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

Cases: 11-CA-077869
11-CA-078827
10-CA-080133
11-RC-076776

RESPONDENT'S MOTION FOR RECONSIDERATION OF BOARD DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

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I. INTRODUCTION

Pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations, Respondent Intertape Polymer Corp. (IPG or Respondent) hereby moves the Board for reconsideration of its May 23, 2014 Decision, Order, and Direction of Second Election. Specifically, Respondent asks the Board to reconsider and reverse its findings that Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct affecting the results of the April 26-27, 2012[1] election by confiscating union literature and by engaging in surveillance of employees' union activities.

II. LAW/ANALYSIS

Section 102.48(d) permits a party in "extraordinary circumstances" to move for reconsideration of a Board decision. *AM Property Holding Corp.*, 352 NLRB 279, 280 (2008). In making such a motion, the party must "state with particularity the material error claimed." *Desert Aggregates*, 340 NLRB 1389, 1389 (2003) (quoting Sec. 102.48(d)(1)). As explained in detail below, the Board committed material errors in connection with its findings that Respondent unlawfully and objectionably (1) confiscated union literature by changing its break room housekeeping procedure in response to union activity, and (2) engaged in surveillance of employees' leafleting at the front gate of the plant. Consequently, the Board should grant Respondent's motion for reconsideration and reverse its decision accordingly.

A. CONFISCATION OF UNION LITERATURE

It is undisputed that, during the critical period,[2] Respondent's supervisors regularly cleaned up the break rooms after breaks were over, discarding all material left behind, including union literature. (Tr. 310, 318, 448-449, 475-476, 693-699, 735-736). The Board found that, "[b]efore the union campaign began, literature (e.g., newspapers, magazines, etc.) left in the

[1] All dates referenced herein are in 2012, unless otherwise stated.
[2] The critical period began on March 16 and ended on April 27.

break room remained untouched until at least the end of the workday . . . .” *Intertape Polymer Corp.*, 360 NLRB No. 114, slip op. at 2 (2013). The Board concluded that this alleged “change” in Respondent’s housekeeping procedure—from cleaning up the break rooms at the end of the work day to cleaning up the break rooms immediately after the breaks—was “a reaction to and countermeasure against the union campaign” and, therefore, was unlawful. Id. The Board further concluded that the alleged “change” in procedure occurred during the critical period and, therefore, constituted objectionable conduct. Id. at 3.[3]

The Board committed a material error by finding that Respondent unlawfully and objectionably changed its break room housekeeping procedure in response to union activity because the issue was not closely related to the complaint allegations and was not fully and fairly litigated at the hearing. The Board further erred because counsel for the General Counsel did not satisfy his burden of proving that Respondent changed its break room housekeeping procedure during the critical period or in response to union activity.

1. THE ISSUE WAS NOT CLOSELY RELATED TO THE COMPLAINT ALLEGATIONS AND WAS NOT FULLY AND FAIRLY LITIGATED

Respondent acknowledges that “the Board may find a violation not alleged in the complaint, even where the General Counsel has not filed a motion to amend, if the issue is

[3] Counsel for the General Counsel did not allege, and neither the Board nor the judge found, that Respondent’s break room housekeeping procedure was unlawful on its face, as Respondent’s procedure is consistent with established Board law. See *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136, slip op. at 7 (2011) (“An employer may maintain and enforce housekeeping rules that result in the confiscation of prounion literature from non-working areas ‘left behind following break periods.’”) (quoting *North American Refractories, Co.*, 331 NLRB 1640, 1643 (2000)); *Page Avjet, Inc.*, 278 NLRB 444, 450 (1986) (“Employees do not have the right to clutter break areas with union literature. . . . [U]nion literature in the break area assumes the same character as any other material once the break has ended and employees have returned to work.”).

Moreover, neither the Board nor the judge found, as alleged in the complaint, see GC Exh. 1(aa), ¶ 12, that Respondent’s supervisors cleaned up the break rooms “selectively and disparately, by prohibiting union distributions . . . while permitting nonunion distributions . . . .” See *Intertape*, 360 NLRB No. 114, slip op. at 2 (“[A]fter the Union filed its representation petition, supervisors . . . began removing *all literature, including that related to the union campaign* . . . .”) (emphasis added). This conclusion is also consistent with established Board law. See *North American Refractories*, 331 NLRB at 1643 (finding that employer lawfully “confiscated and removed union flyers left behind following break periods” because “it acted with equal zeal in so collecting anti-union literature”).

closely related to the subject matter of the complaint and has been fully and fairly litigated." *Desert Aggregates,* 340 NLRB at 1292-1293 (citing *Williams Pipeline Co.*, 315 NLRB 630 (1994) and *Pergament United Sales*, 296 NLRB 333, 334 (1989)). In this case, however, the Board applied this maxim in conclusory fashion without giving due consideration to the allegations, facts, or pertinent case law.

a. Not closely related to complaint

First, the Board wrongly assumed that "the issue of a change in the Respondent's [break room housekeeping] practice is closely related to the subject matter of the complaint . . . ." *Intertape*, 360 NLRB No. 114, slip op. at 2 fn. 8. The complaint alleged that Supervisors Bill Williams and Charles Becknell enforced Respondent's distribution rule "selectively and disparately, by prohibiting union distributions . . . while permitting nonunion distributions . . . ." GC Exh. 1(aa), ¶ 12. Whether Respondent's supervisors—in response to union activity and during the critical period—began cleaning up the break rooms immediately after breaks instead of waiting until the end of the day is not "closely related" to that allegation.

The Board has never lightly inferred that an allegation that a rule or procedure was unlawfully promulgated is "closely related" to an allegation that the rule or procedure is unlawful on its face or as applied, primarily because the allegations do not focus on the same set of facts. Compare *Eldeco, Inc.*, 321 NLRB 857, 857 (1996) (finding that a lawful drug-testing program was unlawfully promulgated where "[t]he credited evidence . . . shows that the purpose of the drug-testing program . . . was to 'get rid' of union supporters . . ."), with *Albertson's, Inc.*, 351 NLRB 254, 259 (2007) (finding that a lawful confidentiality rule that was lawfully adopted was unlawfully enforced where "there is sufficient evidence showing that the Respondent applied the rule to restrict an employee's exercise of her Section 7 rights").

In *Florida Steel Corp.*, 224 NLRB 45, 45 (1976), the Board reversed the administrative law judge's finding that the employer violated the Act by promulgating an unlawful no-access rule where "the complaint did not allege, nor was it amended at the hearing to state, that the no-access rule was promulgated in an effort to thwart the campaign of the Union." In that case, the complaint referred only to "maintaining in effect and discriminatorily enforcing" the no-access rule, and "there [was] no evidence in the record to indicate exactly when the rule was originally promulgated . . . ." Id. Consequently, the Board concluded that "[o]nly the validity and enforcement of the rule was litigated—issues separate and apart from its promulgation." Id. at 45 fn. 2.

The *Pergament* case cited by the Board further supports Respondent's position. In that case, the Board found that the issue of whether the employers refused to hire employees because they filed unfair labor practice charges was "closely related" to the complaint allegation that the employers refused to hire them because of their protected concerted activity. *Pergament*, 296 NLRB at 334-335. The crux of the Board's finding was that both allegations involved parallel facts. See id. ("With respect to the connection between the 8(a)(4) and (3) allegations, both allegations focus on the same set of facts, i.e., the lawfulness of the Respondents' motivation for failing to hire the employees. In this regard, the ultimate issue in both allegations is the same: whether the Respondent failed to hire the employees for reasons that are unlawful under the Act.").[4]

Because proving a claim that Respondent unlawfully changed its break room housekeeping procedure in response to union activity does not depend on the same facts as

[4] The Board's reliance on *Enloe Medical Center*, 348 NLRB 991 (2006), is also misplaced. In that case, the Board concluded that its finding that an email message to employees barring only union literature from being placed in the break room was facially discriminatory was "closely related" to the complaint allegation that the employer maintained an overly broad no-solicitation rule. Id. at 992. Under both theories, the focus was on the rule itself, not why it was implemented or whether it was discriminatorily enforced.

necessary to prove a claim that Respondent "selectively and disparately" enforced its distribution rule, the Board erred by concluding the allegations are "closely related."

b. Not fully and fairly litigated

Even if the break room housekeeping procedure change issue were closely related to the complaint allegations that Respondent discriminatorily enforced its distribution rule, the issue was not "fully and fairly litigated" at the hearing. *Desert Aggregates*, 340 NLRB at 1292-1293.

The evidence concerning Respondent's break room housekeeping procedure focused almost exclusively on the complaint allegation that Respondent "selectively and disparately" enforced its distribution rule by cleaning up union material while leaving nonunion material. That theory was dead in the water, however, when General Counsel witness Faith Epps expressly admitted that when supervisors cleaned up the break rooms, they cleaned up "everything"—not just union material. (Tr. 318). Incidental to that admission, Epps testified that she never saw supervisors clean up the break room before the union campaign began. (Tr. 318). Counsel for the General Counsel offered no other witnesses to confirm or amplify Epps' isolated reference to when Respondent began cleaning up the break room.[5]

That the General Counsel's final witness casually referenced something that could arguably be interpreted as evincing a "change" in Respondent's break room housekeeping procedure on redirect examination does not satisfy the Board's stringent standard for determining whether an issue was "fully and fairly" litigated. See *Middletown Hospital Assn.*, 282 NLRB 541, 543 (1986) (finding that an unalleged violation is not necessarily fully litigated simply because the facts giving rise to it emerge incidentally during the hearing); *Enloe Medical Center*,

[5] This is not surprising given that counsel for the General Counsel clearly did not intend to present the unlawful promulgation theory at the hearing. It was not alleged in the complaint or underlying charges, and he did not ask Epps—his final witness—a single question about Respondent's pre-campaign break room housekeeping procedure until his redirect examination. (Tr. 316).

346 NLRB, 854, 855 (2006) ("[T]he presence of evidence in the record to support a charge unstated in a complaint or any amendment thereto does not mean the party against whom the charge is made had notice that the issue was being litigated.") (quoting *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983), cert. denied sub nom. *Ladies Garment Workers Local 222 v. NLRB*, 467 U.S. 1241 (1984)).

This is especially true where there is a complete dearth of corroborative evidence elsewhere in the record. See *Stablius, Inc.*, 355 NLRB No. 161, slip op. at 5 fn. 19 (2010) ("The lack of corroboration from [a General Counsel witness] weakens the General Counsel's case.") (citing *C & S Distributors*, 321 NLRB 404 fn. 2 (1996) (failure to call a potentially corroborative witness may be considered in determining whether the General Counsel has established a violation by a preponderance of the evidence)).

In sum, because the issue of whether Respondent changed its break room housekeeping procedure in response to union activity is not closely related to the complaint allegations and was not fully and fairly litigated at the hearing, the Board should reconsider and reverse its finding that the alleged change was unlawful and objectionable. See *Enloe Medical Center*, 346 NLRB at 855 (granting employer's motion for reconsideration where the Board's initial finding that a no-distribution rule was discriminatorily applied was not "fully and fairly litigated" given that the complaint only alleged the rule was overly broad).

2. THE GENERAL COUNSEL DID NOT MEET HIS BURDEN OF PERSUASION

Assuming, arguendo, that the issue of whether Respondent unlawfully and objectionably implemented a new break room housekeeping procedure in response to union activity was closely related to the complaint allegations and was fully and fairly litigated, the Board nevertheless erred in finding a violation because the General Counsel did not satisfy his burden

of proving by a preponderance of the evidence that Respondent implemented the procedure during the critical period, let alone that it implemented the procedure in response to union activity.

a. No evidence Respondent implemented procedure during critical period

Only conduct occurring during the critical period between the filing of the representation petition and the date of the election may serve as a basis for setting aside an election. See *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275, 1277 (1961).[6] It is the General Counsel's burden to prove that alleged unlawful/objectionable conduct occurred during the critical period. See *Gold Shield Security*, 306 NLRB 20, 22 (1992) ("The conduct alleged constitutes grounds for setting aside the election; the question is whether it occurred during the critical period. . . . General Counsel has not sustained his burden of establishing that the activity occurred during the critical period and I therefore recommend that it be overruled.") (citing *Operating Engineers Local 295-295C (Weather Wise)*, 282 NLRB 273 (1986)). The Board erred by assuming that the General Counsel met that burden here.

The critical period in this case was from March 16 to April 27. Faith Epps is the only witness who even remotely suggested that Respondent changed its break room housekeeping procedure after the union activity began. Even accepting that she was a credible witness, however, her testimony does not establish that the alleged "change" occurred during the critical period.

At best, Epps' testimony suggests that supervisors started cleaning up the break rooms immediately after breaks *once the union activity began in February*. According to Epps, she

[6] The Board correctly recognized and applied this principle in refusing to consider Supervisor Williams' alleged unlawful interrogation of employee Johnnie Thames prior to March 16 in its analysis of whether the election should be set aside. See *Intertape*, 360 NLRB No. 114, slip op. at 3 fn. 12 ("We do not rely on Williams' unlawful interrogation of employee Thames before the petition was filed.") (citing *Ideal Electric*).

never saw supervisors remove literature from the break rooms before the union campaign began. (Tr. 316). She explained that after the union activity began, supervisors "started coming in and cleaning the break room." (Tr. 318). In fact, Epps expressly acknowledged that she put out union flyers in the break room prior to March 15. (Tr. 308-309). She stated, "In the beginning, [she put flyers in the break room] at least twice a week." (Tr. 298). She eventually stopped, however, because she "got tired of [Supervisor Williams] throwing them away." (Tr. 298).

Epps recalled her supervisor allegedly removing union literature that she had distributed in the break room on March 22, 23, and 29. (Tr. 286-291). Although these incidents allegedly occurred during the critical period, that does not support the conclusion that the break room housekeeping procedure *began* during the critical period.[7] Contrary to the Board's apparent assumption, Epps never stated or even implied that March 22 was the *first* day that supervisors removed union literature from the break room, and no other General Counsel witnesses were called to testify about the issue.

In contrast, four of Respondent's witnesses—Manager Tonya Moran, Operations Manager Don Hoffmann, and Supervisors Williams and Becknell—testified that supervisors began cleaning up the break rooms long before the union activity. (Tr. 448-449, 475, 698, 735-736). The judge, however, only discredited two of those witnesses on the issue—Williams and Becknell. See *Intertape*, 360 NLRB No. 114, slip op. at 10. The judge did not even acknowledge, let alone make any credibility resolutions on, Moran's and Hoffmann's testimony about Respondents' break room housekeeping procedure prior to the union campaign. That

[7] Again, it is entirely irrelevant whether Respondent *enforced* its break room housekeeping procedure during the critical period, because the procedure is not unlawful on its face and it was not discriminatorily applied. See *Ozburn-Hessey*, 357 NLRB No. 136, slip op. at 7 ("An employer may maintain and enforce housekeeping rules that result in the confiscation of prounion literature from non-working areas 'left behind following break periods.'"); *North American Refractories*, 331 NLRB at 1643 (finding that employer lawfully "confiscated and removed union flyers left behind following break periods" because "it acted with equal zeal in so collecting anti-union literature"). The only relevant issue here is whether Respondent *promulgated* its break room housekeeping procedure during the critical period.

alone should compel a finding that counsel for the General Counsel failed to carry his burden of proof. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that General Counsel failed to establish claim by a preponderance of the evidence where there was unresolved conflicting testimony on a material issue).

The Board's reliance on *Bon Marche*, 308 NLRB 184, 199-200 (1992), to support its conclusion that the alleged change in policy was an unlawful response to union activity does not alter the analysis of whether the alleged change occurred during the critical period. See *Intertape*, 360 NLRB No. 114, slip op. at 2. The evidence in *Bon Marche* established that the employer unlawfully discontinued its bulletin board policy "after the election petition was filed." *Bon Marche*, 308 NLRB at 200.

Accordingly, the Board erred because there is no evidence that the alleged unlawful/objectionable conduct—implementation of a "new" break room housekeeping procedure in response to union activity—occurred on or after March 16.

b. No evidence Respondent implemented procedure in response to union activity

Regardless of whether and when Respondent implemented a break room housekeeping procedure that resulted in all literature being cleaned up immediately after breaks instead of at the end of the day, the procedure was not unlawful or objectionable because counsel for the General Counsel failed to prove that it was implemented in response to union activity. See *Albertson's LLC*, 359 NLRB No. 147, slip op. at 12 (2013) ("[W]here a rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that . . . the employer adopted the rule in response to union activity . . . .").

The Board's conclusion that Respondent's break room housekeeping procedure was a "reaction to and countermeasure against the union campaign," *Intertape*, 360 NLRB No. 114,

slip op. at 2, is based on pure speculation with no record support. Most telling is the absence of a close temporal proximity between Respondent's knowledge of the union campaign and the alleged unlawfully implemented procedure.

The Union's organizing campaign undisputedly began in January (Tr. 53-54), and Respondent undisputedly learned of it in early February (Tr. 447, 713, 724-725). Thus, accepting the Board's finding that the break room housekeeping procedure was implemented on or after March 16, there is, at a minimum, a delay of over one month between Respondent's knowledge of the union activity and the alleged implementation. This lengthy delay seriously undermines any causal link between the two events. See *EZ Park, Inc.*, 360 NLRB No. 84, slip op. at 4 (2014) ("[T]he timing of Dasa's discharge was well removed from the union campaign. He was discharged almost a month after the election . . . . Thus, I cannot make the inference that his discharge was motivated by discriminatory reasons."); cf. *Gallup, Inc.*, 334 NLRB 366 (2001) (finding employer promulgated new rules in response to union activity where record demonstrates that new rules were all issued within nine days of employer's discovery of union organizing campaign); *Portsmouth Ambulance Service*, 323 NLRB 311, 320 (1997) (finding that the "timing strongly indicates that [a no-solicitation] policy was in response to the union-related occurrences" where it was promulgated "just a few days after the employees held an off premises union organizational meeting" and "just after the [employer's] receipt of [a] fax from the Union which informed it about an organizational drive").

Common logic also undermines the Board's conclusion. If Respondent's true motivation were to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights and affect the upcoming election, it would not have had supervisors discard union material *after* the break was over. Moreover, Respondent would not have had supervisors only clean up the break

room that Epps and her coworkers used. There are multiple break rooms at the plant, and there was no evidence that any supervisors cleaned up literature immediately after breaks at any of the other break rooms.

Accordingly, the Board erred in finding a violation because counsel for the General Counsel did not satisfy his burden of proving by a preponderance of the evidence that Respondent implemented a new break room housekeeping procedure during the critical period, let alone that it implemented a new procedure in response to union activity.

B. SURVEILLANCE OF UNION ACTIVITY

The Board committed another material error by finding that Respondent engaged in unlawful/objectionable surveillance on April 24 and 25 when it was exercising its Section 8(c) right to distribute campaign literature at the plant gates. The Board misread, and therefore, erroneously distinguished, *Arrow-Hart, Incorporated,* 203 NLRB 403 (1973), a case in which the Board expressly approved of an employer's campaign leafleting simultaneously with union leafleting notwithstanding the employer's incidental observation of open union activity in connection therewith. As a result, the Board unintentionally overruled its 40-year-old precedent, effectively establishing a new and significant limitation on employer free speech rights during union organizing campaigns.

1. OBSERVATION OF OPEN UNION ACTIVITY IS NOT UNLAWFUL OR OBJECTIONABLE WHEN INCIDENTAL TO AN EMPLOYER'S EXERCISE OF FREE SPEECH RIGHTS

The Supreme Court has held that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969). In *Arrow-Hart*, the Board carefully

balanced this free speech right against the right of employees not to be coerced by their employer's surveillance of union activity.

In *Arrow-Hart*, union agents distributed leaflets outside the glass door of the plant when employees arrived for work. They did this on the six days preceding a union election and on the day of the election. On three of the six days preceding the election, one or two supervisors distributed their own campaign material inside the door at the same time the union agents were distributing literature outside. The employer was charged with unlawful surveillance arising out of the supervisors' conduct in distributing the campaign material from a location where the union's simultaneous distribution could be openly observed.

The *Arrow-Hart* Board adopted the administrative law judge's finding that the supervisors did not engage in unlawful surveillance when they distributed company literature at the same time the union's agents distributed union literature. The judge observed that if the supervisors looked out the glass door and saw their counterparts distributing literature, it "could hardly be avoided." Id. at 406. The judge explained that "[i]t would be childish to call this spying, for if there is one thing everybody knew all the time it is that the [union] was distributing outside and the Company inside." Id. at 406.

The judge further explained:

> 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.

2. THE BOARD ERRONEOUSLY DISTINGUISHED *ARROW-HART*

The Board does not appear to disagree with the principles set forth in *Arrow-Hart* or purport to overrule it. Instead, the Board circumvents the precedent by distinguishing it on the basis that, unlike here, "the employer in *Arrow-Hart* was not doing anything out of the ordinary . . . ." *Intertape*, 360 NLRB No. 114, slip op. at 2 fn. 9. The Board seriously misreads *Arrow-Hart* to draw this distinction.

The *Arrow-Hart* supervisors were unquestionably acting "out of the ordinary" at the time of the alleged unlawful surveillance, because it was not normal for them to gather as a group immediately inside the glass door entrance to the plant and pass out flyers to employees coming in to work in an effort to influence their decision in an upcoming union election.[8] The Board ignores the *Arrow-Hart* supervisors' atypical behavior in this regard and instead rests its conclusion that they were not acting "out of the ordinary" on the unsupported finding that "it was a common practice for supervisors to be in that location at that time." Id.

Contrary to the Board's reading of the case, it was not a "common practice" for the *Arrow-Hart* supervisors to be at the location where the alleged unlawful surveillance occurred. The "common practice" in *Arrow-Hart* was for supervisors "to stop at the desk at the end of [the hall where the supervisors were distributing some of the literature] every morning when they arrive to check on any message received by the janitor about employees who call to say they will not come to work." *Arrow-Hart*, 203 NLRB at 405. But the alleged unlawful surveillance in *Arrow-Hart* did not occur at the desk at the end of the hall where it was a "common practice" for supervisors to stop every morning—it allegedly occurred when the supervisors approached the

[8] Member Miscimarra aptly recognized this key distinction in his dissent. See *Intertape*, 360 NLRB No. 114, slip op. at 5 fn. 1 ("Although my colleagues suggest it was a common practice in *Arrow-Hart* for supervisors to be present near the entrance door, there is no indication in *Arrow-Hart* that supervisors had a preexisting practice of spending significant periods near the entrance distributing literature (which the supervisors did during the period leading up to the election).").

glass entrance door to distribute literature to employees who would not be walking all the way down the hall to that area.

To be sure, the record in *Arrow-Hart* reflects that the supervisors charged with unlawful surveillance generally stood 15 feet inside the entrance door toward the end of the hall. In handing out the literature, however, the supervisors "had to walk back and forth from the rear to the front door, because some of the employees punched a clock in the back and went to work on the first floor, and others turned right in the corridor immediately inside the entrance door to punch a separate clock and go right upstairs to the second floor." Id. Thus, it was when the supervisors walked to the glass front door that they allegedly engaged in unlawful surveillance of the union agents handbilling outside. See id. at 406 ("If, as they approached the front door to reach some of the employees, the supervisors also looked out the door—after all, it is made of glass—and saw their counterparts giving out their election material, it was something that could hardly be avoided in any event.").

The Board further misreads *Arrow-Hart* by failing to recognize the lack of evidence in that case that the supervisors regularly communicated with employees by handing them literature as they entered the building. Curiously, however, this appeared to be a compelling factor for the Board's conclusion that Respondent was acting "out of the ordinary" by distributing literature at the plant gates on April 24 and 25: "[M]anagement officials typically communicated with employees in meetings, and there was no evidence that, prior to the campaign, it had leafleted its own employees." *Intertape*, 360 NLRB No. 114, slip op. at 2.

The Board also misreads *Arrow-Hart* as being analogous to other Board cases holding that observation of open union activity on company property is not unlawful so long as the employer is not acting "out of the ordinary." See *Intertape*, 360 NLRB No. 114, slip op. at 2

(citing *Arrow Automotive Industries*, 258 NLRB 860 (1981) and *PartyLite Worldwide, Inc.*, 344 NLRB 1342 (2005)). *Arrow-Hart* is different from *Arrow Automotive*, *PartyLite*, and similar cases because in *Arrow-Hart*, the supervisors observed open union activity *incidental to the exercise of their Section 8(c) free speech rights* during a union organizing campaign. In ordinary surveillance cases such as *Arrow Automotive* and *PartyLite*, the employer was not engaging in free speech when it engaged in surveillance. This is a critical distinction, because the First Amendment concerns the Supreme Court in *Gissel Packing*, 395 U.S. at 617, sought to protect are not present in the latter line of cases.

3. THE BOARD ESTABLISHED A NEW AND SIGNIFICANT LIMITATION ON EMPLOYER FREE SPEECH

The Board's decision establishes a new and significant limitation on employer free speech. Under the Board's rationale, if an employer is engaging in Section 8(c) free speech in a manner or place in which it does not normally communicate with employees, and union activity commences, the employer must immediately stop its speech and leave the area, otherwise it will be guilty of unlawful surveillance. Nothing in the Act or case law supports such a construction of Section 8(c). See *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005) ("Section 8(c) gives an employer representative the right to express an antiunion opinion to employees. Apparently, our colleague would not allow such expression if the employees are engaged in a Section 7 discussion at the time. However, there is nothing in Section 8(c) that even remotely suggests such a limitation."), petition for review denied *Local Joint Exec. Bd. v. NLRB*, 515 F.3d 942 (9th Cir. 2008).

Additionally, Respondent's supervisors began distributing literature *before* the union supporters did. (Tr. 68, 132, 436-437, 518-519). The Board, however, inexplicably "attribute[s] no relevance" to that fact, but nevertheless finds it noteworthy. See *Intertape*, 360 NLRB No.

114, slip op. at 2 fn. 9. As recognized by the Board in *Aladdin Gaming*, 345 NLRB at 586, however, "this is not a case when an employer representative lurks in the background to surreptitiously hear the employee conversation."

Indeed, this is a case where the union chose to engage in open union activities at the very location where Respondent's supervisors were exercising their Section 8(c) rights. It simply strains credulity to believe they would have cause to complain of surveillance under those circumstances. See *Milco, Inc.*, 159 NLRB 812, 814 (1966) ("Union representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complaint than management observes them.").

Accordingly, the Board erred by misreading its own precedent and establishing new and significant limitations on employer free speech rights.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in Respondent's brief in support of its exceptions to the judge's decision, the Board should grant Respondent's motion for reconsideration and reverse its decision to reflect that a second election should not be held.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Reyburn W. Lominack, III, do hereby certify that I have on this 20th day of June, 2014, served a copy of Respondent's Motion for Reconsideration of Board Decision, Order, and Direction of Second Election upon the following by email:

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