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11 QUAD/GRAPHICS, INC.

12

13

UNITED STATES OF AMERICA

14

BEFORE THE NATIONAL LABOR RELATIONS BOARD

15

REGION 32

16

17 WORLD COLOR (USA) CORP., a wholly  
18 owned subsidiary of QUAD/GRAPHICS,  
19 INC.

Case Nos. 32-CA-062242  
32-CA-063140

20

and

**RESPONDENT QUAD/GRAPHIC  
INC.'S BRIEF IN SUPPORT OF ITS  
EXCEPTIONS TO DECISION AND  
ORDER OF THE ADMINISTRATIVE  
LAW JUDGE**

21

22 GRAPHIC COMMUNICATIONS  
23 CONFERENCE OF THE  
24 INTERNATIONAL BROTHERHOOD OF  
25 TEAMSTERS, LOCAL 715-C

[Hearing Date: June 4, 2013]

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1 **I. STATEMENT OF THE CASE**

2 Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and  
3 Regulations, Respondent Quad/Graphics, Inc. (“Quad”) submits this brief in support of its  
4 Exceptions to the Report and Recommendations of the Administrative Law Judge William  
5 Cates issued on July 31, 2013.<sup>1</sup>

6 Quad excepts to the ALJ’s findings and to his recommended Order, including that  
7 the Company take certain affirmative remedial action, including the posting of improper  
8 notices to employees. Those findings, conclusions, recommended order and notice  
9 requirements are not supported by the record, substantial evidence or the law.

10 As discussed below, the ALJ ignored relevant record evidence and misapplied  
11 applicable law to incorrectly conclude that: (1) Quad maintains and enforces an unlawful  
12 and discriminatory hat policy that prohibits employees’ exercise of their Section 7 rights;  
13 and (2) even in the absence of any evidence of protected, concerted activity, a low level  
14 supervisor’s lone statement to a good friend that “don’t you think they know what you  
15 posted on Facebook” violated Section 8(a)(1) of the Act because it reasonably interfered  
16 with the free exercise of that employees’ rights under the Act. Finally, the ALJ’s remedial  
17 order requiring Quad to rescind its baseball cap policy impermissibly oversteps the  
18 Board’s well-established role not to substitute its business judgment for the legitimate  
19 exercise of the Employer’s. Accordingly, the ALJ’s findings, conclusions, recommended  
20 order and notice should be vacated.

21 **II. STATEMENT OF FACTS**

22 Quad is a multi-national printing corporation that puts ink on paper. (Rec: 140:4-  
23 6.)<sup>2</sup> On July 2, 2010, Quad acquired World Color (USA) Corp. Included in the acquisition  
24 was the Fernley plant location which prints retail newspaper inserts (e.g., advertisements in

25 <sup>1</sup> Respondent’s Exceptions are filed concurrently with this brief pursuant to Section 102.46 of the Board’s  
26 Rules and Regulations.

27 <sup>2</sup> References to the transcript of the July 31 hearing on this matter are designated as “Rec: \_\_\_; to Joint  
28 Exhibits as “Joint Exh. \_\_\_; to the General Counsel’s Exhibits as “GC Exh: \_\_\_; to Respondent’s Exhibits as “Resp.  
Exh: \_\_\_; and to ALJ’s Order and Report and Recommendations as (“ORD:page:line number.)

1 the Sunday paper). (Rec: 40:12-15.) At the time of the acquisition, the Fernley Press  
2 Room employees were represented by the Union. (Rec: 49:4-16.) A few months later, on  
3 October 4, 2010, a decertification petition was filed by Curtis Farrell, a Lead Press  
4 Operator. (Rec: 153:1-8.) A stipulated election occurred on November 30, 2010 with the  
5 employees voting to decertify the Union. (Rec: 117:25-118:2.) The Certification of  
6 Election Results was ultimately issued on February 1, 2011. (Rec: 23:17-19, 50:3-7.)

7 **A. The Quad Uniform And Hat Policy**

8 Quad maintains a Company-wide uniform policy which includes some mandatory  
9 and some optional components. (See Joint Exhs. 2, 4-5.) Known as “Quad/Blues,” the  
10 minimum required uniform consists of navy blue pants, shorts or skirt and a navy blue shirt  
11 with the Quad logo and employee name. In terms of further restrictions, the uniform  
12 policy merely states that “you are required to dress and groom professionally at all times.”  
13 (See Joint Exh. 2, p. 12.) The Quad/Blues serves as a reminder that everyone employed by  
14 Quad is a production employee regardless of their role and promotes inclusion at every  
15 level of the Company – from the Press Room floor in Fernley, Nevada to Corporate  
16 Headquarters in Sussex, Wisconsin. The Company-wide uniform policy described above  
17 is written, among other places, in the “Employee Guidelines For U.S. Employees”  
18 (“Employee Guidelines”). (See Joint Exh. 2.)

19 The Government concedes that Quad’s uniform policy is lawful, “not in dispute”  
20 and that it does “not have a problem with an employer asking employees to wear a uniform  
21 that depicts a logo of the Company.” (Rec: 37:18-21; 103:25-104:1, 133:21-22.) The  
22 Government further does not dispute that Quad may require employees to wear uniforms  
23 of a certain color, only containing the Company’s logo and an employee’s name. (Rec:  
24 105:18-106:2).

25 As mentioned above, the uniform policy allows employees to wear “optional”  
26 layers of clothing, such as vests, t-shirts and sweaters. The policy permits such additional  
27 gear, so long as the additional optional layers contain the Quad logo. (See Joint Exh. 2.)  
28



1 All such optional components of the Quad/Blues policy may be purchased through Quad's  
2 website. (See Joint Exhs. 2, 4 and 5.)

3 Given that Quad's uniform policy applies to all classifications of employees,  
4 different employees may have different uniform requirements. The uniform policy states  
5 that there may be "additional or different" uniform requirements depending on an  
6 employee's job classification. (Joint Exh. 2.) For example, some of Quad's employees  
7 work in more safety-sensitive positions than do others. In the production areas of Quad's  
8 plant locations, printing presses operate at high rates of speed. (Rec: 206:12-14.) Due to  
9 the obvious dangers of bodily injury posed by this equipment, Quad adopted an additional  
10 policy applicable to production employees. The policy provides that "all hair hanging past  
11 the bottom of the collar must be secured to the head." (See Joint Exhs. 2 and 5.) Further,  
12 even if "hair does not hang past the collar but could potentially be caught in equipment, it  
13 must be secured with a hairnet or by other means." (See Joint Exhs. 2 and 5.) Ponytails  
14 are strictly forbidden and facial hair longer than the base of the neck must be secured.  
15 (See Joint Exhs. 2 and 5.)

16 Due to the increased frequency of employees wearing hats in the workplace, in the  
17 mid-2010 timeframe, Quad made the decision to formalize a written Company-wide hat  
18 policy (set forth below). (Rec: 206:1-4.) This policy applied to all Quad facilities  
19 throughout the country. (Rec: 203:1-10,207:11-20.) Three departments were involved in  
20 formulating this new corporate policy: Safety, Security, and Human Resources. (Rec:  
21 204:10-205:25, 211:21-212:2.) Safety wanted to ensure "that the hat was appropriate for  
22 the production floor, safe, as well as making sure that it could secure hair to the head."  
23 (Rec: 206:5-11.) With the operation of high-speed presses at the plant locations, the Safety  
24 Department had concerns, among others, about hats falling into the equipment. (Rec:  
25 206:12-17.) Security had concerns about gang insignia and symbolism, specifically the  
26 colors of the hats and the direction of the bill. (Rec: 206:18-207:6.) Human Resources  
27 "wanted to ***make sure the hat aligned with the uniform policy from a presentation***  
28 ***standpoint.***" (Rec: 207:7-14.)(Emphasis added.)

1 The three departments ultimately decided that, as an optional part of the uniform  
2 (like a vest or a sweater) and as an optional means of securing hair that hangs past the  
3 bottom of the collar, all employees companywide who needed to secure their hair to their  
4 head for safety purposes would be allowed to wear hats with Quad's logo. The hat policy,  
5 in effect during the relevant timeframe, states:

6 All hair hanging past the bottom of the collar must be secured to the head  
7 while in the production areas. If hair does not hang past the collar but could  
8 potentially get caught in our equipment, it must be secured to the head with a  
9 hairnet or by other means. Baseball caps are prohibited except for  
Quad/Graphics baseball caps with the bill facing forward. Ponytails are  
strictly prohibited. Facial hair longer than the base of the neck must be  
secured. (Joint Exh. 2.)

10 Consistent with Quad's uniform policy, just as employees cannot wear optional  
11 vests with a non-Quad logo, employees cannot wear baseball caps displaying logos for  
12 sports teams, clothing apparel, vacation destinations or other non-Quad logos.

13 While the hat policy is consistent with and is a part of the uniform policy, the hat  
14 policy is spelled out specifically in the Safety Section of the Employee Guidelines, which  
15 appears on page 17 – five pages after the uniform policy. (See Joint Exh. 2.)

16 On February 8, 2011 through a memo and during meetings with employees who  
17 worked at the Fernley location, the uniform policy (which included the optional Quad hat  
18 for certain employees) was announced to employees and rolled out over the next few  
19 weeks. (Rec: 208:21-209:6; See Joint Exhs. 4 and 5) The policy has remained in place  
20 and unchanged since the 2011 roll-out. (Rec: 21:12-22.) The memorandum directed to  
21 "All Fernley Employees" explained the mandatory requirements of the uniform (Quad  
22 shirt/blue pants or skirt) and the optional components which are available for purchase  
23 (jackets and hats). Nowhere does the memorandum limit employees from wearing any  
24 gear to demonstrate union support. (See Joint Exhs. 4 and 5). Employees who testified at  
25 the hearing all reasonably understood that the hat was an optional component of Quad's  
26 uniform policy. (Rec: 64:13-20, 121:15-22, 129:17-21.)

27 In addition to the fact that the hat policy does not expressly prohibit union insignia,  
28 the Government presented no evidence that Quad's hat policy prohibits employees from

1 demonstrating union support. For example, as stated, employees are not required to wear a  
2 hat; employees can wear anything (safety compliant) to secure their hair to their head, and  
3 their chosen hair-securing device can be any color with any symbol.<sup>3</sup>

4 Finally the Government presented no evidence or allegations that Quad ever  
5 enforced its hat policy in a discriminatory manner. In fact, the only evidence presented at  
6 trial was that Quad consistently enforces its hat policy to prohibit employees from wearing  
7 any logo other than the Quad logo. (Rec: 100:18-102:1.) It is also undisputed that Quad's  
8 uniform policy and its hat policy applies to all Quad employees throughout the country.

9 **B. Quad Made A Collective Decision To Reassign John Vollene Unrelated**  
10 **To His Alleged Facebook Activity**

11 **1. Quad Experienced An Operational Slow Down**

12 Since its inception, the Fernley facility has housed five Gravure printing presses.  
13 (Rec: 145:11-22; See Joint Exh. 1.) Four shifts operate the presses and are designated by  
14 color: Red; Yellow; Blue; and Green. (Rec: 42:20-24, 141:10-13.) Each shift is 12 hours  
15 in duration and rotates between nights and days, weekdays and weekends. (Rec: 42:20-24,  
16 141:14-142:3.) Each press is assigned a Lead Press Operator. (Rec: 146:4-7.) The Lead  
17 Press Operator runs a five-person "crew" and is responsible for safety, quality, speed, set-  
18 up of the machine, decision-making, and interaction with the Press Room Supervisors.  
19 (Rec: 45:6-11, 90:16-19, 146:8-19.)

20 Due to the continued economic downturn in the 2010 timeframe, the Fernley plant  
21 experienced a significant reduction in customer orders which was expected to impact the  
22 facility in the first quarter of 2011. (Rec: 148:5-10.) In an effort to prevent lay-offs, and  
23 simultaneously maximize operational capacity, the decision was made that the Press Room  
24 employees operate three presses on a consistent basis, rather than five. (Rec: 146:1-3,  
25 147:5-14, 149:4-8.)

26 <sup>3</sup> One of the Government's witnesses testified that he personally did not wear any union insignia on his hat at  
27 work. (Rec: 123:5-8.) However, the Government presented no admissible evidence that Company policy prohibits  
28 employees from wearing union insignia on their hats or elsewhere.

1                                   **2.     The Press Room Supervisors Met To Discuss Operator**  
2                                   **Reassignments**

3                                   In the Fall 2010 timeframe, Pressroom Manager Ernie Koch called a meeting of the  
4 Press Room Supervisors. (Rec: 147:5-14.) There were eight attendees at this meeting:  
5 Koch, four Shift Supervisors, two Technical Supervisors, and the Training Supervisor.  
6 (Rec: 150:17-19.) Randy Bingham, as the Yellow Shift Supervisor, was among those in  
7 attendance. The purpose of the meeting was to identify individual operators (including  
8 Lead Press Operators) and discuss their respective strengths and weaknesses in order to  
9 evaluate press rotations/reassignments that matched skill sets, personal dynamics, and  
10 equipment. (Rec: 147:15-25, 149:4-8.) Koch wanted all of the Press Room Supervisors  
11 (Shift, Technical, and Training) present to effectively critique employee performance.  
12 (Rec: 149:9-12, 150:7-15.)

13                                   **3.     Facebook Postings Were Not Discussed During The Press Room**  
14                                   **Supervisor Meeting**

15                                   The reassignment discussion focused on three presses: G-201, G-203, and G-206.  
16 (Rec: 148:11-20.) Presses G-201 and G-203 were considered the “workhorse presses” as  
17 they were the fastest and most efficient. (Rec: 148:21-24.) The ultimate goal of the  
18 reassignment was to put the most qualified, best teams together for each of the three  
19 above-referenced presses in an effort to maximize capacity. (Rec: 149:4-8.) All attendees  
20 at the Fall 2010 meeting provided input regarding the operator rotations/reassignments.  
21 (Rec: 150:20-24, 175:24-176:3.)

22                                   In the Fall of 2010 and for approximately eight years prior to that, John Vollene  
23 worked on the Yellow Shift, assigned to Press G-201, and reported directly to Bingham for  
24 seven of those eight years. (Rec:43:14-44:1.) Koch testified that Vollene’s performance  
25 on the press was “average.” (Rec: 152:2-6.) Because of Press G-201’s “workhorse”  
26 status, coupled with the operational slow-down, an “average” Lead Press Operator on this  
27 press was insufficient for Quad’s business needs going forward. Koch and the Press Room  
28 Supervisors were looking beyond the status quo and seeking the highest quality individuals  
that would take the initiative to maximize productivity on Press G-201. (Rec: 147:19-25,

1 152:7-11.) Thus, during the Fall 2010 Supervisor meeting, the collective decision was  
2 made to move Vollene from Press G-201. (Rec: 152:12-19, 178:24-179:4.) The press  
3 operator reassignments were not limited to Vollene, Press G-201, or the Yellow Shift.  
4 (Rec: 78:3-16, 152:20-25.) All presses and all shifts experienced reassignments; in fact,  
5 four out of five Lead Press Operators on the Yellow Shift were reassigned.<sup>4</sup> (Rec: 56:11-  
6 22, 155:11-20, 179:5-9.)

7 During the reassignment discussions, it is undisputed (and the ALJ concluded) that  
8 Vollene's alleged Facebook, social media activity, or Union activity was not discussed and  
9 that Koch never discussed Facebook postings with any employee. (ORD: 5:26-30; Rec:  
10 150:25-151:14, 157:6-11, 170:10-17, 176:7-18.) It is also undisputed that the  
11 reassignment decisions were based solely on individual operator performance. (Rec:  
12 157:6-11.) Significantly, the Government did not argue that Vollene was reassigned  
13 because of his alleged Facebook postings (or because of his engagement in any other  
14 protected activity) and the ALJ did not conclude otherwise.

15 **C. Koch Advised Vollene Of The Reassignment In The January**  
16 **2011 Timeframe**

17 Although the reassignment was determined in Fall 2010, the implementation was  
18 delayed until after the busy holiday advertising season. (Rec: 156:15-20.) In the January  
19 2011 timeframe, Koch called Vollene into the Press Room Manager's office to discuss his  
20 reassignment. (Rec: 156:12-25, 160:21-25, 170:25-171:4.) As Koch testified, Vollene  
21 "was not pleased with the decision" and asked why the moves were being made. (Rec:  
22 157:1-11, 170:22-24.) Koch responded that he and all the Supervisors previously met to  
23 identify the strengths and weaknesses of the press operators and the reassignments were  
24 determined based on that meeting. (Rec: 157:6-11.) At no time during this meeting with  
25 Koch did Vollene complain that the reassignment was retaliatory due to Vollene's alleged  
26

27 <sup>4</sup> (1) Vollene from G-201 to G-204; (2) Steve Schaefer from G-203 to G-205; (3) Rich Garza from G-204 to  
28 G-203; and (4) Billy Cleland from G-204 to G-201.

1 Facebook, social media, or Union activity. (Rec: 158:9-12.) Following the reassignment,  
2 Vollene remained a Lead Press Operator on the Yellow Shift, earned the same wages, and  
3 performed the same job duties and responsibilities. (Rec: 81:1-8.)

4 **D. The Personal Relationship Between Vollene And Bingham Extended**  
5 **Beyond Supervisor And Subordinate**

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6 Bingham was Vollene’s supervisor for almost 8 years. It was widely known that  
7 Vollene was active with the Union and was on the first bargaining committee as far back  
8 as 2007. (Rec: 49:14-25.) Outside of work, Vollene and Bingham have been close (if not  
9 the best of) friends for more than a decade. (Rec: 74:22-75:1.) They talked “outside of  
10 work” and remained in contact although neither works for Quad and Bingham has moved  
11 away from the Fernley, Nevada area. (Rec: 72:17-25, 181:16-19.) For example, Bingham  
12 invited Vollene to his son’s high school graduation, and they discussed plans to spend time  
13 together following his testimony at the Fernley trial. (Rec: 73:7-18, 74:19-75:7.) As noted  
14 below, the ALJ erroneously ignored the fact that Vollene and Bingham were close friends  
15 when he concluded that Bingham unlawfully threatened him.

16 **E. Vollene and Bingham’s Facebook Relationship**

17 Given that Vollene and Bingham are close friends, they are also friends on  
18 Facebook.<sup>5</sup> Vollene is friends with no other Quad supervisor on Facebook. (Rec: 54:4-7).  
19 The Government presented no evidence regarding the frequency of Vollene and  
20 Bingham’s interchange on Facebook or whether Bingham even regularly checks his  
21 Facebook account. Without presenting the actual Facebook postings themselves, Vollene  
22 claimed that beginning in September 2010, he made unspecified comments about Quad  
23 and about the Union. (Rec: 53:4:20.) The Government’s most specific evidence of these  
24 comments are that Vollene commented on another employee’s Facebook post about the  
25 Company in September 2010 “and it grew from there over the next 5-6 months.” (Rec:  
26

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27 <sup>5</sup> In order to be “Facebook friends” the two “friends” must willingly agree to share posts and information.  
28 Vollene chose to share all of his Facebook posts with his supervisor, Bingham.

1 53:18-25). Again without presenting any evidence as to the content of the Facebook posts,  
2 Vollene said that an unknown number of discussions were “heated at times, a lot of funny  
3 jokes posted.” (Rec: 52:18-20.) Vollene further testified that “no supervisors participated  
4 in these posts or communications.” (Rec: 54:2-4.) The Government presented no  
5 evidence that these posts were pro-union posts and no evidence that Bingham, or any other  
6 supervisors at Quad, knew about these specific posts.<sup>6</sup>

7 **F. The Alleged Facebook Discussion and Alleged Threat**

8 A few days after the job reassignments were in effect, the Government claims that  
9 Vollene approached Bingham and asked why he was reassigned. During this interchange,  
10 Vollene claims Bingham told him in response “don’t you think that they know about what  
11 you posted on Facebook.” (Rec: 58:17-59:1.) No other witnesses were present for this  
12 conversation. The Government never presented any of the comments that Vollene  
13 allegedly posted on Facebook about the Company or the Union and did not call another  
14 employee witness who participated in these Facebook discussions to corroborate Vollene’s  
15 claim about the substance of the postings. The Government also failed to present evidence  
16 (and did not ever claim) that other employees were reassigned to other positions because of  
17 their postings on Facebook. The evidence also demonstrates that Vollene and Bingham  
18 continued to remain friends on Facebook (and in real life) after this statement was made.  
19 It is this lone statement which the Government alleges (and the ALJ found) coerced  
20 Vollene and therefore violated Section 8(a)(1) of the Act.

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25 <sup>6</sup> Bingham testified generally that he knew that Vollene “talked about work” and “criticized” the Employer on  
26 Facebook. (Rec 182:14-16.) He credibly denied recollection of Vollene discussing the Union on Facebook. (Rec:  
27 183:4-12.) However, the Government presented no evidence as to what Vollene actually said “about work” or to  
28 “criticize the company,” when he made such remarks and the number of times such comments were made. Such  
vague evidence is woefully insufficient for the ALJ to conclude that the Government met its burden to establish that  
Vollene engaged in “protected concerted activity.”

1 **III. LEGAL ARGUMENT**

2 **A. The ALJ Incorrectly Found That Quad’s “Hat Policy” Violated The Act**  
3 **(Exceptions 14-20)**<sup>7</sup>

4 The Government did not contest the lawfulness of the uniform policy or contest the  
5 optional nature of the hat policy. Nonetheless, in a tortured interpretation of the policy, the  
6 ALJ determined Quad’s optional hat policy “prohibits employees from displaying a union  
7 logo or insignia” and thus violates Section 8(a)(1) of the Act. The decision is erroneous  
8 because the ALJ (1) unreasonably concluded that Quad’s integrated uniform and hat policy  
9 are “separate and distinct”; (2) improperly “cherry picked” certain sentences of Quad’s hat  
10 policy to find a violation where none exists; (3) failed to apply unanimous Board precedent  
11 which allows employers to maintain lawful, non-discriminatory uniform policies; and  
12 (4) improperly shifted the burden to require that Quad establish “special circumstances”  
13 for its hat policy absent evidence that its hat policy is discriminatory or that Quad prohibits  
14 employees from wearing union insignia at work. (See Exceptions Nos. 14-20). Further, if  
15 upheld, the ALJ’s decision and order radically expands the power of the Board to rewrite  
16 lawful Company uniform and dress code policies. His decision cannot stand.

17 **1. Rules Cannot Be Considered In A Vacuum – The ALJ Erred In**  
18 **Concluding That The Hat Policy Is Not Part of the Uniform**  
**Policy (Exceptions Nos. 14-15)**

19 First, in finding that Quad’s hat policy violated the Act, the ALJ erroneously  
20 concluded the “uniform and hat policies are two separate distinct policies.”<sup>8</sup> In reaching  
21 this conclusion, the ALJ made improper and unreasonable findings of fact and misapplied  
22 Board precedent.

23 It is well settled that when assessing the lawfulness of work rules the Board must  
24 “give the rule a reasonable reading...it must refrain from reading particular phrases in

25 <sup>7</sup> The specific Exceptions referred to herein are set forth fully in Respondent’s Exceptions filed concurrently  
26 with this brief.

27 <sup>8</sup> The ALJ’s decision is particularly puzzling because it appears to be inconsistent with how the ALJ viewed  
28 this case at the hearing. At the hearing, the ALJ identified the issue before him as whether the Company’s hat policy,  
which “rounded out” the Company’s uniform policy, violated the Act. (Rec:134:5-135:3.)



1 isolation, and it must not presume improper interference with employee rights.” *See*  
2 Lutheran Heritage Village-Livonia, 176 LRRM 1044 (2004). For example, in Aroostook  
3 County Regional Ophthalmology v. NLRB, 81 F.3d 209 (D.C. Cir. 1996), the Court of  
4 Appeal overturned the NLRB’s conclusion that the employer maintained overbroad work  
5 policies in violation of the Act. In reaching this conclusion, the court held that the Board’s  
6 refusal to read the challenged policy in the context of another policy contained in the  
7 employer’s office manual was unjustified, even though the two provisions were in  
8 different sections of the manual, were seventeen pages apart, and did not reference each  
9 other. The court found that the challenged policy was “entirely reasonable **when read in**  
10 **context with the accompanying provision**” and therefore reversed the Board’s finding to  
11 the contrary. *Id.* at 213-14 (emphasis added).

12 Similarly in Meijer, Inc. 318 NLRB 50 (1995), the NLRB upheld the ALJ’s  
13 decision concluding that the Company’s hat policy, which prohibited employees from  
14 wearing insignia on clothing unless approved by the Company, was lawful and was part of  
15 the uniform policy even though the hat policy was not referred to in the employee  
16 handbook section titled “Proper Dress and Grooming.” In fact, the hat policy was nowhere  
17 in the handbook and was distributed to employees in a memo that was posted on the time  
18 clock. The ALJ concluded “the hat policy became part of the uniform and maintained  
19 Respondent’s desired uniformity.” *Id.* at 57.

20 Here, like the Board in Aroostook County Regional Ophthalmology, the ALJ failed  
21 to provide reasonable context to the rules and improperly concluded the hat policy is not  
22 part of the uniform policy because: (1) the hat policy is in the safety section of the  
23 employee guidelines, where the “dress code” is set forth in a different section of the  
24 employee guidelines (five pages apart); (2) the hat policy was formulated by the safety,  
25 security and human resources department with emphasis on safety (to secure the hat to the  
26 head) and security (to prevent insignia, color and direction of the bill to encourage gang  
27 activity). (ORD: 10:1-14.) Specifically, the ALJ concluded that “if the hat policy was just  
28 to make the optional hat color coordinated with the uniforms then the hat policy would

1 have been made part of the dress code and placed with the dress code in the Employee  
2 Guidelines...” (ORD:10-10-14.) His analysis misses the mark. The ALJ’s reasoning  
3 disregards the record evidence establishing the Company’s legitimate, undisputed reasons  
4 for the implementation of the nationwide hat policy and the record evidence establishing  
5 that its placement in the the safety section did not mean the Company intended the hat  
6 policy to be separate and distinct from the uniform policy. The ALJ’s decision also  
7 ignores Board law which requires a finder of fact to consider Company policies as a whole  
8 and to consider the context in which rules are created, understood, distributed and  
9 enforced. Had the ALJ correctly considered the evidence presented in context as he is  
10 required to do under Board precedent, the ALJ would have correctly concluded that mere  
11 placement of the hat policy in the safety section cannot legitimately lead to a conclusion  
12 that the hat policy is not a part of the uniform policy.

13 First, the undisputed evidence demonstrates that three different departments met to  
14 discuss the addition of the hat policy and the necessity for the rules. After those  
15 discussions, as for placement, the hat policy landed in safety section of the Employee  
16 Guidelines because in Quad’s view “that is where it made sense” – not because it intended  
17 the hat policy to separate and distinct from the uniform policy. Specifically, as detailed in  
18 Ott’s undisputed testimony:

19 Q. There seems to be some question about why the hat policy has been placed  
20 where it’s been placed within the employee handbook.

21 A. Uh-huh.

22 Q. Can you enlighten us? Can you tell us why?

23 A. At the time because when the three teams got together, security such a - -  
24 safety is such a priority for Quad Graphics, we just felt it was best placed  
25 there.

26 Q. Yet the hat remains an optional item within the uniform policy.

27 A. Yes. (Rec: 209:20-210:5.)

28 \* \* \* \*

Q. And why was the baseball cap rule placed in the safety policy instead of the  
uniform policy?

A. When we were discussing the policy, safety, again, is just a number one  
priority for us. We felt it best placed there. (Rec: 220:17-20.)

1 This testimony is uncontroverted. Moreover, the placement in the Safety Section  
2 makes perfect sense given that hats can be used to secure hair to the head in line with  
3 Quad's safety standards. This testimony was erroneously ignored by the ALJ and if  
4 properly considered, the only reasonable conclusion is that the hat policy is part of the  
5 uniform policy.

6 Second, the uniform policy itself says that "certain positions may have additional or  
7 different uniform requirements" making clear that position-specific uniform requirements  
8 may be, and are, addressed in other sections of the handbook. The hat policy is directed to  
9 attire on the production floor.

10 Third, the overwhelming evidence established that the hat is part of the uniform  
11 policy, just one of several "optional" items of attire. This is buttressed by the cumulative  
12 evidence that (1) as with other optional pieces of the Quad uniform, employees could  
13 purchase the hats at the same web site where they purchased all other components of the  
14 Quad uniform; (2) as with other optional items of the uniform policy (such as a sweater or  
15 vest), if they are to be worn, the hats must have the Quad logo; (3) when the Company  
16 presented the uniform policy to the Fernley employees in writing, it explained that the hat  
17 was an "optional" component of the uniform; (4) the Government's own employee  
18 witnesses confirmed they believed the hat was an optional part of the uniform policy; and  
19 (5) employees who are subject to the hat policy are still also subject to the requirements of  
20 the uniform policy (i.e., employees are not able to ignore the uniform policy because the  
21 hat policy also applies to them).

22 If that weren't enough, at hearing, Counsel for the General Counsel *stipulated* that  
23 the hat policy was intended to be part of the uniform. (Rec: 237:6-238:13.) Specifically,  
24 Counsel for the General Counsel stipulated "the HR policy was to bring the hat policy in  
25 line esthetically and color purposes and for those matters that would make it, for a lack of a  
26 better way, appealing to the eye. That it's all navy blue slacks, navy blue button up shirt  
27 and a navy blue baseball cap." (Rec: 237:6-11.) This stipulation is not surprising given  
28 that the addition of a piece of clothing or optional attire cannot be reasonably construed to

1 be anything other than the uniform/dress code. The ALJ simply ignored this stipulation in  
2 concluding that the uniform and hat policies are separate and distinct.

3 Finally, based on the Government's statements during trial, if the collective  
4 decision was made to put the hat policy in the same section of the Employee Guidelines as  
5 the uniform policy, the Charge would have been dismissed, no Complaint would have been  
6 issued (or amended), and no trial would have occurred. (*See* Rec: 38:10-16, 103:25-  
7 104:14.)

8 But in finding the hat policy separate, the ALJ disregarded these factors, and  
9 improperly read the hat policy out of context and without regard to the "reality of  
10 workplace" analysis that the Board requires. The ALJ's conclusion is not based on a  
11 proper consideration of the evidence. Had the ALJ correctly concluded the hat policy was  
12 part of the uniform policy, there would be no basis for a violation of the Act because the  
13 Government is not contesting the lawfulness of the uniform policy. Accordingly, the  
14 ALJ's decision should be reversed and the charge dismissed.

15 **2. Even If The Hat Policy Is Separate From The Uniform Policy,**  
16 **The ALJ Applied Incorrect Legal Standards To Conclude The**  
17 **Hat Policy Violated The Act (Exceptions Nos. 16-18)**

18 Even if the ALJ correctly found the hat policy was separate and distinct from the  
19 uniform policy, it is still part of the Company's dress code. Thus, the ALJ's decision  
20 cannot stand because it is based on an incorrect application of the law resulting in faulty  
21 legal conclusions.

22 A uniform policy must be enforced consistently and cannot be used to target union  
23 insignia. *See* NLRB v. St. Francis Healthcare Center, 212 F.3d 945 (6th Cir. 1993). Thus,  
24 Quad may lawfully prohibit the wearing of hats, except for hats with the Quad's logo so  
25 long as the prohibition applies to all other types of hats. *See, e.g.,* Burger King Corp v.  
26 NLRB, 725 F.2d 1053 (6th Cir. 1984) (the employer did not violate the NLRB since it  
27 consistently enforced a policy requiring the wearing of uniforms only with authorized  
28 name tags).

1 The Board has implicitly recognized that an employer may promulgate and enforce  
2 a nondiscriminatory uniform rule. Further, the Board has specifically allowed employers  
3 to require employees to wear uniforms with company-approved logos so long as the rules  
4 do not otherwise prohibit employees from wearing union insignia. For example, in Meijer  
5 Inc., 318 NLRB 50, certain employees were required to wear hats. The only hats  
6 permitted were those authorized by the Company – occasionally the hats were supplied by  
7 vendors with vendor colors and logos. Otherwise, the Company prohibited employees  
8 from wearing union logos and other personal logos on their hats. The ALJ concluded, and  
9 the NLRB affirmed, that “the wearing of hats bearing the Union’s logo, I believe, stands  
10 on different footing” (than a policy which prohibits pins on uniforms), that the Company’s  
11 hat requirement “became part of the uniform” and that the employer did not violate the act  
12 in maintaining and enforcing a policy that prohibited union logos on hats.<sup>9</sup> *See also*  
13 Noah’s New York Bagels, 324 NLRB 266, 275 (1997)(finding that an employer lawfully  
14 enforced policy requiring employees to wear a company t-shirt and lawfully insisted that  
15 she remove a company shirt with an added phrase). Indeed, the Board has never held that,  
16 where an employer lawfully maintains and consistently enforces a non-discriminatory  
17 policy requiring employees to wear a company uniform or other article of clothing, its  
18 employees have a right under Section 7 to disregard the policy and wear union apparel in  
19 place of a company uniform.

20 However, here, the ALJ concluded that notwithstanding the fact that the hat policy  
21 does not expressly prohibit employees from wearing union insignia at work, on their hat or  
22 otherwise, Quad’s hat policy is unlawful on its face because it prohibits union logos “or for  
23 that matter other protected messages on their hats.” (ORD: 10:15-20.) The ALJ reached  
24

25 <sup>9</sup> In Meijer, the ALJ engaged in the “special circumstances” analysis because Meijer prohibited employees  
26 from wearing union insignia of all kinds at work. Therefore, the ALJ found that the employer could prohibit  
27 employees from wearing hats with union identification in customer areas of the store, other than in parking lots. The  
28 special circumstances analysis is not applicable here because in this case, there is no record evidence that  
demonstrates Quad prevents employees from wearing union insignia on their hats or on other items of their person at  
work.

1 this conclusion relying simply on the text of the rule which says “baseball caps are  
2 prohibited except for Quad/Graphics baseball caps.” However, the Government presented  
3 no evidence that Quad’s policy prevents employees from wearing union insignia on their  
4 hats and no evidence that Quad prevents employees from securing their hair with devices  
5 that have union insignia on them. Instead, the policy simply prevents employees from  
6 replacing the Company hat with any hat of their own choosing. The ALJ’s decision is  
7 erroneous and, if upheld, effectively prevents an employer from requiring employees to  
8 wear hats with Company logos without the showing of special circumstances. Essentially,  
9 the ALJ’s decision allows employees to pick and choose what articles of clothing to wear  
10 regardless of a dress code or uniform policy – a right no other Board decision has  
11 conferred upon employees.

12 **3. Had The ALJ Applied The Proper Legal Standard and**  
13 **Considered The Appropriate Evidence, The Only Possible**  
14 **Conclusion Is That Quad’s Hat Policy Is Lawful (Exceptions Nos.**  
15 **14-20)**

16 Because the ALJ erroneously found that the hat policy was facially invalid, the ALJ  
17 did not engage in the appropriate legal analysis and compounded his error.<sup>10</sup> In the  
18 absence of a facially invalid rule, to find a work rule unlawfully overbroad, the  
19 Government must show one of the following: (1) the rule has been applied to restrict the  
20 exercise of Section 7 activity; (2) employees would reasonably construe the language to  
21 prohibit Section 7 activity; or (3) the rule was promulgated in response to Section 7  
22 activity. Martin Luther Memorial Home, Inc., 343 NLRB 646, 647 (2004). The only  
23 relevant inquiry into the lawful uniform policy is whether it was discriminatorily enforced.  
24 See Sears Roebuck and Company, 300 NLRB 804 (1990).

25 First, there is no evidence that the hat policy has been applied to restrict Section 7  
26 activity. The Government presented no evidence that employees have been prohibited

27 <sup>10</sup> Even though the ALJ’s decision cites no evidence as to why Quad’s policy is “discriminatory” (presumably  
28 because there is no such evidence in the record), his remedial order demands that Quad “rescind the discriminatory  
rule...” (See ORD: 12:25-30.) Quad further excepts to the judge’s reference to the rule as “discriminatory” when he  
appears to have made no legal or factual finding in this regard.

1 from adorning the hat (or any other parts of their person or uniform) with union insignia.  
2 In fact, the *only* admissible evidence was that Quad places limitations on accessories or  
3 adornments (including hats) when the restriction is necessary to comply with legitimate  
4 safety policies (e.g., no pins or buttons on the production floor that could fall into the  
5 equipment). (See Joint Exhs. 2 and 5.) In addition, the Government presented no evidence  
6 of actual interference, coercion, or restraint in employees' exercise of their Section 7  
7 rights. Indeed, there was no evidence that any employee attempted to or even desired to  
8 wear union logos or insignia in the workplace and were denied that opportunity.

9       Second, employees would not reasonably interpret the hat policy as restricting  
10 Section 7 activity. Even assuming that the uniform policy is separate from the optional hat  
11 policy (which it is not and not even considered as such by employees), all employees are  
12 still subject to the uniform policy. While Quad's uniform policy (and the hat policy)  
13 require all mandatory and optional items of clothing to have the Quad logo insignia on  
14 them, there is no express limitation which prevents employees from also wearing union  
15 insignia such as stickers, pins, bracelets, socks on their person.<sup>11</sup> Therefore, even if the hat  
16 policy prohibited union insignia from being placed on it (which it does not), there is no  
17 evidence that the policy otherwise interfered with employees' ability to wear union  
18 insignia on any other part of their person.

19       It appears the ALJ concluded that the hat policy was overbroad and unlawful  
20 because he believes employees have a Section 7 right to wear clothing with union logos at  
21 work regardless of employees ability to wear other union insignia at work. If this analysis  
22 is accepted, then employers would never be able to enforce a dress code of any kind  
23 without a showing a special circumstances. Indeed, according to the ALJ's interpretation  
24 of the law, a dress code of a plain white T shirt with no writing would now be unlawful as  
25 it prevents an employee from wearing a union shirt. That is simply not the law.

26  
27 <sup>11</sup> The failure of the Government to adduce such evidence at hearing is a critical roadblock to the ALJ's  
28 ultimate finding of a violation of the Act.

1 Further, the record evidence clearly establishes that Quad employees understand  
2 that hats are an optional uniform item with the sole purpose of offering employees a  
3 variety of options of how to secure hair to the head. (See Joint Exhs. 2-3, and 5.) For  
4 example, when employees at Fernley were presented with Quad's uniform policy, they  
5 were told that as with the mandatory and other items of the uniform, hats, while optional,  
6 must only contain the Quad logo. Based on how the hat policy was presented initially,  
7 employees would reasonably interpret the policy requiring Quad logo hats only as a  
8 legitimate means of ensuring consistency with the Quad/Blues uniform requirements.  
9 Further, while the Government called several employee witnesses to testify, significantly,  
10 none of them testified that the hat policy prohibited the employee from engaging in  
11 protected Section 7 activity at work. That is because nothing in the hat policy prohibits  
12 employees from doing so, it only prevents them from replacing the Company hat with any  
13 other type of hat, including a union hat.

14 The fact that Quad maintains a policy allowing employees to wear hats with a Quad  
15 logo (as opposed to any other logo they wish) cannot be reasonably viewed by any  
16 employee as a policy in place simply to eliminate their exercise of Section 7 rights. That is  
17 especially true here where the policy does not otherwise prohibit employees from wearing  
18 union insignia on their heads. Rather, the only reasonable purpose of the policy from the  
19 employees' perspective is to allow them the privilege to protect their heads from the  
20 known hazards of the printing floor and to wear a complete uniform.<sup>12</sup>

21 The Government also presented no evidence that Quad promulgated the rule in  
22 response to Section 7 activity. In fact, the evidence demonstrates exactly the opposite. It  
23 is undisputed that Quad's nationwide hat policy was implemented for legitimate business  
24 reasons and uniformly applies to all employees throughout the Company – it was not put in  
25 place just at Fernley in response to union activity. It is undisputed that Quad's policies

26  
27 <sup>12</sup> According to the Government's own evidence industry-wide, employees who work in production areas of the  
28 printing industry wear hats because "the worst thing to get in your hair is paper, dust and grease." (Rec: 63:18-23.)



1 apply to Fernley employees as they do for anyone else who works at Quad throughout the  
2 country.

3 In fact, it is also undisputed that while Quad's nationwide hat policy was  
4 implemented at all other Quad facilities throughout the country in 2010, Quad delayed  
5 implementing the identical hat policy at the Fernley facility until after the certification of  
6 decertification election results was issued in February 2011. Indeed, if Quad's motivation  
7 to implement the policy was to prevent expression of union support, Quad would have  
8 certainly implemented it earlier – as prior to the change, Fernley employees wore hats with  
9 logos of their choosing. (Rec: 118:8-10.)

10 Finally, there is no evidence that Quad applied the policy in a discriminatory  
11 manner. Rather, *the Government's witnesses testified that the policy was consistently*  
12 *applied*. Indeed, the evidence demonstrated that an employee was required to remove a  
13 Green Bay Packers hat on the production floor. (Rec: 100:18-102:1.)

14 The ALJ failed to consider any of these factors in concluding that Quad's hat policy  
15 violated the Act. A proper review of the evidence and correct application of the law easily  
16 demonstrates that the Government failed to establish Quad's hat policy violates the Act.

17 **4. The ALJ Incorrectly Placed The Burden On The Employer To**  
18 **Establish "Special Circumstances" For Its Hat Policy (Exception**  
**No. 18)**

19 It is well settled that where an employer prohibits employees from wearing union  
20 insignia while at work, it must establish "special circumstances" that justify this  
21 prohibition. Republic Aviation v. NLRB, 324 US 793, 801-803 (1945). -However, this is  
22 not a union insignia case but instead a dress code case. Employers may establish uniform  
23 or dress code requirements without a showing of special circumstances. Sears Roebuck &  
24 Co., 300 NLRB 804, 807 (1990); Coca-Cola Bottling Co., 311 NLRB 509, 515 (1993).

25 Moreover, the law is equally well settled that there is no absolute right to wear  
26 union insignia, or other attire in the workplace. Rather, the Board law has struck a delicate  
27 balance between employees' right to self-organize and an employer's right to maintain  
28 rules that further the objectives of its business. For that reason, the special circumstances

1 analysis has been applied where (1) an employer without a uniform or dress code  
2 prohibited employees from wearing union insignia or attire; or (2) an employer with a  
3 uniform or dress code policy prohibited employees from adding union insignia (such as a  
4 pin) to the required attire. *See Boise Cascade Corp.*, 300 NLRB 80, 84-85 (1990)(absent a  
5 dress code, employer unlawfully prohibited t-shirts with protected message); *North Hills*  
6 *Office Services*, 346 NLRB 1099 (2006)(absent a requirement that a uniform be worn by  
7 night shift employees, employer unlawfully directed them to remove union t-shirts);  
8 *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6<sup>th</sup> Cir. 1984)(employer lawfully prohibited  
9 employees from wearing union buttons on uniforms). In this case, the ALJ improperly  
10 placed the burden on the Employer to establish special circumstances in the absence of a  
11 policy that prevented union insignia. (ORD:11:13-15.) His ultimate conclusion that the  
12 Company's hat policy violated the Act for the sole reason that Quad failed to establish  
13 special circumstances is reversible error.

14 The Government presented no evidence to support either scenario that would  
15 require the Employer to establish "special circumstances" to avoid a violation of the Act.  
16 It is undisputed that the uniform policy nor the hat policy expressly prohibit union insignia.  
17 Rather, the uniform policy simply states that "employees are required to dress and groom  
18 professionally at all times. While accessorizing the uniform in good taste and in  
19 accordance with safety rules is acceptable, your name (first and last) and the  
20 Quad/Graphics logo must show at all times." (See Joint Exh. 2). While disregarding this  
21 evidence, the ALJ erroneously concluded the hat policy prohibits employees exercising  
22 their Section 7 rights. His decision is erroneous and must be reversed.<sup>13</sup>

23

24

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26

27 <sup>13</sup> In fact, this aspect of the ALJ's decision goes far beyond the allegations of the Complaint and well beyond  
28 any record evidence.

1                   **5. The ALJ’s Remedial Order Improperly Usurps Quad’s**  
2                   **Undisputed Ability to Maintain Lawful Policies and Undermines**  
3                   **Any Employer’s Exercise of Its Legitimate Business Judgment**  
4                   **(Exceptions Nos. 19 and 20)**

5                   The established role of the Board is not to make employer policies that it would  
6                   subjectively prefer. Rather, it is well settled that “management is for management.”  
7                   Neither the Board nor the Court can second guess it or give it gentle guidance by over-the-  
8                   shoulder supervision.” *See NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5<sup>th</sup> Cir.  
9                   1956). The role of the Board is also to not substitute its business judgment for that of the  
10                  employer in the absence of unlawful conduct. *See also Liberty Homes, Inc.*, 257 NLRB  
11                  1411, 1412 (1981)(explaining that the Board should not substitute its judgment for that of  
12                  the employer).

13                  However, here, by ordering that Quad “rescind the discriminatory rule...prohibiting  
14                  employees from wearing baseball caps except those with the Company logo” the ALJ has  
15                  improperly usurped the ability of Quad to maintain lawful policies as its business requires.  
16                  His order is erroneous.

17                  Based on the ALJ’s remedial order, Quad must either (1) allow employees to wear  
18                  any hat they would like with any insignia that they would like; or (2) prohibit hats  
19                  altogether; or (3) establish “special circumstances” at each and every facility around the  
20                  country in order to support its hat policy. This order, if upheld, improperly usurps Quad’s  
21                  legitimate exercise of its lawful business judgment.

22                  Application of the ALJ’s erroneous order also leads to nonsensical results. For  
23                  example, according to the ALJ’s analysis, if an employer maintains a hat policy where the  
24                  only component included a hat with a Company logo, then the *only* way any company may  
25                  have such a policy is if the employer shows “special circumstances” – regardless of the  
26                  fact that the employees may be able to wear union pins, t-shirts or other adornments on  
27                  other areas of their person. Or, if an employer’s policy required employees to wear a white  
28                  hat with no logo whatsoever, that too would be improper unless the employer established  
                    “special circumstances.” Or, if an employer’s uniform policy required only that employees

1 wear shirts with Company logos but the safety policy allowed employees to wear hats with  
2 union stickers, that would also be improper absent the employer establishing special  
3 circumstances for the shirts. While the ALJ's ruling in this case would establish new  
4 limitations on any employer's unquestioned right to maintain a uniform policy, it  
5 impermissibly undermines long-standing Board policy which allows employers to make  
6 policies as their businesses require so long as the policies are lawful. For this additional  
7 reason, the ALJ's order should be reversed.

8 **B. The ALJ Erroneously Concluded That Bingham's Statement Violated**  
9 **Section 8(A)(1) of the Act (Exceptions Nos. 1-13)**

10 While Quad disagrees with the ALJ's finding that Vollene was more credible than  
11 Bingham, the ALJ's conclusion was erroneous notwithstanding the ALJ's credibility  
12 determination. Even assuming, for purposes of argument, that Bingham made the  
13 statement as Vollene claims, the Government still failed to meet its burden of proving that  
14 the alleged statement violated Section 8(a)(1) of the Act.

15 First, the Government failed to introduce any evidence that Vollene's Facebook  
16 posts were protected concerted activity. In the absence of such activity, any alleged  
17 statements about the posts could not, as a matter of law, have violated the Act.  
18 Additionally, the Government failed to carry its burden of proving that the statement was  
19 coercive or interfered with Vollene's Section 7 rights under the totality of the  
20 circumstances, as it must do in order to succeed on this charge. Therefore, the ALJ erred  
21 in finding that the statement violated Section 8(a)(1) of the Act, and the charge must be  
22 dismissed.

23 **1. Because There Is No Evidence of Protected Concerted Activity,**  
24 **The ALJ Erred In Concluding That Bingham's Statement**  
**Violated The Act (Exceptions Nos. 4, 5, 8, 9, 12, 13)**

25 It is well settled that in order for a statement like the one allegedly made by  
26 Bingham to have violated Section 8(a)(1), it must have been in response to some protected  
27  
28

1 concerted activity on the part of the employee.<sup>14</sup> The Board’s test for concerted activity is  
2 whether the activity is “engaged in with or on the authority of other employees, and not  
3 solely by and on behalf of the employee himself.”<sup>15</sup> The question is a factual one and the  
4 Board will find concert “[w]hen the record evidence demonstrates group activities,  
5 whether ‘specifically authorized’ in a formal agency sense, or otherwise.”<sup>16</sup> Thus,  
6 individual activities that are the “logical outgrowth of concerns expressed by the  
7 employees collectively” are considered concerted.<sup>17</sup> Concerted activity also includes  
8 “circumstances where individual employees seek to initiate or to induce or to prepare for  
9 group action” and where individual employees bring “truly group complaints” to  
10 management’s attention.<sup>18</sup> The burden is on the Government to prove both that the  
11 statement was made and that it was unlawful.<sup>19</sup>

12 Here, the Government presented no evidence that Vollene engaged in protected  
13 concerted activity through his Facebook postings. While the Government claims that the  
14 postings addressed Vollene’s terms and conditions of employment, that claim is entirely  
15 unsupported by the evidence in the record because the actual postings were not produced at  
16  
17  
18

19 <sup>14</sup> Mueller Brass Co. v. NLRB, 544 F.2d 815, 821 (5th Cir. 1977) (“Certainly, every remark made by a  
20 Company supervisor to employees with whom he has day-to-day working contact about union support or sympathies  
21 does not violate the Act.”); Buel, Inc., NLRB Case No. 11-CA-22936, Office of the General Counsel Advice  
22 Memorandum (July 28, 2011) at \*2 (“We conclude that the Charging Party did not engage in any concerted activity  
when he made his Facebook posting. Accordingly, the Employer’s actions in response to that posting did not violate  
Section 8(a)(1)”; Frito-Lay, Inc., NLRB Case No. 36-CA-10882, Office of the General Counsel Advice  
Memorandum (September 19, 2011) at \*2 (“We conclude that the Employer did not violate Section 8(a)(1) because  
the Charging Party did not engage in any concerted activity.”).

23 <sup>15</sup> Meyers Industries, 281 NLRB 882, 885 (1986) (Meyers II), *aff’d sub nom*, Prill v NLRB, 835 F.2d 1481  
(D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

24 <sup>16</sup> Id. at 886.

25 <sup>17</sup> *See, e.g.*, Five Star Transportation, Inc., 349 NLRB 42, 43-44, 59 (2007), *enforced*, 552 F.3d 46 (1st Cir.  
26 2008) (drivers’ letters to school committee raising individual concerns over a change in bus contractors were logical  
outgrowth of concerns expressed at a group meeting).

27 <sup>18</sup> Meyers II, 281 NLRB at 887.

28 <sup>19</sup> NLRB v. Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981).

1 the hearing.<sup>20</sup> Without being able to review the content of the postings, the only evidence  
2 presented that the statements were made was that of Vollene. His testimony is  
3 objectionable and should have been excluded under the Best Evidence Rule. See United  
4 States ex. rel. El-Amin v. George Wash. Univ., F.Supp. 2d 135, 144-45 (D.C. Cir. 2007)  
5 (The best evidence rule provides that to prove the content of the writing, recording or  
6 photograph, the original document should be produced).

7 But the ALJ's decision simply ignores this fatal evidentiary flaw in the  
8 Government's evidence, another reason why the ALJ's decision must be reversed. *See*  
9 NLRB's Division of Judges Bench Book, Trial Manual, August 2010 ("Any [unfair labor  
10 practice] proceeding shall, so far as practicable, be conducted in accordance with the rules  
11 of evidence applicable in the district courts of the United States under the rules of civil  
12 procedure for the district courts of the United States"); *see also* Section 102.39 of the  
13 NLRB's Rules and Regulations and Section 101.10(a) of NLRB's Statements of  
14 Procedure.

15 Even if the ALJ correctly disregarded the Federal Rules of Evidence, there is still  
16 no basis whatsoever to conclude that Vollene engaged in protected or concerted activity.  
17 The entire evidence the Government relied upon was Vollene's testimony claiming he  
18 made unspecified comments about the Union and "discussed" the Company on Facebook.  
19 (Rec: 53:18-20). The fact that Vollene vaguely testified that the postings related to the  
20 Company and/or the Union, in and of itself, does *not* make the postings protected. For  
21 example, if Vollene posted threats directed at the Company or the employees, those posts  
22 would not be protected under the NLRB and the Company could lawfully have taken  
23  
24

25 <sup>20</sup> The ALJ also failed to draw an adverse inference against the Government for failing to present the actual  
26 Facebook posts. *See Advocate So. Suburban Hosp. v. NLRB*, 468 F.3d 1038, 1048 fn. 8 (7<sup>th</sup> Cir. 2006)(The  
27 Administrative Law Judge may draw an adverse inference from the Government's failure to present the actual  
28 Facebook posts); Parksite Group, 354 NLRB No. 90, slip op. 5 (2009). While the Government certainly could have  
produced Vollene's actual Facebook posts, it did not. The ALJ completely ignored this evidentiary flaw in concluding  
the Government met its burden.

1 adverse action against him had it wished to do so.<sup>21</sup> Even if the statements were “critical”  
2 of the Company as testified to by Bingham, that testimony is simply too vague and  
3 insufficient to determine that Vollene engaged in protected or concerted activity. In Karl  
4 Knauz Motors, Inc., 358 NLRB No. 164 (2012), the Board found that an employee’s  
5 Facebook posting that made light of an accident that had occurred at the car dealership  
6 where he worked was not protected activity and upheld the employer’s decision to  
7 discharge the employee. The ALJ, whose opinion was affirmed by the Board, considered  
8 the fact that the posting was made solely by the employee, without any discussion about it  
9 with other employees, and “had no connection to any of the employees’ terms and  
10 conditions of employment,” in finding that the posting was “so obviously unprotected.”<sup>22</sup>  
11 Similarly another employer did not violate Section 8(a)(1) by demoting an employee for  
12 criticizing his employer by posting his complaints about the company on Facebook when  
13 there was no concert between employees,<sup>23</sup> and another employer’s discharge of an  
14 employee was lawful where the employee’s Facebook complaints about how he was  
15 treated at work were not intended to “initiate or induce coworkers to engage in group  
16 action.”<sup>24</sup>

17 Here, without any evidence about the content of Vollene’s Facebook postings other  
18 than Bingham’s hearsay testimony that he saw postings “critical” of the Company, the ALJ  
19 could not, as a matter of law, have concluded that the postings were either protected or  
20 concerted. As is made clear by case law such as Karl Knauz Motors and others, the  
21 *content* of such postings is an essential element of this determination. In the absence of  
22

23 <sup>21</sup> Corriveau & Routhier Cement Block v. NLRB, 410 F.2d 347, 351 (1st Cir. 1969) (“Threats of violence are  
not only not protected activity, they are the very antithesis of protected activity.”).

24 <sup>22</sup> Id. at 11.

25 <sup>23</sup> Buel, Inc., NLRB Case No. 11-CA-22936, Office of the General Counsel Advice Memorandum (July 28,  
2011) at \*2.

26 <sup>24</sup> Frito-Lay, Inc., NLRB Case No. 36-CA-10882, Office of the General Counsel Advice Memorandum  
27 (September 19, 2011) at \*2; *see also* Meyers II, 281 NLRB at 887 (NLRB found that bartender’s Facebook comments  
28 about the unfairness of his employer’s policies was not concerted activity, despite the fact that it was about  
employment conditions, because the statement was not an “attempt to initiate group action” about the issues).

1 protected, concerted activity, any alleged statement made to Vollene about his Facebook  
2 posts could not, and did not, violate Section 8(a)(1). In his decision, the ALJ did not  
3 address whether the Government established this element of its prima facie case and did  
4 not make the necessary factual determination of whether Vollene engaged in protected  
5 concerted activity. His failure to engage in this necessary analysis is reversible error.

6 **2. The ALJ Failed To Properly Consider the Totality of the**  
7 **Circumstances In Concluding That Bingham’s Alleged Statement**  
8 **Violated the Act (Exceptions Nos. 1-13)**

9 The ALJ also erroneously failed to consider the totality of the circumstances, as  
10 required, in finding that the alleged statement violated the NLRB. Absent threats of  
11 reprisal, promises of benefits, or other coercive statements not based in fact, statements  
12 made to employees do not violate the Act.<sup>25</sup> “The test for determining whether an  
13 employer has violated section 8(a)(1) is whether the employer’s conduct tends to be  
14 coercive . . . . In making this determination, the Board considers the **total context** in which  
15 the challenged conduct occurs.”<sup>26</sup>

16 In order to find that Bingham’s statement “Don’t you think that they know what you  
17 posted on Facebook” violates the Act, the Board must find that “a threat (to the employee),  
18 either latent or overt, [was] contained in the employer’s words.” This is an objective  
19 standard based on the totality of the circumstances. “The inquiry under §8(a)(1) is an  
20 objective one which examines--not whether the employer intended, or the employee  
21 perceived, any coercive effect--but whether ‘the employer’s actions would tend to coerce a  
22 reasonable employee.’ See Wyman-Gordon Company, Petitioner v. NLRB, 654 F.2d  
23 134, 145 (1<sup>st</sup> Cir. 1981). Had the ALJ correctly considered the totality of the  
24 circumstances surrounding this statement, the ALJ could not have possibly reached the  
25 conclusion that Bingham’s statement was coercive to Vollene and thus violated the Act.

25 <sup>25</sup> See Smithfield Packing Co., 344 NLRB No. 1, slip op. at 2 (2004).

26 <sup>26</sup> NLRB v. St. Francis Healthcare Centre, 212 F.3d 945, 954 (6th Cir. 2000) (emphasis added), quoting United Parcel Serv. v. NLRB, 41 F.3d 1068 (6th Cir. 1994); see also Sunnyvale Med. Clinic, 277 NLRB 1217, 1217 (1985) (to determine whether an 8(a)(1) violation has occurred, the Board must engage in “a case-by-case analysis which takes into account the circumstances [of the situation]”).



1           In Wheeling-Pittsburgh Steel Corp., 618 F.2d 1009, 1020 (3d Cir. 1980), *cert.*  
2 *denied*, 449 U.S. 1078 (1981) a supervisor told an employee that the employee would not  
3 have received a lengthy suspension if the employee had “kept his mouth shut” at a  
4 disciplinary hearing. The Third Circuit found that the statement was not coercive because  
5 of the surrounding circumstances: (1) the supervisor did not initiate the conversation, but  
6 instead was only responding to the employee; (2) the exchange was a short one; (3) the  
7 supervisor did not speak with “a hostile or vindictive tone”; (4) there was no evidence that  
8 the employer had any anti-union animus; and (5) it was “a single, isolated, non-hostile,  
9 comment in response to . . . [the employee].” *Id.* *Every one* of those factors is present in  
10 this case: Bingham did not initiate the conversation with Vollene, but was only responding  
11 to him; the alleged conversation was brief; Vollene never claimed Bingham’s tone was  
12 hostile or vindictive; there is no evidence that Quad bears any animus toward the Union;  
13 and the comment was “single, isolated, [and] non-hostile.” In this case, like in Wheeling-  
14 Pittsburgh Steel Corp., there was no violation of Section 8(a)(1).

15           Moreover, additional circumstances in this case which were not factored into the  
16 ALJ’s decision reinforce the fact that the alleged statement was in no way coercive to the  
17 only listener, Vollene. First, Vollene was widely known to be an active supporter of the  
18 Union and was on the bargaining committee in 2007. Had Bingham wanted to “retaliate”  
19 or “coerce” Vollene at any time because of his known Union involvement, he certainly had  
20 several years to do so. However, there is no evidence that Vollene ever suffered unlawful  
21 retaliation or coercion during his long tenure. In fact, Vollene experienced no adverse  
22 employment action, loss of wages or benefits as a result of his reassignment in February  
23 2011. (Rec: 81:1-8.) Second, Vollene claims Bingham’s statement was made in February,  
24 2011. That is *seven* months after Vollene allegedly made comments on Facebook.<sup>27</sup>  
25 Certainly, if the Company or Bingham had any retaliatory motive to punish him for

26 \_\_\_\_\_  
27 <sup>27</sup> As the Government failed to produce the postings, there is no evidence that the postings were even made  
28 prior to Vollene’s reassignment. Assuming for purposes of argument, however, that they were made when alleged,  
the timeline still suggests an absence of coercion in Bingham’s alleged statement.

1 making comments on Facebook, it certainly would have acted earlier. Third, the  
2 Government presented no evidence that the person responsible for the ultimate decision to  
3 transfer Vollene and four other employees (Koch) knew about Vollene’s alleged postings  
4 and no evidence that Bingham discussed or reported Vollene’s alleged Facebook posts  
5 with Koch or any other Supervisor. Indeed, Bingham was the only Supervisor who was  
6 Facebook “friends” with Vollene, so he was the only Supervisor who could view the  
7 alleged Facebook comments. (Rec: 51:4-8.) In addition, the ALJ acknowledged that the  
8 alleged Facebook postings did not impact the reassignment consideration during the Press  
9 Room Supervisor meeting. (ORD: 5:27-30; Rec: 150:25-151:14, 157:6-11, 176:7-18.)  
10 Koch further credibly testified regarding the reasons for the reassignment and that they had  
11 nothing to do with the Facebook posts. (Rec: 156:12-25, 157:1-11, 160:21-25, 170:22-  
12 171:4.) It is unreasonable to conclude that Vollene would have even believed Bingham’s  
13 statement had an iota of truth given these reassignments—one of whom included the  
14 decertification petitioner.

15 Finally, Vollene and Bingham also both testified that even after the alleged  
16 statement they remain friends both on Facebook and otherwise, significant factors which  
17 weigh against a finding of coercion.<sup>28</sup>

18 However, the ALJ ignored these key “circumstances” and concluded that Vollene  
19 reasonably believed from Bingham’s statements that he was reassigned in “in retaliation”  
20 for his “protected activity”, i.e., Facebook posts. To reach this result, the ALJ improperly  
21 assumed, without any record evidence of the posts that Vollene’s Facebook constituted  
22 protected concerted activity. Further, while stating he considered the “totality of  
23 circumstances”, the ALJ’s decision relied exclusively on his factual conclusions that

24 <sup>28</sup> See, e.g., NLRB v. Rockwell M’fng Co., 271 F.2d 109, 118 (3d Cir. 1959) (“friendliness of [supervisor and  
25 employee’s] relationship” suggested no coercion); NLRB v. K&K Gourmet Meats, Inc., 640 F.2d 460, 465 (3d Cir.  
26 1981) (considering fact that “[employee’s] question was put to a self-described ‘good friend’ with whom she not only  
27 regularly rode to work but also engaged in social and recreational activity” in finding no coercion); Dow Chemical  
28 Co. v. NLRB, 660 F.2d 637, 649 (5th Cir. 1981) (“the circumstances in which [supervisor’s] comments were made  
cannot be disregarded. Those circumstances cast a light quite different from that in which the board viewed those  
comments. [Employee] admitted that he had known [supervisor] for twenty-five years and considered him a friend.”).

1 (1) Bingham made the statement; and (2) Bingham did not tell Vollene that Quad did not  
2 prevent Vollene from expressing himself off the clock after Vollene expressed concern  
3 with Bingham's alleged statement.<sup>29</sup> This evidence is simply insufficient in light of all of  
4 the other surrounding circumstances which the ALJ just incorrectly ignored. Had the ALJ  
5 properly considered the totality of circumstances, it is clear that Bingham's comment, if  
6 ever made, was not coercive to Vollene. At best, it was a "single, isolated, non-hostile  
7 comment" made from one friend to another with no evidence of Union animus whatsoever.  
8 As the Fifth Circuit stated, "in analyzing a question to detect the presence of coercion, the  
9 context, manner, and circumstances in which the question occurred simply cannot be  
10 ignored."<sup>30</sup> The ALJ erred by ignoring them, and his decision must therefore be overruled.

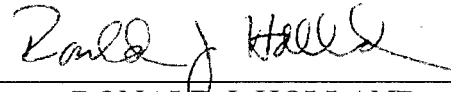
11 **IV. CONCLUSION**

12 For the foregoing reasons, Quad respectfully requests that the Board reverse those  
13 portions of the ALJ's Decision and Order to which it has filed Exceptions.

14 Dated: August 28, 2013

15 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

16  
17 By



18 RONALD J. HOLLAND  
19 ELLEN M. BRONCHETTI

20 Attorneys for QUAD/GRAPHICS, INC.  
21  
22  
23  
24  
25

26 <sup>29</sup> Bingham testified that he did not remember making the alleged statement at all. Therefore, either the  
27 conversation did not happen at all or Bingham did not remember responding to Vollene.

28 <sup>30</sup> Dow Chemical Co., 660 F.2d at 649.

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32

**WORLD COLOR (USA) CORP.,  
a wholly-owned subsidiary of  
QUAD GRAPHICS, INC.**

and

**GRAPHIC COMMUNICATIONS  
CONFERENCE OF THE  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 715-C**

**Case(s) 32-CA-062242  
32-CA-063140**

**Date: July 15, 2013**

**AFFIDAVIT OF SERVICE OF RESPONDENT QUAD/GRAPHIC INC.'S BRIEF IN  
SUPPORT OF ITS EXCEPTIONS TO DECISION AND ORDER OF THE  
ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of Sheppard Mullin Richter & Hampton LLP say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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August 28, 2013  
Date

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