UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

In the Matter of

PRINT FULFILLMENT SERVICES LLC

and

GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS DISTRICT COUNCIL 3, LOUISVILLE, LOCAL 619-M

Cases 9-CA-068069
9-CA-068849
9-CA-069188
9-CA-070706
9-CA-072457

EXCEPTIONS AND BRIEF ON BEHALF OF PRINT FULFILLMENT SERVICES LLC TO THE DECISION OF HON. PAUL BUXBAUM, ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

This brief sets forth and supports the exceptions of the employer, Print Fulfillment Services LLC ("PFS"), to the June 27, 2012 decision of Administrative Law Judge Paul Buxbaum (the "ALJ") issued in Case Nos. 9-CA-068069, 9-CA-068849, 9-CA-069188, 9-CA-070706, 9-CA-072457 (the "Decision"). A hearing upon the Complaint issued in this matter by the Regional Director of Region 9 of the National Labor Relations Board ("the Board") was conducted on February 27, 28, 29; March 1, 2; and April 10, 11, 12, 2012.[1]

In this case, the General Counsel alleged seventeen distinct unfair labor practices stemming from the circumstances surrounding the election of the Graphic Communications Conference of The International Brotherhood of Teamsters District Council 3, Louisville Local 619-M ("the Union"). The ALJ ruled in favor of PFS on four of the allegations in their entirety, and two additional allegations in part. PFS takes exception to the ALJ's Decision to the extent the ALJ found that PFS violated the Act. Moreover, PFS takes exception to the remedy awarded by the ALJ for PFS's alleged failure to bargain over the "effects" of a layoff. Although the Board has consistently stated that the financial remedy for the failure to bargain over the "effects" of a layoff is limited to the backpay described in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the ALJ nevertheless awarded a full backpay remedy.

This matter is before the Board pursuant to Section 10(c) of the Act and Sections 102.45 and 102.46 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended (the "Rules").

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[1] A transcript of the Hearing was made. References to pages of the transcript will be designated "T. ___," General Counsel Exhibits will be designated as "GC Ex. ___," and PFS's Exhibits will be designated as "R Ex. ___."

II. THE PARTIES

PFS is a printing fulfillment company located in Louisville, Kentucky. (T. 1110, 1114). It is a wholly-owned subsidiary of a Nevada-based corporation. (T. 1108). Brett Heap is the general manager of the Company and also the managing member of the Nevada-based corporation. (T. 1107). At all relevant times, Paul Barnum was Mr. Heap's Executive Assistant, William Morrison was the Production Manager, Scott Pearcy was the Quality Control and Press Room Manager, and Dale Miller was the Human Resources Director. (GC Ex. 1(ff) at ¶4).

The Graphic Communications Conference of The International Brotherhood of Teamsters District Council 3, Louisville Local 619-M ("the Union") is the exclusive collective bargaining representative for all full-time and regular part-time press department employees, including offset press operators, digital press operators, plate makers, feeders, helpers, and team leaders. (GC Ex. 1(ff) at ¶5(a)). The Union was voted in at Respondent's Louisville, Kentucky plant on October 28, 2011, and certified on November 7, 2011. (GC Ex. 1(ff) at ¶5(b)).

The size of the workforce changes from time to time during the year. (T. 1110). During the peak times of the year, the largest peak time being from October to the middle of December, the Company employs approximately 150 employees. (T. 1111-1112). At peak employment in December 2011, about 21 of the Company's pressroom employees were bargaining unit employees. (T. 1112). During work troughs, the Company employs approximately 90 to 105 workers, with 15 to 18 being bargaining unit employees. (T. 1114).

III. SPECIFIC EXCEPTIONS

Pursuant to Section 102.46(b)(1) of the Rules, PFS specifically excepts to the following findings and/or conclusions of the ALJ:

Exception No. 1**.** This portion of the Decision is the greatest miscarriage of justice, and why the Company addresses it first. PFS excepts to the portion of the ALJ's Decision that found that a full backpay remedy is warranted because PFS failed to bargain over the "effects" of the December 2011 layoff. (Decision at 62-67.) The ALJ misapplied the Board's holding in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) and subsequent Board decisions in order to reach his erroneous finding. The Board has consistently applied the limited *Transmarine* backpay remedy where the employer has violated the Act by failing to bargain over the "effects" of a layoff. In this case, the General Counsel conceded the necessity for the layoff and its timing, and did not contend that PFS violated the Act by failing to bargain over the "decision" to implement a layoff. Under such circumstances, the ALJ was required, in accordance with Board precedent, to impose a limited *Transmarine* backpay remedy for the alleged violation. Rather, he vitiated the layoff *in toto* without a legitimate factual or legal basis for doing so, relying instead on speculation and factual errors.

Exception No. 2. PFS excepts to the finding of the ALJ that William Morrison's statements rose to the level of a violation of the Act. (Decision at 28-30.) Morrison's statements did not violate the Act because they were non-coercive and appropriate during a union campaign.

Exception No. 3. PFS excepts to the finding of the ALJ that William Morrison's alleged threats to send an employee home if the employee did not acknowledge receipt for newly implemented work rules violated the Act. (Decision at 30-31.) Morrison's actions were unrelated to union activity.

Exception No. 4. PFS excepts to the finding of the ALJ that Pearcy's alleged threat to Richard Woosley that all employees would be written up for being late, absent or making

mistakes because the Union had asked for documentation of discipline given employees violated the act. (Decision at 31-32.) The ALJ's finding is not supported by the record.

Exception No. 5. PFS excepts to the finding of the ALJ that the General Counsel's allegations regarding Timberlake are not time barred. (Decision at 32-35.) The charge related to Timberlake was not "closely related" to any timely filed charged.

Exception No. 6. PFS excepts to the finding of the ALJ that the General Counsel's allegations regarding Lincoln are not time barred. (Decision at 35-38.) The charge related to Lincoln is not "closely related" to any timely filed charge.

Exception No. 7. PFS excepts to the finding of the ALJ that the distribution and implementation of a "Responsibility Press Operators" document violated the Act. (Decision at 38-40, 52-54.) Merely putting the rules in written form does not constitute a material, substantial, and significant change and did not violate Section 8(a)(5).

Exception No. 8. PFS excepts to the finding of the ALJ that PFS violated the Act by sending Nicholas Recktenwald home without pay before his regular shift ended. (Decision at 40-41.) The General Counsel failed to show that the decision to send Recktenwald home was in retaliation for his union activity.

Exception No. 9. PFS excepts to the finding of the ALJ that PFS's written warning to Richard Woosley violated the Act. (Decision at 41-42.) The General Counsel failed to show that Woosley's union activity was a motivating factor for his discipline.

Exception No. 10. PFS excepts to the finding of the ALJ that PFS violated the Act by laying off Jonathan Bishop. (Decision at 45-47.) The record establishes that Bishop was not laid off.

Exception No. 11. PFS excepts to the finding of the ALJ that instituting a policy of sending employees home when presses were down violated the Act. (Decision at 54.) The ALJ's decision is not supported by the record.

Exception No. 12. PFS excepts to the finding of the ALJ that Company did not respond in a timely manner to the Union's request to furnish information. (Decision at 54-57.) PFS provided the sought information in a reasonable time under the circumstances.

Exception No. 13. PFS excepts to the finding of the ALJ that it violated the Act by refusing to bargain over the selection criteria for the layoff and the effects of the layoff. (Decision at 58-62.) PFS established that it bargained as to both.

Exception No. 14. PFS excepts to the finding of the ALJ that it violated the Act by failing to provide productivity statistics requested by the Union. (Decision at 58-62.) The Union did not make clear requests nor did PFS fail to respond.

Exception No. 15. PFS excepts to the finding of the ALJ that Morrison told Dykstra that he could not be given a raise because of the union proceedings. (Decision at 31.) It would have been an unfair labor practice to give Dykstra a raise without bargaining with the Union.

IV. QUESTIONS INVOLVED

1. Whether *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) describes the appropriate remedy for a failure to bargain in good faith over the "effects" of an otherwise uncontested layoff decision. (Exception No. 1).

2. Whether the expression of disappointment in an employee's support for a union, unaccompanied by threats, is protected employer free speech under Section 8(c). (Exception No. 2).

3. Whether the General Counsel sufficiently established that PFS's actions were related to Union activity. (Exception Nos. 3, 8, 9, 13).

4. Whether the ALJ's findings are supported by the record. (Exception Nos. 4, 10, 11, 12, 14).

5. Whether the ALJ properly determined that the charges were timely. (Exception Nos. 5, 6).

6. Whether putting the rules in written form violates Section 8(a)(5). (Exception No. 7).

7. Whether it is an unfair labor practice to give an employee a raise without bargaining with the Union. (Exception No. 15).

V. ARGUMENT

A. The ALJ improperly awarded a full backpay remedy. (Exception No. 1)

In the Complaint, the General Counsel did not allege that PFS failed to bargain over the ***decision*** to implement a layoff. (Decision at 19 ("in this case, the General Counsel does not allege any unfair labor practice related to the decision to conduct a layoff.").) Indeed, at the hearing before the ALJ, counsel for the General Counsel stated, "'[D]efinitely, we are not challenging the ***decision*** whether to have layoff at this point.'" (Decision at 19 n.34 (emphasis added) (quoting T. 963).) Rather, the alleged layoff-based violations were "strictly related to an asserted failure to bargain over the methodology of the selection process and ***other effects*** of the ensuing layoff." (Decision at 19 (emphasis added).) Despite acknowledging that the remedy traditionally awarded for this type of alleged violation is the "limited remedy outlined in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968)[,]" (Decision at 63,) the ALJ nevertheless ordered a full backpay award. This full backpay award was improper and should be vacated.

In *Louisiana Dock Co.*, 293 NLRB 233 (1989), the Board explained the circumstances under which the limited *Transmarine* remedy, rather than a full backpay remedy, is awarded:

> In cases in which an employer has failed to provide its employees' bargaining representative with an opportunity to engage in effects bargaining, including bargaining over the effects of the layoff of employees, the Board traditionally has imposed a limited backpay requirement and an affirmative order that the parties bargain over these effects. In fashioning this remedy, the Board has specifically found that in order to assure meaningful bargaining a limited backpay requirement is needed.

Louisiana Dock Co., 293 NLRB at 237 (citing *Litton Bus. Sys.*, 286 NLRB 817 (1987); *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)). Under the limited backpay remedy, the Board orders the employer to pay all affected employees backpay at the rate of their normal wages when last in the employer's employ from 5 days after the date of the Board's decision until the occurrence of the earliest of the following conditions:

> (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the layoffs of June 28 and September 16 and 17, 1982; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from the dates on which he was laid off or terminated to the time he was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

Id. at 238. This limited backpay remedy is contrasted with a full backpay remedy, like that awarded by the ALJ in this case, which "includes ordering the employer to bargain over the layoff decision and the effects of that decision, reinstating the laid-off employees, and requiring the payment to the laid-off employees of full backpay, plus interest, for the duration of the layoff." *Ebenezer Rail Car Servs., Inc.*, 333 NLRB 167, 167 (2001) (citing *Lapeer Foundry & Mach.*, 289 NLRB 952, 955-56 (1988)).

Although the ALJ recognized that the alleged layoff-based violations were the result of the failure to bargain over the effects of the layoff, (Decision at 19,) he nevertheless awarded a full backpay remedy. (Decision at 19.) It appears that the ALJ's decision is based upon his misplaced reliance on several Board decisions.

The ALJ primarily relied upon the Board's decision in *Pan Am. Grain Co.*, 343 NLRB 318 (2004). There, the employer "violated Section 8(a)(5) and (1) of the Act by implementing [a] layoff of 15 striking employees without giving the Union adequate notice and a reasonable opportunity to bargain." *Id.* at 318. Unlike the allegations against PFS, however, the Board in *Pan American* "found that the Respondent's ***decision to lay off employees*** was a mandatory subject of bargaining, and that the Respondent violated Section 8(a)(5) and (1) by failing to satisfy its obligation to bargain both over the ***decision*** and its effects." *Id.* (emphasis added). Although the Board did "find that the full backpay and reinstatement remedy [was] appropriate[,]" it made clear that it did so because of the employer's failure to bargain over the layoff ***decision***:

> Where . . . the evidence establishes that a layoff was the direct result of a decision over which an employer has no bargaining obligation, the Board has provided the more limited *Transmarine* "effects" remedy. This limited remedy is distinguishable from those cases where ***the layoff decision*** was a separate and independent employer decision and not the direct result of an earlier, nonbargainable decision. In such cases, a full backpay and reinstatement remedy for the layoffs is ordered.

Id. (emphasis added) (quoting *Bridon Cordage, Inc.*, 329 NLRB 258, 259 n.11 (1999)).

The ALJ also relied upon the Board's decision in *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB No. 46 (2012). There, the employer "violated Section 8(a)(5) and (1) by laying off employees . . . without giving the Union an opportunity to bargain . . . ." *Jason Lopez, slip op.* at 1. Like *Pan American*, the allegation in the case was not merely that the employer failed to bargain over the "effects" of the layoff, but it failed to bargain over the layoff decision as

well. *Id.* at 4 ("The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by laying off employees . . . without notice to the Union and without affording the Union an opportunity to bargain with the Respondent ***with respect to the layoffs*** and their effects." (emphasis added)). As a result, a full backpay remedy was appropriate.

The additional cases cited by the General Counsel in its brief to the ALJ are distinguishable for the same reason. *See, e.g.*, *Eugene Iovine, Inc.*, 353 NLRB 400, 409 (2008) ("However, in cases, such as the instant case, involving a violation of the duty to bargain over ***the decision to undertake layoffs***, the Board has consistently rejected such arguments." (emphasis added)); *Plastonics, Inc.*, 312 NLRB 1045, 1048 (1993) ("By laying off its unit employees without giving notice of its intention to do so to the Union and affording the Union an opportunity to bargain in good faith over that ***decision*** and its effects, the Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act." (emphasis added)); *Lapeer Foundry & Mach, Inc.*, 289 NLRB 952, 955 (1988) ("Having determined that an employer violates the Act by failing to bargain over its ***decision to lay off employees***, we must formulate a remedy that redresses the wrong committed." (emphasis added)); *Wilen Mfg. Co.*, 321 NLRB 1094, 1100 (1996) ("The Respondent . . . unlawfully laid off bargaining unit employees on or about December 30, 1994, without affording the Union an opportunity to bargain over ***the layoff decision***" (emphasis added)); *Porta-King Bldg. Sys.*, 310 NLRB 539, 544 (1993) ("Respondent violated the Act by failing to bargain over its ***decision to lay off employees***" (emphasis added)).

Each of the decisions relied upon by the ALJ or cited by the General Counsel involved a violation of the Act as a result of the employer's refusal to bargain over the layoff decision. A

full backpay remedy is traditionally awarded for such violations. *Ebenezer Rail*, 333 NLRB at 167. Here, however, there has been no such allegation by the General Counsel or finding by the ALJ. Instead, the only allegation has been that PFS failed to bargain over the effects of the layoff decision. Under such circumstances, *Transmarine* provides the appropriate remedy. *Louisiana Dock Co.*, 293 NLRB at 237.

The ALJ suggested that the facts of this case were unique because, "[i]n addition to a complete unwillingness to bargain over the effects of the layoff, the Employer equally steadfastly refused to engage in bargaining over the method for selection of employees who would be subject to the layoff." (Decision at 63.) According to the ALJ

> The unwillingness to bargain over the selection criteria ***may likely have had*** particularly great impact in the circumstances of this case. The Employer's criteria did not mandate any difference in treatment between PFS employees and employees of temporary services agencies. At the December 12 meeting, Castro suggested to management that, if they eliminated the temporary agency employees, there would not be any need to lay off unit members. Had the parties engaged in meaningful bargaining about this, the criteria ***may have been altered*** to give retention preference to PFS employees. In that event, fewer bargaining unit members would have been laid off at all.[2]

(Decision at 63 (emphasis added).) But the circumstances described by the ALJ, even if accepted by the Board, are not unique. *Miami Rivet of Puerto Rico, Inc.*, 318 NLRB 769 (1995) is instructive. In *Miami Rivet*, the Board found that the employer violated Section 8(a)(5) and (1) of the Act by failing to provide layoff information at the request of the Union, and also failed to provide timely notice of the layoff decision. *Miami Rivet*, 318 NLRB at 771-72. Like the ALJ in this case, the Board found that:

[2] This significant speculation on the part of the ALJ was not warranted. The ALJ's speculation that more discussion might have avoided layoffs is not supported by the facts. The pressmen told Castro layoffs were typical at that time of the year. (T. 1635.) Castro admitted that Barnum told him "at some point" they would sit together and Barnum would explain the production data to him. (T. 1630.)

> Had the information relevant to the layoffs been timely furnished, the Union would have been in a better position to bargain over the number of employees laid off and the identities of those selected. . . . The question of how many employees would be laid off as a result, and how many might be kept on for production of rivets for local distribution, was clearly a bargainable subject. As it was, the Union was presented with a fait accompli on these "effects" issues.

Id. at 772. As a result of this finding, the Board accompanied its "Order to bargain with a limited backpay requirement designed both to make employees whole for losses, if any, suffered as a result of the violation, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." *Id.* It did so "by requiring the Respondent to pay backpay to its employees in a manner analogous to that required in *Transmarine Corp.*, 170 NLRB 389 (1968), and *Interstate Fuel Co.*, 177 NLRB 686 (1969)." *Id.*

Thus, there was nothing unique about this case. Even in cases where the employer has presented the union with a *fait accompli*,[3] the Board has nevertheless awarded the limited backpay remedy provided for in *Transmarine*. The ALJ should have done the same here, but failed to do so. The portion of the ALJ's award that provides for a full backpay remedy should be vacated.

B. The Company Followed its Prior Layoff Practices in December 2011 and Bargained with the Union About the Selection of Employees for Layoff. (Exception Nos. 10 and 13)

The ALJ erred when he determined that the decision to layoff Jonathan Bishop was discriminatory, (Decision at 45-49,) and that PFS violated the Act by laying off Jonathan

[3] In this case, the Company indicated more flexibility in discussing its selection criteria than did the Union. The Company preferred to use productivity and other factors, such as the ability to run multiple machines. (T. 1631.) The Union demanded that straight seniority control. (T. 1479.) The Union allowed the Company little room for compromise.

Bishop, Nicklaus Recktenwald, William Wellman, and Robert Starks when it failed to bargain over the effects of the layoff decision. (Decision at 58-60.)

The ALJ's finding that the PFS's "decision" to layoff Bishop was discriminatory is beyond belief. Bishop is a printing press operator on a machine called a 74 karat. (T. 58). Although considered for layoff, Bishop was not laid off. He took a voluntary layoff, allowing a fellow production employee, Robert Roederer, to stay. (T. 135).

As to Wellman, when the Union met with the Company to discuss which employees the Company had initially identified for layoff, the Union had its own suggested list, based on seniority. The Union's list included Wellman or Teague because they were least senior. (T. 1749). Although the Union would have included Wellman in a layoff, the ALJ provided him a full back pay remedy.

The General Counsel alleged that the Company selected employees for layoff based on the fact that they supported the Union. There was not a single fact adduced at the hearing which supports that allegation. Rather, every fact supports the Company's position that the decision was made based on demonstrated productivity and other legitimate factors.

The General Counsel does not contest the need for the December 2011 layoff. Although not seasonal, the Company's layoffs are fairly regular and predictable. Bishop testified that he recalled at least two layoffs prior to December 2011; one in 2008 and one in 2010. (T. 1480). In both cases, the Company did not select employees based on seniority; union witness Jonathan Bishop testified that the Company kept some of the junior employees and laid off some of the senior employees.[4] (T. 1477). In 2008 and 2010, there was no union activity taking place. (T. 1479). In the absence of union activity and the Company having not selected employees to be

[4] This testimony is contrary to the ALJ finding that "there was a complete failure of . . . proof" that PFS "employed the same selection criteria for layoff that it had used in past instances." (Decision at 64 n.86.)

laid off based strictly on seniority, only one other conclusion is reasonable. The Company has laid off employees in the past based on their relative ability to contribute. This is exactly what happened in December 2011.

By acting consistently with its past practices, and by showing that the layoffs of Recktenwald, Wellman, and Starks would have occurred for legitimate business reasons regardless of any union activity, the Company met its burden to establish that the layoffs were permissible and did not run afoul of the Act. *Baptista's Bakery, Inc.*, 352 NLRB 547, 550-551 (2008) (reversing ALJ decision and dismissing alleged violations of the Act where company demonstrated that it would have laid off the employees for legitimate business reasons regardless of union activity); *Alberts, Inc.*, 213 NLRB 686, 695-696 (1974) (because the layoff of employee occurred as a result of a regular slowdown and was consistent with company's past practices at its other sites in response to such slowdowns, layoff decision did not violate the Act; the General Counsel's "mere suspicion" of antiunion motivation for the decision was "not enough"); see also, *A.J. Schmidt*, 269 NLRB 579, 588 (1984) (retention of strong union supporters during layoffs is evidence that layoff decision was not motivated by anti-union animus).

Paul Barnum testified that he selected employees based on their productivity, and other factors. Productivity was one element, and probably the most significant.[5]

However, Barnum also testified that Teague, who was not one of the most productive pressmen, was retained in 2011 because he was able to run every press. (T. 1856). That was one of the "other factors" to which Barnum referred.

[5] As Bishop said, productivity is the "focus" of the Company. (T. 180).

Barnum testified that he initially asked all department heads to identify the employees in their respective departments whom they would select for layoff. (T. 1209). Barnum then reviewed data on the Company's "profit" system which shows the productivity of each employee. (T. 1847). It does this primarily by indicating their output of sheets per hour. (T. 1847). The data is a series of computer screens; it is not compiled in a single document and is not converted into written form. (T. 1847).

Barnum's initial examination indicated the following pressroom personnel would be laid off: Bishop, Glover, Jones[6], Recktenwald, Starks, Vaught and Wellman. (G.C. Ex. 26) Bishop showed as having fewer sheets per hour than Roederer, but only by a few sheets (T. 1862).

On December 9, 2011, Barnum notified the Union. (G.C. 26).

Shortly after Barnum sent Castro that letter, Barnum double checked the productivity data upon which the December 9, 2011 letter was based. The computer personnel had changed the program to make sure the appropriate pressman was credited with the correct number of sides, and Barnum reviewed the information again. (T. 1852). It showed Roederer as having fewer sheets per hour than Bishop. (T. 1855). The Company immediately contacted the Union and said there had been an error. Roederer would be laid off instead of Bishop. Bishop told the Union he would take a voluntary layoff, the Union notified the Company of that request, and the Company agreed. Nevertheless, the ALJ provided Bishop a full back pay remedy.

If the Company intended to lay off Union supporters to "send a message," it makes sense that it would identify the most visible Union supporters, the "open and notorious" ones, and lay them off. GC Ex. 7, the talking heads piece, identifies the strongest Union supporters. In that document, Bishop (a Steward), Murray, Gartland, Dykstra (another Steward), Roederer and

[6] Not just regular employees were laid off. Jones was a temp. (GC Ex. 81).

Woosley expressed their strong support for the Union. Only one of them, Roederer, was ultimately selected for layoff, and he retained his job by virtue of Bishop taking a voluntary layoff.

Retaining the strongest Union supporters is not the action of a Company trying to get rid of the Union supporters. *See, e.g.*, *Operational Energy Corp.*, No. 20-CA-22788, 1992 NLRB LEXIS 150, at *52-53 (Feb. 5, 1992) (holding no violation of the Act where leader of union supporters was retained after a layoff, the layoff was economically justified, and the employer provided non-discriminatory reasons for laying off union supporters).

In a unit as small as the pressmen, removing good producers because they were Union supporters is a luxury the Company could not have afforded. In order to meet its unique delivery schedule[7], it had to retain the employees who best contribute to satisfying its obligations to customers. The Company did just that.

One other fact militates against the General Counsel's theory that the Company used the selection process to "send a message" that union supporters would be punished. If it intended to do that, the press department would likely be more affected by the layoffs than other departments. The opposite occurred. Castro testified that in the December 9 or 12 meeting, the Company and Union discussed the fact that other departments were affected more than the press department. (T. 1631).

Here, the General Counsel did not meet even his initial burden under *Wright Line*. The facts clearly fail to warrant an inference that the layoffs were unlawfully motivated.[8] Moreover,

[7] The Company commits to "buy it today – get it tomorrow." (T. 1123).

[8] The ALJ found that Nick Recktenwald was not selected for layoff because of any Union activity. (Decision at 48-49.) Rather, his layoff "was primarily motivated by a neutral assessment of his productivity and would have occurred regardless of management's animus against him arising from his union activities." (Decision at 49.) Nevertheless, the ALJ provided him a full back pay remedy.

the evidence amply demonstrates that Barnum made the layoff decisions for only legitimate reasons.

The alleged remarks by Brett Heap, although vivid, did not result in a violation of the Act. Taking Pearcy's testimony as accurate, Heap may well have been upset by the election results and would have liked to remove certain individuals.

However, it didn't happen. Pearcy and Barnum understood, and said to each other, that Heap might not be happy about the people retained. Barnum said the Company would follow the law and do what was best for the Company. (T. 263). And the Company did follow the law. (T. 253). Barnum testified he showed the list of employees to be laid off to Heap and Heap accepted it. (T. 1209).

This was not the first time Barnum scrupulously followed what he believed the Act required. Previously, Barnum had told Roederer that the law prohibited pay increases without bargaining. Because his actions have been shown to be consistently in accordance with the Act, the ALJ should have credited Barnum's entire testimony. He did not do so, and the Company believes he was so taken with the alleged remarks attributed to Heap that his entire decision-making process was adversely affected.

C. William Morrison's Statements Did Not Rise to the Level of a Violation of the Act. (Exception No. 2)

The ALJ erroneously found that PFS violated the Act when Morrison made what the ALJ characterized as a statement of futility to PFS employees, a threat to Recktenwald, and a coercive statement to Woosley. (Decision at 28-30).

Morrison unequivocally testified that he did not tell any employee that there would be fewer work opportunities if the Union were voted in. (T. 995). He further denied telling press operators that if the Union came in, the Company would no longer allow operators to stay and

work if there was no press to operate. (T. 996). Rather, his comments to Ben Teague and Nick Recktenwald related to a situation where they had worked successive shifts performing inventory and maintenance without his knowledge. He merely informed them that it was not company policy to have people remaining at work when their machines were down. (T. 996-997). They developed a plan to rotate employees so that no one person suffered all the loss of pay. (T. 997-998). It was his standing practice to not have employees remain at work when there was no productive work for them to do because it made no business sense. (T. 999).

Woosley was not an open union supporter early in the campaign. He testified he only wore a union button one time, late in the campaign. (T.895). The talking heads piece was distributed only a week prior to the election. (T.936).

Woosley attempted to mislead Morrison into believing that he did not support the Union. Morrison testified Woosley told him he did not support the Union. (T. 1001). When the talking heads piece came out, in an effort to mislead Morrison, Woosley told Morrison he "might not have authorized" the use of his picture. (T. 896). Woosley's efforts to mislead Morrison were so successful that Morrison asked Woosley to be the Company observer at the election. (T. 898).

Obviously, when Morrison saw Woosley's picture in the handout, he was surprised and "disappointed" in the context in which it occurred. The mere statement by Morrison that he was disappointed by seeing Woosley's picture in the union handout does not rise to the level of a violation of the Act. Morrison's remark was not threatening and Woosley was entirely responsible for it. Without more, the mere expression of disappointment at an employee's support for a union is not a violation of the act.

In fact, the Board has held that the expression of disappointment in an employee's support for a union, unaccompanied by threats, is protected employer free speech under Section

8(c). *Collavino Bros. Construction Co., Inc*., 222 NLRB 889, 891 (1976); *Aztec Chemicals*, 218 NLRB 116, 117 (1975). In *Aztec Chemicals*, the Board reversed an ALJ finding of a violation where a manager told an employee that he was "very disappointed" that the employee was involved in the union.

D. The Company's Rules Existed Prior to Union Activity. (Exception Nos. 3 and 7)

The ALJ erroneously found that PFS violated the Act when Morrison threatened to send Bishop home for refusing to sign an acknowledgment that he received a "Responsibility Press Operators" document. (Decision at 30-31.) Likewise, the ALJ erred when he determined that the "Responsibility Press Operators" document was issued in retaliation for the Union's victory, (Decision at 38-40,) and that it constituted a unilateral change in the terms of employment (Decision at 52-54.)

In Spring 2011, before any union activity, management personnel began discussing methods to improve the performance of its presses, particularly with respect to color matches. (T. 1141, 1151). The Company needed to improve the consistency with which it complied with press manufacturer recommendations (T.1145). Scott Pearcy was primarily responsible for this task. (T.1150). Pearcy drafted a preliminary list of operational functions and gave it to Paul Barnum, Executive Assistant to General Manager Brett Heap. (T. 1148, R. Ex. 7). The list would compile in one document the responsibilities press operators were already performing. (T. 1004, 1146).

G.C. Exhibit 2 was distributed to press room employees on October 31, 2011. Barnum was out of town and had not seen the final draft. (T.1147).

The press operator responsibility document had 23 duties (GC Ex. 2). As noted by the ALJ, the Company is not prohibited from enforcing, and does not have to bargain about, pre-

existing rules. (T. 168). The following compares the testimony of Paul Barnum and that of union supporter and former steward Jonathan Bishop as to which rules were new and which were old:

Rule No.	**Paul Barnum**	**Jonathan Bishop**
1.	Uncertain (T. 1162)	Old rule but more frequent (T.148)
2.	Old (T. 1163)	Old T. 151)
3.	Old (T. 1164)	Company had always expected employees to comply (T. 150)
4.	Old (T. 1164)	He had been disciplined under this rule in past. (T. 155)
5.	Old (T. 1169)	Old rule – not uniformly enforced (T. 158)
6.	Old (T. 1170)	Sometimes applied (T. 166)
7.	Old (T. 1170)	Always done (T. 173)
8.	Old (T. 1170)	Always done (T. 174)
9.	Old (T. 1171)	Old (T. 174)
10.	Old (T. 1171)	Old (T. 174)
11.	Old (T. 1171)	New but "not a big deal" (T. 174)
12.	Doesn't know (T. 1172)	"Not a big deal" (T. 209)
13.	Old (T. 1172)	Old (T. 209)
14.	Old (T. 1172)	Old (T. 176)
15.	Old (T. 1172)	Old (T. 176)
16.	Old (T. 1173)	Does not know (T.176)
17.	Old (T. 1175)	Old, but more frequent (T. 177)
18.	Old (T. 1175)	Old, but more frequent (T. 177)
19.	Old (T. 1175)	Old (T. 177)
20.	Old (T. 1175)	Old (T. 177)
21.	Maybe new (T. 1176)	New (T. 185)
22.	Old (T.1176)	Old (T. 177)
23.	Old (T.1176)	Does not know (T.186)

For the most part, the rules had been in place for some time, but were not contained in a single document. The issuance of the document was not a significant change from conditions

which existed prior to the union campaign. It is well-established Board law that only charges that are material, substantial, and significant violate Section 8(a)(5). *Berkshire Nursing Home*, 345 NLRB 220 (2005) (change in employee parking locations not unlawful as insignificant), *Toledo Blade Co.*, 342 NLRB 385 (2004) (change must be material, substantial, and significant to require bargaining), *Crittenden Hosp.*, 342 NLRB 686 (2004) (change in dress code policy not unlawful because not material, substantial, or significant).

Here, the Union's own witness admitted that the rules were little more than a codification of existing procedures. A review of the document confirms that. The codification was unaccompanied by any change in disciplinary policy or practice. Accordingly, merely putting the rules in written form was not a material, substantial, and significant change and did not violate Section 8(a)(5).

When Morrison passed out the document on October 31, and began to review it with the press department employees, then-Union Steward Bishop asked if the Union was contacted. (T. 1004). Bishop asked what would happen if an employee refused to acknowledge receipt. Morrison said he might have to send him home because he did not know if he could let him work as the employee would, in effect, be stating that he was not going to comply with the job responsibilities. (T. 1005). Bishop signed "under protest" and was not sent home. (T.85). Morrison's actions and remarks were unrelated to union activity. (T. 1017). Viewed in context, it is difficult to see how Morrison's comment rises to the level of a violation. No employee was disciplined and the signing of the document had no adverse effect on any employee's employment.

E. The Company Followed Its Established Disciplinary Policies. (Exception Nos. 4 and 9)

The ALJ erroneously determined that PFS violated the Act when Pearcy threatened Richard Woosley that all employees would be written up for being late, absent or making mistakes because the Union had asked for documentation of discipline given employees. (Decision at 31-32.) Likewise, the ALJ erred when it found that the issuance of a written warning to Richard Woosley was discriminatory. (Decision at 41.)

Woosley received a written warning on November 3, 2011 because his inattentiveness caused production errors that spoiled two entire print jobs. (GC Ex. 9). The discipline that the Company issued to Woosley was not new or unusual. On the contrary, discipline for production errors is common, as evidenced by 35 documented examples of discipline for production errors that the Company produced. (R. Ex. 15-50) (T. 1201-03). These records evidence the indisputable fact that the Company had an established practice of issuing discipline for the types of production errors that Woosley caused long before the Union arrived.

In all cases alleging a violation of Section 8(a)(3), the Board applies the causation test set out in its decision in *Wright Line*, 251 NLRB 1083, 1089 (1980). Initially, the General Counsel must make a *prima facie* showing sufficient to support the inference that the employees' protected activity was a "motivating factor" of the employer's action. *Id.* Once established, the burden shifts to the employer to demonstrate that its action would have taken place even in the absence of the employees' protected activity. *Id.*

"The Act is not a shield protecting employees from their own misconduct." *Neptco, Inc.*, 346 NLRB 18 (2005); see also, *Standard Products Co. v. NLRB*, 824 F.2d 291, 293 (4th Cir. 1987) ("the Act is not a shield for the incompetent even though the incompetent seeks immunity under the mantle of union membership or activity.") Absent a "showing of anti-union

motivation, an employer may discharge [or discipline] an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws." *Id.*, quoting *Midwest Regional Joint Board v. NLRB*, 564 F.2d 424 (D.C. Cir. 1977).

The General Counsel had the burden to show that Woosley's union activity was a motivating factor in his discipline. Only if this initial burden was met did the burden shift to the Company to demonstrate that Woosley would have been disciplined even if he had not been engaged in union activity.

Even assuming, *arguendo*, that the General Counsel met his burden of demonstrating that Woosley's union activity may have been a motivating factor in his discipline, the Company articulated a sufficient and legitimate reason for disciplining Woosley consistent with its past practices and established policies. As evidenced by the disciplinary records issued for similar production errors, the Company routinely issues discipline for the types of production errors for which Woosley received a written warning. See, *Mid-Mountain Foods, Inc.*, 350 NLRB 742 (2007) (reversing a finding of a violation of Section 8(a)(3) because the "Respondent showed that it had issued numerous warnings to employees for infractions akin to [that of the union employee].") The Company's written warning to Woosley was consistent with its past disciplinary practices, and there is no evidence that Woosley would not have been disciplined absent the union election. Accordingly, there can be no violation of Section 8(a)(3) based upon the discipline issued to Woosley in November 2011.

Furthermore, the finding that the Company had threatened to implement and later did implement new disciplinary practices and policies concerning absences and tardiness, are belied by the record evidence. Specifically, Morrison testified that the Company routinely issued discipline for production errors and absenteeism well before any union activity. (T. 1006, 1012).

The Company also presented multiple instances of written warnings for tardiness, and the numerous warnings for production errors referenced above clearly shows that the Company followed a practice of writing up employees for production errors before the union arrived. *See, e.g.*, GC Ex. 17 attachments containing June 22, 2011 (tardiness) and July 16, 2011 (tardiness) Employee Warning Notices of Kevin Tooley. The allegations are without merit.

F. The Allegations Regarding Timberlake and Lincoln are Time Barred Under Section 10(b) of the Act. (Exception Nos. 5 and 6)

Finally, the ALJ erroneously determined the General Counsel's allegations related to Benjamin Timberlake and William Lincoln were timely. (Decision at 32-28.)

Apparent on the face of the charge is that both are time barred by Section 10(b) of the Act (GC Ex. 1(ff) at ¶¶ 8(a) and (b). Section 10(b) provides "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board…" *See* 29 U.S.C. § 160. The General Counsel did not first raise these allegations until its March 27, 2012 letter notifying the Company that it intended to attempt to amend its complaint at the next convening of the hearing. (GC Ex. 1(ee)). The charge was not filed until April 6, 2012. Even using the March 27 date as the starting point for calculating the timeliness of the charge, the later of the two allegations were raised in the letter 6 months and 3 days after the alleged conduct occurred. Thus, both allegations are time barred by the Act.

The Board may permit untimely allegations that are "closely related" to a timely filed charge and involve conduct occurring within six months of that timely charge. *Carney Hosp.*, 350 NLRB 627 (2007) (holding that untimely amended charge allegations were not closely related to timely filed charge allegations, and thus time barred by section 10(b) of the Act). As developed in *Redd-I, Inc.*, the Board: (1) considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) considers whether the

otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) "may look" at whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

The allegations regarding Timberlake and Lincoln are not factually related to the other timely pled allegations. Regarding the second prong of the *Redd-I* test, factual relatedness "is not shown simply because two events occurred close in time, during the same union organizing campaign, or in response to a campaign. Mere chronological coincidence during a union's campaign does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign." *Carney Hosp.*, supra, 350 NLRB at *19.

A sufficient factual relationship can be established by showing that the two sets of allegations "'demonstrate similar conduct, usually during the same time period with a similar object,' or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity." *Id.* The General Counsel failed to prove that this is the case here. As described below, each worker had unique circumstances to those making other allegations. Each situation was handled as a one-off decision, without thought to potential union ramifications.

Regarding Timberlake, Morrison advised Barnum that Timberlake was thinking of leaving the Company because of pay issues and that Timberlake had received other offers of employment. (T. 1831). Timberlake operated both a slitter and a cutter, and the Company was heading into their busiest season. (T. 1831). Barnum did not know that Timberlake was part of the group seeking to organize, and the NLRB had not yet decided on the appropriate bargaining

unit. (T. 1832). There was no intent to influence his vote if he were part of the voting group. (T. 1832).

Regarding Lincoln, Barnum discussed the Union during his job interview with Lincoln to let him know that even though he was working through a temp agency, he might have to join the Union. (T. 1834). Barnum wanted to know if Lincoln had any problems with joining the Union, and Lincoln said he did not. Lincoln admitted that this is what took place. (T. 1692). That was the only reason for Barnum's comments. Lincoln also knew that he would not become an actual employee of the Company, and would not receive a pay raise, unless it was bargained for by the Union. (T. 1698). If the Company was concerned about Lincoln's union leanings, it could have never hired him in the first place.

These allegations clearly must be dismissed as time barred under Section 10(b). Notwithstanding the 10(b) argument, the Company did not violate the Act in the way it treated Timberlake or Lincoln. As stated previously in this brief, the Union cannot use the Act as a shield and turn every action by the Company into a violation.

G. The Company's Decision to Rotate Available Work Was Fair to All Employees. (Exception Nos. 8 and 11)

The ALJ also erred when he concluded that PFS violated the Act when it sent Nicholas Recktenwald home without pay before his regular shift ended, (Decision at 40-41,) and because it instituted a policy of sending employees home when presses are down, (Decision at 54.)

Toward the end of October, several presses were down. Recktenwald had been allowed to work the previous two shifts performing various types of work, but there was no additional maintenance work to be done. (T. 996). As Morrison said, Recktenwald was "maintenanced out." (T. 996). Morrison felt the fair thing to do was rotate the available work among all the affected employees. (T. 997). That decision was not in retaliation for Recktenwald's union

activity, and the General Counsel has provided no evidence that the decision was in retaliation for his union activity.

Recktenwald is not entitled to a preference over all other employees because he is a union supporter.[9] The Act is not a shield that prevents the Company from making fair and/or necessary decisions as to its union supporters. *See Standard Products Co. v. NLRB*, 824 F.2d 291, 293 (4th Cir. 1987) ("The Act is not a shield…" that allows union supporters to seek "immunity under the mantle of union membership or activity"), *See also, Sam's Club*, 349 NLRB 1007, 1025 (2007), *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1221 (2004).

The Company's decision was fair and reasonable. All employees are entitled to fair treatment – not just union supporters.

H. The Company Made a Good Faith Effort to Comply With the Union's Request for Information in November 2011. (Exception No. 12)

The ALJ erroneously found that PFS violated the Act when it failed to timely respond to the Union's request for information. (Decision at 54-57.)

Under the Act, it is an unfair labor practice for an employer to unlawfully delay responding to an information request. The NLRB defined the test for evaluating "unlawful delay" Section 8(a)(5) allegations as follows:

> In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In evaluating the promptness of the response, "the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

[9] Interestingly, although General Counsel claims Recktenwald was one of the strongest union supporters, his picture does not appear in the talking heads piece. (GC Ex. 7).

Allegheny Power, 339 NLRB 585, 587 (2003). General Counsel failed to establish the Company's actions were unreasonable or unlawful in the circumstances of this case.

The request was for a significant amount of information, and the Company was only given 10 days to respond.[10] (GC. Ex. 12, T. 556). Though Mr. Castro believed subjectively that 10 days was enough time for the Company to respond, he had no experience responding to a comparable request and thus had no rational basis to believe that 10 days was enough time for the Company to respond. (T. 556-557). The 10-day response time was not objectively reasonable.

Then - Human Resources Manager Dale Miller was initially responsible for collecting the requested information (T. 1188). Miller fell ill and was out of the office from November 18 through 28 (T. 1190). The Company terminated him on November 30. (T. 1191). Paul Barnum picked up where Miller left off. (T. 1191). He collected the information as quickly as he could. (T. 1194). He had to contact the insurance company for some of it. (T. 1195). Barnum sent his responses to the Company attorney, who forwarded it to the Union (T. 1192). As of early February, 2012, the Union had received everything requested. (T. 508).

An example of the overreaching nature of this allegation is the claim that the Company attorney had intentionally mailed the first group of responses to the Union's Cincinnati office to cause delay.[11] The Union's cover letter containing the requests was written on its Cincinnati main office letterhead. (GC Ex. 12). Counsel for the Company mailed the first response to

[10] The requests were drafted from a "standard" request for a contract "reopener" (T. 548). In the case of a reopener, there is already a collective bargaining agreement. In this case, there was none. The negotiations were for an initial contract. Because the requests were not particularized for this Company, (T. 540), they were more extensive than necessary.

[11] The ALJ did not find that this occurred, but the claim by the Union indicates its unreasonableness and disregard of the Company's attempts to comply.

Cincinnati. (GC Ex. 16). The Cincinnati Union office mailed it to Union Business Agent Israel Castro in Louisville. The transfer delayed his receipt by two days, but there was no prejudice to him (T. 560, 561). Castro did not tell Company Counsel of his preference that it be mailed to the Louisville office. (T. 559).

The Company provided the sought information in a reasonable time under all the circumstances and General Counsel failed to demonstrate any prejudice to the Union. As of early February, 2012, the Union had received everything requested. (T. 508). Under the totality of the circumstances here, the provision of the requested information within three months was more than reasonable, and there is no basis or support for the General Counsel's allegation that the response was unlawfully delayed. *See, e.g., Good Life Beverage Co., supra*, (5-1/2 month delay in providing information not unlawful); *Union Carbide Corp.*, 275 NLRB 197 (1985) (delay of over ten months found to be reasonable for request for voluminous amount of information).

I. The Company Provided Requested Information to the Union Regarding the December 2011 Layoffs. (Exception No. 14)

The ALJ erred when it determined that PFS violated the Act by failing to provide requested information related to the December 16, 2011 layoffs. (Decision at 58-62.)

Barnum testified that the Union made no specific request for information at the meeting of December 12, 2011 or at any other time. He recalled that in the meeting of December 12, 2011, the Company stated that it intended layoffs to be decided based on productivity and other considerations. (T. 1631). He explained generally the formula he used. (T. 1845). The Union wanted strict seniority to control – the most senior regular employees would be retained, and all temps and junior employees would be laid off. (T. 1479).

After that discussion, Castro said that "Eventually, we [the Union] will want to get the data [Barnum] used for the determination for the layoff". (T. 1836). Castro recalled Barnum making a remark in that meeting that "at some point" he and Castro would get together and he would show Castro the information and "explain it". (T. 1630). A meeting was necessary because the information was in a form that "would not mean anything to Castro unless Barnum showed it to him and explained it." (T. 1630). It was not written; it was a series of computer screens. An oral response to an information request where there is no written information that can be provided is acceptable under the Act. *See, e.g., Anheuser-Busch,Inc.*, 342 NLRB 560, 567 (2004).

The meeting did not take place for a while and the Union did not press for it. The reason is obvious. The Union did not care about the productivity information because they wanted the layoffs based on strict seniority. In truth, they had no need for it.

Barnum and Castro have met to review the information. (T. 1489). The meeting took place sometime after the initial hearing days. (T. 1492).

The Company never refused the Union's request for information. The Company had no obligation to respond to an information request that it never knew was made. *See Kieft Bros. Inc.*, 355 NLRB 116 at *47-48 (2010). And, as stated in response to allegation 12, even when the Company was casually asked for the information it made a reasonable good faith effort to respond to the request as promptly as the circumstances allowed considering the information to be provided. Under the circumstances, the Company met its duty under the Act.

J. It would have been an unfair labor practice for PFS to provide Dykstra with a raise. (Exception No. 15)

In early November, 2011, the Company was having considerable mechanical trouble with the presses. (T. 1180). Scott Pearcy came to Paul Barnum and said he needed to swap the

shifts of Woosley and Dykstra to increase production. (T. 1183). On or about November 3, 2011, Scott Pearcy asked Dykstra if he was ready to go to third shift the following week. (T. 685). The shift change was not convenient to Dykstra because he was seeking a second job and the work times might conflict. (T. 687). He met with Morrison and Pearcy to discuss it. Dykstra said, "They could give me a long overdue raise and [I] wouldn't need the second job. (T. 688). Pearcy said he "could not give [Dykstra] a raise because of the Union proceedings."[12] (T. 688).

Pearcy's comment is nothing more than an accurate statement of the law. The Company did not have compelling economic considerations for providing Dykstra with a raise.[13] Thus, it would have been an unfair labor practice to give Dykstra a raise without bargaining with the Union.[14]

VI. CONCLUSION

For the reasons set forth above, the ALJ erred to the extent it determined that PFS violated the Act. To that extent, the Board should reject the ALJ's Decision and dismiss the Complaint in its entirety. At the very least, the Board should vacate the ALJ's Decision to the extent it ordered a full backpay award for the failure to bargain over the effects of PFS's layoff decision and institute a limited backpay remedy in accordance with *Transmarine*.

[12] Dykstra stated that it was Pearcy, not Morrison, who stated that a raise could not be given because it needed to be bargained for with the Union first.

[13] At about the same time, bargaining unit member Paris Bradford was also pressing for a raise. Barnum, in another example of the Company following the law, told him he could not give him a raise because the election was in a week and the Union had to be consulted. (T.953).

[14] It is well-established that "an employer's duty to avoid unilateral changes in wages, hours, and working conditions attaches when the Union wins the election, and if an employer makes material unilateral changes between the election and certification, it acts at its peril when it does so absent compelling economic considerations." *Starcraft Aero., Inc.*, 346 NLRB 1228, 1246 (2006), citing *Celotex Corp.*, 259 NLRB 1186 (1992).

Respectfully submitted,

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Certificate of Service

This certifies that on this 25th day of July, 2012, the foregoing Exceptions and Brief on Behalf of Print Fulfillment Services LLC to the Decision of Hon. Paul Buxbaum, Administrative Law Judge, was filed electronically with the Office of the Executive Secretary, National Labor Relations Board, 1099 Fourteenth Street N.W., Washington, DC 20570 (http://www.nlrb.gov), and one copy served by UPS Overnight Mail on the following:

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