

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERTAPE POLYMER CORP.

and

UNITED STEEL, PAPER & FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL
UNION, AFL-CIO-CLC

Case Nos: 11-CA-077869
11-CA-078827
10-CA-080133
11-RC-076776

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

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I. STATEMENT OF THE CASE

Intertape Polymer Corp. (IPG or the Company or the Respondent) is a global supplier of industrial and consumer packaging products, including various types of adhesive tapes. At all material times, IPG maintained a manufacturing facility in Columbia, South Carolina (the facility), where it employed approximately 250-260 hourly employees. (Tr. 22-23). On March 16, 2012,¹ the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (the Union) filed a petition seeking to represent a unit of all production and maintenance employees at the facility. (GC Exh. 2). Pursuant to a Stipulated Election Agreement (GC Exh. 3), a secret ballot election was held on April 26 and 27. The tally of ballots showed 97 votes for, and 142 against, the Union, with three challenged ballots. (GC Exh. 5).

The Union filed the underlying charges between March 30 and July 25. The resulting consolidated complaint alleged that IPG violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about their union sympathies; threatening employees with replacement during a strike if they selected the union; threatening employees with loss of overtime, unspecified reprisals, and discharge because of their union activities; selectively and disparately enforcing its solicitation/distribution policy; and surveilling employees' union activities. The complaint further alleged that IPG violated Section 8(a)(3) and (1) of the Act by withholding overtime from employee Wilton Dantzler and discharging employee Johnnie Thames because of their union activities.

In addition to the above-described charges, on May 4 the Union filed objections to the election. The objections were largely based on the allegations in the complaint.

¹All dates referenced herein are in 2012, unless otherwise indicated.

The case was tried before Administrative Law Judge Robert A. Ringler in Columbia, South Carolina, from October 9 to 12. The judge issued a Decision and Order on February 20, 2013, recommending that all but four Section 8(a)(1) allegations be dismissed and that both Section 8(a)(3) allegations be dismissed. He further recommends that the objections mirroring the complaint allegations he finds unlawful be sustained, while the remaining objections be dismissed.

IPG timely filed exceptions to the decision and, pursuant to Section 102.46(a) of the Board's Rules and Regulations, submits this brief in support thereof.

II. QUESTIONS INVOLVED

1. Did Supervisor Bill Williams unlawfully interrogate employee Johnnie Thames? (Exceptions 10-11, 21-23, 32, 37-40, 45-48)
2. Did Senior Vice President of Administration Burge Hildreth unlawfully threaten employees? (Exceptions 1-8, 24-26, 30-31, 33, 36-39, 41, 45-48)
3. Did Supervisors Bill Williams and Charles Becknell unlawfully confiscate union materials from the break room? (Exceptions 12-18, 27-28, 30-31, 34, 36-39, 42, 45-48)
4. Did IPG managers engage in unlawful surveillance when distributing "thank you" flyers at the plant gates? (Exceptions 19-20, 29-31, 35-39, 43, 45-48)
5. Did the judge erroneously order a rerun election? (Exceptions 30-31, 36)

III. ARGUMENT

A. THE JUDGE ERRONEOUSLY FOUND THAT SUPERVISOR BILL WILLIAMS UNLAWFULLY INTERROGATED EMPLOYEE JOHNNIE THAMES.

The judge found that Supervisor Bill Williams unlawfully interrogated employee Johnnie Thames about his union activities. (ALJD, p. 14). IPG excepts to this finding on the grounds that (1) the judge erroneously credited Thames over Williams; and (2) the judge failed to follow Board precedent and consider "all the circumstances" in analyzing whether the alleged interrogation was unlawful. (Exceptions 10-11, 21-23, 32, 37-40, 45-48).

1. The judge erroneously credited Thames over Williams.

The judge credited Thames over Williams and found that Williams asked Thames on a single occasion in late February or early March what he thought about the Union.² (ALJD, p. 6). According to the judge, Thames “offered a detailed account and had a strong recall of this discussion,” while Williams “solely offered a general denial.” (ALJD, p. 6). The judge added, “It is probable that Williams, a lower level supervisor, was curious about Thames’ Union sentiments at this nascent campaign stage and unaware that such queries might be unlawful.” (ALJD, p. 6). Based exclusively on these conclusory findings, the judge determined that Williams acted unlawfully.

While the Board is generally reluctant to overturn the credibility determinations of an administrative law judge, “where credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.” *J.N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979) (quoting *Electrical Workers Local 38*, 221 NLRB 1073, 1074 (1975)). Further, even demeanor based credibility findings are not dispositive when the testimony is inconsistent with “the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.” *Humes Electric, Inc.*, 263 NLRB 1238 (1982). Here, the judge credited Thames without regard for demeanor, inherent probabilities, or reasonable inferences.

Thames’ “detailed account” of the alleged conversation is as follows: “Bill Williams came upstairs when I was working and he was asking me what I think about the Union, and said that it was – if you don’t think it’s good then, that it can hurt you, and so I didn’t respond to him.

²Curiously, the judge credited Williams over Thames with respect to the General Counsel’s claim that Thames was terminated in violation of Section 8(a)(3). At issue there was whether Williams truthfully testified that he observed Thames asleep on the job or whether Thames truthfully testified that he was not asleep. In crediting Williams over Thames, the judge noted that Williams was a “trusted employee that lacked an obvious motivation to lie” (ALJD, p. 10), and he pointed out that Thames’ testimony was inconsistent with his affidavit (ALJD, p. 11).

I just walked away.” (Tr. 251). Thames did not know the exact date of the alleged conversation, but claimed it was “two or three weeks after” he signed a union authorization card on February 10.³ (Tr. 250). Thames also failed to identify who initiated the conversation or what precisely was said. Thames’ testimony is muddled, at best, and can easily yield varied interpretations.

For example, because Thames did not offer any further details about this alleged conversation, one interpretation is that Williams directly asked him, “What do you think about the Union?” A different but equally plausible interpretation is that Williams lawfully approached Thames and initiated a conversation about why he believes unionization would not be in Thames’ best interests, and Thames inferred from that conversation that Williams was asking for his thoughts on unionization. Thames likely would have described either scenario as Williams “asking him what he thought about the Union.”

For the judge to assume one set of facts over the other in the absence of any additional testimony is improper. Compare *SKD Jonesville Division L.P.*, 340 NLRB 101, 102 (2003) (“A statement as to what someone has heard could be based on (1) what he had heard from the grapevine *or* (2) what he had picked up from spying. There is no reason to infer the latter as the source over the former.”). This is particularly true where the General Counsel is required to establish that it was “more likely than not” that Williams interrogated Thames. See *Daikichi Sushi*, 335 NLRB 622, 623 (2001).

Further compounding the judge’s error was his discrediting of Williams on the basis that he “solely offered a general denial.” (ALJD, p. 6). What more was Williams supposed to say in response to being asked about something that, in his mind, did not occur? It is illogical to presume that a witness’s credibility is diminished if he does nothing more than generally deny an

³Notably, the complaint alleged that Williams unlawfully interrogated employees “[i]n or about mid or late-January 2012” (GC Exh. 1(aa), ¶ 7). By Thames’ account, the event could have occurred as early as February 24 or as late as March 2.

allegation.⁴ Perhaps if Williams had appeared to the judge to be soft-spoken, shifty, or nervous in his response, a general denial may have undermined his credibility. The judge made no such findings here, however.

A final fatal flaw in the judge's credibility resolution is his statement that, "It is probable that Williams, a lower level supervisor, was curious about Thames' Union sentiments at this nascent campaign stage and unaware that such queries might be unlawful." (ALJD, p. 6). First, the campaign undisputedly began in mid-January (Tr. 53-54), and the first captive audience speeches occurred on February 11 and 13 (Tr. 377-379, 725). The alleged questioning occurred a month-and-a-half after the organizing began, and at least two weeks after captive audience speeches were first held. Thus, the campaign was hardly at a "nascent" stage when the alleged questioning occurred.

Second, the judge's presumption that Williams was "curious" about Thames' union sentiments is inconsistent with his later finding that Williams knew Thames supported the Union when he discharged him. (ALJD, p. 17). According to the judge, the General Counsel made out a prima facie case with respect to the Section 8(a)(3) allegation concerning Thames' discharge. (ALJD, p. 17). That conclusion was based in part on the judge's finding that Williams had knowledge of Thames' union activity given that "Williams observed and commented upon [Thames'] relationship with Epps." (ALJD, p. 17). Epps testified that "somewhere in February," Williams confronted her and Thames while they were talking at Epps' machine and "told [Thames], you're spending a lot of time down here with [Epps]." (Tr. 299).

The judge's finding that Williams knew of Thames' alleged union activity "somewhere in February" and his alternative finding that Williams was "curious" about Thames' union

⁴Ironically, the judge had no trouble crediting Supervisor Leon Robinson notwithstanding that he generally denied telling employee Wilton Dantzler he was cutting his overtime because of his "activities." (ALJD, p. 6).

sentiments in late February or early March are mutually exclusive. Either Williams had knowledge of Thames' union activity or he was "curious" about it – but not both.

For these reasons, the Board should not accept the judge's finding that Thames was more credible than Williams.

2. The judge failed to consider all the circumstances surrounding the alleged interrogation.

Even accepting the judge's unsupported and illogical credibility resolution, the Board should reject his finding that the alleged questioning was unlawful. When analyzing whether a supervisor's questions to an employee constitute an unlawful coercion, the test is whether, under all of the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The factors to be considered in assessing whether an alleged interrogation is unlawful include: background, nature of information sought, identity of the questioner, place and method of interrogation, and truthfulness of the reply. *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000). The judge flat ignores these factors when reaching his conclusion that Williams unlawfully questioned Thames. Had the judge considered and applied these factors consistent with Board precedent, the only reasonable conclusion he could have reached is that Williams did not violate the Act.

a. Background

First, the judge completely failed to address the fact that IPG has no history of union hostility or discrimination. This was the first union activity at the IPG facility in Columbia, South Carolina, in over 20 years. (Tr. 734). There is no evidence that IPG has ever been charged with discrimination, and there were no alleged acts of discrimination occurring in conjunction

with the alleged questioning. Cf. *Network Dynamics Cabling*, 351 NLRB 1423, 1434 (2007) (finding supervisor’s questioning employee about why he supported the union “coercive in that it was asked in conjunction with Respondent’s illegal removal of [the employee] from the . . . jobsite [for distributing union literature]”).

Of further significance, the judge only found three other unfair labor practices – an unlawful threat of futility in late March; an unlawful application of the distribution policy in late March; and unlawful surveillance in late April. None of these alleged unfair labor practices bear any relationship to Williams’ alleged unlawful interrogation of Thames in late February or early March. See *Enloe Medical Center*, 345 NLRB 874, 877 (2005) (finding that the only two other unfair labor practices “bore little, if any relationship to the alleged interrogation”); *Temp Masters, Inc.*, 344 NLRB 1188, 1188 (2005) (“[The supervisor] did not question [the employee] in a context contaminated by other unfair labor practices. Concededly, there were other unfair labor practices here, all occurring after the interrogation.”).

Accordingly, the first factor in the analysis weighs against finding that Williams’ alleged questioning was unlawful.

b. Nature of information sought

Next, the judge failed to consider the nature of the information sought. Thames vaguely testified that Williams “was asking him what he thought about the Union.” (Tr. 251). Again, the judge blindly interpreted this to mean that Williams directly asked Thames, “What do you think about the Union?” Even assuming Williams directly asked Thames what he thought about the Union, this single question did not “appear[] to be seeking information upon which to take action against individual employees.” *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1223 (2002), *enfd.* 73 Fed. Appx. 617 (4th Cir. 2003).

Crucially, Williams did not ask Thames if he supported the Union. He did not ask Thames how he would vote in an election. He did not ask Thames whether he had signed an authorization card. He did not ask Thames whether he attended a union meeting. He did not ask Thames whether he had distributed any union literature. And he did not ask him who else supported the Union. At most, Williams casually posed a rhetorical question designed to engender a discussion of the merits of unionization.

Accordingly, the second factor weighs against finding that Williams' alleged questioning was unlawful.

c. Identity of the questioner

Next, the judge inexplicably ignored his own finding that Williams was a "lower level supervisor." (ALJD, p. 6). The Board has consistently held that questioning by a front-line supervisor is far less coercive than questioning by a manager or owner. See, e.g., *Cardinal Home Products*, 338 NLRB 1004, 1009 (2003) (finding no unlawful interrogation where questioning was "posed not by a high-level manager, but by [a] front-line supervisor"); *SKD Jonesville Division L.P.*, 340 NLRB 101, 102 (2003) ("Although [the supervisor] spoke to [the employee] in his office, his relatively low rank greatly reduces any coercive effect the statement might have had it been made by, for example, the plant manager in his office."). In light of this precedent, the judge should have applied his finding of fact to the law and deemed this factor to weigh against finding that Williams' alleged questioning was unlawful.

Accordingly, the third factor weighs against finding that Williams' alleged questioning was unlawful.

d. Place and method of interrogation

Next, the judge ignored the place and method of the alleged interrogation. Regarding the place, Thames testified that Williams allegedly questioned him “upstairs when [he] was working.” (Tr. 251). The Board recognizes a significant distinction between questioning occurring on the plant floor and questioning occurring in a manager’s office, holding that an office is a more coercive environment. See *Cardinal Home Products*, 338 NLRB at 1009 (no unlawful interrogation where alleged questioning occurred “informally on the plant floor” and the employee “was not called away from work to the boss’s office”).

Regarding the method, the judge made no determination as to Williams’ alleged tone or demeanor. This is not surprising given the absence of any evidence in that regard. See *Heartshare Human Services of New York*, 339 NLRB 842, 843 (2003) (“As to the method of interrogation, neither [employee] testified that [the supervisor’s] tone was hostile or threatening, and she did not make any explicit or implicit threats of reprisal or promises of benefit in the context of her questioning.”).

Accordingly, the fourth factor weighs against finding that Williams’ alleged questioning was unlawful.

e. Truthfulness of the reply

Finally, the judge ignored the impact of Thames’ testimony that he did not respond to Williams’ alleged question and instead just “walked away.” (Tr. 251). In other words, Thames neither confirmed nor denied his thoughts about the Union. In any event, had Thames truly been coerced by the manner or method of Williams’ questioning, he certainly would not have felt free to not respond to it.

Accordingly, the final factor weighs against finding that Williams' alleged questioning was unlawful.

In sum, the judge took an impermissible per se approach and completely ignored the surrounding circumstances in reaching his conclusion that Williams unlawfully interrogated Thames on a single occasion in late February or early March. See *Amcast Automotive of Indiana, Inc.*, 348 NLRB 836, 837 (2006) ("The Act does not make it illegal per se for employers to question employees about union activity."). Even assuming Williams asked Thames one time what he thought about the Union weeks before a petition was even filed, Williams was a front-line supervisor, the question allegedly occurred on the plant floor, it was not alleged to be made in a threatening or intimidating manner, and Thames felt free to just walk away. Moreover, there is no history at the facility of union hostility or discrimination, and there were no unfair labor practices accompanying Williams' alleged conduct. Had the judge applied Board precedent to these facts, he could not have reasonably found that Williams' alleged questioning of Thames was unlawful.

B. THE JUDGE ERRONEOUSLY FOUND THAT SENIOR VICE PRESIDENT OF ADMINISTRATION BURGE HILDRETH UNLAWFULLY THREATENED EMPLOYEES.

The judge found that Senior Vice President of Administration Burge Hildreth made statements at a captive audience meeting that unlawfully conveyed that unionizing would be futile. (ALJD, p. 15). IPG excepts to this finding on the grounds that (1) the judge crafted his own theory of the violation notwithstanding that it was neither alleged in the complaint nor litigated at the hearing; (2) Hildreth did not make the alleged unlawful statements; and (3) even if Hildreth made the statements, they are not unlawful. (Exceptions 1-8, 24-26, 30-31, 33, 36-39, 41, 45-48)

1. The judge impermissibly crafted his own theory of the violation.

It is black letter Board law that the General Counsel's theory of the case is controlling. See *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43 (2003) (citing *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999)). It is equally well-established that it is inappropriate for an administrative law judge to make unfair labor practice findings that were not fully and fairly litigated. *Id.* (citing *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992)). Here, the judge blatantly disregarded this binding precedent and crafted his own theory upon which to find that IPG violated the Act.

Paragraph 8 of the General Counsel's complaint alleges that on March 25 and April 2, Hildreth unlawfully threatened employees with replacement during a strike if they selected the Union. (GC Exh. 1(aa), ¶ 8). Paragraph 11 alleges that on March 26, Hildreth unlawfully made an implied threat of discharge because of employees' union activities. (GC Exh. 1(aa), ¶ 11). The judge found that Hildreth's alleged strike-related comments were lawful. (ALJD, pp. 14-15). Rather than address whether Hildreth made an unlawful implied threat of discharge, however, the judge found that Hildreth made statements that, "when taken as a whole, conveyed that unionizing would be futile." (ALJD, p. 15).

The following colloquy from the hearing plainly reveals that the General Counsel neither alleged nor intended to litigate the theory that Hildreth's alleged comments constituted an unlawful threat of futility:

JUDGE RINGLER: Okay. Okay. Let me just ask you this, Mr. Brown, because we've heard a lot of testimony about this, you know, go off to Los Angeles, San Diego, California, whatever. You've got that in paragraph 11 –

MR. BROWN: Yes, sir.

JUDGE RINGLER: – of the complaint. I just want to understand. You're alleging that as an implied threat of discharge though or that – I understand what

you're alleging and maybe, you know, maybe I'm not sure if I credit people, maybe it would be a violation, maybe it won't. I'm not saying that part, but I don't understand describing it as an implied threat of discharge. Maybe it's futility of selecting the Union or something else. Do you want to just explain that to me quickly? All things, you know, if I credit everyone –

MR. BROWN: Your Honor –

JUDGE RINGLER: – how would that be had?

MR. BROWN: – that, that is the General Counsel's position, that by telling employees that they should get on a bus and go to California, that the Employer is somehow telling them that they – if they bring a union in, if they try to organize a union, that that is a threat of termination.

JUDGE RINGLER: Of termination.

MR. BROWN: Right.

JUDGE RINGLER: Okay.

MR. BROWN: And, Your Honor, I'm sure I will have to supply you with some case law on that issue, but other than that, that all I can tell you is that is General Counsel's position on this.

JUDGE RINGLER: Okay. Okay. It seems more like to me an argument that you're alleging, you know, futility of getting a union, you know, kind of thing, but – okay. I raised that to you. I'm leaving that for your consideration to –

MR. BROWN: Yes, sir.

JUDGE RINGLER: – ponder that. Okay. Good.

MR. BROWN: And I share Your Honor's consternation on it.

(Tr. 305-306).

Consistent with the complaint and the above discussion during the hearing, the General Counsel argued in his post-hearing brief only that Hildreth unlawfully threatened employees with replacement during a strike (GC Br. pp. 6-9) and unlawfully impliedly threatened employees with discharge if they unionized (GC Br. pp. 12-14). He neither expressly nor implicitly argued

that Hildreth's alleged statements conveyed that unionizing would be futile. To be sure, the General Counsel did not even use the word "futile" or "futility" anywhere in his brief.

Given that the complaint did not allege that Hildreth made statements threatening employees that unionizing would be futile, and in light of the General Counsel's unequivocal explanation of his theory of the case at the hearing, IPG is severely prejudiced by the judge's sua sponte finding. As much as the judge may believe the evidence supports an alternative theory to the one advanced by the General Counsel, he is constrained by Board precedent to consider and rule upon the case as it is alleged and litigated. See *GPS Terminal Services*, 333 NLRB 968, 969 (2001) (holding that a judge has no authority to amend the complaint in a manner that was "neither sought nor consented to by the General Counsel," even where "the record evidence would support the additional allegations").

Consequently, the Board can easily reject the judge's finding that Hildreth unlawfully threatened employees that unionizing would be futile.

2. Hildreth did not make the alleged unlawful statements.

Even throwing decades of Board precedent out the window and entertaining the judge's theory of a violation, the record makes clear that Hildreth did not make the statements attributed to him by the judge. First, there is absolutely no record support for the judge's finding that "Hildreth commented that unionizing and collective bargaining would be futile." (ALJD, p. 15). In fact, a thorough review of the entire transcript reveals not a single utterance of the word "futile" by anyone involved. Indeed, the word "futility" was mentioned only twice, and that was by the judge during his discussion with the General Counsel about the theory of the case. (Tr. 305-306).

Second, there is no record support for the judge’s finding that Hildreth told employees he “would prompt a lockout.” (ALJD, p. 15). Only two witnesses mentioned the word “lockout” in their testimony – Hildreth and lead union supporter Wilton Dantzler. Hildreth denied mentioning the word “lockout” to the employees. (Tr. 658). Dantzler testified only that Hildreth stated that “he *could* cause a lockout.” (Tr. 66). From that limited record evidence, the judge concluded that Hildreth told employees he “*would* prompt a lockout.”⁵ (ALJD, p. 15). At the risk of belaboring the obvious, confusing the words “would” and “could” in the course of making legal conclusions about an employer’s captive audience speech is unacceptable.

Third, the judge surprisingly found that Hildreth told employees he “did not have to negotiate with the Union,” even though Dantzler was the only witness who recalled such a statement. (ALJD, p. 15). Most witnesses who testified about Hildreth’s comments recanted that Hildreth merely explained that he would be the one conducting the negotiations on behalf of the Company. (Tr. 141, 161, 173, 222, 293). Perhaps more alarming, the judge specifically found that Dantzler was not a credible witness: “Dantzler was not credible; he was less than candid, and seemed mainly motivated to advocate his overtime case, rather than aiding the proceeding.” (ALJD, p. 6).

Again, the Board may ignore credibility determinations made by a judge where they are not based primarily upon a witness’s demeanor or where they are inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *J.N. Ceazan Co.*, 246 NLRB at 638 fn. 6; *Humes Electric, Inc.*, 263 NLRB at 1238. Here, the judge failed to discuss Dantzler’s demeanor when crediting his testimony that Hildreth purportedly said he did not have to negotiate with the Union.

⁵Ironically, in his factual findings, the judge correctly noted that Dantzler recalled Hildreth saying he “*could* cause a lockout.” (ALJD, p. 5).

Moreover, a careful reading of Dantzler's surrounding testimony reveals that it is inherently improbable and unreasonable to believe that Hildreth made the statement ascribed to him. Dantzler described Hildreth's alleged comments as follows:

Well, the part that he said was that he was one of the ones that would be conducting the negotiation with the Union and, excuse me, I need some water. He would be the one that – Mr. Hildreth will be one of the ones that will be conducting the negotiating for the Union. And that he didn't have to negotiate with the Union

(Tr. 66).

Interestingly, Dantzler begins by testifying that Hildreth said he would be "one of the ones that would be conducting the negotiation with the Union." This is a perfectly legitimate and lawful thing for Hildreth to say. After a sip of water, however, Dantzler recharacterizes his testimony to reflect that Hildreth said he would be "one of the ones that will be conducting the negotiating *for* the Union." Of course, while not unlawful, this would be a rather odd (and inaccurate) thing for someone who is responsible for leading contract negotiations at IPG's four unionized facilities to say. (Tr. 644). Only after this initial confusing and self-contradicting testimony does Dantzler add that Hildreth said "that he didn't have to negotiate with the Union"

If an uncredited witness's illogical and unreasonable testimony – which is against the "great weight of the evidence" – is not "inherently improbable" enough to overturn the judge's finding as to this statement attributed to Hildreth, then it is difficult to imagine any circumstance that would justify overturning a judge. It simply strains credulity to believe that Hildreth, who has worked at IPG for nearly 20 years and who leads contract negotiations at all of IPG's unionized facilities, would make such a ridiculous statement to a group of workers. It is even further implausible that only a single person at the meeting would recall such a statement if it

were said. Nevertheless, the judge ignores the weight of the evidence, inherent probabilities, and reasonable inferences and attributes what he deems to be an unlawful statement to Hildreth. The Board should reject this finding.

3. Hildreth’s alleged comments were not unlawful.

Assuming, arguendo, that the General Counsel advanced this theory and that Hildreth made the comments he is alleged to have made, his comments did not unlawfully communicate an implied threat that unionizing would be futile. The judge recently reached a similar conclusion in *Newburg Eggs*, 357 NLRB No. 171 (2011). In that case, he found that the following comments during a pre-election presentation, when taken as a whole, “reasonably left employees with the impression that collective bargaining would become an exercise in futility because the Company was in sole control over negotiations”:

Another . . . very important point . . . negotiating a contract you are thinking a lot about raises, benefits, all this, but no one thinks about operation. The operation remains in the hands of the company. No outside organization can . . . impact . . . the operation . . . if I am the owner of this operation, and an organization comes in, my only obligation is to try and reach an agreement but if I want to make changes . . . in my operation, change departments, . . . change different things in the schedule, they are . . . changes in production, in operation—they are the company’s. No organization has to change this or do that.

* * *

[N]o one says how to manage the company, it is always the owner. He will be the only person that says . . . it’s good for the company and good for the employees or not. If [the CEO] decides that it’s not good for the company or that the company is losing money, then he will be the only one who has the final say.

* * *

Don’t forget that negotiating is asking for something. It is all asking, so this is coming here and asking the company and the company always has the right to say yes or no.

Id. at 8.

As he did in this case, the judge in *Newburg Eggs* found the comments “conveyed to employees that they would solely obtain in bargaining what the Company unilaterally chose to bestow.” Id. The Board, however, rejected the judge’s findings in this regard.

According to the Board, the statements “more reasonably conveyed descriptions of some of the parameters of good-faith bargaining.” Id. at 3. The Board explained that the employer “correctly pointed out to employees that there are operational matters that fall outside the scope of an employer’s duty to bargain, and [the employer’s] follow-up comments reiterated and elucidated this point.” Id. The Board further explained, the employer’s comments about saying “yes” and “no” indicated that the employer “would be within its rights to bargain hard about mandatory subjects of bargaining, and would not necessarily have to accept the Union’s proposals.” Id. The Board concluded, “Such expressions, without more, do not suggest an intent not to negotiate in good faith with the Union; nor do they suggest that the outcome of negotiations would be foreordained.” Id. (citing *Alamo Rent-A-Car, Inc.*, 338 NLRB 275, 276 (2002)).

Similarly here, Hildreth’s alleged comments conveyed the parameters of good-faith bargaining. He stated that during negotiations, the Company must consider what it will take to attract and retain qualified employees. (Tr. 650-651). Most of the witnesses who testified about Hildreth’s comments – including General Counsel witnesses – explained that when Hildreth was discussing California and the labor market, he was referring to the generally well-known difference in the cost of living between South Carolina and California. (Tr. 66, 141-142, 249, 386, 446). Without question, Hildreth was lawfully advising employees that they should consider the difference in the cost of living when evaluating any comparisons Union representatives were making about contracts they have negotiated in other parts of the country.

Contrary to the judge's conclusion drawn from unsupported testimony, Hildreth did not convey that, irrespective of the Union's proposals during negotiations, he would unilaterally set wages in accordance with IPG's assessment of the local labor market.

C. THE JUDGE ERRONEOUSLY FOUND THAT IPG UNLAWFULLY CONFISCATED UNION MATERIALS FROM THE BREAK ROOM.

The judge found that IPG unlawfully confiscated union literature from the break areas. (ALJD, p. 16). IPG excepts to this finding on the grounds that there is no evidence that Supervisors Bill Williams or Charles Becknell disparately enforced IPG's distribution policy or confiscated union materials during employees' nonworking time.⁶ (Exceptions 12-18, 27-28, 30-31, 34, 36-39, 42, 45-48).

1. There is no evidence that Williams or Becknell confiscated pro-union literature discriminatorily.

Employees have the right to distribute literature in nonworking areas during nonworking time. *United Aircraft Corp.*, 139 NLRB 39 (1962), *enfd.* 324 F.2d 128 (2d Cir. 1963), *cert. denied* 376 U.S. 951 (1964). An employer, however, may maintain and enforce housekeeping rules that result in the confiscation of pro-union literature from nonworking areas left behind following break periods so long as it does so in a nondiscriminatory manner. *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136, slip op. at 7 (2011) (citing *North American Refractories, Co.*, 331 NLRB 1640, 1643 (2000); *Page Avjet, Inc.*, 278 NLRB 444, 450 (1986); *Jennie-O Foods*, 301 NLRB 305, 338 (1991)). It is undisputed that neither Williams nor Becknell cleaned up pro-union material and left other material, including pro-company material, during the campaign.

⁶The judge did not specifically discuss Becknell's alleged conduct in his analysis. He concluded only that "Williams' repeated confiscation of Epps' Union materials from the break area was unlawful." (ALJD, p. 16). In his factual findings, however, the judge credited employee John Jordan as testifying that "Becknell banned him from leaving out Union literature." (ALJD, p. 8). Thus, IPG assumes, for purposes of these exceptions, that the judge's conclusion that "IPG unlawfully confiscated Union literature from the break areas" is based in part on his factual findings that Becknell barred Jordan from distributing union literature.

General Counsel witness Faith Epps testified that during the campaign, supervisors cleaned up “everything” in the break room. (Tr. 318). Williams confirmed that when he cleaned up the break room, he not only cleaned up union material, he cleaned up anything left on the table, including “[n]ewspapers, magazines, menus, [and] empty drink cans.” (Tr. 694). Manager Tonya Moran also confirmed that Williams cleaned up both union and non-union material. (Tr. 448). Becknell similarly testified that he cleaned up all material from the break room. (Tr. 475).

In short, not a single witness testified that they observed Williams, Becknell, or any other supervisor confiscate union material while leaving nonunion material. Accordingly, there is no evidence to support the General Counsel’s allegation that Williams and Becknell selectively and disparately enforced IPG’s distribution policy “by prohibiting union distributions in non-work areas, while permitting nonunion distributions in non-work areas.” (GC Exh. 1(aa), ¶ 12). See *North American Refractories*, 331 NLRB at 1643 (“To the extent that Respondent . . . confiscated and removed flyers left behind following break periods, the evidence shows that it acted with equal zeal in so collecting anti-union literature.”).

2. There is no evidence that Williams or Becknell confiscated pro-union literature during nonworking time.

As discussed above, so long as it is done in a nondiscriminatory manner, an employer may confiscate pro-union literature from nonworking areas left behind following break periods. Here, there is no evidence that Williams or Becknell removed union literature during break periods.

Williams testified that he would clean the break room after the employees’ breaks. (Tr. 695). He explained, “I usually always try to take my breaks after they go into theirs, so I’m not in there at the same time.” (Tr. 695). Significantly, Epps confirmed that she never observed a supervisor clean up the break room while the break was ongoing:

Q. Now, did you ever see anybody in supervision for the Company come in there during your break times and pick up what was left on the counter?

A. During break?

Q. Yeah.

A. No, he always came after.

(Tr. 310).

Becknell acknowledged that he cleaned up union material from the break room (along with other materials), but did not testify one way or another as to whether he did so during or after the break.⁷ Employee John Jordan testified that Becknell told him during the pre-shift meeting on April 23 that he “couldn’t leave any more literature out, union literature out.” (Tr. 202). Significantly, Jordan did not testify that Becknell told him during his break that he could not leave literature out. According to Jordan, this conversation occurred during the pre-shift meeting.

Thus, there is absolutely no evidence on which to support the judge’s finding that Williams and/or Becknell confiscated union material during nonworking time.

3. There is no evidence that Williams and/or Becknell applied the distribution policy differently prior to the campaign.

Although the judge did not discuss it in his analysis, in his findings of fact he credited Epps for the proposition that prior to the Union’s organizing drive, reading material was left in the break area until, at least, the end of the workday. (ALJD, p. 8). It was not alleged in the complaint that IPG applied the distribution policy one way before the campaign and one way

⁷The judge found that Becknell was “less than credible” inasmuch as he “indicated on direct that he did not discard union literature and then admitted to doing so on cross.” (ALJD, p. 8). The judge’s finding in this regard is based on an incorrect reading of the transcript. Becknell never testified on direct that he did not discard Union literature – he testified that he never removed literature *that Jordan put down*. (Tr. 471). A careful review of Becknell’s testimony on direct reveals that he was never asked whether he discarded union literature during the campaign. On cross, Becknell was asked that question, and he admitted to doing so non-discriminatorily. (Tr. 475). Consequently, a fundamental premise for the judge’s discrediting of Becknell’s testimony does not exist.

after it began. Nevertheless, to the extent the judge's conclusion is based on such an allegation, it can easily be rejected.

Williams explained that cleaning up the break room was one of his responsibilities as a supervisor. (Tr. 694). His testimony in that regard was corroborated by Manager Moran (Tr. 448-449), Supervisor Becknell (Tr. 475), and Plant Manager Don Hoffmann (Tr. 736). Moran and Hoffmann both explained that this was a necessary duty of supervisors because the janitorial staff is not at the facility "24/7." (Tr. 449, 736). Williams, Moran, and Becknell also confirmed this was their practice prior to the campaign. (Tr. 448-449, 475, 698).

The General Counsel failed to rebut any of this testimony, including through Epps. At best, Epps testified that she never saw any supervisors remove literature from the break room prior to the Union campaign. (Tr. 316-317). That Epps never saw supervisors remove union literature prior to the campaign, however, does not establish that it was not done; it merely reflects that she never saw it being done. This is far too slender a reed on which to support a finding that IPG applied the distribution policy differently once the campaign began.

D. THE JUDGE ERRONEOUSLY FOUND THAT IPG ENGAGED IN UNLAWFUL SURVEILLANCE.

The judge found that IPG engaged in unlawful surveillance when, on April 24 and 25, managers distributed "thank you" flyers as employees entered and exited the plant gates. (ALJD, p. 16). IPG excepts to this finding on the grounds that it contravenes IPG's Section 8(c) rights and contradicts established Board precedent. (Exceptions 19-20, 29-31, 35-39, 43, 45-48).

1. IPG has a statutory right to distribute literature at its plant gates.

The Board and the courts have made clear that Section 8(a)(1) and 8(c), when read together, leave an employer free to communicate with his employees so long as the communication does not contain a "threat of reprisal, or force, or a promise of benefit." *NLRB v.*

Gissel Packing Co., 395 U.S. 575, 617–618 (1969); *General Electric Co.*, 332 NLRB 919 (2000); *Advanced Mining Group*, 260 NLRB 486 (1982). On the mornings and evenings of April 24 and 25, a group of IPG managers stood at the upper and lower employee entrance gates and distributed flyers thanking employees for their service to the Company. Nothing in the flyer was alleged or found to be unlawful or objectionable. Thus, there can be no dispute that IPG was lawfully exercising its Section 8(c) right to communicate with employees on April 24 and 25.

2. IPG did not engage in unlawful surveillance when exercising its right.

Even though it is undisputed that IPG was lawfully exercising its Section 8(c) right on April 24 and 25, the judge found that IPG engaged in unlawful surveillance because “management typically communicated in meetings and there was no evidence of any pre-campaign leafleting.” (ALJD, p. 16). In reaching this conclusion, the judge completely fails to address, let alone distinguish, a Board decision that is on all fours with the facts presented here.

In *Arrow-Hart, Incorporated*, 203 NLRB 403 (1973), the Board held that the mere presence of management officials while union supporters are handbilling is insufficient to establish a claim of unlawful surveillance. In that case, during the last week before the election, union agents and management representatives stood 15 feet apart from one another and distributed leaflets to employees at the door of the plant as they arrived for work. *Id.* A management representative explained that the managers distributed countervailing literature “to create goodwill among the employees.” *Id.* at 405. The Board rejected the General Counsel’s claim that the management officials engaged in unlawful surveillance, opining as follows:

An employer has the right to distribute election campaign material of its own. It has a right to express its opinion of union literature, even calling it trash – in writing as well as orally. And, it has the right to do these things at the very moment the union is trying to persuade the employees to a contrary view – certainly anywhere on its premises in the inner reaches of the plant or at the front door, even if the door is made of looking-through glass. What the General

Counsel's argument really amounts to here is that the Respondent may not do what it legally is permitted to do.

Id. at 406.

Like the employer in *Arrow-Hart*, IPG did what it had a perfectly legal right to do on April 24 and 25: distribute literature to influence the votes of employees in the upcoming election. That IPG does not regularly communicate with employees via distributing leaflets is entirely irrelevant. Essentially, the judge is saying that employers are prohibited from exercising their free speech rights and passing out flyers anywhere near open pro-union activity if they do not normally pass out flyers to communicate with workers. Under this logic, if an employee hands a co-worker a union flyer in front of a supervisor, the supervisor cannot offer the co-worker a counterveiling flyer in an attempt to persuade him that he would be better off without a union unless the supervisor normally communicates with employees by handing them flyers. This is an absurd notion and plainly contradicts the meaning and intent of Section 8(c).

The pro-union employees arrived to distribute literature at the plant gates the nights of April 24 and 25 after management representatives had already distributed earlier those days. (Tr. 132). Both union witnesses testified that nothing was said between the groups. (Tr. 134, 215). There could not be a more innocent and lawful exercise of IPG's Section 8(c) rights than that. Accordingly, the judge's conclusion that IPG managers engaged in unlawful surveillance should be rejected.

E. THE JUDGE ERRONEOUSLY ORDERED THAT A RERUN ELECTION BE HELD.

Based on his conclusions regarding Hildreth's alleged threat of futility, Williams' and Becknell's alleged confiscation, and management's alleged surveillance, the judge ordered a

rerun election.⁸ (ALJD, pp. 19-20). IPG excepts to this finding on the grounds that the alleged conduct was so de minimus that it is virtually impossible to conclude that it could have affected the results of the election. (Exceptions 30-31, 36).

Obviously, if the judge's erroneous findings are rejected, no rerun is appropriate. Even assuming his findings are accepted in whole or in part, however, a rerun is not warranted. Not all unfair labor practice conduct will warrant setting aside an election. If the conduct is unlawful and objectionable, the election will not be set aside if the conduct "is so de minimis that it is virtually impossible to conclude that [the violations] could have affected the results of the election." *Airstream, Inc.*, 304 NLRB 151, 152 (1991) (internal quotations omitted).

In *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1223 (2004), the Board refused to overturn an election "[g]iven the isolated nature of the misconduct and the fact that the election was not close" In that case, the Board observed that in evaluating whether to overturn an election, the Board looks at the number of violations, their severity, the degree of dissemination of the unlawful conduct, the size of the unit, the proximity between the conduct and the election, and the closeness of the election. *Id.*

Here, at most, there were three instances of unlawful conduct during the critical period. Two of those instances occurred more than a month prior to the election, and the degree of dissemination was minimal given the size of the unit. Hildreth's alleged threat of futility was made in only one meeting out of six that Hildreth led. Williams' alleged confiscation occurred on three separate days, and Becknell's alleged confiscation occurred on one day. Both alleged confiscations occurred in a single break room at the plant.

⁸Williams' alleged interrogation of Thames did not occur during the critical period. Consequently, the judge correctly dismissed the objection based on that alleged conduct. (ALJD, p. 19).

Given that the vote count was not even close, and given that none of the unfair labor practices were of a serious nature (as compared to threats of termination or plant closures, granting benefits, etc.), there is no doubt that “it is virtually impossible to conclude that [the alleged violations] could have affected the results of the election.” *Airstream, Inc.*, 304 NLRB at 152. Consequently, the Board should reject the judge’s recommendation that a rerun election be held, assuming it adopts his recommendations on one or more of the violations.

IV. CONCLUSION

This election took place almost a year ago. 142 employees secretly voted that they did not want to be represented by this Union. 97 employees secretly voted that they did. No adverse action was taken against a single employee for exercising his or her Section 7 rights during the campaign. The record makes clear that employees were thoroughly educated about unionization by both sides in an atmosphere free from intimidation or coercion that unfortunately plagues many other workplaces.

At IPG, supervisors and managers were respectful and considerate of all employees’ views on the subject. For the judge to conclude that any of the 142 employees who voted for the Company did so because (1) Burge Hildreth told them a month earlier they could make more money in California than in South Carolina; (2) Bill Williams and Chuck Becknell removed all material left behind in a single department’s breakroom following a few breaks; and/or (3) several well-known and well-respected managers handed them a letter thanking them for their support during the difficult campaign period at the same time pro-union employees passed out literature, is erroneous.

As the judge in *Arrow-Hart* so eloquently stated, “The play is over; the Union lost” *Arrow-Hart*, 203 NLRB at 406. To order the parties to put on another performance under these

circumstances would undermine the fundamental purpose of the Act, which is to permit employees to make a free choice as to whether or not they want to be represented by a union. The Board is implored to respect the will of the majority of workers at this plant, understanding that doing so is consistent with the letter and spirit of the law.

Respectfully submitted,

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March 20, 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERTAPE POLYMER CORP.

and

UNITED STEEL, PAPER & FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL
UNION, AFL-CIO-CLC

Case Nos: 11-CA-077869
11-CA-078827
10-CA-080133
11-RC-076776

CERTIFICATE OF SERVICE

I, Reyburn W. Lominack, III, do hereby certify that I have on this 20th day of March, 2013, served a copy of Respondent's Brief in Support of Exceptions to Administrative Law Judge's Decision and Order upon the following by email:

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