United States of America
Before the National Labor Relations Board

OZBURN-HESSEY LOGISTICS, LLC,	)	
	)	
RESPONDENT,	)	
	)	
and	)	**Case No. 26-CA-24057**
	)	**26-CA-25065**
	)	**26-CA-24090**
	)	**26-RC-8635**
UNITED STEELWORKERS UNION,	)	
	)	
CHARGING PARTY.	)	

UNION'S BRIEF IN RESPONSE AND OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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UNION'S RESPONSE TO THE COMPANY'S EXCEPTIONS

On June 19, 2012 the Respondent, Ozburn-Hessey Logistics, LLC ("Company" or "OHL"), filed 17 exceptions to the Decision of Administrative Law Judge Robert A. Ringler in this case, which arises from an election held on July 27, 2011 pursuant to a Stipulated Election Agreement. The Decision sustained four of the six Union ballot challenges, one Board ballot challenge, and eleven of the twenty Union objections. In addition, Judge Ringler found the Company engaged in eight unfair labor practices, seven of which also form the basis of Union objections. Judge Ringler overruled the Company's four ballot challenges and thirteen objections. The Company excepts to all of the above determinations, with additional exceptions to Judge Ringler's conclusion that a new election should be held if the Union loses, alleged bias by the ALJ, his credibility determinations, and the reading remedy. The Union respectfully submits this brief in response to the Company's exceptions and urges that Judge Ringler's Decision in this matter be upheld in its entirety.

Background

The challenges, objections, and unfair labor practice charges that form the basis of this case are part of an election campaign in which a recalcitrant employer has fought to thwart a fair and impartial election. The long history of the Company's efforts to frustrate the union's organization efforts are set out in recent decisions of the National Labor Relations Board. Ozburne-Hessey Logistics, LLC, 357 NLRB No. 125, 2011 WL 6002198 (Nov. 30, 2011) ("Ozburn I"); Ozburne-Hessey Logistics, LLC, 357 NLRB No. 136, 2011 WL 6147441 (Dec. 9, 2011) ("Ozburn II"). In this second election, OHL has continued its pattern of misconduct and violations of the Act, as was evidenced at the hearing of this case. Judge Ringler's decision

sustaining most of the Union's challenges and objections, while rejecting those filed by the Company, is well-reasoned and supported by the record.

I. The Union's Challenges to the Ballots of Workers Outside the Bargaining Unit should be Sustained.

A. The challenges to office clericals Ms. Harris and Ms. Chaisson's votes should be sustained (Respondent's Exception No. 9)

The Union challenges the ballots of Tia Harris and Rachel Maxey Chaisson because their actual job duties are those of excluded office clerical employees. In keeping with the Board's general rule that office clerical and plant clerical are not joined in a single unit, the parties specifically excluded "office clerical" employees in the stipulated election agreement. U. Ex. 15. See Kroger Co., 204 NLRB 1055 (1973). To distinguish between office clericals and bargaining unit employees, the test generally is whether the employees' duties are related to the production process (plant clericals) or related to general office operations (office clericals). The distinction is grounded in community of interest concepts. Cook Composites & Polymers Co., 313 NLRB 1105 (1994). The Administrative Law Judge correctly held that both Harris and Chaisson are excluded office clerical employees.

OHL quarrels with Judge Ringler's factual finding that Harris and Chaisson "work in a ***separate*** office area and spend an extremely small percentage of their time on the warehouse floor." Decision, p. 33 (emphasis added). However, the evidence at hearing clearly demonstrated that Harris and Chaisson worked in an office separate from the warehouse production floor. Harris' work area is directly adjacent to her manager, Buddy Lowery. Tr. 1626, 1634-35. The area is secure and limited to access by other employees. Tr. 379, 401, 765. Chaisson's work station, until shortly before the second election, was located next to two

supervisors, and she was not seen on the warehouse floor. Tr. 715-16, 1607. Thus, the evidence supports Judge Ringler's factual conclusion.

OHL also argues that Judge Ringler incorrectly described Harris' and Chaisson's job duties. OHL admits that he correctly notes they are "data clerks," but quibbles with the Judge's statement that they "prepare reports," claiming instead that they enter information into a computer program that prepares reports. OHL Brief, p. 35. Such nit-picking is irrelevant and unnecessary; Harris and Chaisson are correctly identified as data entry clerks and analyzed under Board caselaw according to that job description and their actual job duties.

OHL's attempts to distinguish the analogous cases cited in Judge Ringler's decision also fail. Mitchellace, Inc., 314 NLRB 536 (1994), cited by Judge Ringler to set out the Board's test for distinguishing between plant and office clericals, is analogous here because it also involves data entry clerks. OHL tries to distinguish Mitchellace and Virginia Manufacturing Co., Inc., 311 NLRB 992 (1993) because some factors addressed in the cases' community of interest analyses differ from the instant challenges, focusing particular attention to the fact that Mitchellace and Virginia Manufacturing compared the community of interests of the data clerks with that of production employees, and arguing that the unit at OHL is not limited to production employees. OHL Brief at 35-36. Because the community of interest test involves a totality of circumstances analysis, there will always be facts distinguishing one case from another. But the record is clear that Harris and Chaisson perform job functions related to general office operations, and are therefore office clerical employees.

OHL did not consider either Harris or Chaisson, who both hold the position of "administrative assistant," to be bargaining unit members in the previous election. Tr. 715-16, 1642; U. Ex. 3 at 1; OHL/USW 0705. Likewise, the record demonstrates that both ladies' actual

job functions relate to general office operations, not production. Clerical employees whose principal functions and duties "relate to the general office operations and are performed within the general office itself are office clericals who do not have a close community of interest with a production unit." Cook Composites, 313 NLRB at 1108. The record establishes that Ms. Harris' duties require her to be on the warehouse floor less than an hour per day. U. Ex. 4 at 3; OHL/USW 0700. She is seldom seen on the warehouse floor, does not break with warehouse employees, and does not pick or engage in operator activities. Tr. 400-01, 405. Instead she spends most of her day working on a computer. Tr. 1627; see Container Research Corp., 188 NLRB 586, 587 (1971) (Employees held to be office rather than plant clericals even though they spent as much as 25 percent of their time in the production area and had daily contact with production personnel).

Ms. Harris' specific duties also distinguish her from other bargaining unit employees. Her primary responsibility is administration of the Red Prairie computer program, which she mainly uses to prepare labor management reports for management use. U. Ex. 4 at 4; USW/OHL 0701; Tr. 1629, 1632. She also has billing responsibilities that have a direct impact on the operational budget of the facility. Tr. 1631; See Dunham's Athleisure Corp., 311 NLRB 175 (1993) (typical office clerical duties are billing, payroll, phone and mail). Because Ms. Harris' principal functions and duties are only tangentially related to those of bargaining unit employees, she is "office clerical" and not eligible to vote. See Kroger Co., 2003 WL 21167471, 9-CA-39712 (N.L.R.B. Div. of Judges, May 14, 2003).

Like Ms. Harris, Ms. Chaisson does not work on the warehouse floor and does not take her breaks with bargaining unit workers. Tr. 717. Ms. Chaisson's job duties and functions are

closely aligned with office management, necessitating a determination that she is "office clerical," not "plant clerical".

Whether Ms. Chaisson shares a community of interest with the bargaining unit employees can be ascertained by analyzing the extent of her work contact with warehouse employees, their similarities in skills and requisite educational preparation, integration of functions, facility of transfer between the two groups, and the degree to which interests are aligned with parties outside the unit, like management. S & S Parts Distributor Warehouse, 277 NLRB 1293, 1296 (1985). Ms. Chaisson, a college graduate, is a Red Prairie logistics program "super user." Tr. 1789-90. Like Ms. Chaisson she prepares reports in the program for use by management. Tr. 1793. Ms. Chaisson can access areas of the computer system only supervisors can access, and can change employees' passwords. Tr. 563, 571. She communicates with management at Memphis and Brentwood regarding productivity numbers and participates in management-level conference calls. TR at 1806-07. She attended Union avoidance classes at the direction of OHL. U.Ex. 8, 9; OHL/USW 0963, 0965. Ms. Chaisson can adjust employee time in the Red Prairie system and the time clock kiosk. Tr. 765, 1800. Ms. Chaisson has the additional duties of discussing performance with employees and explaining ways they could improve. Tr. 567-68, 1791, 1795. Bargaining unit employees testified that they understood they could be disciplined if they did not follow Ms. Chaisson's instructions regarding production levels. Tr. 716, 764, 776. Where community of interest is "judged by the extent to which an employee's duties [are] integrated into and necessary to the smooth functioning of the particular branch of the Employer's business," the record evidence establishes that Ms. Chaisson serves management interests at OHL. Halpak Plastics, Inc., 287 NLRB 700, 707 (1987) (internal quotations omitted).

Based on the foregoing, the ALJ's decision upholding the Union challenges to Ms. Harris' and Ms. Chaisson's ballots should be upheld.

B. The Union's challenges to part-time employees' ballots should be sustained (Respondent's Exception No. 10)

The challenges to the ballots of part-time employees James Brewer and Richard James should be upheld because the stipulated election agreement did not include part-time employees. Written agreements between the parties establishing bargaining units are final and binding upon the parties. Norris-Thermador Corp., 119 NLRB 1301, 1301-02 (1958). The Agreement in this case, which the Region 26 Director approved on June 24, 2011, described the Unit as follows:

> INCLUDED: ***All full-time*** custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facilities . . .
> EXCLUDED: All other employees, including, office clerical and professional employees, guards, and supervisors as defined by the Act.

U. Ex. 15 (emphasis supplied).

The Union challenged the ballots of both James Brewer and Richard James because they are not full-time employees as expressly required by the parties' Stipulated Agreement. The fact that they are part-time is undisputed. U. Ex. 1 at 7; U. Ex. 11 at 2. Only full-time employees are included in the unit and "all other employees" are specifically excluded. The agreement is a final determination of eligibility issues. Norris-Thermador Corp., 119 NLRB at 1301. The language is clear and unambiguous. The objective intent of the parties, expressed in the agreement's clear and unambiguous terms, should be enforced. Northwest Cmty. Hosp., 331 NLRB 307, 307 (2000). Bell Convalescent Hosp., 337 NLRB 191 (2001) ("… if the classification is not included, and there is an exclusion for "all other employees," the stipulation will be read to clearly exclude that classification"); Halstead Communications, 347 NLRB 225

(2006). Because the parties' intent is clear, there is no need to rely on extrinsic evidence or other considerations to determine whether part-time employees are excluded from the election.

The Board reached a similar conclusion in Northwest Cmty. Hosp., 331 NLRB at 307. In that case, the Board considered a Stipulated Election Agreement that included "regular full-time and regular part-time employees" in the bargaining unit. The employer classified employees as full-time, part-time, or on-call. The Union challenged ballots for "on-call" employees. The Board found that "although the stipulation did not exclude 'all other employees,' . . . the parties intended to include only full-time and part-time employees from the bargaining unit." Northwest Cmty. Hosp., 331 NLRB at 308. The on-call employees' votes were therefore not counted.

Even if the parties' agreement is ambiguous as to the exclusion of part-time employees, extrinsic evidence proves the parties intended to include only full-time employees. *See* Northwest Cmty. Hosp., 331 NLRB at 307 (Board may look to extrinsic evidence if stipulation is not clear). Union Organizer Benjamin Brandon testified that from the beginning of USW's organizing campaign it sought only full-time employees. Tr. 1705. The bargaining unit the Union petitioned for is the bargaining unit described in the parties' Stipulated Election Agreement. Tr. 1706; U. Ex. 13, U. Ex. 14. No other extrinsic evidence of intent was presented.

Respondent urges that, other than the number of hours James and Brewer work and the fact that they do not receive benefits, they are identical to OHL's full-time maintenance techs. However, even under a community of interest analysis, the challenges to their ballots should be sustained. Northwest Cmty. Hosp., 331 NLRB at 307 (If the parties' intent is still unclear after considering outside evidence, Board considers community-of-interest principles). Neither Richard James nor James Brewer has a community of interest with other workers at OHL. They do not receive the same benefits such as health, dental, life and disability insurance. Tr. 812,

816, 1616. OHL tailors the part time employees' hours based on the hours of their other jobs and other employees working overtime. Brewer is retired; James has another full time job. Because of their part-time status, they work different shifts from other employees and on different projects at the behest of OHL. See Tr. 817, 820; Cf. U. Ex. 12, pg. 3; OHL/USW 518-19.

James is assigned "small special projects such as cabinet making, kitchen remodeling, damage repair of warehouse drywall etc." and tasks which are "noncritical assignments that do not require immediate completion." U. Ex. 1; OHL/USW 333. He assists with contractors who are working in the buildings on the weekend. Id. He often works weekends and saves the Company overtime pay. Tr. 1762-4. He does not work from the punch list like the other maintenance man. Tr. 820; Cf. U. Ex. 12, pg. 3; OHL/USW 518-19 (maintenance employees must complete "punch list" within 72 hour time limit). Similarly, Mr. Brewer, who retired in 2010 and is drawing social security and/or retirement benefits, works with the Company if they need to switch shifts for cost reasons. U. Ex. 11, pg. 2-4; OHL/USW 510-511. Therefore, their conditions of employment are fundamentally different from other maintenance employees.

By any analysis, the challenges to the part-time workers' ballots should be sustained.

II. The ALJ Correctly Overruled Challenges to the Ballots of Dotson, Smith, Kurtycz and Jones. (Respondent's Exception No. 11)

The ballots of Jerry Smith, Renal Dotson, and Glorina Kurtycz should be counted. The reinstatement of all three has been affirmed by the Board in Ozburn (I), supra, and Ozburn (II), supra. Likewise the challenge to the ballot of Carolyn Jones should be overruled and her vote counted. The board agent objected to the vote of Carolyn Jones because she was not on the eligibility list provided by the Company. GC Ex. 1(q). Jones, however, was improperly discharged by the Company in violation of the Act, as demonstrated by Counsel for the General Counsel's argument on this subject. Because the discharge was in violation of the Act, Jones

ballot should be opened and counted. Sorenson Lighted Controls, 286 NLRB No. 108 at 34 (1987) (Disposition of challenges is governed by ALJ's findings that layoffs were discriminatory. Accordingly, challenges to such ballots should be overruled.); citing Lake Shore, 219 NLRB 1091 (1975); Crown Distributors, 210 NLRB 881 (1974); Kasper Disposal Serv., 286 NLRB 14, 15 n.5 (1987).

III. The Company's Objections to Union Conduct are Without Merit and Properly Overruled. (Exception No. 12)

Under longstanding precedent, the Board will set aside an election because of the conduct of third parties[1] if the conduct creates a general atmosphere of fear and reprisal that renders a fair election impossible. Accubilt, 340 NLRB at 1337; citing Westwood Horizons Hotel, 270 NLRB 802, 803 (1984). In determining whether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner,

> the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election. Westwood Horizons, 270 NLRB at 803. (Citations omitted.)

The alleged incidents of objectionable Union conduct do not meet this standard.

A. Keith Hughes' comments to Ms. Barnhill (OHL Objections 7, 10, 11 and 13)

The Company alleges that Keith Hughes threatened Dawn Barnhill, who was wearing a t-shirt opposing the Union, by telling her "I'll rip that shirt off of you." OHL Brief, p. 38; Tr. 1726. True or not, this isolated statement, made by a fellow employee (not a Union agent)

[1] The individuals OHL claims made threatening comments were pro-Union OHL employees, not Union employee or agents. The document (R. Ex. 20) OHL argues is objectionable "campaign literature" was not entered into evidence or authenticated at hearing as a Union-generated document.

outside the hearing of others, is not sufficiently serious or likely to intimidate voters in the bargaining unit to affect the outcome of the election.

B. Campaign Literature (OHL Objections 1, 2, and 13)

Judge Ringler was correct to overrule the Company's objection that the Union distributed campaign literature that appealed to violence and racial prejudice, thus interfering with the election. The sole document referred to was marked but not entered into evidence during the hearing and was never authenticated or otherwise connected to the Union through competent evidence. Decision, p. 26.

C. Electioneering (Objections 3, 4, 9)

The ALJ correctly found that the only evidence of electioneering occurred ***after*** the vote in dispute. Decision p. 26. The only evidence which appears to relate to these objections was testimony from Bobby Hill. Mr. Hill, an observer appointed by the Company, allegedly saw an employee give a high five to a Union observer and heard the Union observer say "you did the right thing" back to the voter ***after*** the voter had submitted his ballot. Tr. 1734-35. The exchange took place in the parking lot outside the polling place and lasted about "15 seconds." Tr. 1734. Nobody else could hear them. Tr. 1735-36. That nothing about the exchange interfered with any voters' free choice in the election is borne out by established Board precedent. In U-Haul Co. of Nevada, Inc., 341 NLRB 195, 196 (2004), the Board overruled the employer's contention that a Union observer engaged in objectionable electioneering by giving a "thumbs up" to employees. "Whether or not giving a 'thumbs up' and smiling at voters is wise or desirable conduct on the part of an observer, it does not by itself constitute objectionable conduct." Id. The observer did not talk with voters and the gesture "could not reasonably be understood to convey any particular meaning." Id. The same is true here. The contested action

does not convey any particular meaning and could have had multiple meanings given the time and location of the action. There was no evidence that the Union observer spoke to or signaled any employee that had not voted or that the observer attempted to influence voters. Good Samaritan Hosp., 2009 WL 981075, 31-RD-1555 (N.L.R.B. Div. of Judges, Apr. 7, 2009). The activity simply did not rise to the level that it could reasonably be construed to have interfered with the election in any way.

D. Keith Hughes' comments in response to Coleman's statements during captive audience meeting (OHL Objections 1, 2 and 13)

The record reflects that Mr. Hughes commented upon and repeated a connection which OHL Vice President Randall Coleman had tried to make between Union adherents and violence. Tr. 1741, 1744-45, 1750-52. Such facts cannot reasonably be said to be either an appeal to or threat of violence.

IV. The ALJ Correctly Sustained the Union's Objections to Company Conduct. (Exception No. 13)

Judge Ringler's sustaining eleven Union's objections must be upheld because the Company engaged in multiple acts of coercive conduct which destroyed the free choice for a collective bargaining representative. As demonstrated by the General Counsel and upheld by Judge Ringler, the Company violated Section 8(a) of the Act in several instances by its conduct, including discharging and disciplining Union supporters in retaliation for their Union activity. Objectionable conduct is analyzed under a more lenient standard than are unfair labor practices and violations of Section 8(a)(1) are "a fortiori, conduct which interferes with the results of an election." Airstream, Inc., 304 NLRB 151, 152 (1991). The conduct of the Company was not limited to violations of the Act, however. OHL engaged in other conduct which when construed in its totality shows that its employees were deprived by the Company of an opportunity to freely

and fairly vote. Indeed, OHL's conduct demonstrates an ongoing effort to systematically undermine Union support.

The standard to be applied in assessing the objections of the Union to the election is whether the misconduct affected the results of the election considering the circumstances, including the conduct challenged, its severity, and the number of violations. Caron Int'l, 246 NLRB 1120 (1979). The Union will demonstrate that the Company misconduct was severe and that there were multiple instances of misconduct. Given the margin of votes, and the history of repeat violations by OHL, the overwhelming weight of the evidence compels a determination that a free and fair election did not occur. Holdings Acquisition Co., 356 NLRB No. 142 (2011); Accubuilt, Inc., 340 NLRB 1337 (2003).

A. Objection 1: Surveillance of Union activity (Related to ULP ¶9 and ¶10 and (Exception Nos. 4, 13)[2]

Judge Ringler correctly held that the Company security supervisor and one of its managers engaged in surveillance of Union hand billers. See, e.g., Tr. 67, 258, 259-60, 262-63. The surveillance activity had a chilling effect as demonstrated by Union witnesses who testified that as soon as the surveillance began, employees refused to speak to them. Tr. 84. Surveillance of employees constitutes election interference where, as here, it interferes with free choice. Holdings Acquisition Co., supra.; Crown Cork & Seal Co., 254 NLRB 1340 (1981).

The Company's argument that the two management employees merely openly observed the handbilling activity is without merit. As Judge Ringler noted, several witnesses testified to the fact that Coleman and McNamee were in the parking lot, one after the other, watching workers distribute handbills and authorization cards. Decision, pp. 5-6. Judge Ringler

[2]Several of the objections are related to the ULP charges. Proof of the ULP is also proof of the objection. Airstream, Inc., 304 NLRB 151, 152 (1991). The objections are addressed in numerical order, and any related ULP charge is noted.

discredited the testimony of Coleman and McNamee denying they watched the activity due to their inconsistent statements and poor recall of the events in comparison to the testimony of Union witnesses. Id. at p. 5. Their behavior in the parking lot was sufficiently "out of the ordinary" to warrant a finding of unlawful surveillance under Board law. See Eddyleon Chocolate Co., 301 NLRB 887, 888 (1991) (Unlawful surveillance found where company president watched employees engaged in protected activity from his car parked 15 feet away, all the while speaking on his cell phone).

B. Objection 2: Interrogation (ULP ¶ 9 and ¶11 and Exception Nos. 3, 13)

The questioning of Sharon Shorter and Kedric Smith constitutes unlawful interrogation by OHL management officials. In light of the history of anti-union animus at OHL, as demonstrated by the ongoing litigation in Ozburn (I), (II), and the current case, the questioning regarding the union activities of Rayford and Carolyn Jones would reasonably tend to coerce, restrain or interfere with rights guaranteed by the NLRA, and thereby destroyed the laboratory conditions for the election. See, e.g., Hertz Corp., 316 NLRB 672, 683-85 (1995).

C. Objection 3: Issuing written warnings in retaliation for Union activity (ULP ¶13 and Exception Nos. 2, 13)

Judge Ringler correctly determined that Jennifer Smith's Final Warning was violative of the Act. While OHL claims Ms. Smith was disciplined for calling a coworker a "house n-----", Ms. Smith testified credibly that she does not use that kind of language and did not call anyone a "n-----" at work. Tr. 491. Her testimony was corroborated by two witnesses, Sheila Childress and Jerry Smith, who were nearby, and did not hear the racial epithet used. Tr. 539; 617. Judge Ringler found the accuser and his corroborating witness, Shirley Milan, not to be credible based on the disjointed nature of their testimony and bias against Ms. Jennifer Smith. Decision, p. 8.

The record demonstrates significant anti-union animus on the part of OHL, that the Company knew about Ms. Smith's union activity, and that the Company's animus was a substantial and motivating factor in its discipline of Ms. Smith. The Union's objection was properly sustained.

D. Objection 5: Threats to bargain from scratch (Exception No. 13)

Randall Coleman, a Company representative, told employees at a mandatory meeting that "when you get to the bargaining table you have to start from scratch. And even though you bargain from scratch, you could already lose what you already have." Tr. 618. The threats are coercive misconduct because the comments are a threat that the employer will become punitively intransigent if the Union wins the election. Coach and Equipment Sales Corp., 228 NLRB 440, 440-41 (1977). The statements are coercive because they threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. Plastronics, Inc., 233 NLRB 155, 156 (1977); see also Conagra, Inc., 248 NLRB No. 85 (1980). Considered in conjunction with the numerous other unfair labor practices and sustained election objections, Judge Ringler correctly held that Coleman's comments were unlawful in this context. Decision, p. 22; see also Noah's Bay Area Bagels, LLC, 331 NLRB 188, 189 (2000).

E. Objection 6: Destruction of Union literature (ULP ¶7, ¶8 and Exception No. 13)

There is significant evidence to support Judge Ringler's finding that the Company unlawfully confiscated Union literature. Tr. 693, *et seq*. For example, Ms. Harrington saw Eric Nelson remove the Union documents that had been placed in the break room. Tr. 744. She also saw Phil Smith remove Union documents. Tr. 700, 749-50; 755. Union witnesses testified they saw Union documents in Company supervisors' hands, including Eric Nelson. Tr. 996. Randy Phillips also threw Union literature away. Tr. 703. The confiscation of pro-union literature from

employee break tables violates the Act. Vemco, Inc., 330 NLRB 1133, 1137-38 (2000); citing Vemco, Inc., 304 NLRB 911, 927 (1991); see also Romar Refuse Removal, 314 NLRB 658 (1994); NCR Corp., 313 NLRB 574 (1993). Respondent, by the actions of Phil Smith, Nelson and Owens in confiscating pro-union literature from the employee breakroom, violated Section 8(a)(1) of the Act.So-

F. Objection 8: Anti-Union T-shirt distribution (Exception No. 13)

Contrary to the Company's assertion, there is ample evidence in the record to support the Judge's finding that the Company aided employee Union opposition by distributing anti-Union t-shirts. Several Union witnesses testified to the distribution of anti-union paraphernalia by Company representatives. For example, Jerry Smith testified that he saw anti-union green T-shirts bearing the slogan "no means no" being delivered to a management representative at the facility shortly before the election. Tr. 624-25, 645-46. Similarly, Randy Phillips, a management representative, gave employee Eric Collins a blue T shirt that said "I can speak for myself" and "no means no." Tr. 718. Alfreda Owens, a Company representative, gave T-shirts to two employees as well. Tr. 720. In doing so, management employees effectively put employees in a position of having to make an observable choice that would reveal the employees' favor or disfavor of the union – a violation of Section 8(a)(1). Tr. 599; A. O. Smith Automotive Products Co., 315 NLRB 994 (1994) (supervisors who directly offered employees antiunion paraphernalia put employees in a position of having to accept or reject the employer's proffer and thereby make an observable choice that would reveal their Union sentiments).

G. Objection 12: Loss of benefits (Exception No. 13)

Several Union members were told that employees would not be able to participate in the 401(k) plan if they voted for the union. Tr. 626, 628, 649, 722. The statement was made at

meetings which the bargaining unit personnel were required to attend. Tr. 629. A threat of loss of benefits is objectionable conduct. Lake Mary Healthcare and Rehabilitation, 345 NLRB 544 (2005).

H. Objection 13: Discharge of Carolyn Jones (ULP ¶ 13 and Exception No. 13)

The Union defers to the General Counsel's discussion of Ms. Jones' unlawful termination for her involvement in protected concerted activity. For the same reasons expressed in that argument, the discharge of Jones was objectionable and sufficient in and of itself to set aside this election. VJNH, Inc., 328 NLRB 87 (1999).

I. Objection 14: Advising to quit due to Union support (Exception No. 13)

The record evidence establishes that in a captive audience meeting an employee asked if Union supporters are so unhappy, "why don't they just quit?" Manager Phil Smith responded "my point exactly," thereby inviting Union supporters to, in fact, quit their jobs. Tr. 495. This is a violation of Section 8(a)(1) and eroded laboratory conditions. That the statement was made to a group of employees rather than an individual is irrelevant; "It is unlawful for an employer to suggest that union supporters should quit their jobs, because such a statement implies that union activity is incompatible with further employment." Solvay Iron Works, Inc., 341 NLRB 208, 216 (2004); citing McDaniel Ford, 322 NLRB 956, 962 (1997).

J. Objection 18 and 20: Hostile environment, other misconduct (Exception No. 13)

Given the margin of votes, the multiple instances of misconduct, the history of repeated violations by OHL, the overwhelming weight of the evidence compels a determination that the Company destroyed the laboratory conditions and that a free and fair election did not occur. Caron Int'l, 246 NLRB 1120 (1979); Holdings Acquisition, supra.; Accubuilt, supra.

K. Date of misconduct does not preclude sustaining objections (Exception No. 13)

Judge Ringler correctly noted that in circumstances such as these, where objections to a prior election have been sustained and a second election ordered, the second critical period runs from the first election to the second. Decision, p. 21, n. 26; citing Star Kist Caribe, Inc., 325 NLRB 304 (1998); see also Times Wire & Cable Co., 280 NLRB 19, 20 fn. 10 (1986); Singer Co., 161 NLRB 956 (1966). The Company's argument otherwise is without merit.

V. The Sustained Union Objections Require Setting Aside the Election in the Event the Union does not Win Once the Challenged Votes are Counted. (Exception No. 14)

The Company argues that the Union in its post-hearing brief and Judge Ringler in his Decision fail to establish that the sustained objectionable Company conduct occurred and interfered with the voters' exercise of free choice. OHL Brief, p. 41. In so doing the Company lays out the factors to be addressed and faults the ALJ for failing to address them, without adding any analysis or argument. Id. The Company also wrongly claims the Union carries a heavier burden because the "vote margin is wide." Id. This is patently false – the margin is ***one vote***. Decision, p. 34.

Applying the test cited in the Company's Brief in Support of Exceptions, it is apparent that the sustained Company misconduct has a tendency to interfere with the election. There were multiple incidents; eleven Union objections were sustained. The severity of the incidents is likely to cause fear among employees in the bargaining unit. One employee was discharged in retaliation for union activity; another was disciplined. Employees were interrogated and surveilled by management, pro-union documentation was confiscated and thrown away, threats were made in captive audience meetings, management passed out anti-union t-shirts to employees, and employees were solicited to resign. Decision, pp. 21-25. In fact, the conduct

underlying five of the objections was also found to be unfair labor practices in violation of Sections 8(a)(1) and (3). "Conduct violative of Section 8(a)(1) is, *a fortiori,* conduct which interferes with the exercise of a free and untrammeled choice in an election. Dal-Tex Optical Co., Inc., 137 NLRB 1782 (1962). Given the Company's established history of unfair and objectionable conduct, the proximity of the current objectionable conduct to the election – all occurring during the critical period and in the two and a half months prior to the second election – and the utter lack of evidence that the Company tried to cancel the effects of prior misconduct, a third election must be held if the Union loses this one. See Taylor Wharton Harsco Corp., 336 NLRB 157, 158 (2001) (Citations omitted).

VI. OHL Was Not Denied Due Process. (Exception No. 15)

The Company further excepts to the decision on grounds that Judge Ringler is biased against employers. This scurrilous attack is unsubstantiated by facts. "The charge of personal bias and prejudice (against an ALJ) is a serious charge, and one which should not be taken lightly without clear substantiation, as the risk of summarily undermining the integrity of the administrative law judge, and the administrative process in general." Teamsters Local 722 (Kaspar Trucking, Inc.), 314 NLRB 1016, 1020 (1994) (ALJ D).

The Company relies on its own conclusion that Judge Ringler has ruled for the union in 45 of 49 unfair labor practice cases against companies he has decided. OHL Brief, p. 42. Whether or not this observation is accurate, it is improper to raise a contention of bias based on conduct outside of the instant hearing as an exception to the hearing. Jesco, Inc., 347 NLRB 903, 910, fn. 1 (2006). "Under Sec. 102.37 of the Board's Rules and Regulations, the Respondent was required first to raise its bias contention to the judge and move that he disqualify himself and withdraw from the proceeding." Id.; citing Pioneer Natural Gas Co., 253 NLRB 17

fn. 2 (1980). Having failed to do so, the Company is precluded from raising the issue now in its exceptions brief. Id. Second, even assuming that the Company may initially raise the issue of bias in its exceptions brief, there is no merit in its contention. A careful review of the record shows no statements or other evidence indicating bias or prejudice against OHL by Judge Ringler. Rather, the ALJ "afforded all parties full opportunity to adduce evidence bearing on the issues and to develop a complete record." The Liberal Market, Inc., 264 NLRB 807, 807 (1982). Under such circumstances, OHL cannot establish bias or lack of due process. Id.

VI. Judge Ringler Did Not Err in his Credibility Findings. (Exception No. 16)

The Employer has excepted to many of the hearing officer's credibility findings. Where a judge is confronted with conflicting testimony, credibility is a function not only of what a witness says but of how a witness says it. Medeco Security Locks, Inc., 322 NLRB 664 (1996). Hence, the Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect. Stretch-Tex Co., 118 NLRB 1359, 1361 (1957); see also NLRB v. So-White Freight Lines, 969 F.2d 401, 407 (7th Cir. 1992); Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

In its brief, the Company lists several circumstances that may warrant an exception to the deference normally provided ALJ credibility rulings, but neglects to identify which of Judge Ringler's determinations are being challenged and which exceptions to the deference rule apply to each challenged credibility finding. OHL Brief, pp. 42-43. To the extent the Company relies on arguments elsewhere in its brief, the Union rest on its arguments in response to the previous exceptions. However, without identification and analysis of the challenged findings under relevant Board law, the Company's argument in support of Exception No. 16 is unpersuasive.

VIII. The ALJ's Reading Remedy is Appropriate. (Exception No. 17)

The Company first argues that to the extent unfair labor practices occurred, a reading remedy is unwarranted, and second, that the ALJ ordered that a Board agent read the notice, as opposed to the General Counsel's request that OHL official Mr. Coleman read it. OHL Brief, p. 43. Both arguments are without merit. After a complaint issues, the responsibility for fashioning an appropriate remedy rests with the Board under Section 10(c) of the Act, and the Board has broad discretionary authority to fashion an appropriate remedy. Douglas Autotech Corp., 357 NLRB No. 111, 16 (2011), citing NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-263 (1969).

As Judge Ringler's Decision and the above discussion demonstrate, the unfair labor practices and objectionable conduct in this case are sufficiently "serious and widespread to warrant having the attached notice to employees read aloud to the employees, so that they "will fully perceive that the Respondent and its managers are bound by the requirements of the Act."" Homer D. Bronson Co., 349 NRLB 512, 515 (2007) (reading remedy upheld where employer threatened plant closure in two meetings); citing Federated Logistics & Operations, 340 NLRB 255, 258 (2003); see also McAllister Towing & Transportation Co., 341 NLRB 394, 400 (2004); Blockbuster Pavilion, 331 NLRB 1274, 1276 (2000). The reading of the notice "will ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards." Federated Logistics, supra at 258, quoting Excel Case Ready, 334 NLRB 4, 5 (2001). The Board also noted in Federated Logistics that the "presence of a responsible management official when a government official informs employees of the terms of [the] remedial order is not demeaning, but only a minimal acknowledgment of the obligations that have been imposed by law." Id. at 258 n. 12. The employees in this case are

"entitled to at least that much assurance that their organizational rights will be respected in the future." Id.

The General Counsel sought a reading by OHL Senior Vice President of Operations Randall Coleman, with a representative of the Union and the Board present. The ALJ held that a Board Agent would perform the reading. The Board has full authority over remedial aspects of its decisions; therefore the General Counsel's failure to seek certain remedies does not preclude the Board from ordering them. Allied General Services, Inc., 329 NLRB No. 58, 7 (1999), citing Schnadig Corp., 265 NLRB 147 (1982) and Loray Corp., 184 NLRB 577 (1970). Remedies imposed by the Board must be consistent with the General Counsel's theory of the case. ATS Acquisition Corp., 31 NLRB 712, 712 n. 3 (1996). Ordering a Board Agent rather than a Company official read the notice is a minor change in the requested remedy and is consistent with the General Counsel's approach. See, e.g., Federated Logistics, supra. at 259 (company given option of having a Board Agent or management official read the notice at an employee meeting). Therefore, the ALJ's reading remedy is both warranted by the facts and consistent with the General Counsel's case against the Company, and should be sustained.

Conclusion

For the reasons stated above, the Company's exceptions to Judge Ringler's Decision are without merit and should be overruled. Judge Ringler's Decision is due to be upheld in its entirety.

Date: July 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, I electronically filed the foregoing with the National Labor Relations Board by using the electronic filing system and that I have mailed by United States Postal Service the document to the following:

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