

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF ITS LIMITED CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. STATEMENT OF THE CASE:

As a preliminary matter, the Board is hereby notified that on August 2, 2012, the U.S. District Court for the Western District of Kentucky entered an opinion and order granting, in part, the Acting General Counsel's petition for injunctive relief pursuant to Section 10(j) of the Act. *Muffley v. Print Fulfillment*, 3:12-CV-00080-CRS. Accordingly, pursuant to Section 102.94 of the Board's Rules and Regulations, expedited treatment of these matters by the Board is requested. These cases are before the Board on the Respondent's exceptions and Counsel for the Acting General Counsel's limited cross-exceptions to the decision of Administrative Law Judge Paul Buxbaum, which issued on June 27, 2012. Counsel for the Acting General Counsel files exceptions to the Administrative Law Judge's findings and conclusions as enumerated in its Limited Cross-Exceptions, filed contemporaneously with the instant brief.

II. SUMMARY OF THE FACTS:

Respondent provides “web-to-print fulfillment services” at its Louisville, Kentucky facility. (G.C. Ex. 89) ^{1/} On August 24, 2011, ^{2/} the Union filed a petition in Case 9-RC-063284, seeking to be certified as the bargaining representative of a unit of 21 press department employees. (G.C. Ex. 89) A Decision and Direction of Election issued on September 29, directing an election in the petitioned-for bargaining unit. (G.C. Ex. 89) An election was conducted on October 28 and the Union received a majority of the valid votes cast. No objections to the election were filed and a Certification of Representative issued to the Union on November 7. (G.C. Ex. 1(p)(y)(ff)(gg))

Respondent resisted the Union’s organizing efforts from its nascent stages and that resistance continued unabated after the Union won the representation election. As found by the Administrative Law Judge, after the filing of the representation petition, Pressroom and Quality Control Manager Scott Percy told press operator Dale Gartland that the owner Brett Heap would “get rid of them all.” (ALJD p. 5, lines 13-14; Tr. p. 746) Indeed, Heap and Percy strategized ways to avoid unionization during a conversation within 2 to 3 weeks of the representation hearing. (Tr. p. 238) Heap and Percy discussed hiring other press operators to work in the Louisville facility and potentially replacing discharged operators. (Tr. p. 238) Heap expressed concern that there not be a “clamor” from Union supporters for another election in the fall of 2012 if the Union was unsuccessful in its bid to represent employees in the election scheduled for the fall of 2011. (Tr. p. 240) Respondent intended to avoid this scenario by hiring

^{1/} References to the Administrative Law Judge’s Decision will be designated as (ALJD p. __, line __) references to the trial transcript will be designated as (Tr. p. __); references to the Acting General Counsel’s and Respondent’s trial exhibits are designated as (G.C. Ex. __) and (Resp. Ex. __), respectively.

^{2/} All dates herein are in 2011 unless otherwise indicated.

pressroom employees to replace those Union supporters in the pressroom whom it had discharged because of their Union support. (Tr. p. 240) Percy testified that the Union supporters had to be replaced, “because, chances are, a year from now they’d want to try to vote the Union in again.” (Tr. p. 240)

According to Percy, Heap told him that he wanted to bring in employees who could manage and also operate the presses because, “If [Respondent] were able to get rid of [Union supporters], [Respondent] needed to qualify people to step right in and run, because [Respondent] couldn’t afford to just have . . . empty presses sit there and not run.” (Tr. p. 275) If Respondent did not terminate or lay off Union supporters, it had sufficient employees to operate the presses. (Tr. pp. 275-276)

Heap and Percy had other conversations about the topic of hiring employees or having prospects in place if Respondent determined to discharge one or more pressroom employees because of their support for the Union. (Tr. p. 243) Percy summarized his conversations with Heap and other managers of Respondent in this manner: “Brett wanted to get rid of the people in the Union at the time, he wasn’t happy. We talked about it on occasions. And the . . . names that were brought up was the people in the Union, the . . . supporters that had the stickers, and everything . . .” (Tr. p. 251) Percy summarized further: “. . . On numerous occasions and when I talked to him and we all talked together, not just him, but the management, yeah, we wanted to get the people in the Union out.” (Tr. p. 251) Following the representation election Percy and Heap had another one-on-one conversation about replacing Union supporters. (Tr. pp. 247-248) Heap asked Percy if he had any operators or people lined up to replace “the Union people.” (Tr. p. 247)

In addition to coordinating a plan to replace Union supporters, Respondent explicitly conveyed the consequences of unionization to pressroom employees before and after the election. Specifically, Respondent threatened that unionization would cost employees pay raises and would result in less work opportunities when presses were inoperable. Respondent implemented new work rules that saddled pressroom employees more responsibilities and restricted previously enjoyed benefits. Additionally, Respondent announced after the election that pressroom employees would be subjected to additional disciplinary action.

After the election, Heap told Percy that Respondent needed to “start documenting” and “get all our stuff in a row” so Respondent would have a basis, “to let employees go who were with the Union.” (Tr. p. 247) On November 3, Percy issued a written warning to press operator and Union supporter Richard Woosley, purportedly for productivity errors that had occurred during his shift on November 2. (G.C. Ex. 9; Tr. pp. 865, 869-870) At the time that the warning was issued Percy told Woosley that “we were going to start writing up, that we were going to start having documentation, and that everybody’s going to have to start doing their job, pay more attention. I said we were doing the paperwork for the Union.” (Tr. pp. 340, 870) Percy told Woosley regarding why he was disciplined that, “This is something that [we] have to do now because [we] received a letter from the Union demanding that [we] keep records of any disciplinary actions.” (Tr. p. 872) The only letter from the Union pertaining to disciplinary records was its information request of November 1, which only sought disciplinary action that Respondent had already issued. (G.C. Ex. 12) Woosley testified that Percy told him additionally, “He said I could write it down that I’m the first person to be written up, and that that’s what they’ve got to do from now because they received a letter from the Union to keep documentation of any disciplinary action.” (Tr. pp. 873-874, 879)

Prior to the representation election, production errors attributable to operator error occurred more than 500 times on an annual basis. (Tr. pp. 1081-1082) Respondent was aware of these errors at the time that they occurred. (Tr. pp. 691-692) Yet, Respondent produced only a handful of records showing employees who had been disciplined for production errors during that same timeframe. (Resp. 44, 46, 49; G.C. Ex. 17, Attachment 5)

After the election, Percy made it clear to press operators that they would now be subject to written discipline for such errors. Although Percy threatened Woosley that he and the other supervisors were going to start writing up bargaining unit employees for all kinds of infractions, in practice those written warnings were issued in a discriminatory fashion. Travis Dykstra was an outspoken union supporter who was elected as an assistant union steward after the union election.^{3/} A November 1, e-mail exchange between Morrison and Percy reflects Respondent's disdain for Dykstra and the Union after Dykstra requested to speak with both managers. Percy wrote, commenting on Dykstra's request: ". . . They need to do their job and that's the end of it. Nobody wanted to talk when they sucker punched us with the Union." (G.C. Ex. 41)

Respondent's contempt for Dykstra was reflected in its decision to target him for written discipline following the union election. On December 14, Morrison wrote up Dykstra for an "inappropriate" text message he had sent to a co-worker. During Dykstra's meeting with Morrison concerning the December 14 reprimand, Morrison informed Dykstra that he was considering writing him up for a production error from October 9. (Tr. p. 1732) When Dykstra informed Morrison that Percy had already talked to him about the job, Morrison's response was that Percy should have written him up. (Tr. 1732) Morrison also threatened to write Dykstra

^{3/} After Johnathan Bishop, press operator and chief union steward, was laid off on December 16, Dykstra became the chief union steward.

up for an alleged production error on December 9, and he only reconsidered after Dykstra provided proof that the job was sellable when it left his press. (Tr. 1733-1734)

Two weeks later, on December 28, Respondent wrote up Dykstra for a job he ran on December 21. (Tr. p. 1735, Resp. Ex. 48) Morrison and supervisor Mike Reid had prepared the written warning in advance of meeting with Dykstra to discuss the print job. (Tr. pp. 1756-1757) Dykstra had last been written up for a production error in September 2009. (Resp. Ex. 38) When Dykstra attempted to explain why the job was bad, Morrison flatly refused to discuss it and issued him the reprimand. (Tr. 1756) In contrast to Percy's comments to Woosley concerning his November 3 reprimand, Morrison did not explicitly connect Dykstra's written warning with the Union election.

On December 9, while the parties were in the preliminary stages of establishing negotiations for an initial collective-bargaining agreement, Respondent announced to the Union that effective December 16, it was going to conduct a layoff based primarily on employee productivity. (Tr. pp. 1427, 1581; G.C. Ex. 26) Union Representative Castro immediately requested that Respondent bargain over the layoff decision and its effects. (Tr. pp. 1433, 1434, 1584) Barnum told Castro, Bishop, and Dykstra that Respondent had reviewed the productivity of the employees and the employees listed in the letter were determined to be the least productive employees. (Tr. p. 1583) Barnum stated that the determination was based on productivity data that Respondent had compiled over the past year. (Tr. p. 1583)

Respondent had been aware for weeks that it was planning a layoff, but presented it to the Union on December 9, as a fait accompli. (Tr. pp. 252, 1581; G.C. Ex. 26) Percy testified that the managers had discussed, "who we would like to see laid off and what . . . protocol we would use to conduct the layoffs." (Tr. p. 253) There was discussion that, "Brett wanted to lay off the

people in the Union, but he wanted to get Murray, and . . . some of those people . . . like I said before, but we had to find - - you couldn't just go and lay them off. So that's why, you know, we had to come up with the protocol." (Tr. p. 253) Percy stated that when they arrived at their selections, "it wasn't the ideal people that Brett would want to laid (sic) off, but we had to try to follow the law the best we could as to pick the people that fell under that category." (Tr. p. 254)

According to Percy, the protocol discussed for layoff selection was, "production numbers of the press operators and the quality of the press operators." (Tr. p. 254) Percy was unable to testify as to the criteria for layoff that was actually used because he quit his employment with Respondent before the layoff occurred. (Tr. p. 254-255) According to Percy, before he left Respondent's employ, "We pulled the numbers (productivity) and we discussed what was going to be done and how we were going to do it." (Tr. p. 256) Percy asserted that he was the manager who suggested that productivity was the principal criteria that should be used to determine whom to layoff. (Tr. p. 257) Managers' "input on job performance" was also to be accorded some weight. (Tr. p. 257) Percy had no knowledge as to the criteria utilized in prior layoffs. (Tr. pp. 263-264)

Barnum, Morrison, and Percy all commented on whom Heap wanted to be laid off. (Tr. pp. 257-258, 263) They remarked that, "the exact people when [Percy] was there that [Heap] had thought would be laid off wouldn't be the ideal list." (Tr. pp. 257-258) Barnum remarked, "Brett's not going to be happy about the list . . ." (Tr. p. 263) Percy stated that Heap wanted to see the staunch union supporters laid off, but Heap was aware that Respondent had to have some kind of basis to justify their selection. (Tr. p. 258)

The layoff was to include unit employees Johnathan Bishop, Nicklaus Recktenwald, Robert Starks, and William Wellman. (G.C. Ex. 26) ^{4/} On December 16, employees Bishop, Recktenwald, Starks and Wellman were laid off. Bishop and Recktenwald were both known union adherents. (Tr. p. 261) Bishop testified in the representation hearing, was the Union steward, and had appeared in union campaign literature. (G.C. Exs. 4, 7, 77) Recktenwald was known by Respondent's managers to be a union supporter. (G.C. Ex. 1(c); Tr. p. 261) Recktenwald had been unlawfully sent home for a day and was named as an 8(a)(3) discriminatee in the amended charge to the lead case. (G.C. Ex. 1(c)) As detailed above, Percy testified that Heap issued instructions that union supporters be targeted for termination, which logically encompasses layoff. (Tr. pp. 233, 239-240, 243-245, 247, 251, 275)

III. ARGUMENT:

EXCEPTION NO. 1: The Administrative Law Judge erred in finding that the Respondent's discipline policy did not violate Section 8(a)(1), (3) and (5) of the Act.

Judge Buxbaum found that Respondent violated Section 8(a)(1) and (3) of the Act when it disciplined press operator Richard Woosley for a production error on November 3, but declined to find that Respondent violated the Act by generally imposing a disciplinary policy on employees for production errors. (ALJD p. 42, lines 26-34; p. 43, lines 24-29) Counsel for the Acting General Counsel respectfully submits that this finding was error based on the judge's literal and rather hypertechnical reading of the Acting General Counsel's pleading.

The Acting General Counsel alleged that the Employer "instituted a policy of disciplining unit employees for production errors." (G.C. Ex. 1(ff), para. 9(c)) The Judge concluded that the decision of the Acting General Counsel not to amend the allegation to specifically conform to the

^{4/} Respondent later "discovered" an error in their system and informed the Union that Bishop had been misidentified for layoff. Instead, according to the Respondent, press operator Robert Roederer should have been selected. After learning of the error, Bishop volunteered to take the layoff in Roederer's place. (Tr. pp. 1466, 1610)

evidence prejudiced the Respondent's defense. (ALJD p. 43, lines 13-14) In so concluding, the Judge opined that the evidence presented a "separate question of whether [Respondent's disciplinary] policy's degree of enforcement changed on and after November 3." (ALJD p. 43, lines 18-19) The Judge found that the two concepts involve "different sets of facts and different ultimate issues."

Contrary to the Judge's findings and conclusion, Respondent was not harmed or prejudiced by the drafting of the allegation. Rather, Respondent was clearly put on notice of the basis of the allegation. "[T]he Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). Judge Buxbaum cited *SPE Utility Contractors, LLC*, 352 NLRB 787 (2008), in finding that the allegation that the complaint pleaded was not closely connected to the allegation that the evidence supported. (ALJD p. 43, lines 20-22) In *SPE Utility Contractors*, the Board reversed an ALJ's finding that Respondent had violated 8(a)(5) of the Act. The underlying complaint in that case had alleged that the layoff of an employee was in breach of an agreement to lay off employees by reverse seniority. Although the ALJ there found that the parties had not entered any such agreement, he found that the respondent had nonetheless violated the Act because it had laid off an employee prior to an overall impasse in bargaining.

Unlike the situation in *SPE Utility Contractors*, the allegation pleaded and the allegation as Judge Buxbaum believes it should have been pleaded involved similar issues and nearly identical sets of facts. The issues of contractual breach versus unlawful bargaining impasse present different questions and require separate legal analyses; the issues of whether an employer

has implemented a new disciplinary policy versus whether that employer has implemented a newer, more stringent policy in retaliation for a unit of employees' union activity, on the other hand, present similar questions and require nearly identical legal analyses. The evidence adduced at trial reflects the closeness of these two issues and the disingenuous nature of Respondent's claim of prejudice. Testimony by Percy and Woosley clearly demonstrated that the Respondent intended to step up its issuance of discipline for production errors in response to the union-organizing drive. Any ambiguity in the drafting of the complaint was cleared up early on in the hearing.

Moreover, reading the complaint as a whole dispels any uncertainty regarding the import of the allegation that Respondent instituted a retaliatory policy of discipline following the union election: The date of the institution of a new policy of discipline alleged is November 3 – the same date of the Woosley written reprimand allegation. As the evidence showed and the Judge found, the reprimand of Woosley was 8(a)(1) and (3) retaliation. In finding this conduct to be a violation of the Act, the Judge specifically pointed to a statement by Percy that the reason for the write-up was “the Union coming in.” (ALJD p. 42, lines 20-21)

The Judge opined that “[c]ompetent defense counsel faced with the allegation as written” could “reasonably be content” to present evidence on the narrow question of whether any previous policy of discipline existed. (ALJD p. 43, lines 15-18) Counsel for the Acting General Counsel respectfully submits that the Judge's finding on this point is erroneous. The allegation itself does not preclude the existence of a prior policy of discipline. Respondent was unquestionably put on notice of the basis of the allegation. It had ample opportunity to rebut testimony from Woosley and Percy, both of whom credibly testified that Respondent intended to generate written documentation for production errors in response to the Union's request for

such documentation and in retaliation for the press operators' choice to elect a collective bargaining representative. Consequently, Counsel for the Acting General Counsel respectfully requests the Board to find that the Respondent's policy of issuing written reprimands to pressroom employees following November 3 was unlawful retaliation for protected union activity in violation of Section 8(a)(1) and (3) of the Act.

EXCEPTION NO. 2: The Administrative Law Judge erred in finding that Respondent did not violate Section 8(a)(1) and (3) of the Act when it reprimanded Travis Dykstra on December 28, 2012.

Pearcy expressly stated Respondent's intent to begin documenting production errors when he wrote up Woosley on November 3. Although Judge Buxbaum found that the November 3 written reprimand issued to Woosley was a violation of Section 8(a)(1) and (3) of the Act, he declined to find that a similar reprimand issued to press operator and vocal union supporter Travis Dykstra on December 28 was also a violation. (ALJD p. 51, lines 35-43) ^{5/} Judge Buxbaum found that the Acting General Counsel had established a prima facie case of discrimination under the *Wright-Line* analysis. (ALJD p. 49, fn. 71; p. 50, lines 48-51) But the Judge found that Respondent presented sufficient evidence of a legitimate business reason for issuance of the reprimand. (ALJD p. 51, lines 1-9) Counsel for the Acting General Counsel respectfully submits that this finding is in error.

The most troubling aspect of the Judge's conclusion is that he readily acknowledges that Respondent "expressed an unlawful intent to tighten up its disciplinary standards in response to the Union." (ALJD p. 51, lines 35-36) He acknowledges the threats made by Morrison 2-weeks before the written reprimand, on December 14, which foretold the stricter standards the

^{5/} The Acting General Counsel also alleged that Respondent violated Sections 8(a)(1) and (3) of the Act when it issued Dykstra a written reprimand for an inappropriate communication with a co-worker on December 14. The judge found that Respondent had a legitimate motive for issuing that written warning, and the Acting General Counsel does not except to that finding.

Respondent intended to apply to Dykstra's work product. Nevertheless, the Judge concluded that the Morrison's response was "appropriately calibrated to address the nature and extent of the infraction in a reasoned and impartial manner." (ALJD p. 51, lines 2-3) In reaching this conclusion, the Judge did not consider credible testimony that production errors attributable to operator error occurred more than 500 times annually. (Tr. p. 1081-1082) Although Respondent was aware of those errors at the time they occurred, it was not until after the press operators elected a union representative that Respondent implemented a strict policy of issuing written reprimands for such errors, as announced by Percy on November 3. (Tr. pp. 691-692) That Respondent had issued sporadic written warnings prior to that time does not legitimize its patently unlawful retaliatory actions post-election. Counsel for the Acting General Counsel respectfully submits that the Judge's conclusion that Respondent did not violate Section 8(a)(1) and (3) of the Act when it issued Dykstra a written reprimand for a production error should be reversed.

EXCEPTION NO. 3: The Administrative Law Judge erred in finding that Respondent did not violate Section 8(a)(1) and (3) of the Act when it laid off Nicklaus Recktenwald.

Although Judge Buxbaum found that the Acting General Counsel had met its initial burden of establishing a prima facie case of discrimination with regard to Nicklaus Recktenwald's layoff, he concluded that the Respondent met its burden under *Wright Line*. Counsel for the Acting General Counsel respectfully submits that the Judge's conclusion should be reversed. The process used by Respondent to select employees for layoff is clear pretext for several reasons discussed below.

Respondent's rationale for utilizing the selection criteria and process that it used for the December 16 layoff simply does not withstand scrutiny. First, the Judge did not consider

evidence that the productivity criteria used by Respondent insulated anti-Union employees from the layoff. The Rapida 105 operators were on a high volume machine that by the nature of the machine would result in those operators producing more product than the Karat operators regardless of their skill or ability as operators. The three 105 operators, Logsdon, Gilby, and Swartz, were all known by Respondent to be opposed to the Union. Swartz and Logsdon were particularly active and vocal in their opposition to the Union. Production Manager Morrison promised Swartz via an e-mail that, "Things will be OK for the 105 operators, I assure you." (G.C. Ex. 50)

Second, Respondent claimed that the ability of an operator to operate more than one machine would be a consideration when production was relatively close. Yet, Castro testified without contradiction that once an operator had trained on one machine that a relatively short training period would be needed before the operator could qualify on the press. (Tr. p. 1637)

Third, the Union pointed out to Respondent that it was nonsensical for it to lay off Recktenwald, a Karat operator, rather than a temporary employee who was retained. In addition to being an operator, Recktenwald was proficient as a platemaker and had extended experience as a helper on the 105. (Tr. p. 1453, 1646, 1648-1649) He was so highly thought of that Respondent promoted him to an operator position. The temporary employees who were kept as platemaker and helpers were only qualified and experienced to perform those limited tasks. (Tr. pp. 1646-1649) Moreover, and perhaps most damning of all, Recktenwald was still only earning \$11 an hour as an operator at the time he was laid off, the same rate he had been earning as a helper. (Tr. p. 1647) He could have been retained without costing Respondent more money, but giving Respondent much more versatility. All of this was pointed out to Respondent's representatives and managers – as if they did not already know it – and they failed to offer any

logical defense for their selection of Recktenwald. (Tr. pp. 1453-1454) The fact that Recktenwald's numbers were low in Respondent's flawed statistical analysis was logical based solely on his status as a new operator and is not indicative of his skill. Moreover, his numbers were for a much smaller timeframe that included Respondent's tough or slow months. Recktenwald's productivity numbers were also adversely affected by the fact that his press was inoperable for a substantial number of days.

Fourth, Respondent's decision to lay off long term and generally higher skilled employees whom it had employed directly for several years in favor of temporary employees who had worked at the facility through a temporary service for a period of at most 4 or 5 months is itself a red flag that again exposes the flawed nature of Respondent's layoff selection and its pretextual nature. Thus, Respondent could have chosen to retain all four of the bargaining unit operators whom it laid off and the four temporary employees who were retained. In this regard, Respondent could have permitted those more senior and more qualified employees to bump into helper or platemaker roles. It could have negotiated lower rates for employees while performing those functions, but it chose not to.

Fifth, the record also discloses that Respondent's claim in its December 9 letter to the Union that the layoff was being conducted using the same criteria as had been used in the past is false. To the contrary, the evidence shows that at least one prior lay off of pressroom employees ostensibly used the criteria of laying off the highest paid operators and the least senior operators. (Tr. pp. 1541-1543) Productivity was not cited as a criterion in this mid-year 2010 layoff. Indeed, Matt Murray, who was laid off at that time, was one of Respondent's most productive operators Respondent had at the time so it seems unlikely that productivity was even remotely factored. (Tr. p. 1545) Beyond this one layoff and another in the spring of 2008 as testified to

by Bishop, but for which there is little evidence, Respondent did not have either an established pattern of laying off employees nor an established criteria in selecting employees for layoff. With the possible exception of Brett Heap, who did not testify, none of Respondent's managers who are centrally involved in this matter were employed by Respondent long enough to have any idea how Respondent had conducted layoffs in the past. Indeed, Percy testified that he had no knowledge as to the criteria utilized in prior layoffs. (Tr. pp. 263-264)

Sixth, the record reflects ample testimony that Respondent's PROFIT computer system is ill suited to evaluate the productivity of its press operators. Thus, the evidence shows that there are significant differences not only between the different types of presses, but also between presses of the same type, and that these differences can, and do, have a vast impact on raw production numbers generated by PROFIT. (Tr. p. 1503-1504) Moreover, those raw numbers captured by PROFIT do not take into account quality issues with the product being run, nor do they accurately account for downtime when presses break down or for less serious maintenance issues. Recording of such downtime only occurred during the relevant timeframe for maintenance issues of 15 to 30 minutes or longer and relied on operator input. The record discloses that not all the operators were proficient or diligent at recording downtime. Production also varied greatly in terms of the number of sheets produced based on the type of product each operator was assigned to run. Products with greater ink coverage requirements, for example, take much longer to run than products such as envelopes or stationary, which require little coverage. (Tr. pp. 1503-1504)

The Judge did not consider any of the aforementioned evidence in reaching his conclusion that Respondent's articulated business reason for laying off Recktenwald was not pretextual. Instead, he relied on the testimony of Scott Percy, who essentially testified that the

task he faced was finding a way to eliminate Union supporters in a facially nondiscriminatory manner: “Brett [Heap] wanted to lay off the people in the Union . . . but we had to find – you couldn’t just go and lay them off and not have a reason to lay them off. So that’s why, you know, we had to come up with the protocol.” Under *Wright Line*, the Respondent’s burden is to demonstrate that it would have made the same decision regarding layoffs even if it had not unlawfully considered protected union activity. As evidenced above, Respondent clearly failed to meet its burden in this case. The Acting General Counsel respectfully requests that the Board reverse the Judge’s conclusion and find that Respondent violated Section 8(a)(1) and (3) of the Act when it laid off Nicklaus Recktenwald.

EXCEPTION NO. 4: The Administrative Law Judge erred in refusing to order a tax remedy.

Counsel for the Acting General Counsel also respectfully excepts to the Judge’s failure to grant certain requested remedial measures. The Judge declined to issue an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump sum payment and taxes that would have been owed had there been no discrimination, and the submission of appropriate documentation to the Social Security Administration, so that when backpay is paid, it will be allocated to the appropriate periods. (ALJD p. 65, lines 5-11) In declining to compel either, the Judge held that the Acting General Counsel’s position may be meritorious but that without Board precedent, he was unwilling to grant these remedies. (ALJD p. 65, lines 5-11)

Regarding reimbursement of taxes and the submission of appropriate documentation, ordering those requested remedies are necessary in order to properly effectuate the remedial purposes of the Act – that is, to make the employee whole for any losses incurred as a result of the unlawful discrimination. Presently, the Internal Revenue Service and the Social Security

Administration consider backpay awards to be wages in the year paid. Thus, discriminatees who receive lump sum backpay awards covering a multi-year period are often placed in a higher tax bracket and, therefore, pay a greater amount in taxes than they would have had they been retained and paid wages in due course. Likewise, the Social Security Administration credits backpay awarded to an individual's earning record in the year reported by the employer and if not credited to the proper year in which it would have been earned, absent the discrimination, could result in lower social security benefits or a failure to meet the requirements for benefits. Consequently, to achieve the Act's goal of making Johnathan Bishop, Nicklaus Recktenwald, Robert Starks, and William Wellman whole and returning them to the state they would have been in absent Respondent's unlawful conduct, the Judge's remedy should be modified according to the complaint as amended at hearing.

EXCEPTION NO. 5: The Administrative Law Judge should have required a notice reading under the circumstances in this case.

Judge Buxbaum erred in refusing to grant a notice reading remedy, but found that a broad cease and desist order would be appropriate and adequate. In declining to grant the requested notice reading remedy, the Judge relied on an outdated standard. (ALJD, p. 65, lines 16-18, citing *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001), aff'd 354 F.3d 534 (6th Cir. 2004)) In that case, the Board limited the use of the notice remedy to cases involving "egregious" conduct by a party. Although the Judge acknowledged the egregious nature of the Respondent's violations, he nonetheless declined to order the notice reading based on his personal view that the remedy "reflects a rather outmoded conception of appropriate governmental intervention. . . ." (ALJD, p. 65, lines 33-35)

As a preliminary matter, the Judge applied an older standard for the reading remedy than that currently applied by the Board in determining whether a notice reading remedy is

appropriate. See, *Marquez Brothers Enterprises*, 358 NLRB No. 61 (June 25, 2012) (citing *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB No. 46, slip op. at 1 (2012) and *HTH Corp.*, 356 NLRB No. 182, slip op. at 8 (2011), and applying the “sufficiently serious and widespread” standard). But under either standard, Respondent’s gross misconduct warrants the issuance of a notice reading remedy. As the evidence demonstrated and the Judge found, Respondent engaged in a systematic and widespread campaign to discourage union support from the earliest stages of the press operators’ organizing efforts, including various unlawful threats and promises of benefits prior to the election and retaliatory actions post-election. The Judge’s own conclusion underscores the necessity of a notice reading remedy: “I conclude that the General Counsel has demonstrated that this Employer maintained a long-range and comprehensive overall plan to unlawfully thwart the Union’s organizing efforts at PFS. This plan originated at the top of the management pyramid and came into existence no later than the time that Heap attended the representation hearing.”

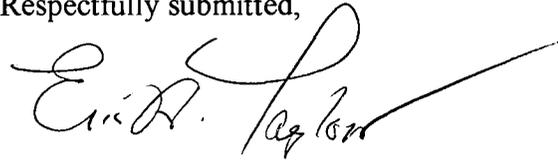
The Judge based his decision not to order a notice reading remedy in part on the fact that he considered witnesses who were members of the bargaining unit to be “articulate, intelligent, and sophisticated.” (ALJD p. 66, lines 3-4) While this is undoubtedly true, it should hardly be considered a reason to deprive these employees of the “warming wind of information and . . . reassurance” that a notice reading remedy provides. (ALJD p. 65, lines 30-33, citing *United States Service Industries*, 319 NLRB 231, 231 (1995)) Counsel for the Acting General Counsel respectfully requests that the Board reverse the Judge with respect to this finding and order the notice reading remedy as requested in the complaint, as amended.

IV. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, Counsel for the Acting General Counsel respectfully submits that the decision of the Administrative Law Judge should be reversed with respect to the findings and conclusions described above.

Dated at Cincinnati, Ohio this 8th day of August 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric A. Taylor". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Eric A. Taylor
Counsel for the Acting General Counsel

A handwritten signature in black ink, appearing to read "Joseph F. Tansino". The signature is cursive and somewhat stylized.

Joseph F. Tansino
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
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