on any General Die Caster property will be viewed as defacement/destruction of company property and disciplinary action will be taken up to and including termination. Any questions see Human Resources.

The employee handbook provides for disciplinary action for violation of the following work rules (GC Exh. 2, Bates No. 00021):

> **Destruction or damage of property belonging to the Company**, or its employees, customers, or visitors.
>
> Stealing, misappropriating, or **intentionally damaging property belonging to the Company**, or any of its employees, customers, or visitors.

Unlike the above rules, the April 3 memo added the paragraph informing employees that they were subject to discipline or discharge if they placed a sticker on company property. (GC Exh. 16).

Prior to the union organizing campaign, Respondent permitted employees to place stickers, such as Nascar or sports stickers, on company lockers. (Tr. 464, 465, 606, 607, 718, 977, 978). The ALJ noted that this practice continued after the March 2008 union election until about November 2008 when Respondent removed stickers from its facilities and informed some employees that they could be disciplined for placing stickers on company property. (JD 22) Employees Jerome Ivery and Sam Tomsello testified that the April 3 memo was the first time that Respondent notified employees that it considered stickers to be a form of defacement or destruction of property that would subject them to

disciplinary action. (Tr. 235, 721).

Respondent presented employee witnesses who testified that in about November, 2008, Brian Lennon verbally notified employees that placing stickers on company property was not permitted and that they would be subject to discipline if they violated the policy. Third shift employee Ed Dickerhoof testified that when he was hired in November, 2008, stickers were on company lockers. (Tr. 1574). About two weeks later, the stickers were removed. Id. Dickerhoof made a general claim that "someone" said that they did not want any more stickers placed in the plant. Id. Robert Collins asserted that it was his understanding that employees could no longer place stickers in the plant. (Tr. 1651). When pressed for details on cross examination, Collins offered vague testimony regarding what management said at that time regarding stickers in the plant. (Tr. 1653-1655).

According to the Respondent, at about the time of Maze's discharge, the Peninsula plant was awash in stickers. Lennon asserted that there were hundreds of stickers in the plant. (Tr. 1796). The ALJ credited Maze's denial that he placed hundreds of stickers in the plant. (JD 24). The ALJ also credited Maze's testimony that he observed other employees placing stickers in the plant. (JD 24).[1] It should be noted that it is established Board policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Maze also testified that he was not aware of the rule that placing stickers in the plant could result in discharge. (Tr 627).[2]

[1] According to employee Mark Albright, second and third shift employees also put stickers in the plant. (Tr. 1103).

[2] Respondent stated in its brief that Local President Travis Bornstein warned Maze during a meeting that he could be terminated if caught placing stickers in the plant. (Resp. Br. 48). Respondent refers to testimony

The ALJ correctly relies upon the following cases for the proposition that an employer has a duty to bargain with a union regarding work rules, particularly those rules that may result in discipline: United Cerebral Palsy of New York City, 347 NLRB 603 (2006); The Toledo Blade Co., Inc., 343 NLRB 385 (2004); Behnke, Inc., 313 NLRB 1132 (1994); Robbins Door & Sash Co., Inc., 260 NLRB 659 (1982) (JD 25). Respondent attempts to distinguish these cases by pointing out factual differences in the various rules discussed in those cases as compared to the present matter. However, the essential point remains; an employer is obligated to bargain with the union in circumstances where a unilateral change in a work rule could lead to disciplinary action.

Peninsula Plant Manager Brian Lennon admitted that he did not give the Union notice or opportunity to bargain before the April 3 memo was posted in the plant. (Tr. 1796). The credible evidence presented at trial establishes that the April 3 memo was not merely a reminder to employees of long standing company policy. The wording of the memo supports the General Counsel's assertion on this point. The memo does not state that the foregoing paragraph referring to the stickers is a reminder of existing company policy. The fact that employees were urged to consult with HR if they had questions also establishes this was a newly expanded rule.

Respondent relies on Timken Co., 331 NLRB 744 (2000) to argue that it was merely following company policy when terminating Maze. (Resp. Br. 50, 51) Respondent noted that the employer in that case tolerated the wearing of union insignia on employees' personal property during work time, but refused to permit stickers to be attached to the interior walls of cubby holes in the plant. (Resp. Br. 50, 51). Respondent then states that, as in the Timken case, Respondent has a right to prohibit stickers from

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by its witness, Dennis Lemon found at transcript page 1559. Bornstein testified that he never made such a statement to Maze. (Tr. 1340).

being placed on its "personal property" (Respondent is presumably referring to company property when it refers to "personal property"). The ALJ properly rejected the application of Timken Co. to the present case. As a non-union plant, the employer had no duty to bargain as does Respondent in the current case. In that case, the GC argued disparate application of the relevant policy.

Respondent did not produce any evidence that the rule was applied prior to Maze's termination. The current handbook on the subject of destruction of company property makes no reference to stickers. (GC Exh. 2).

B. Section 10(b) does not bar the allegation that the Respondent unilaterally expanded a work rule.

Respondent asserts that as of November, 2008 the Union was aware of the unilateral implementation of the rule regarding placing stickers in the plant. (Resp. Br 48). General Counsel urges the Board not to consider this argument. The Respondent did not file an exception stating that the ALJ erred in his finding with respect to Section 10(b) and the unilateral change allegation. Thus, the Section 10(b) issue goes beyond the scope of Respondent's exceptions. Even if the Respondent properly asserts the argument, Section 10(b) does not bar the ALJ's finding that Respondent violated the Act as alleged.

Travis Bornstein testified that the Respondent did not provide the Union with notice and opportunity to bargain over the expansion of the work rule. (Tr.1255).[3] Bornstein testified on rebuttal, that after the March, 2008 election, the Respondent did not provide the Union with notice and opportunity to bargain over the expanded work rule. (Tr. 2208). Prior to the posting of the April 3, 2009 memo, the Union was not aware of

[3] Respondent notes that the ALJ found that Travis Bornstein credibly testified that since the Union was selected as the bargaining representative in March, 2008 until after April, 2009, Respondent did not give the Union notice or opportunity to bargain over the expanded work rule. Respondent stated that the ALJ did not refer to a transcript page in making this finding. (Resp. Br. 45). Bornstein's testimony on this point is found at Tr. pg 1255.

the expanded rule. (Tr. 1255, 2208-2212). Brian Lennon admitted that the Respondent did not bargain with the Union before posting that memo. (Tr. 1796, GC Exh. 16).

After the March 14, 2008 election, the Respondent was obligated to bargain with the Union over terms and conditions of employment. The Union was not put on notice of the change until after the April 3, 2009 memo was posted in the plant. The ALJ offered a cogent and detailed basis for his finding that Section 10(b) does not bar the allegation and his basis for rejecting Respondent's assertion made by Brian Lennon that the April 3 memo to employees merely reiterated a long standing policy. (JD 25-27). The ALJ also correctly concluded that the Union did not receive the requisite clear and unequivocal notice of the expanded rule until after Respondent posted the April 3, 2009 memo.

As a result of Respondent's failure to bargain over this matter, it must reinstate Maze to his former position and make him whole for all lost earnings and benefits. If an employer's unlawfully imposed rules or polices were a factor in the discharge or discipline of an employee, then the discipline or discharge violates Section 8(a)(5) of the Act. That is exactly what happened to Maze. Under these circumstances, an employer must rescind the rule as well as the disciplinary action and make the affected employees whole, including reinstatement. Boland Marine and Manufacturing Company, 225 NLRB 824 (1976).

VI THE ALJ CORRECTY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT WHEN IT TERMINATED KEVIN MAZE

Respondent urges the Board to find that the ALJ erred in determining that Maze's termination also violated Section 8(a)(3) of the Act. Respondent asserts that Maze would have been terminated regardless of his union activity. (Resp. Br. 21). The ALJ correctly found that the General Counsel established a prima facie case. (JD 27). There is a direct connection between Maze's termination and his union activity. Respondent's termination

form makes reference to Teamster stickers. (GC Exh. 83). While the ALJ acknowledged that Maze had prior disciplinary warnings, he correctly concluded that the April 3 memo and Maze's action of placing a Teamsters sticker on a coffee machine was the critical factor in his termination. (JD 26)

In rejecting Respondent's Wright Line, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert, denied 455 US 989 (1982) defense[4], the ALJ noted that Respondent did not produce evidence that any other employee was previously disciplined or terminated for placing a sticker on company property despite Brian Lennon's claim that it had a long standing policy barring such activity. (JD 27).

VII THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT UNILATERALLY RECALLED THREE EMPLOYEES IN JUNE 2009

A. This exception should be struck as it refers to documents not in the record.

As alleged in paragraph 12(K) of the Second Amended Complaint, the ALJ found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union concerning the June 10, 2009 recall of three Peninsula employees, Sam Tomsello, Jason Black, and Jason Sallaz. These employees were laid off in late April, 2009. (Tr. 677, 679, GC Exh. 30). In its brief in support of its exceptions, Respondent refers to charge allegations that are not the subject of the instant complaint. (Resp. Br. 52). As previously discussed in this brief, the General Counsel alleged that on about March 9, 2009 Respondent unilaterally laid off Twinsburg employees as alleged in paragraph 12(F) of the Second Amended Complaint and the ALJ found a violation with respect to this allegation.

Respondent attempts to argue that the June 10 recall of the three Peninsula employees can not be properly asserted because the General Counsel failed to allege that

their underlying April layoff was unlawful. (Resp. Br. 52-55).[5] In making this argument the Respondent refers to several charge allegations that it asserts were withdrawn by the Regional Director.[6] (Resp. Br. 52). Specifically, Respondent states that the Regional Director withdrew charges pertaining to additional layoffs that occurred on about March 16, April 28, and May 1, 2009. This exception should be struck because there are no documents in the record that refer to withdrawal of allegations or charges regarding these layoffs. Moreover, when the Respondent attempted to pursue a line of questioning regarding the post March 9 layoffs and unfair labor practice charges, the ALJ sustained the General Counsel's objection that the line of questioning had no relevance to the complaint allegations. (Tr. 1960-1962). Respondent did not take exception to the ALJ's ruling on this point.

Respondent attempts to make an argument based on the disposition of charges that are not part of this record. References to documents not in the record will be disregarded. Tower Industries, Inc., 349 NLRB 1327, 1341 (2007). Accordingly, Exception VI should not be considered.

B. Contrary to Respondent's assertion, the Second Amended Consolidated Complaint properly alleges the June, 2009 recall allegation

In the event that the Board does not strike the current exception, the ALJ has a sound basis for his finding that Respondent failed to meet its duty to bargain with the Union over the June 10, 2009 recall of the three Peninsula employees. (JD 30). The ALJ noted that it would be an anomaly to permit the Respondent to unilaterally recall employees when it has a duty to bargain over the subject of employees' layoff. Id. Respondent mistakenly seizes upon this observation by the ALJ to assert that because the

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied. 455 U.S. 989 (1982).
[5] Standing alone, this argument is based upon a faulty premise that will be addressed in the next section.

April layoff was not alleged to be unlawful, the June recall of employees laid off in April simply can't be unlawful. (Resp. Br. 51, 52). What Respondent fails to recognize is that while layoffs are a mandatory subject of bargaining, employers have a separate and distinct duty to bargain over the recall of employees. (JD 30).

The point the ALJ was making responded to Respondent's argument that it was following a past practice from 1995 when it recalled the three employees by departmental seniority. (JD 30). Respondent made the same argument with respect to the March layoff claiming that it was merely following a past practice from a single layoff in 1995. It would surely be an anomaly for the ALJ to find that Respondent could unilaterally recall employees pursuant to the 1995 past practice argument when the ALJ previously found Respondent could not rely on the 1995 past practice argument to justify a unilateral layoff.

Moreover, the record evidence supports the ALJ's conclusion that Respondent failed to bargain over the recall. At a negotiating meeting held on June 10, 2009, Respondent's attorney Ron Mason informed the Union after the fact that Respondent had recalled three die cast operators, Sam Tomsello, Jason Black, and Jason Sallaz, and it was going to follow up with a confirming letter to the employees. (GC Exh. 23). After Mason told the Union that it was in the process of recalling these employees, Travis Bornstein protested and told Mason that the Respondent had a duty to negotiate the recall procedure with the Union. (Tr. 621, Resp. Exh. 184).

Teamsters Joint Council Organizer Rick Kepler testified that at the time of the June 10 recall, the parties had not negotiated a recall procedure such as the order of recall and the method of notification of recall. (Tr.1469). According to Mason, the first

[6] Despite Respondent's assertion that the Regional Director withdrew the charges, it is more accurately stated that Regional Directors either approve or decline to approve a Charging Party's withdrawal request.

proposal the Respondent gave to the Union on recall was at the June 11, 2009 meeting. (GC Exh 147, pg 15). The parties also had not reached agreement on the length of recall rights. Bornstein recalled that at either the May 21 or May 26 meeting, he made a verbal proposal reducing the length of recall rights from the Union's original proposal of 5 years to 3 years. (Tr. 1209, 1210). The Respondent's bargaining notes indicate that Bornstein made the verbal proposal at the May 26th meeting. (Resp. Exh. 181, Bates No. 00043). At the June 11 meeting, Kepler yet again reminded Mason that Respondent had a duty to bargain over terms and conditions of employment such as recall. (Resp. Exh. 185, pg. 415).

Respondent once again disdained its duty to bargain with the Union at a time when the parties had not reached impasse. Respondent first notified the affected employees of their recall and only then informed the Union of its unilateral action. Respondent tendered its first specific proposal on recall the day after it informed the Union of the June recall. The repeated unilateral changes committed by the Respondent, in the aggregate, serve as potent evidence of its intent to marginalize the Union in the eyes of the employees.

VIII THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT FAILED TO BARGAIN OVER HEALTH INSURANCE REIMBURSEMENT

In Sam Tomsello's layoff letter, Respondent informed him that his health insurance coverage would end on May 31, 2009. (GC Exh. 30). Tomsello returned to work on June 15. (Tr. 680). Tomsello was summoned to HR Manager Doug Hicks' office on June 25, 2009. Hicks informed Tomsello that someone had forgotten to take him and the other two June recall employees off of the Respondent's insurance. (Tr. 684). The Respondent sought to collect $157.48 from Tomsello as reimbursement for Respondent's mistake. Hicks presented Tomsello with a letter for his signature

authorizing Respondent to deduct the amount from his paycheck.[7] (GC Exh. 8(b), Tr. 684). Tomsello protested and again asked for the reason for the deduction. Hicks repeated that a mistake had been made and the Respondent needed to be reimbursed for the coverage it had paid for past May 31. (Tr. 684). Tomsello signed the letter and informed the Union. (Tr. 685). Respondent also recovered money for the same reason from Jason Black and Jason Sallaz. GC Exh.8(a) and (c). Travis Bornstein testified that Respondent did not afford the Union notice or opportunity to bargain over the health care reimbursement issue. (Tr 1253, 1254).

Respondent asserts that in seeking this payment from the three employees, it was offering them an opportunity to close a gap in their insurance created by their mid-month recall to employment. (Resp. Br. 55). HR Manager Hicks testified that the employees were given the option to wait until July 1 for their coverage to resume. (Tr. 2179). On cross exam, Tomsello denied that Hicks told him that due to his mid-month return, his effective date for coverage would not be until July 1, 2009. (Tr. 748). The only option that appears in the letters is for the employees to either submit a check for the amount owed or to authorize payroll deductions. (GC Exh. 8(a),(b), and (c)).

To the extent that there was a conflict in Hick's and Tomsello's testimony, the ALJ credited Tomsello. (JD 31). He also correctly determined that the letters the employees signed clearly reflected that they were reimbursing the company for an expenditure that had already been made. Id. The ALJ concluded, based upon supporting Board law, that health insurance benefits for unit employees are a mandatory subject of bargaining. Id. Accordingly, Respondent was obligated to bargain with the Union regarding the manner in which the health insurance coverage for recalled employees was to be implemented. Id.

[7] The letter also gave Tomsello the option to submit a personal check to the company with 7 days.

IX THE ALJ CORRECTLY DETERMINED THAT RESPONDENT IMPLEMENTED ITS RECALL PROPOSAL WITHOUT FIRST REACHING IMPASSE

A. Respondent's attempt to evade its bargaining responsibility by blaming the Union must fail

The gist of Respondent's argument is that the September, 2009 implementation of its recall proposal was lawful because the Union engaged in delay tactics. (Resp. Br. 56, 60). The ALJ carefully considered the history of bargaining on the recall issue. (JD 31-35). He acknowledged that the Union cancelled a few meetings in August, 2009. (JD 32, 33). However, in view of the context in which the Respondent implemented its recall proposal on September 10, 2009, the ALJ rightly determined that the parties had not reached an overall lawful impasse in bargaining or on the topic of recall. (JD 39-41). Respondent unlawfully implemented its recall proposal in mid-September when it recalled approximately 15 employees to the Peninsula plant. (JD 41).

In particular, the ALJ considered the Union's forward movement over the course of bargaining in its recall proposals and Respondent's actions which created friction at the bargaining table, including Respondent's premature declaration of impasse on August 5. (JD 32, 37, 39). In discussing the impediments to bargaining created by the Respondent, the ALJ noted the series of unfair labor practices that it committed between February, 2009 and September, 2009 that violate Section 8(a)(5) and (1) of the Act. (JD 39). The Board has consistently held that a lawful impasse cannot be reached in the presence of unremedied unfair labor practices. Titan Tire Corp., 333 NLRB 1156 (2001).

While the ALJ did not condone some of the language used by Union negotiator Rick Kepler at the table, he correctly assessed the matter in its entire context and determined that the Union's actions did not privilege Respondent's unlawful unilateral implementation of it recall proposal. (JD 39).

The Respondent notes that the ALJ found that the August 5 declaration of impasse increased friction at the bargaining table and yet the Second Amended Complaint does not allege that the August 5 "implementation" violated the Act. (Resp. Br. 57). Although Respondent declared impasse at the August 5 meeting, it did not actually implement the proposal and recall employees at that time. The ALJ characterized the August 5 declaration of impasse as a precipitous action. (JD 39). This move by Respondent serves to illustrate its determination to grasp what it believed to be an opportunity to shortcut the bargaining process.[8]

Employees were not recalled until after two additional meetings were held on September 2 and 8. Respondent declared impasse again on September 10 and this time it recalled employees pursuant to its September proposal. In its September 2 proposal, the Union stayed with its previous proposal of one-year recall rights. (GC Exh. 112, pg 9). At Article 19, in the paragraph on bumping rights, the Union made forward movement by adopting the Respondent's language, changing the word "able" to "qualified". Id. The Union remained with its proposal that employees be recalled by plant wide seniority. The Union's prior proposal provided that employees must report to work within 7 days of notice of recall. In the September 2 proposal, the Union added language to provide that employees must report to work 7 days after the employee receives written notification of recall. Id.

In its September 2 recall proposal, the Respondent moved from 60-day recall rights to 6 month recall rights. (Resp. Exh. 113). Respondent also added a provision that employees would have 7 days to return to work after GDC mailed the recall notice (as opposed to 7 days from the time the employee receives the written recall notice). The

[8] The ALJ was also justified in rejecting Respondent's argument asserting that economic exigency excused its duty to bargain. (JD 40).

parties did not reach agreement at this meeting. (Tr. 1232).

According to Rick Kepler, Ron Mason did not assert at the September 2 meeting that GDC was losing business or that it could not meet customer demands because they did not have enough employees. (Tr. 1475).

In a letter dated September 4 to Travis Bornstein, Mason claimed that because the Union refused to meet on August 25 and 27, the Union had pushed back the time that Respondent had hoped to meet and bargain over recall. (Resp. Exh. 51). Mason also claimed that Respondent had fallen behind on production in the face of new orders. Mason urged the importance of reaching an agreement at the September 8 meeting in order to recall employees as opposed to hiring off the street. Bornstein testified that he was out of town and did not see the letter until Friday, September 11. (Tr. 1404-1406).

Due to the fact that Bornstein was out of town, Kepler served as the Union's lead negotiator at the September 8 meeting. (Tr. 1475). The federal mediator was present. Id. Initially, the parties were in separate rooms. Kepler had not been copied on Mason's September 4 letter to Bornstein. (Resp. Exh. 59).

At this meeting, Kepler gave Mason a proposal on interim recall procedure. (GC. Exh. 125). The Union again made significant forward movement. The Union dropped its position that recall be conducted by plant-wide seniority and agreed to Respondent's proposal on recall by department seniority. (Tr. 1480, GC Exh. 125). The parties met face to face to discuss the Union's new proposal. (Tr. 1478). Respondent incorrectly asserts that the Union did not propose a time specific date regarding the length of recall rights. (Resp. Br. 59) On the contrary, when Mason brought up the subject of the length of recall rights, Kepler verbally proposed that recall rights end on January, 1, 2010. (Tr. 1481, 1482). By proposing the January date, the Union was reducing its recall rights proposal from 12 months to 9 months. (Tr. 1479). Mason rejected the proposal. (Tr.

1482).

The Respondent's bargaining notes reflect that Mason raised the issue of a cut off date for recall if employees remained on layoff for a few years. (Resp. Exh. 195, pg. 457, 458, GC.Exh. 26). In referring to Kepler's proposal to extend recall rights to January 1, 2010, Mason asked him what would be the length of recall rights for employees who remained on layoff after that date.(Resp. Exh. 195, pg 459). In response to Mason's concern that not all employees may be recalled at the same time, Kepler suggested extending recall rights to March 15, 2010. (Tr. 1481, Resp. Exh. 195, pg. 460). Mason rejected that proposal. Id. Kepler also suggested that if necessary, the parties could negotiate a second interim recall procedure if some employees remained on layoff after January 2. (GC Exh. 147, pg. 19, Resp. Exh. 195, pg. 459, 460).

Mason verbally proposed that recall rights end after 7 months. Tr. 1482. Mason's bargaining notes indicate that he told the Union it was a final offer. (Resp. Exh. 195, pg. 460).

The Union convened a caucus at 4:34 pm. (GC Exh. 26, Resp. Exh. 434). After the caucus, the Union presented a second proposal through the mediator. (GC. Exh. 114). Respondent's bargaining notes indicate that it received the Union's proposal at 4:55 pm. Negotiation meetings usually end at 5:00 pm as Respondent's attorney would not meet past 5:00 pm. **(**Tr**.** 1244**).** In the second proposal, Kepler indicated that the Union would consider Respondent's proposal, with some modifications. Id. Kepler's second proposal also stated the Union was prepared to discuss the issue until an interim agreement on recall was reached. Id.

In a letter dated September 8 to James Mathias and Tom Lennon, Kepler asked for information and stated that the Union wanted to set up another meeting as quickly as possible on the recall issue. (GC Exh. 139).

In a letter dated September 10 to Travis Bornstein, Mason informed Bornstein that he was declaring an impasse on recall in Articles 18 and 19. (GC Exh. 82). Mason also told Bornstein that Respondent was implementing it proposal on 7-month recall rights, with recall by department seniority. Respondent then proceeded to implement its final recall proposal. Kepler testified that in September, approximately 10 to 15 employees were recalled to the third shift at Peninsula. (Tr. 1486). In a Board affidavit, Mason stated that approximately 47 employees were laid off and about 8-10 employees were recalled in mid-September. (GC Exh. 147, pg. 20). The Respondent's records indicate that 14 employees were recalled from September 17, 2009 to 28, 2009. (GC Exh. 58., Bates N0. 04705). One employee was recalled on October 30. Id.

As demonstrated by the record evidence, the ALJ rightly concluded that Respondent unlawfully implemented its recall proposal.

B. The Board should disregard Respondent's characterization of findings by the Regional Director

At page 58, 59 of it brief, Respondent states that the Regional Director "found that the union engaged in the following behavior in violation of the Act:…" Respondent then quotes language from the charges it filed against the Union. (Jt Exh. 5,7). A Regional Director's determination that there is probable cause to issue complaint on charge allegations is not the same thing as a legal finding that the charged party has actually violated the Act. Those matters are left for an ALJ and ultimately the Board to determine. As noted by Respondent, the Union settled the matter. (Resp. Br. 59, Jt. Exh. 10-13).

X THE ALJ CORRECTLY DETERMINED THAT RESPONDENT VIOLATED THE ACT BY UTILIZING TEMPORARY EMPLOYEES AT A TIME WHEN BARGAINING UNIT EMPLOYEES WERE LAID OFF

A. Contrary to Respondent's assertion, the record evidence supports the ALJ's findings

Respondent asserts that there is no evidence to support the ALJ's finding that it violated the Act by using temporary employees at a time when bargaining unit members were laid off. The record reveals otherwise. The ALJ noted that approximately 20 unit employees remained on layoff after the September, 2009 recall. (JD 42). Respondent's records establish that approximately 15 employees were recalled in September, 2009.(GC Exh. 58, Bates No. 04705).

At the same time that employees remained on layoff, Respondent began to use temporary employees. Not long after the September, 2009 recall, Teamsters Organizer Rick Kepler heard rumors that Respondent was using employees from temporary agencies in the Peninsula plant. (Tr. 1486, 1487). Kepler testified that the Respondent did not negotiate with the Union over the use of these temporary employees. (Tr. 1487). According to Kepler, at least 20 employees remained on layoff status at that time. (Tr. 1489). Kepler testified that Mason confirmed the use of temporary employees at a negotiating meeting held sometime after the September 8 meeting. (Tr. 1488). In a letter dated October 15, 2009 to Respondent's management, Kepler protested the Respondent's failure to bargain, including the use of temporary employees. (GC Exh. 126).

Bargaining notes of the November 18, 2009 meeting reveal that Mason confirmed that temporary employees were working in the Peninsula plant. (GC Exh. 28, Resp. Exh. 197, pg. 446, 467). When Bornstein demanded to know how long Respondent had been utilizing temporary help, Mason responded "On and off". (Resp. Exh. 197, pg 467). The Union took the position that employees on layoff should be used before any temporary workers were brought into the plant. (Tr. 1047, 1048).

Former employees Denny Ormsby and current employee Jess Kreinbrook testified that they observed temporary employees performing die cast work after the September

recall. (Tr. 492, 493, 861, 862). Ormsby recalled that three or four temporary employees worked in die cast. (Tr. 493). Ormsby testified that a temporary employee worked in Quality Assurance for about 5 months. (Tr. 492, 493). Ormsby also observed a temporary employee performing janitorial work for a few months. (Tr. 493, 494). Ormsby stated that the Respondent used the temporary janitor when laid off employee Harry Lane could not fill in for injured janitor, Joe Casteel. (Tr. 494). Jay Quarterman also recalled that a temporary employee worked as a janitor for about three weeks. (Tr. 890). Mark Albright testified that he saw temporary employees in the trim department. (Tr. 1044, 1045). Respondent's records establish that it was indeed using temporary employees in the fall of 2009. (GC Exh.50, GC Exh. 60, Bates No. 04946).[9]

B. Respondent can not rely on claims of past practice to justify its use of temporary employees during layoff

Respondent asserts that it has historically used temporary employees as testified to by Brian Lennon. (Resp. Br.60, Tr. 1800). Lennon provided no details regarding when or how often Respondent previously used temporary employees. Again, the claimed use of temporary employees in the past occurred at time when Respondent's employees did not have an exclusive bargaining representative. The ALJ rightly concluded that the decision to employ temporary employees at a time when unit employees are on layoff status is a mandatory subject of bargaining even if the employer had occasionally used temporary employees in the past. Storall Manufacturing Co., Inc., 275 NLRB 220, 29 (1985) and St. George Warehouse Inc., 341 NLRB 904, 924 (2004). (JD 42).

XI THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND TERMINATING WILLIE SMITH

[9] Pursuant to Respondent's final offer of a 7-month recall period, employees had recall rights through until early December.

A. Respondent failed to meet its Wright Line burden

The ALJ found that the General Counsel established a prima facie case that 29-year employee Willie Smith was unlawfully suspended and terminated in October, 2009. (JD 50).[10] Allegations of discrimination which turn on employer motivation are analyzed under the framework set forth in Wright Line, *supra*. To establish a violation of Section 8(a)(3) of the Act under Wright Line, the General Counsel must first show, by a preponderance of the evidence, that the employee was engaged in protected activity, the employer was aware of that activity, and the activity was a substantial motivating reason for the employer's actions. Proof of an employer's motive can be based on direct evidence or inferred from circumstantial evidence, based on the record as a whole. Ronin Shipbuilding, 330 NLRB 464 (2000). As part of its prima facie showing, General Counsel may offer proof that the employer's reasons were pretextual. Pro-Spec Painting, 339 NLRB 946 (2003). Additionally, proof of an employer's animus may be based on circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices. Amptech Inc., 342 NLRB 1131 (2004).

Once the General Counsel has presented a prima facie case, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. Septix Waste, Inc., 346 NLRB 494 (2006). The employer must persuade by a preponderance of the evidence that it would have taken the same action. W.F. Bolin Co., 311 NLRB1118 (1993).

The ALJ determined that the Respondent had a reasonable belief when it suspended and terminated Smith that he had made threatening statements to Safety Coordinator Daniel Owens. (JD 48). HR Manager Douglas Hicks testified that the decision to terminate Smith was made collectively by CEO Jim Mathias, Attorney Ron

Mason, Plant Manager Brian Lennon and former president Tom Lennon and Hicks. (JD 48, Tr. 2199, 2200). Hicks stressed the point that threats of bodily harm made to a co-worker result in immediate termination, particularly due to the fact that a foundry is a dangerous place to work. (JD 48, Tr. 2174). The ALJ noted that although Mathias and Brian Lennon were called as Respondent's witnesses, they did not testify concerning the reasons for Smith's termination. (JD 48).

The ALJ concluded that the Respondent failed to meet its Wright Line burden that it would have discharged Smith absent his union activity. (JD 50). The ALJ determined that Respondent did not establish that it consistently and evenly applied its disciplinary rules as required by Board precedent. Septix Waste, Inc., 346 NLRB 494, 495-496 (2006); (JD 50). Brian Lennon offered vague testimony that employees have been disciplined for threatening a co-worker. (Tr. 78). The Respondent asserts in its brief that an employee by the name of Carl Wolfe was discharged for threatening a co-worker. (Resp. Br. 64). As evidence, it refers to an off the record conversation at the hearing regarding a subpoena issue. (Resp. Br. 62-64, Tr. 77-79). This does not constitute evidence. Respondent chose not to present evidence it now claims supports its Wright Line defense. Respondent failed to offer record evidence at the hearing (such as disciplinary forms, detailed testimony, or personnel files) regarding Carl Wolf or any other employee with respect to the discipline or discharge of employees for threatening co-workers with bodily harm that occurred prior to Smith's termination in 2009. Respondent asserts that the ALJ disregarded Brian Lennon's testimony that an employee was terminated for threatening another employee. (Resp. Br. 62). There was nothing of any substance for the ALJ to consider on this point.

B. Evidence presented by General Counsel establishes disparate treatment

[10] Respondent did not take exception to this finding.

Denny Ormsby testified about an incident in 2007 when the Respondent tolerated a threat directed at Ormsby and his family by co-worker Mike D. Williams. (Tr. 479-487). Williams was upset about a report someone made to management that he had been playing video games on work time. (Tr, 480). Williams came to Ormsby's machine and told Ormsby that if he lost his job, he knew where people lived and that he did not care about them, their wives, or their kids. (Tr. 481). Ormsby had given Williams rides to work and he knew where Ormsby lived. Id. The threat upset Ormsby. Id. A supervisor overheard William's threat and told Ormsby he would report it to management. (Tr. 481). Hicks testified that the punishment for threats of harm to a co-worker is immediate termination. (Tr. 2174). Mike Williams continued to work at General Die Casters after he threatened Ormsby. (Tr. 486, 487).

Williams and Ormsby met with CEO Mathias and Twisburg Plant Manager Keith Kish. (Tr. 482, 483). Ormsby recounted what Williams said to him. (Tr. 482-487). Mathias said that Williams was young and that they should shake hands. (Tr. 483). While Respondent attempts to assail Ormsby's credibility (Resp. Br. 62), Ormsby gave an affidavit to Respondent Attorney Ron Mason which is consistent with his testimony at the hearing about the threat. (Resp. Exh. 96). It is inherently probable that Ormsby would accurately recall being threatened by a co-worker who was not disciplined or terminated as a result of the incident.

The ALJ rejected Mathias' testimony and credited Ormsby's testimony regarding the Williams incident. (JD 49, 50). It is respectfully requested that the Board defer to the ALJ's credibility determination as set forth in Standard Dry Wall Products, *supra.* The evidence reveals that Respondent did not consistently and evenly apply is disciplinary rule regarding employee threats to co-workers.

As found by the Administrative Law Judge, Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating Willie Smith.`

XII THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT DISCRIMINATORILY WITHHELD WAGES FROM EMIL STEWART

Emil Stewart has been employed at General Die Casters for nearly 20 years. (Tr. 931). He works first shift at the Peninsula plant as a trimmer. Id. Stewart participated in the Union organizing campaign and has served on the Union negotiating committee since the start of negotiations in October, 2008. (Tr. 933). In November, 2009, Brian Lennon requested that Stewart attend a meeting that day with representatives from OSHA. (Tr. 940). He told Stewart the company needed a Union representative at the meeting. (Tr. 940). The meeting took place about five minutes after Lennon spoke with Stewart. (Tr. 941).

Stewart testified that Brian Lennon, Tom Lennon, and Dan Owens were present at the meeting on behalf of management. Id. Two representatives from OSHA were also present. The purpose of the meeting was to discuss OSHA fines against the company. (Tr. 941). Union organizer Rick Kepler testified that in June or July, 2009, he participated in a safety tour of the Peninsula plant. (Tr. 1490). The Union did not contact management to request that Stewart attend the November meeting and Stewart did not volunteer to attend the meeting. (Tr. 943, 1492).

For the pay period ending November 8, 2009, Respondent deducted 45 minutes pay from Stewart for his time spent in the OSHA meeting. (Tr. 942, GC Exh. 31). Stewart informed Brian Lennon that his pay was short by three-quarters of an hour. (Tr. 942, 943). Lennon told Stewart that wages were withheld for the time he attended the OSHA meeting. (Tr. 943). The Union protested the Respondent's actions at a negotiation meeting, but to no avail. (Tr. 943, 1492, 1493). Brian Lennon acknowledged that while

Emil Stewart lost pay for attending the OSHA meeting, Lennon and Dan Owens were paid for their time spent in attending the meeting. (Tr. 1775, 1776).

Respondent asserts that it has long held the position that it would not pay employees for their time spent on union related activities, such as contract negotiations. (Resp. Br. 64). The Union did not request to have Stewart attend the meeting; Stewart's presence was at the behest of the Respondent. Respondent claims that Stewart knew that he would not be paid to attend the OSHA meeting. (Resp. Br. 66). On the contrary, as soon as Stewart learned that he did not receive his usual pay, he sought out Lennon to learn the reason. (Tr. 942, 943, GC Exh. 31). Only then did Stewart learn that his pay was docked for the time he attended the OSHA meeting. (Tr. 943).

The ALJ relied on NLRB v. Great Dane Trailers, 388 U.S. 26 (1967) and the principles discussed by the Board in International Paper Co., 319 NLRB 1253, 1267 (1995) when determining whether conduct that facially discriminates against employees who exercise their Section 7 rights violates the Act. (JD 51). As the ALJ concluded that the loss of 45 minutes pay is "relatively slight", he considered the issue of whether the Respondent was motivated by legitimate business considerations. Id. The Respondent's defense/business justification was that it had taken the position in contract negotiations that it would not pay employees to conduct union business on company time. Id.

The ALJ, unlike Respondent, was able to distinguish between union activity an employee voluntary participates in, such as contract negotiations, and those activities an employee undertakes at the direction of the employer. Respondent takes issue with the ALJ's finding that Stewart was instructed to attend the meeting. (Resp. Br. 65, 66). Most employees understand that a "request" by an employer is, in reality, a directive. Had Stewart refused to attend the meeting, his refusal could well have been considered by Respondent to be an act of insubordination. Lennon told Stewart that the company

needed the presence of a union representative at the OSHA meeting. The ALJ noted that Stewart did not volunteer to attend the meeting and the Union did not seek to have a representative present at the OSHA meeting. (JD 51).

The ALJ rightly concluded that Respondent failed to offer a substantial business justification. (JD 51). Stewart was denied pay because of his status as a union supporter and thus Respondent violated Section 8(a)(3) and (1) of the Act when it withheld his pay.

XIII THE RESPONDENT VIOLATED THE ACT WITH REGARD TO AN INFORMATION REQUEST PERTAINING TO NONBARGAINING UNIT EMPLOYEES

A. The ALJ's finding with respect to certain requested information

On April 22, 2009, Union representative Rick Kepler made a written request for information directed to Tom Lennon and James Mathias. (Tr. 1459, 1460, Resp. Exh. 9). The Union requested 10 categories of information. In paragraph 10 the Union asked for information pertaining to non-bargaining unit employees. (Resp. Exh. 9). Specifically, the Union sought: "*The names and titles of any managerial, supervisory, clerical or others who may be affected by this layoff."* The Union requested the information regarding non-bargaining unit employees to determine if Respondent had complied with the WARN Act requirement on mass layoffs. (Tr. 1998. Resp. Exh. 14).

Kepler sent another letter requesting information dated May 6 to Lennon and Mathias. (Resp. Exh. 14). The Union repeated its prior information request seeking to ensure that the Respondent complied with the WARN Act. Id. In a letter to Mathias and Lennon dated May 26, 2009, the Union repeated its request pertaining to non-bargaining unit members on layoff. (GC Exh. 121). The Union made a fourth request for this information in a letter dated August 5 from Kepler to Jim Mathias and Tom Lennon. (GC Exh. 122).

In a letter dated June 9, Ron Mason informed Travis Bornstein that 6 management

personnel were laid off. (Resp. Exh. 24). The Respondent did not provide the Union with the names of management personnel on lay off status. Mason testified at the hearing that after he provided the foregoing information, the Union told him at a negotiating meeting that in order to verify the identity of the management personnel laid off, the Union needed the names of the non-bargaining unit employees on lay off. (Tr. 1999). Mason testified at that a later, unspecified date, Respondent provided the Union with the names of the non-bargaining unit employees. Id. Mason further stated that a former colleague may have provided the Union with the names. (Tr. 1998, 1999). Rick Kepler, however, maintained that the Union did not receive the names of these individuals. (Tr. 1461).

When a union requests information pertaining to non-bargaining unit employees, it must demonstrate that the information is relevant and necessary to enable it to carry out its statutory responsibilities. Frito-Lay, Inc., 333 NLRB 1296 (2001). The ALJ found that the Union had satisfied this requirement. (JD 56). The ALJ concluded that the Respondent violated Section 8(a)(5) and (1) by failing to provide the names of the non-bargaining unit personnel. Id. The ALJ did not rely solely on Kepler's testimony, noting that the record does not contain any documents verifying that the Union received the information. Id. Counsel for the General Counsel notes that Respondent did submit record evidence that the Respondent belatedly furnished the Union with requested the information. Mason's former colleague Matthew Austin, sent a letter dated August 24, 2009 to Travis Bornstein. (Resp. Exh. 50).[11] An attachment to the letter contains the names of six individuals that apparently respond to the request in Kepler's August 5 letter, seeking yet again the names of the non-bargaining unit personnel on lay off. (Resp. Exh. 50, Bates No. 08540).

B. The Respondent unlawfully delayed in providing the requested

information

Paragraphs 13 (A) and (F) of the Second Amended Consolidated Complaint allege that Respondent failed to provide the Union with certain information including the names and titles of any managerial, supervisory, clerical or others who were affected by the layoff from employment that occurred in 2009. (GC Exh. 1(nnnn)).

Based on the record before it, the Board should find that although the Respondent ultimately provided the information, it nevertheless violated Section 8(a)(5) and (1) of the Act by its significant delay in responding to the Union's information request. The Board has held that the delayed and untimely submission of information does not fulfill the duty to bargain under the Act or obviate the need for a remedy. Association of D.C. Liquor Wholesalers, 300 NLRB 224, 229 (1990). Respondent informed the Union of the number of managerial personnel affected by the layoff on about June 9, some seven weeks after the Union's April 22 request. Evidence submitted at trial establishes that the Respondent did not identify the individuals until four months had elapsed from the date of the April 22 request. The identity of managerial employees laid off is information that would be readily available to the Respondent, yet the Union had to make four written requests from April 22 to August 5 before it received the information. Mason concedes that the Union explained to him why it needed the names in addition to the number of non-unit employees laid off.

XIV THE ALJ CORRECTLY CONCLUDED THAT REPSONDENT, THROUGH DAN OWENS, VIOLATED SECTION 8(a)(1) OF THE ACT

The Respondent's efforts to drive a wedge between the Union and bargaining unit employees culminated in April, 2010 with Respondent's support for the circulation of a second decertification petition at the Peninsula plant. A previous decertification petition

[11] Kepler is not cc'ed on the letter.

in Case No. 8-RD-2178 was filed with Region 8 on December 7, 2009. (GC Exh. 84). That petition is blocked by the pending unfair labor practice charges. The first petition is not a subject of the current amended consolidated complaint.

Safety Coordinator Dan Owens solicited employees to sign the second petition to decertify the Union. During April and May, 2010, Owens asked first and second shift employees to sign the petition. (Tr. 97, 1748, 1749).

A. Dan Owens is a 2(11) Supervisor and a 2(13) Agent

Respondent asserts that the ALJ erred in finding that Safety Coordinator Dan Owens is a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) of the Act. (Resp. Br. 69). The ALJ had ample basis for his findings that Owens is a 2(11) supervisor and a 2(13) agent. (JD 66, 67). The ALJ reviewed the evidence and fully explained his findings. (JD 63-67). He made certain well reasoned credibility findings with respect to Respondent's witnesses, Owens, and third shift supervisor Brian Olher as well as GC employee witnesses Jerome Ivery, Chuck Smith, and Mark Albright in addition to considering arguments advanced by Respondent and the GC. Id.

Respondent ignores the cumulative record evidence presented at hearing that presents a convincing picture of Owens' relevant job duties and authority. Owens has been Respondent's safety coordinator for 15 years. (Tr. 93, 94). His duties encompass all safety-related matters at the Twinsburg and Peninsula plants. (Tr 94). Owens does not perform any production work and shares an office with the production scheduler. (Tr. 226, 428, 826). Owens' duties and responsibilities are set forth in detail in GC Exh. 5, the safety coordinator job description. The Respondent vests in Owens the authority to coordinate all of its safety and health programs. An essential duty of the safety coordinator is to "Ensure and enforce safety and health standard rules." (GC Exh. 5).

Owens is responsible for a myriad of duties including, but not limited to, the following tasks:

1. Assess plant-wide safety performance with plant manager and human resource manager.

2. Review accidents and formulate recommendations on a program basis.

3. Lead investigations for all serious accidents as well as near-miss and lost time accidents.

4. Serves as the leader of GDC safety committee, which includes employee members.

5. Trains employees in safety and health programs.

6. Develop and coordinate training activities.

7. Personally trains safety and health programs within the facility.

8. Provide direction, recommendations and general support in emergency situations.

9. Develop and maintain an effective safety and health promotional program (Incentive program etc.).

The duties of the safety coordinator are repeatedly referred to in the safety handbook given to all employees. (GC Exhs. 3 (Twinsburg) and 4 (Peninsula)). Plant Manager Brian Lennon acknowledged that all employees receive a copy of the safety handbook. (Tr. 30). Employees are instructed to alert supervisors or Owens if they feel they are not adequately trained in a certain procedure. If an employee feels a job or process is unsafe, they must immediately shut down the process and discuss the problem with their supervisor or Owens. (GC Exh. 4, Bates No.00077). The handbook also informs employees that Owens is responsible for the implementation and operation of the emergency action plan. (GC Exh 4, Bates No. 00088). The emergency action plan is detailed at GC 4, Bates No. 00085-00088. Significantly, the position of safety coordinator is included in the "Chain of Command" along with supervisors, the Plant

Superintendant, and the Plant Manager. (GC Exh. 4, Bates No. 00086).

Owens has overall responsibility for the Respondent's Hazard Communications Program. The purpose of the program is to ensure compliance with OSHA's standards on hazardous materials and provide employees with training. The handbook states "The program coordinator is DANIEL OWENS, (Safety Coordinator) acting as a representative of the plant manager, who has overall responsibility for the program." (GC Exh 4, Bates No. 00095). Peninsula plant employees Jerome Ivery and Sam Tomsello testified that Owens is responsible for ensuring that employees comply with the hazardous materials rules. (Tr. 228, 737).

The handbook provides that Owens is responsible for conducting safety audits. (GC Exh. 4, Bates No. 00079). Owens inspects employee performance on certain safety procedures and reports the results to management. On March 4, 2010, Owens conducted a lockout audit of second shift employees. In an e-mail dated March 5 to Brian Lennon, Owens stated that he observed several employees performing the lockout/tagout procedure successfully and that he interviewed operators on their knowledge of proper procedures. (GC Exh. 76). The handbook informs employees that the safety rules are governed by the disciplinary policy detailed in the Hourly Employee Handbook. (GC Exh. 4, Bates No. 00081).

According to employee Jess Kreinbrook, Owens patrols the plant to monitor employees in the safe performance of their duties. (Tr. 855). In Owens' 2008 job evaluations, Brian Lennon notes that Owens places a priority on monitoring and controlling employees' safety practices. (Tr. 75, GC Exh. 64, Bates No. 00146). In the event of an accident or near miss, Owens is charged with investigating the matter and interviewing employees involved in the incident. (Tr. 57, GC Exh. 64, Bates No.00146).

Owens conducts safety training for all new employees. (Tr. 730, 855, GC Exh. 10,

Bates No. 00029, 00030, 00032-00048). Owens also provides safety training to current employees. GC employee witnesses Willie Smith, Sam Tomsello, Chuck Smith, Jess Kreinbrook, and Jerome Ivery testified regarding mandatory trainings at the Peninsula plant that Owens provided to employees in 2009 on lockout/tag out, tow motor safety, and the use of fire extinguishers.

First shift employee Chuck Smith testified that the Respondent held a mandatory meeting for the entire first shift on tow motor safety. Owens conducted the meeting in the presence of first shift supervisor Mike Jordon, plant manager Brian Lennon, and casting superintendant Chuck Long. (Tr. 819, 820). Owens told the assembled employees that he would write them up if they did not wear their safety belts. (Tr. 822). Willie Smith also recalled that Owens told employees they would be subject to disciplinary action if they did not observe this safety rule. (Tr. 429, 430).

Owens also informed employees at the training he conducted on lockout/tagout that they would be disciplined if they failed to follow these safety procedures. (Tr 223). First shift employees Chuck Smith, Jess Kreinbrook, and Willie Smith all recall that plant manager Brian Lennon was present at the lockout/tagout training. (Tr. 432, 824, and 856). Although management was present, Owens conducted the meeting. (Tr. 432, 856). Sam Tomsello testified that Chuck Long and Brian Lennon were present at the same training held for third shift employees. Owens reviewed existing and new procedures and told employees they were subject to termination for failure to observe the procedures. (Tr. 736, 737).

Several witnesses testified about Owens' role in enforcing Respondent's safety rules. Brian Lennon admitted that he relied upon Owens' recommendation in issuing employee Denny Ormsby a final written warning on March 4, 2009 for a safety violation. (Tr. 58). On March 3, 2009, Ormsby's supervisor, John Walters, completed a Supervisor

Incident Report form. (GC Exh. 00187). On a line specified for corrective action, Walters indicated that Ormsby should not have been at the end of the conveyor. Id. Supervisors are instructed to submit the incident form to the Safety Coordinator. (GC Exh. 9. Bate No. 187). Owens then completed the Accident Analysis Report on March 4 wherein he recommended that disciplinary action be taken against Ormsby for violation of safety rules relating to reaching past a certain number of hooks on a carousel to clear parts. (Tr. 57, GC Exh. 9. Bates No. 00188-00192). That same day Lennon, relying on Owens' accident report, issued Ormsby a final warning. (GC Exh. 9, Bates No. 00184). Owens is charged with leading serious accident investigations and he documents on the Accident Analysis form if the employee was the root cause of the accident. (Tr. 1749, 1750, GC Exh. 5, 9).

Die cast operator Chuck Smith testified that in 2009 he received a written warning from Owens for not wearing a safety helmet. Owens observed Smith without his helmet on while he was operating a machine. According to Smith, Owens asked him about the whereabouts of his safety hat. (Tr. 827). Smith responded that it was in his locker. Owens replied that Smith was "in trouble." Id. at line 10. About an hour later, Owens handed Smith a written warning. In the time that elapsed between Owens observing Smith without his hat on and Owens handing Smith the written warning, no one else in management questioned Smith about the incident. (Tr. 827, 828). Owens offered a solitary "No" when denying the incident occurred. (Tr. 1746, line 24).

In an e-mail dated July 9, 2008, Owens informed Human Resources Director, Seanna Huberty, that he had issued a verbal warning that same day to Jerome Ivery. (GC Exh. 41). Owens observed Ivery talking to co-worker Emil Stewart. Ivery was not wearing his safety glasses at the time. Owens informed supervisor Mike Jordon and Jerome Ivery about the warning. (Id, Tr. 100, 101). Although Owens told Huberty after

the fact that he took disciplinary action against Ivery, he claimed that it was up to Huberty to initiate the disciplinary action.(Tr. 102, 103).

In 2008 and 2009 Owens issued verbal warnings for safety violations to Jason Sallaz, Joan Cutright, and Leonard Redd. (GC Exh. 40, 48, 49). Owens offered confusing and evasive testimony about his role with respect to these disciplinary warnings. The warning forms allegedly went back and forth between supervisors and Owens with Owens performing tasks he claims should have been done by the supervisors. (Tr. 105-108, 108-112, 112-114). Owens admits that he noted on the forms that the corrective actions taken were verbal warnings and that his signature appears on the forms on the supervisor line. (GC Exh. 40, 48, Tr. 106, 109, 113, 114). While Owens asserted that the warning forms were not official documents, he conceded that he submits the completed forms to the Human Resource department. (Tr. 107, 113).

Jerome Ivery and Mark Albright offered testimony about an incident that occurred in August, 2008. (Tr. 215, 982). Ivery's safety glasses had fallen off his head and were soiled by grease on the floor. As Ivery was wiping them clean, Owens saw him with the glasses in his hand. (Tr. 215, 216, 982, 983). Ivery and Albright were able to recall precise details such as that they were standing near machine #7 when the incident occurred. (Tr. 215, 982). Just a few minutes later, supervisor Brian Ohler approached Ivery and stated that Owens told him to give Ivery a warning. (Tr. 216). Ivery protested and told Olher that Albright could back up his story as to why he was not wearing his glasses.

Albright interceded and backed Ivery's account of the incident. (Tr. 985, 986). Olher confirmed that Owens told him to give the write up to Ivery. (Tr. 986). Olher returned to Ivery and told him that he had returned the write-up to Owens based on Albright confirming his story. (Tr. 217). Later that day, Brian Lennon got involved and

told Ivery to sign the disciplinary form. (Tr. 217). The ALJ did not credit Olher's version that he gave the warning to Ivery after Owens reported the incident to him as explained at JD 65, fn. 65.

Ivery also recalled an incident that occurred a few days before the hearing began. (Tr. 217, 218). Co-worker Jim Pruney, while operating a tow motor, cut a hydraulic line. As a result, Ivery was sprayed with oil. (Tr. 218, 219). In speaking to him about the incident, Owens told Ivery that he recently directed Engineer Gail Stansberry to issue a warning to Pruney for hitting a machine with a tow motor. (Tr. 220-222). Again, Owens offered a one-word denial. (Tr. 1746, line 11).

The General Counsel has presented convincing evidence that Owens is a 2(11) supervisor and a 2(13) agent. There is reasonable cause to believe Owens is a statutory supervisor pursuant to the test in Oakwood Healthcare, 348 NLRB 686 (2006). Individuals are statutory supervisors if they (1) have the authority to engage in one of the 12 supervisory functions listed in Section 2(11) of the Act, (2) utilize independent judgment to exercise that authority, and (3) hold their authority in the interest of the Respondent. Here, each element is met where Owens disciplined employees without direction or review from higher management and effectively recommended that disciplinary action be taken against employees.

In addition to the previously discussed evidence, in Owens' 2008 evaluation Brian Lennon lists the following as one of Owens' principal strengths: "Dan is well versed in our disciplinary system as well, and integrates safety management with our personnel policies to insure consistency in administration." (GC Exh. 64, Bates No. 00146). GC Exhibits, such as Owens' e-mail to HR Manager Huberty also establish that Owens has the authority to discipline employees. (GC Exh. 41). The verbal warnings Owens issued to Sallaz, Cutright, and Redd also serve as persuasive evidence of Owen's supervisory

status. The ALJ soundly rejected Owens' inconsistent and unpersuasive accounts of his role in these disciplinary actions. (JD 64).

The ALJ properly relied on the Board decisions found that JD 66. As noted by the ALJ, the cases that Respondent relies upon are distinguishable, referring to Vencor Hospital-Los Angeles, 328 NLRB 1136 (1999); Ten Brock Commons, 320 NLRB 806 (1996); and Passavant Health Center, 284 NLRB 87 (1987). (JD 67). In those cases, the alleged supervisors' reports regarding employee misconduct were independently reviewed by acknowledged supervisors before disciplinary action was imposed. Respondent also relies on Lakeview Health Center, 308 NLRB 75 (1992),[12] where, unlike the evidence presented in the instant matter, the purported disciplinary authority amounted to charge nurses checking a box on a form for the corresponding infraction. The check box function was not a recommendation and it did not reflect an independent decision as to a definitive disciplinary action.[13]

There is also compelling evidence that Owens is a 2(13) agent. The test for determining if a person is acting as an agent of the Respondent is whether, under all the circumstances, employees would reasonably believe that the employee in question is reflecting company policy and speaking and acting for management. Waterbed World, 286 NLRB 425 (1987).

The Board uses the common law principle of agency in determining whether an employee is an agent of an employer when making statements or taking particular action. The Board may find agency based on either actual or apparent authority to act for the

[12] Resp. Br. 75.

[13] Respondent's reliance on Ken Crest Services, 335 NLRB 777 (2001) is also misplaced. The Board agreed with the hearing officer's findings that program managers were not supervisors and directed that their ballots be opened and counted. In that case, the HR Manager noted that verbal warnings meted out by the program managers may not even be noted in the employer's personnel files. Again, under the particular facts of that case, the program manager's level of involvement was deemed to be reportorial in nature.

employer. "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal had authorized the alleged agent to perform the acts in question." Southern Bag Corp., 316 NLRB 725 (1994). An employer may have an employee's actions/statements attributed to it if the employee is held out as a conduit for transmitting information from management to other employees. D.F. Industries, 339 NLRB 618 (2003).

The ALJ was correct in concluding that Owens possesses apparent authority regarding Respondent's terms and conditions of employment pertaining to health and safety. (JD 67). The safety handbook expressly states that Owens acts as a representative of management for the Respondent's hazardous materials communications programs. Owens is included in the safety handbook as being in the management chain of command for emergency evacuations. Owens serves as a conduit for Respondent in the area of plant safety and its policies. The safety coordinator job description as well as Owens' job performance evaluation also establishes Owens' agency status.

As recently as 2009, Owens conducted safety training sessions for employees, which were attended by top plant management. Owens informed employees they were subject to the Respondent's disciplinary policy if they did not follow lock out/tag out procedures and tow motor safety. Owens conducts all new employee safety training.

Owens monitors employees' performance to ensure compliance with safety regulations. Employees know that they are subject to disciplinary action if they fail to follow these procedures. He is charged with leading serious accident investigations and will document on the Accident Analysis form if the employee was the root cause of the accident.

Unlike the current case, there was no other evidence in Ken Crest Services that supported a finding of supervisory status.

In NLRB v. Thermon Heat Tracing Services, Inc., the Fifth Circuit held there was substantial evidence that a safety professional whose "duty was to assist in promoting, providing, and maintaining a safe working environment" is an agent of the employer. 143 F.3d 181, 186 (5th Cir. 1998). An agent's violation of the Act is properly imputed to the employer. Atlas Minerals, 256 NLRB 91, 96 (1981); Uniontown Hospital Association, 277 NLRB 1298, 1303 (1985). Just as in Thermon, Owens is an agent based on his job duties and the apparent and actual authority he possesses to act on Respondent's behalf. *supra*.

The record evidence thus establishes that Dan Owens is a supervisor and agent within the meaning of Section 2(11) and 2(13) of the Act.

B. Owens role in the 2010 decertification effort

Owens openly solicited employees to sign the petition. Owens admits that during April and May 2010, he asked first and second shift employees at the Peninsula plant to sign the decertification petition. (Tr. 97, 1748, 1749). At times, Owens was doggedly persistent in his attempts to secure employee signatures. Jerome Ivery and Chuck Smith turned him down on two occasions, yet Owens returned for a third try. (Tr. 181-187, 810-815). On the third occasion, both men relented and signed the petition. (Tr. 186, 187, 816, 817). Dave Smerk, Leonard Redd, Jess Kreinbrook and Jay Quarterman testified that Owens asked them to sign the petition. (Tr. 120, 121, 842, 852, 885).

Owens solicited employees to sign the petition while they working. Owens asked Smith to sign the petition while Smith was on work time. (Tr. 810, 811). Owens approached Krienbrook as he was retrieving gloves and supplies from the crib area. (Tr. 853). Jay Quarterman was working by the scale when Owens asked him to sign. (Tr. 885, 886). In an apparent effort to convince Smith to sign the petition, Owens told Chuck Smith that CEO James Mathias would be more willing to negotiate wages with

employees if the Union were no longer at the plant. (Tr. 829).

Respondent violated the Act by permitting Owens to solicit employees to sign a petition to decertify the Union. It is unlawful for an employer to solicit employees to circulate a decertification petition, solicit employees to sign such a petition or provide more than ministerial aid in their preparation. Mickeys Linen and Towel Supply, Inc., 349 NLRB 790 (2006). Armored Transport, Inc., 339 NLRB 374 (2003); Harding Glass Co., 316 NLRB 985 (1995) and cases cited by the ALJ at JD 67. Board law establishes that an employer is responsible for the acts of its agents. (JD 67).[14]

XV THE ALJ CORRECTLY FOUND THAT OWENS STATEMENT TO EMPLOYEE SMITH VIOLATED SECTION 8(a)(1) OF THE ACT AS ALLEGED

The ALJ found that Respondent violated Section 8(a)(1) of the Act when through Dan Owens, it told employee Chuck Smith that CEO Jim Mathias would be more willing to negotiate wages if the employees no longer had union representation. (JD 68). The Respondent makes much of the fact that Smith corrected himself during his testimony regarding the unlawful statement that Dan Owens made to him. (Resp. Br. 27, 78). At one point Smith testified that Chuck Long made the statement and then corrected himself, testifying that in fact, it was Dan Owens who made the statement. (Tr. 812, 814, 829). Any momentary confusion on Smith's part is understandable as, discussed in more detail below, Long also made an unlawful statement to Smith the same day as Owens made the coercive statement to Smith.

The key point is that Respondent violated Section 8(a)(1) Act when Owens

[14] Without referring to transcript pages, Respondent asserts the following in it brief in support at page 77: the Union added the safety coordinator to the bargaining unit; the Union proposed that the position be included in the recognition clause during bargaining; and the Union never made a proposal during contract negotiations to remove the safety coordinator position from the bargaining unit. (JD 77). These observations do not undermine the ALJ's determination of supervisory or agency status. However, to set the record straight, the Union challenged the safety coordinator's ballot during the election. The challenges

coercively informed Chuck Smith that CEO Mathias would be more willing to address issues with employees, such as wages, if the Union no longer represented employees. This statement was all the more coercive because it was made at the same time Owens was soliciting employees, including Smith, to sign the petition. Owens offered only a general denial; he was not asked about, and made no reference to, Smith's specific assertions. (Tr. 1744).

XVI THE ALJ CORRECTLY DETERMINED THAT CHUCK LONG VIOLATED SECTION 8(a)(1) OF THE ACT AS ALLEGED

The ALJ found that die cast superintendant Chuck Long threatened employees with plant closure and job loss in violation of Section 8(a)(1) of the Act. (JD 68). The first time that Dan Owens approached Chuck Smith to sign the decertification petition, Chuck Long spoke to Smith the same day at about 1:00 pm as he was working at machine #15. (Tr. 811). Long told Smith that CEO Jim Mathias was getting mad about spending money on a lawyer. Long then stated that he hoped they did to lose their jobs. (Tr. 811).

Peninsula plant employee Dave Smerk testified that in April, 2010, at the time the decertification petition was circulating in the plant, Chuck Long approached him in the area by the production and supervisors offices. (Tr. 117, 118). Long shook his head and said, "It's unbelievable." (Tr. 118, line 13.) He went on to ask Smerk "Don't people realize that Jim Mathias said he'd close the doors before he'd let the union come in?" (Tr. 118, line 15, 16). When Smerk asked if that was what the surveyor stakes were for, Long told him "It could very well be." (Tr. 118, line 18, 19). Long's version of the conversation was stilted and disjointed, repeatedly stating "you know" and "I don't know". (Tr. 1910, lines 1-21). For example: "I--I –I don't know, you know, I--I don't

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were not sufficient in number to affect the outcome of the election and thus the issue was not addressed at that time. (Tr. 1449, 1450).

know what--I don't know what to say to him, you know." (Tr. 1901, lines 18-20).

Respondent asserts that Smerk was threatened by Counsel for the General Counsel regarding his testimony. (Resp.Br. 78). Respondent's attorney Ron Mason put the question to Smerk: "Is it not true that you told Mary Smith, Doug Hicks, and Brian Lynn on Friday that Ms. Fernandez told you that if you did not appear that she would send a Sheriff out and he would bring you to the hearing?" (Tr. 122, lines 22-25, 123, line1). Respondent also claims that Smerk's testimony was given under duress and should not be credited. (Resp. Br. 79).

Respondent neglected to include all relevant parts of Smerk's testimony on this point. On re-direct Counsel for the General Counsel inquired:

Q. Okay, did I tell you that we could have the subpoena enforced?

A. Yes.

Q. And that I would recommend it, if you didn't come?

A. Yes.

Q. Okay. I didn't use the word, "Sheriff"?

A. Not -- well it wasn't you that said that. It was somebody else that brought that up, because I –mentioned it to somebody at work and they said, yeah, this is what'll happen.

Q. Oh, so those weren't my words—

A. I don't think so.

Q.- -that Mr. Mason suggested to you?

A. Right. It was indirect.

Q. And you are here pursuant to the subpoena and nothing else?

A. Yes.

(Tr. 126, lines 7-24).

Respondent's request that Smerk's testimony be discredited is not worthy of serious consideration.

XVII THE ALJ CORRECTLY DETERMINED THAT RESPONDENT'S "NEGOTIATION UPDATES" UNLAWFULLY ENCOURAGED EMPLOYEES TO DECERTIFY THE UNION

The ALJ concluded that the Respondent violated Section 8(a)(1) of the Act when it issued two documents entitled "Negotiation Updates" to employees in April and May, 2010 at the time that a second decertification was circulating at its plants. (JD 70). In taking exception to this finding, the Respondent refers to the decertification petition filed on December 7, 2009 in Case No. 8-RD-2178 when claiming that it has fundamental free speech rights under Section 8(c) of the Act to encourage employees to support the decertification effort. (Resp. Br. 79, 80). As detailed below, the ALJ did not find that Respondent lent any unlawful support or encouragement in the filing of the petition in 8-RD-2178 as there are no complaint allegations regarding that petition. The complaint allegations concern the Respondent's actions with respect to the decertification petition that circulated at its plants during April and May 2010.

In April and May, 2010, at the same time the second petition was circulating at the Peninsula plant, CEO Mathias issued two "Negotiations Updates" wherein he openly and blatantly encouraged the decertification effort. (GC Exh. 14(b) and 15). Mathias proclaimed the Respondent's support for the decertification effort, encouraged employees to support it, and concluded the April update by stating: "Therefore, the only real option left is to throw the Union out." (GC Exh. 14(b)). Respondent attached two letters from March and April, 2010 to the April update in an effort to support its argument that it was "time to throw the Union out."

The argument advanced by Respondent that Mathias was merely referring to the decertification petition filed in December, 2007 should be rejected because he did not

refer to that petition in either update. Mathias specifically mentions the second petition in his May update. Mathias informed employees that it was clear the Union was running scared about "*...the petition that is circulating*". (GC Exh. 15). Mathias closed the May memo by stating *"We fully support the decertification of this Union and hope that in an NLRB election you will all be given a chance to vote the Union out."* Employees testified that they received the Mathias' updates either by mail or saw them posted in the plant. (Tr. 237, 239,781, 781, 784, 785, 835).

Mathias' negotiation updates violate Section 8(a)(1) of the Act. In Armored Transport, Inc., 339 NLRB 374 (2003), the employer issued a series of letters expressing frustration with the course of negotiations and blaming the union for the lack of progress. The letters directed employees to, among other things, go to the NLRB and demand a new election because employees no longer desired union representation.

The Board determined that the employer violated the Act by soliciting employees to decertify the union when it directed employees to the decertification process and requested that they file a petition. The Board noted that "*The law is clear that an employer may not solicit its employees to circulate or sign decertification petitions and it may not threaten employees in order to secure their support for such petitions."* Id at 377. The Board noted that although the employer did not expressly advise the employees to get rid of the union, such express appeals are not necessary to establish that an employer effectively solicited decertification and thereby violated the Act. In the present case, Mathis did expressly encourage employees in the two negotiations updates to rid the Company of the Union's presence. Mathias also stated that the Respondent was supporting and encouraging the decertification effort.

The fact that there is already a decertification petition on file with the Region in the present case does not excuse Respondent or make implausible its involvement in the

second petition drive. The first petition was blocked and the second petition did not need to be filed with the Region to achieve the desired end of draining support for the Union through unlawful coercion. As noted by the ALJ, Respondent's negotiation updates contained much more than its version of the status of negotiations; they included an overt appeal to employees to rid themselves of union representation. (JD 70).

XVIII THE ALJ CORRECTLY FOUND THAT RESPONDENT VIOLATED SECTION 8(a)(1) WITH REGARD TO A MEETING MANAGEMENT HELD ON SEPTEMBER 17, 2010 WITH EMPLOYEE JEROME IVERY

The ALJ considered at length certain events that occurred between long-time employee Jerome Ivery, Peninsula plant management, and Respondent's attorney Ron Mason that occurred on September 17, 20, and 22. (JD 70-78). The ALJ found that Respondent violated Section 8(a)(1) of the Act at a meeting held with Ivery on September 17 where HR Director Doug Hicks, Brian Lennon, and Chuck Long coercively requested that Ivery meet with Ron Mason regarding his upcoming testimony as a General Counsel witness. (JD 75). The ALJ concluded that Respondent failed to observe the safeguards set forth in Johnnie's Poultry Co., 146 NLRB 770 (1964) enf. denied 344 F.2d 617 (8th Cir. 1965) (JD 75). In reaching his decision, the ALJ made specific credibility resolutions, considered the applicable law as well the context of unfair labor practices in which the September 17 meeting took place. (JD 70, 71, 72, 75).

Respondent asserts that by finding the September 17 meeting to be coercive, the ALJ precludes the company's ability to even ask an employee to agree to be questioned. (Resp. Br. 83). On the contrary, the ALJ merely determined that such a request must conform to established standards and be free of the stain of coercion.

On Friday, September 17, 2010, Jerome Ivery was summoned to attend a meeting in HR Manager Doug Hick's office. Hicks, Brian Lennon, and Chuck Long were in

Hick's office. The meeting was recorded by management. (Resp. Exh 19). Although the managers did not inform Ivery that they were recording the meeting, Ivery is aware of Respondent's penchant for recording employees during meetings with management. (Tr. 150, 151, 263). When Hicks told Ivery that they wanted him to meet with Ronald Mason, Ivery expressed uncertainty about such a meeting. (TR. 148, Resp. Exh. 19). Hicks told him it was his choice. (Tr. 149). The transcript of the audio tape reflects that despite the Hick's assurances, Brian Lennon strongly urged Ivery to cooperate. (Resp. Exh. 19, pg 2, 6).

Ivery testified that in considering whether he would meet with Mason, he believed that if he did not, he would once again be subjected to the same disciplinary action that Respondent took against him before he renounced his support for the Union towards the end of 2009. (Tr. 148, 149). Hicks told Ivery to take the weekend to "Drink about it." (Resp. Exh. 19).

When Ivery returned to work the following Monday, he spoke with Chuck Long. Ivery asked Long if anyone would hold it against him if he chose not to speak to Mason. (Tr.152). Long replied that he would not hold it against him, but he did not know what other people would do. Id. Long did not offer any further explanation. Ivery agreed to meet with Mason. (Tr. 152). Long testified that he told Ivery it would not be held against him if he chose not to meet with Mason. (Tr. 1906, 1907). The ALJ credited Ivery's version over Long's account. (JD 72).

The ALJ discussed in detail the actions that Respondent took at the September 17 meeting that failed to follow the Johnnie's Poultry safeguards. Respondent did not clearly inform Ivery that the purpose of the meeting was to aid in Respondent's defense at trial or advise him that no reprisals would be taken against him if he chose not to cooperate. (JD 76). Informing Ivery that it was his choice is not the same thing. It is also

clear, as noted by the ALJ, that the meeting did not take place in an atmosphere free of hostility given the Section 8(a)(1), (3) and (5) violations that had occurred prior to the September 17 meeting.

The ALJ correctly relied upon Freeman Decorating Co., 336 NLRB 1 (2001) for the proposition that the Board requires that explicit assurances against reprisal be afforded to employees when being asked by management to meet with a company attorney. Respondent urges that like Freeman Decorating, it was necessary for Mason to meet with Ivery in an attempt to present an effective defense at trial. Such a desire does not excuse Respondent from its Johnnie's Poultry obligations.

XIX THE ALJ CORRECLTY FOUND THAT RESPONDENT, THROUGH CHUCK LONG, IMPLIEDLY THREATENED IVERY WITH RETALIATION

The ALJ found that Long implied threatened Ivery with retaliation when Ivery asked him on September 20 if there would be any consequences for not meeting with Mason. (JD 72, 76). As discussed in the above section, the ALJ explained why he credited Ivery over Long with respect to this conversation.

In support of this exception, Respondent goes to some length to argue against Ivery's credibility. (Resp. Br. 85-91). Respondent urges the Board to completely reject Ivery's testimony regarding the September 17 meeting. (Resp. Br. 85). As noted by the ALJ, it is not uncommon for an administrative law judge to reject some aspects of a witness's testimony while finding the same witness's testimony to be trustworthy on other matters. (JD 5, ftn 5). The Board should defer to the ALJ's credibility findings pursuant to the standards set forth in Standard Dry Wall Products, *supra.*

In urging this exception, Respondent also refers to certain credibility resolutions the ALJ made in a second hearing held in General Die Casters, Inc., Case No. 8-CA-39211, et al, JD-39-11 (2011). (Resp. Br. 89 ftn 11). As will be discussed in more in

detail below, the Board should not apply credibility resolutions the ALJ made in that case to the present case.

XX and XXI THE ALJ CORRECTLY DETERMINED THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT WITH RESPECT TO A SECOND MEETING HELD WITH JEROME IVERY AND THAT THIS MEETING TOOK PLACE IN AN ATMOSPHERE OF HOSTILITY

A. The Respondent overstepped permissible bounds when it questioned Ivery about his subjective state of mind

The ALJ found that Respondent violated Section 8(a)(1) of the Act on September 20 when Ron Mason coercively interrogated Jerome Ivery. (JD 76). The ALJ noted that Johnnies Poultry, *supra* specifically precludes questions that elicit information concerning an employee's subjective state of mind. Id.

After Ivery told Chuck Long on September 20 that he would meet with Mason, arrangements were made for Ivery to meet with Mason that day. Ivery met with Mason, his colleague Aaron Tulencik, and Doug Hicks after work at an airport in Akron. (Tr. 153, 155, 156). Mason had Ivery sign a statement setting forth certain Johnnies Poultry assurances (Tr. 2017). Mason then secured an affidavit from Ivery. (Resp. Exh. 115). Mason asked Ivery how he felt about the unfair labor practice charge he filed against Respondent. (Tr. 159). Mason asked him how he felt about the charges now compared to how he felt at the time the charges were filed. Id. The ALJ noted that the affidavit that Mason secured from Ivery demonstrates on its face that Ivery was asked about his subjective state of mind regarding events in question during the interview. (JD 76). While Respondent seeks to now place Ivery's credibility on trial, its transgression is memorialized in the affidavit as well as in Ivery's testimony.

B. The September 20 meeting occurred within an overall context of unlawful hostility

The ALJ considered the Johnnie's Poultry requirement that the questioning must

take place in an atmosphere free of hostility and found that the Respondent's actions at the September 20 meeting violated Section 8(a)(1) of the Act. (JD 76). Given the ALJ's findings of Section 8(a)(1), (3) and (5) that predate the September 20 meeting, it is abundantly clear that the meeting was held in an atmosphere suffused with hostility towards employees' Section 7 rights.

It should be noted that Respondent seeks to impugn Ivery's credibility in the present case (referring to Ivery's "constantly changing positions" during Respondent's investigation) by referring to Ivery's testimony in a second General Die Caster hearing in Case No. 8-CA-32911, et al. (Resp. Br. 93). The hearing in that case was held in Cleveland, Ohio on March 14, 15, 16, 2011. (JD 5 ftn. 4). The ALJ's credibility determinations made pursuant to the second hearing have nothing to do with his credibility resolutions and findings in the matters before him in the first hearing. Respondent seeks to concoct a credibility cocktail. Mix credibility resolutions by the ALJ in the second case with credibility resolutions made in the first case, shake vigorously, pour, and reject Ivery's credited testimony. The ALJ had a sound basis for his resolution of the witnesses' testimony in the instant matter and correctly applied relevant Board precedent.

XXII THE ALJ'S RULING ON CONSOLIDATION SHOULD STAND

The ALJ denied General Counsel's pre-hearing motion to reopen the record and consolidate the hearing in the present cases with a second round of cases in General Die Casters, Inc., Case No. 8-CA-39211, et. al. (JD 4, ftn. 4). The ALJ denied the motion. During the trial in General Die Casters, Inc. Case No. 8-CA-39211, et.al., on March 16, 2011, Respondent made a motion to consolidate the two proceedings which was also denied. Id. Respondent requests, post hearing, that the matters now be consolidated and considered together by the Board in reviewing Jerome Ivery's and another General

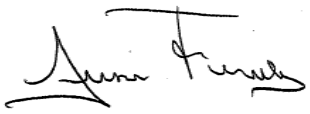
Counsel witness, Leonard Redd's credibility. (Resp. Br. 95, 96). Respondent argues that if this is done, surely credibility resolutions made in favor of Ivery and Redd in the first hearing, could now be decided against them. As discussed in sub-section XX and XXI (A) above regarding credibility resolutions made at the two hearings, the General Counsel urges the Board to reject such a notion.[15] Moreover, it is not uncommon for an administrative law judge to accept some portion of a witness' testimony while rejecting other aspects of that witness' testimony. (JD 5 ftn.4).

XXIII CONCLUSION

Accordingly, Counsel for the Acting General Counsel submits that Respondent's exceptions are without merit and that the ALJ's decision should be affirmed in its entirety.

Dated at Cleveland, Ohio this 26th day of August, 2011.

Respectfully submitted,



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Susan Fernandez,
Counsel for the Acting General Counsel
National Labor Relations Board, Region 8
AJC Federal Building, Rm. 1695
1240 East Ninth Street
Cleveland, Ohio 44199

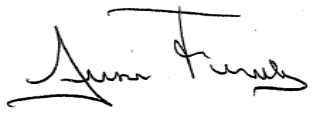
[15] Respondent chose not to take an interim appeal to the ALJ's denial of Respondent's motion made at trial.

PROOF OF SERVICE

Copies of the foregoing Answering Brief of Counsel for the Acting General Counsel were sent this 26th day of August, 2011 to the following individuals by electronic mail:

Ronald Mason, Esq.
Mason Law Firm
425 Metro Place North, Suite 620
Dublin, Ohio 43017
rmason@maslawfirm.com

John R. Doll, Esq.
Doll, Jansen, Ford & Rakay
111 West First Street, Suite 1100
Dayton, Ohio 45402-1156
jdoll@djflawfirm.com



Susan Fernandez
Counsel for the General Counsel
National Labor Relations Board
Region 8