JD(SF)-50-15
Upland, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

LIBERTY GLASS & METAL, INC.

and

Cases 31-CA-149721
31-CA-151870
31-RC-147046

PAINTERS AND ALLIED TRADES
DISTRICT COUNCIL 36

ERRATA

On December 15, 2015, I issued my Decision and Recommended Order on Objections to Election in the above-captioned case (JD (SF)-50-15) ("the decision"). On page 8 of that decision, on line 28 and again on line 30, it states that Respondent filed 6 objections to the conduct of the election on April 9, 2015, and thereafter withdrew 3 of those objections. The decision should be corrected to state that the *Union/Petitioner* filed the objections and thereafter withdrew 3 of the objections.

SO ORDERED

Dated: Washington, D.C., December 31, 2015.

Ariel L. Sotolongo
Administrative Law Judge

election, which the Union avers should be overturned.[1] I will first address the unfair labor practices alleged in the complaint.

I. The Allegations of the Complaint

A. Findings of Fact

Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it is a corporation with an office and place of business in Upland, California, where it is engaged as a contractor in the construction industry performing glazing work. In conducting its business operations during the 12-month period ending on March 9, 2015, Respondent purchased and received at its Upland facility goods valued in excess of $50,000 directly from points outside the State of California. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

B. The Alleged Unfair Labor Practices

1. Background facts

As briefly discussed above, Respondent installs windows and frames primarily throughout southern California, although it occasionally operates in northern California. It is headquartered in Upland, California, where it maintains an office and shop, and where it builds frames for the windows. Respondent employs about 70 glazers who work at different construction sites. Among these jobsites are two that are germane to this case, located in Beverly Hills (BH) and Moreno Valley (MV), California.[2] Ace Epps is Respondent's president, and Walter Fabian is Respondent's field superintendent. The complaint alleges, and Respondent admits, that Fabian is a supervisor and an agent of Respondent.[3] Respondent also employs three of Ace Epps' sons: Aaron Epps, who is a foreman at the BH jobsite; Isaac Epps, who is a delivery driver and occasional installer; and Josh Epps, who is a shop foreman at Respondent's facility in Upland. None of these three individuals is named in the complaint, but two of them, Aaron and Isaac, are alleged to have engaged in objectionable conduct in the representation case, and their supervisory status is disputed, as discussed below.

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[1] At the hearing, the Union/Petitioner withdrew three of the objections, Objections 2, 4, and 6.

[2] There are actually two jobsites in Beverly Hills, located in two buildings directly across the street from each other.

[3] Although Ace Epps is not named in the complaint, he is alleged to have engaged in objectionable pre-election conduct in the representation case, as discussed below. He is indisputably a 2(11) supervisor and 2(13) agent of Respondent, as he admitted in his testimony that he has the authority to hire and fire on behalf of Respondent. Indeed, he testified that he is ultimately the only person with that final authority.

The Union began organizing Respondent's employees in late 2014 or early 2015, and it is Respondent's alleged conduct in response to the Union's efforts that is the subject of the allegations of the complaint, as discussed below.[4]

2. The statements by Fabian at the BH jobsite

As Respondent's field superintendent, Fabian's duties include overseeing the work and foremen at all the jobsites, coordinating between the contractors and the shop, scheduling production and workers, and troubleshooting jobsite problems. The foreman at all jobsites report directly to him, and he reports only to Ace Epps. As part of his duties, Fabian frequently visits the different jobsites.

Mauricio Garcia, who has worked as a glazer for Respondent at the BH jobsite since late 2014, testified that Fabian visited that jobsite in early February 2015. Fabian was present during the early morning safety meeting conducted by Jobsite Foreman Aaron Epps, and attended by approximately 15 workers. These safety meetings are routinely conducted by foremen at all jobsites on a weekly basis. After Epps spoke, according to Garcia, Fabian spoke and said that a "list" had been going around (for the apparent purpose of bringing the Union in).[5] Fabian then added, "[I]f you don't like our pay, go back to the Union," and then said "[T]hey don't have any work." According to Garcia, Fabian sounded upset, and everyone was surprised by his remarks (Tr. 25-30; 38-42).

Cesar Lopez has worked as a glazer for Respondent on several occasions, the last time from January to May 2015, during which he worked at the BH jobsite. Lopez was also present at the safety meeting in February described by Garcia above, and essentially corroborated Garcia's testimony about Fabian's remarks. According to Lopez, during the safety meeting Fabian said that he didn't want anyone complaining about their wages, that if they were not happy with how much they were making, they could call the Union. Fabian then added that if they did not have the number for the Union, he could give it to them, and then added, "[O]h, I forgot, the Union has no work for you guys." Lopez also testified that Fabian sounded upset, and in fact intentionally dropped a notebook or clipboard at the end of his remarks, which made a loud sound, as an exclamation point. (Tr. 55-58; 63-64.)

I found Garcia and Lopez credible based on their demeanor, internal consistency of their stories, and mutual corroboration of their testimony. More importantly, their testimony was corroborated—and expanded upon—by Fabian himself. Thus, Fabian testified for about 2 weeks prior to the safety meeting described above, he had been hearing rumors ("scuttlebutt") that "there was a lot of turmoil and disruption of work, of people talking about how come we

[4] These background facts are not in dispute. Henceforth, transcript pages will be referred to as "Tr." followed by the p. number(s). General Counsel's exhibits will be referred to as "GC Exh.;" Respondent's exhibits will be referred to as "R. Exh.;" The Charging Party's/Petitioner's exhibits will be "P. Exh.;" and joint exhibits will be referred to as Jt. Exh." Additionally, I note that the transcript, while generally accurate, contains a number of errors. The transcript should be corrected in the following manner: P. 121, L. 2, the word "now" should be "no;" p. 131, L. 2, "police" should be "employees;" p. 137, L. 10, the word "said" should be included between the word "Ace" and the word "about;" p. 181, L. 23, the words "supervisor at" should be included between the word "a" and the word "Liberty;" p. 182, L. 24, "Oakland" should be "Upland." There may be others, but these are the most prominent.

[5] Although it is not clear, the "list" that Fabian mentioned may have referred to authorization cards.

don't pay Union scale and a lot of grumbling." Fabian told the workers at the meeting, "[Y]ou're all right, you're all correct, you should be all making Union scale, you should be getting Union benefits, you should be working Union. All right. They don't have no work. That's why you're here. Be quiet (or "shut up") and go to work." (Tr. 196-197; 199; 202.)[6] In response to my question about what he had heard, Fabian testified that he had heard (the workers) " were standing around in groups talking about how come this isn't a Union job, and they were distracting their work and on work hours." (Tr. 200.) Fabian further testified that this had been going for a couple of weeks "during the regular working hours" and that it got to the point where "I had to put a stop to it." (Tr. 202.) Fabian explained that what he meant by telling the workers that if they wanted union scale that they should go back to the Union was that the reason they were working there (for Respondent) was precisely because the Union had no jobs to offer, and that that Respondent did not pay union scale. (Tr. 203.) Fabian admitted that while making his statements, he may have raised his voice, and that the meeting—which up to that point had been jovial, with employees joking around—"got real quiet" after he made his remarks (Tr.197).

After Fabian's remarks, the meeting ended and the workers went back to their duties.

3. Respondent's March 26 letter to employees[7]

The parties stipulated that on March 26, 2015, Respondent mailed a letter to all its employees on the voting list for the upcoming election, scheduled for April 1, 2015. (Jt. Exhs.1, 2.) The letter reads as follows:

> Gentlemen;
> April 1 is an important day for all of us. On that day, the National Labor Relations Board will conduct an election so that you can decide whether you want District Council 36 to represent you for collective bargaining with Liberty Glass & Metal, Inc. Because your decision will have such an important impact on you and the Company, there are some things you should know and consider before your vote.
>
> First of all, none of us believe that you need District Council 36. We believe District Council 36 will only drive a wedge between us. We do not believe that District Council 36 cares about how competitive its signatory companies are. That is why District Council 36's pressure in our marketplace continues to shrink. It is also why more and more employees around the country say no to having a union.
>
> Some employees may think that we do not want District Council 36 because they would cost us more money in wages and benefits. That is false! The mere fact that District Council 36 represents you would have no effect on your wages or benefits. District

[6] During cross-examination, Fabian said he told the workers, "[I]f you want to work Union scale, you should be working Union," then adding "oh, yeah, they have no work." (Tr.203-204.)

[7] The complaint initially alleged that Respondent had posted the letter to its employees on March 25, 2015. At the hearing, the General Counsel amended the complaint to allege instead that on March 26, 2015, Respondent had mailed the letter to its employees (Tr. 14-16; GC Exh. 2). As discussed below, the evidence shows that the letter (or notice) in question was both mailed <u>and</u> posted on at least one jobsite (P. Exh. 2).

Council 36 has no magical or legal power to force us to pay more than we are willing or able to pay, nor to make any changes we do not want to make.

The law says we have to bargain in good faith with the UNION if they win an election. But nothing is automatic. We cannot and will not agree to a contract that would make us uncompetitive. I believe that the best way to get higher wages and more benefits is for each of us to do our individual jobs the best way we can. Doing our jobs well makes the Company successful. As in the past, the more we work to improve the Company, the better our future.

Many of you have contacted me since my site visits and expressed your support and your hope that we stay unchanged as a company. Many of you have expressed your surprise and disgust at hearing from many of the guys how they were told the signature cards being distributed by the Business Agents from DC 36 were to be used to update their records and to have their contact information should the union get busy again. I was told by an entire crew of guys that the Business Agent said that they would never come after our company to organize it if these cards were filled out. This same group of guys asked the Business Agent to leave after they declined to sign the cards. One of them told me he didn't appreciate being lied to. We all talked about the fact that DC 36 is simply a business trying to impose itself onto another business. They want to collect money from you to feed into their already huge coffers. You can help us to remain an open shop and continue on as we have for over 10 years. You can simply vote NO on April 1st.

The letter is signed by Ace Epps, Respondent's president. As also discussed below, the General Counsel alleges in the complaint (par. 7) that some of the language in this letter was coercive and thus unlawful.[8]

B. Discussion and Analysis

1. The statements by Fabian at the BH jobsite

The General Counsel alleges that Fabian's statements to the assembled workers during a meeting at the BH jobsite violated Section 8(a)(1) of the Act (complaint par. 6). Specifically, the General Counsel contends that by telling employees that if they did not like their pay (or benefits), they should go back to the Union—which had no jobs to offer—Respondent was impliedly threatening employees with job loss. I agree, noting that the Board has found implied threats of job loss in cases where the supervisors made statements closely similar to those made by Fabian in this case. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at 2 (2011); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006); *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997). The Board explained its rationale in *Jupiter Medical Center*, supra at 651:

[8] According to the undisputed testimony of Respondent's employee, Jose Garcia, an almost identical letter was posted at the MV jobsite around the same time period (Tr. 92; 96; P. Exh 2). However, since the substance of this letter is the same as the March 26 letter, which was mailed to all employees and thus had wider distribution, there is no need to discuss the posted letter.

> The Board has long found that comparable statements made either to union advocates or in the context of discussions about the union violate Section 8(a)(1) because they imply that support for the union is incompatible with continued employment *Rolligon Corp.*, 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.

In its post-hearing brief, Respondent argues that Fabian's statements (that the Union had no work, which is the reason the employees were working for Respondent, who did not pay union wages) was simply the truth, and therefore was protected by the First Amendment and Section 8(c) of the Act. I reject these arguments, noting that the Board and the courts have long held that threatening or coercive statements made in the context of employees exercising their rights under Section 7 of the Act enjoy no constitutional or Section 8(c) protection. Respondent also avers that these statements were de minimis under the circumstances. I also reject this argument, and note that Fabian was a high-level supervisor (indeed, the second in command at Respondent, after Ace Epps), and that employees credibly described his tone of voice as suggesting that he was upset or angry, and that indeed he slammed down a clipboard (or something similar) at the end of his remarks to accentuate his point. Indeed, Fabian admitted that he may have raised his voice and that the meeting got real quiet when he finished speaking, strongly suggesting that his remarks made an impact on the workers. Moreover, even if Fabian—a former union member himself—did not intend his remarks as an implied threat, the test is whether under the circumstances a reasonable employee would find such remarks coercive. I conclude such remarks were coercive, for the reasons explained by the Board in *Jupiter Medical Center*, as quoted above.

There is another aspect of Fabian's statements that also makes them coercive and unlawful. As correctly pointed out by the Union in its posthearing brief, Fabian—by his own admission—was attempting to shut down discussions amongst the employees during their "work hours"(Tr. 200) regarding their wages (or more precisely, lack of union wages), which he found disruptive and causing turmoil. Fabian in essence announced and implemented a rule that prohibited employees from discussing their wages during working *hours* (emphasis added). To determine the validity of this rule, I must first determine, pursuant to the Board's ruling in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts activities protected by Section 7. If so, the rule is unlawful. If the rule does not explicitly restrict Section7 rights, I must examine the following criteria: (1) whether employees would reasonably construe the rule to prohibit (or restrict) Section 7 activity; (2) whether the rule was promulgated in response to union activity; (3) whether the rule has been applied to restrict the exercise of Section7 rights. *Lutheran Heritage*, supra at 647; *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. *Bell v. Erwin,* 255 Fed. Appx. 527 (D.C. Cir. 2007). See; also; *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part; 737 F.3d 344 (5th Cir. 2013).

I conclude that Fabian's rule explicitly prohibited Section 7 activity, and was thus unlawful. In this regard I note that Fabian did not prohibit these discussions during working *time, which* would be presumably lawful. Rather, Fabian testified that these discussions were taking place during working *hours*, which he believed was causing "turmoil," which he wanted

to put a stop to. Moreover, Fabian's directive would also appear to violate all three criteria under *Lutheran Heritage*. It should be noted that the General Counsel did not advance this particular theory of a violation in its complaint, for reasons that I am not privy to.[9] Nonetheless, this matter was fully litigated—indeed, Fabian was called as a witness by Respondent—and the violation arises out of the same conversation and the same set of facts alleged in the complaint. In these circumstances, it is permissible for me to find a violation on a different (or additional) theory than espoused by the General Counsel. *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015); *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 2 fn. 6 (2015); *Facet Enterprises v. NLRB*, 907 F.2d 963, 969-975 (10th Cir. 1990).

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by impliedly threatening employees with job loss for engaging in protected activity, and by announcing and implementing a rule prohibiting employees from discussing their wages during working hours.

2. The March 26 letter to employees

It is undisputed that on March 26 Respondent's president, Ace Epps, sent unit employees a letter about the upcoming election scheduled for April 1. The entire text of the letter is reproduced above in the facts section, on pages 4-5 of this Decision. The General Counsel alleges that a portion of this letter, which states [*t*]*he mere fact that District Council 36 represents you would have no effect on your wages or benefits* implies that selecting the Union would be futile and thus violates Section 8(a)(1) of the Act (complaint pars. 7 and 8). For the following reasons, I disagree.

It is well-established that employers are free under Section 8(c) of the Act to express their opposition to a union, so long as the employer does not expressly or impliedly make threats or other coercive statements in expressing such views. In expressing such views, employers may tell employees that choosing to be represented by a union does not automatically guarantee better wages or benefits. *Fern Terrace Lodge*, 297 NLRB 8 (1989); *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 28-29 (2014). Indeed, employers may go further and inform employees not only that union representation is no guarantee of better wages, but also that collective bargaining amounts to a "roll of the dice" that could in fact result in *worse* benefits or pay. *City Market, Inc.*, 340 NLRB 1260, 1272-1274 (2003); *Mediplex of Connecticut, Inc.*, 319 NLRB 281 (1995).

The General Counsel correctly argues in its post-hearing brief that determining the lawfulness of an employer's statement in these circumstances depends on the context of the statement, which presumably includes the remainder of the message as well as the circumstances in which it was made. Ironically, however, by "cherry-picking" or isolating the above sentence from the rest of Respondent's March 26 letter, the General Counsel has deprived it of the all-important context contained in the rest of the letter. By focusing on the offending sentence, the General Counsel argues that the language implies that Respondent alone controlled the fate of negotiations and that the Union was irrelevant. Other parts of the letter, however, stress that the law requires Respondent to bargain in good faith, which implies that the employer was willing to do so, and correctly points out that "nothing is automatic," and that the Union could not force

[9] In all fairness, however, most of the evidence supporting this theory did not surface until Fabian himself testified at the trial and expanded on what he had said and the reasons therefor.

Respondent to agree to anything it could not afford or that would make it uncompetitive. Thus, I find that the language of the March 26 letter more closely resembles the "nothing is automatic" language found permissible by the Board in *Fern Terrace Lodge*, supra, as well as the "hard bargaining" language found permissible by the Board in *Newburg Eggs, Inc.*, 357 NLRB No. 171, slip op. at 3 (2011), than the language found coercive in the cases cited by the General Counsel and the Union.[10] See also *Star Fibers, Inc.*, 299 NLRB 789 (1990); *Clark Equipment Co.*, 278 NLRB 498, 499-500 (1986); *Textron, Inc.*, 176 NLRB 377, 380 (1969), for other examples of language similar to the one used by Respondent in this case, which was found permissible by the Board.

Moreover, even in isolation, I do not find the sentence cherry-picked by the General Counsel to be coercive. In that sentence, Respondent points out that the "mere" fact that the employees select the Union would not have an effect on wages or benefits, which is another way of saying that nothing is automatic. This is a correct, if perhaps clumsy, summation of the law and the reality of labor-management relations. Selecting a union as collective-bargaining representative, although an important step, is merely the first step in what may turn out to be a thousand-mile journey, a bargaining journey that could take weeks, months, or even years, and one that ultimately might bear no fruit, even in the absence of bad faith. Indeed, as noted above, this type of language has been found permissible by the Board. *Fern Terrace Lodge*, supra, and other cases cited above.

In light of the above, I conclude that the language of the March 26 letter is protected under Section 8(c) of the Act, and that therefore it was not in violation of Section 8(a)(1) of the Act. Accordingly, I recommend that this allegation of the complaint (par. 7) be dismissed.

II. The Objections

The election in this matter as held on April 1, 2015. On April 9, Union/Petitioner filed six timely objections to the conduct of the election, alleging that Respondent's conduct tainted the results. Thereafter, Union/Petitioner withdrew Objections 2, 4, and 6, and thus the issues before are those presented by Objections 1, 3, and 5. Additionally, in her Notice of Hearing on Objections, the Regional Director added an objection not specifically alleged by the Union, based on evidence discovered during the course of the investigation of the unfair labor practice cases discussed above. This objection, which I will call the "objection not specifically alleged," is based on the same conduct alleged as an unfair labor practice in paragraph 7 of the complaint.

Briefly, I note that it is well settled that representation elections will not lightly be set aside, and that the proponent of objections bears a heavy burden of proving that the conduct alleged warrants the setting aside of the election. See *Safeway, Inc.*, 338 NLRB 525, 525-526 (2002), and cases cited therein. With this in mind, I will now consider the Union's objections, which are as follows:

[10] Both the General Counsel and the Union cite *Smithfield Foods, Inc.*, 347 NLRB 1225, 1229 (2006), and the General Counsel further cites *Swingline, Co.*, 256 NLRB 704, 716 (1981); and *Hicks-Power Co.*, 186 NLRB 712, 723-724 (1970). In all of these cases, however, the employers had made numerous other coercive statements that provided the unlawful context and flavor to the statements. See also *Fisher Island Holdings, LLC*, 343 NLRB 189, 189-190 (2004). The context in the instant case, however, has the opposite effect.

Objection 1.

The Employer, though supervisor Walt Fabian, engaged in conduct that improperly affected the outcome of the election by orally promulgating and maintaining an overly broad and discriminatory rule forbidding employees from requesting higher wages from the Employer.

The above objection is based on the same conduct that is alleged as an unfair labor practice in paragraph 6 of the complaint, which occurred on or about February 6, 2015, at the BH jobsite. On that date, as discussed at length above, Fabian told about 15 employees assembled at a meeting that he wanted them to stop discussing their wages during working hours, and that they could go work for the Union if they did not like their wages. I found those statements coercive and in violation of Section 8(a)(1) of the Act, both because they impliedly threatened employees with job loss, and because Fabian in effect created a rule prohibiting employees from exercising their Section 7 rights.

Although this conduct was plainly coercive, it occurred on or about February 6, about 3 weeks before the Union filed its petition on February 25, and thus before the start of the "critical period." Under well-established Board doctrine, the critical period, during which "laboratory conditions" must be maintained, begins on the date the petition is filed, and runs through the date of the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961); *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Generally, conduct that occurs prior to the critical period is not considered objectionable. *Ideal Electric,* supra; *Data Technology Corp.*, 281 NLRB 1005, 1007 (1986). There are exceptions to this doctrine, however, such as when the prepetition conduct is truly egregious or is likely to have a "significant impact" on the election, *Servomation of Columbus*, 219 NLRB 504, 506 (1975) (violence or threats thereof); *Royal Packaging Corp.*, 284 NLRB 317 (1987) (promises of benefits in violation of the *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1970) doctrine); or when such conduct "adds meaning and dimension to related postpetition conduct," D*resser Industries*, 242 NLRB 74 (1979). None of these exceptions is applicable here, however. In this regard I note that there is no evidence that Fabian's conduct was repeated or re-affirmed during the critical period, or that it is related or adds meaning to any postpetition conduct.

Accordingly, I recommend that Objection 1 be overruled.

Objection 3.

The Employer, through supervisor Ace Epps, engaged in conduct that affected the outcome of the election by unlawfully threatening that employees would be discharged if they chose to be represented by the Union.

In support of this objection, the Union offered the testimony of Jose Garcia, who worked as an installer for Respondent from November 2014 to May 2015. Garcia, who was working at Respondent's MV jobsite, testified that about 1 to 2 weeks prior to the election, Ace Epps came

to the jobsite, bringing with him soft drinks and pizza, which he gave to the workers.[11] Garcia testified as follows regarding what occurred during a meeting that Epps held with employees:

> Q. (by MR. ROJAS) What did he say when-- during this time?
> A. He said to be honest and vote whatever was best for us. He also said that not everybody qualified to be an apprentice, there might be some people that weren't going to be qualified to be apprentices.
> Q. What else did he say?
> A. To make sure and make the right decision.
> Q. Did he say anything about people losing their jobs?
> A. Oh, yes. He said not everybody qualified to be apprentices, and whoever didn't qualify to be apprentices, they weren't going to have work.
> Q. Did the employees talk about this afterward?
> A. Yes. They asked me if it was true, if everybody doesn't qualify to be an apprentice. And I answered and I said, everybody does. There's two things you've got to have to become an apprentice. As long as you have a high school diploma/GED, and you pass the written exam. [Tr. 99.]

The above testimony does not clearly denote a threat directly related to the outcome of the election, and indeed it begs a question as to why, all of the sudden, Epps was talking about apprentices. After some prodding (Tr. 106), Garcia, who admitted he was a trustee for the Union (Tr. 134), later clarified that the conversation turned to apprentices because Epps asked him about the journeyman to apprentice ratios that the Union typically wants (presumably, as part of its collective-bargaining agreements, but this isn't clear)—a question that Garcia did not answer because he was unsure of the answer. During cross-examination, Garcia testified as follows regarding what Epps said during this meeting regarding journeyman-apprentice ratios:

> Q. BY MR. LENZ: Do you remember when Ace Epps spoke to employees in Moreno Valley, talking about apprenticeship ratios?
> A. Excuse me. What's that?
> Q. Do you remember talking about the rules on journeymen versus apprenticeship—or journeymen versus apprentices on the job?
> A. Yes, I remember.
> Q. And do you remember any discussion about what Liberty would or should be able to do if they were out of—or to be in compliance with the journeyman versus apprenticeship numbers?
> A. Yes.
> Q. Okay. Let's talk about that. What was said?
> A. He asked me what was the ratio, and I answered him. I'm not sure.
> Q. Was there anything else said?
> A. No, because I remember him asking me. He directed the question to me. And I said: You know what? I'm not sure about that.
> Q. Okay.
> A. I don't know the answer. I would have answered. Something that I'm not sure—

[11] As will be discussed below, Epps admitted that he brought soft drinks for the workers, but denied bringing pizza. I note, however, that this is not alleged as objectionable conduct.

Q. Do you know how the ratio works?
A. No.
Q. Okay. Is it your experience as a glazer that, on certain jobs, you need to have a certain number of journeymen and a certain number of apprentices?
A. It changes, because there's always—you always get changed. You always get changed jobs. I mean I always get changed job sites. I'm not always on the same job site.
Q. Are you aware of any rules that determine—
A. I believe there is a rule.
Q. So in terms of how many journeymen you have, how many apprentices you have?
A. Yes, there is a rule.
Q. Okay.
JUDGE SOTOLONGO: And you don't know what the rule is?
THE WITNESS: I'm not sure, because if I say, and it might be different. I'm not—I don't have that authority to say—
JUDGE SOTOLONGO: Well, we understand you don't want to misspeak. But what is your understanding of the rule?
THE WITNESS: I believe it's four to one. I'm not sure.
JUDGE SOTOLONGO: So four journeymen for each apprentice?
THE WITNESS: Yeah. I might be wrong. It might be—
JUDGE SOTOLONGO: It could be five for one, but—okay.
THE WITNESS: Yeah. I'm not sure.
JUDGE SOTOLONGO: But there's a ratio. There has to be so many apprentices for—
THE WITNESS: Yes.
JUDGE SOTOLONGO: So many journeymen for each apprentice.
THE WITNESS: Yes.
JUDGE SOTOLONGO: Okay, all right.
Q. BY MR. LENZ: Did Ace talk about that at Moreno Valley?
A. Yes. He said—I don't remember exactly the amount he said. And I don't remember the amount he said, but there was talk about it.
Q. Okay. So without regard to the numbers, what do you remember Ace about it?
A. That there would be—I think he said there would be too many journeymen and not enough apprentices. Or it'd be too many journeymen and just one apprentice or two. I don't remember the exact words.
Q. Okay. Some sort of difficulty with the numbers?
A. Who, me?
Q. No, no, no, no. No, I mean in terms of managing the staffing.
A. Yeah. I think what he was trying to say, he would have too many journeyman and not enough apprentices. And just one apprentice. So maybe the budget or I—you know, I don't know.
Q. Or complying with the rules?
A. Or—yes.
Q. Yeah. Is it possible it could have been the other way around, too many apprentices, not enough journeymen?
A. Maybe. I mean I don't remember. Like I said, I try to—I was there at the meeting, but I was just listening and, you know— [Tr. 135-138].

The above testimony represents the only evidence offered by the Union's witness in support of Objection 3. I note that in his recounting of this conversation during cross-examination, Garcia did not repeat the threat that Epps had allegedly made about laying off those that were not qualified as apprentices. Such alleged threat simply made no sense, under the circumstances. Indeed, as reflected above, Garcia changed the context of the testimony, testifying that Epps was in fact saying that under the ratios typically found under the Union rules, he might not have enough journeymen and too many apprentices.

Ace Epps also testified about the meeting he held at the MV jobsite on that day. Epps testified as follows with regard to what he said regarding the apprenticeship-journeyman ratios that might be required under a union contract:

> [A]nd so then I began to talk about my understanding of things. And where the thing with the apprentice—the ratio came up was it was one of the many concerns that I had. Because I had 40 to 45 inexperienced, you know, less than two years guys in my employ. And I had a couple of dozen, 25 to 30 journeymen glaziers at the time. And the point I was making is if I even—even if I agree to go signatory, what do I do with the extra guys? Because there's a ratio. And that's when I asked Jose do you know—because I knew he was the trustee. He told me he was the trustee. I had no issues with that. So I asked him, I said what—do you know what the ratio is. And he did say I'm not sure.
>
> So I encouraged those guys—because there were three or four guys there that were inexperienced guys or less than two years of experience. And I encouraged them, I said you need to get—those are answers you guys need to get, you need to find out. I said, now, let's just say hypothetically that the Union agree just to make you all journeyman. I said, are you guys okay with that? You journeyman, are you okay with that? Are you okay with that guy getting his card with only two years of experience? Are you going to be all right with that? They weren't okay with it. They were—and that was the kind of discussion that we had. Because I didn't have the answer to those questions. And I told them you need to call, you need to find out. And you get these answers for yourself. I told them that they needed—just like Jose testified, I told them that they needed to make an informed decision and do what was best for them.
>
> Q. Did you tell anybody they were going to lose their job?
> A. No.
> Q. Did you make any threats to anyone?
> A. No. [Tr. 166-167.]

Epps additionally testified that it was his understanding, based on having been a union member as well as having been in a supervisory position with another company that was signatory to the union contract, that typically the ratio of journeymen to apprentices (in a union job) was 4 to 1, with some exceptions in public works jobs. (Tr. 168-169, 184.) Although he admitted during cross-examination that he did not specifically tell his employees that he did not have to agree to the union contract (with the aforementioned ratios), he wanted to encourage his

workers to ask the Union what the ratios were (and thus, what the Union would likely try to get Respondent to agree to), and to think of how that might affect their jobs. (Tr. 186-187.)[12]

I credit Epps' version of the statements he made during this meeting at the MV jobsite. In contrast to Garcia's accounting, Epps' version was a far more complete and detailed—and more internally consistent and sensible accounting of the discussion held at the jobsite. Although I believe that Garcia sincerely tried to give his honest recollection of events, his recollection—by his own admission—was spotty, and he repeatedly said that he wasn't sure or did not recall the exact conversation. Garcia was not sure, for example, of what the ratios discussed by Epps were. Indeed, in fact Garcia's initial version seems to suggest that Epps said that the workers were not going to qualify as apprentices, which led Garcia to later explain to his coworkers that anyone with a high school diploma or GED was qualified to be an apprentice. Indeed, even this testimony, to wit "[h]e said not everybody qualified to be apprentices, and whoever didn't qualify to be apprentices, they weren't going to have work," came in response to a leading question, making it less reliable.

Having credited Epps' version of events, the issue before me is whether he threatened the employees with discharge if they chose to be represented by the Union, as alleged in Objection 3. I conclude that Epps' statements at the MV jobsite meeting did not amount to a direct, indirect or implied threat, and would accordingly not be objectionable conduct. In so finding, I conclude that the cases cited by the Union in support of its objection, to wit, *Foster Electric, Inc.*, 308 NLRB 1253, 1259-1260 (1992), and *Mariposa Press*, 273 NLRB 528, 540 (1984) are inapposite. In those cases, the threat of job loss attributable to voting for the union was far more direct and specific, or at least far more clearly implied, and came in the midst of other threats that were also found to be in violation of Section 8(a)(1) of the Act. In contrast, the statements by Epps in this case were not alleged by the General Counsel as an unfair labor practice in its complaint, which suggests that no merit was found to the allegation that Respondent made a threat. Accordingly, since the alleged conduct in this objection was not also an unfair labor practice, the proper standard to apply is whether the alleged misconduct , taken as a whole, warrants a new election because it has "the tendency to interfere with employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Metaldyne Corp.*, 339 NLRB 352 (2003).

As discussed above, I find that no threat was made in this instance. Rather, I conclude that Epps' discussion of—and his questioning of union trustee Garcia about— what the Union typically requires in its contracts, and his urging of the workers to ask the Union about such, was a proper discussion of the possible disadvantages of union representation. As such, there is no "misconduct" that is objectionable under the criteria of *Cambridge Tool,* supra.[13]

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[12] As described in his quoted testimony above, Epps said that Respondent typically employs about two apprentices for each journeyman employed, an obviously different ratio than exists in union jobs.

[13] The Union argues that Epps' discussion of the ratios typically required by the Union, coupled with his failure to state that he did not have to agree to a union contract with the aforementioned ratios, represented a threat of dire consequences if the Union was voted in. Yet, in the March 26 letter to employees, discussed above, Epps stated that the mere fact the Union was voted in would not affect the workers' wages or benefits—because, as the letter also explains, he did not have to agree to the Union's demands—the very same letter that the Union (and the General Counsel) alleged amounted to a threat of futility. This argument thus appears to create a "Catch-22" trap for the

Accordingly, I recommend that Objection 3 be overruled.

Objection 5.

The Employer, through supervisors Isaac Epps, Aaron Epps, and Thomas Hinojosa, interfered with the conduct of the election by entering the polling places during the conduct of the election.

It is undisputed that Aaron Epps and Thomas Hinojosa are jobsite "foremen" for Respondent, and an issue exists as to whether as such they are 2(11) supervisors of Respondent. There is also no dispute that Aaron and Isaac Epps are the sons of Ace Epps, Respondent's president. The evidence shows that Isaac Epps is a delivery driver and occasional installer, not a "foreman" like his brother and Hinojosa, but the Union nonetheless contends that he is also a 2(11) supervisor.

The issue presented by Objection 5 is whether the mere act by these individuals of showing up to vote (and actually voting) at the election, without more, represents objectionable conduct. For the reasons discussed below, I conclude that it is not.

There was much testimony adduced regarding the duties, responsibilities, and authority (or lack thereof) of job foremen. If the issue posed by the objection were a different one—such as whether statements made by these individuals were coercive and thus affected the results of the election—I would discuss this testimony thoroughly. I conclude, however, that their supervisory status is ultimately irrelevant to the merits of the objection. Suffice it to say, however, that the evidence shows—or at least suggests—that Aaron Epps and Hinojosa lack most of the indicia of supervisory status, such as the authority to hire, fire, discipline, promote, demote, etc., or effectively recommend thereof. This type of authority appears to belong exclusively to Ace Epps and Walter Fabian, Respondent's president and superintendent, respectively. There is, however, evidence that these foremen have the authority to assign or direct work to the workers in their jobsites, although it is not completely clear whether this authority stems from their supervisory status or their experience as senior journeymen who can gage the skill level of their coworkers. The evidence regarding Isaac Epps' authority is even more lacking; indeed, it is nonexistent.

Even if these individuals are supervisors, however, the evidence plainly suggests that, at best, they are low-level supervisors, and that a bona fide dispute exists as to their status. Thus, in the Stipulated Election Agreement between the Employer/Respondent and the Union/Petitioner (P. Exh. 1) there was no specific mention of these individuals as being excluded from the bargaining unit as supervisors, and indeed the *Excelsior* lists includes all three individuals (P. Exhs. 2(a), (b)). All three individuals voted under challenge, but there is evidence that other foremen in similar positions voted without being challenged. Finally, there is absolutely no evidence that these individuals engaged in any electioneering at the polling place(s), or otherwise made any statements or engaged in any conduct that was distinctly coercive. All they did was to

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employer. I would also note that there appears to be no factual dispute that in its contracts the Union typically requires the ratios discussed—at least the Union did not dispute the accuracy of Epps' understanding about such.

show up and vote. The Board's ballot challenge procedure is designed precisely to handle this particular scenario, which permits voters who may not be eligible for whatever reason to cast challenged ballots, the validity of which can later be determined. Under these circumstances, I am not aware of, nor can conceive, a theory or doctrine that would render the mere act of just showing up to vote as objectionable conduct. Indeed, the Union has cited no authority in support of such proposition. To hold such conduct objectionable would mean that employers would always face a dilemma—a *Hobson's* Choice—anytime an employee who *might* be a low-level supervisor wants to vote. If the employer directs such individual to not to vote, and it turns out that the individual is not a 2(11) supervisor, such conduct would likely be objectionable. On the other hand, if the employer does nothing (as in this case), and that individual actually votes and is later found to be a supervisor, the Union would argue that such conduct is also objectionable. Either way, the employer loses, and an "automatic" objection would always be built into the system. Such policy would simply make no sense. Conceivably, the Union might have a valid argument if an undisputed high-level supervisor, such as Ace Epps or Walter Fabian, had showed up at the polling place(s), mingled with the other voters, and attempted to vote. Such is not the scenario at hand, however, and I find nothing objectionable in the mere fact that alleged low-level supervisors simply showed up to vote.

Accordingly, and for the above reasons, I conclude that Objection 5 lacks merit, and recommend that it be overruled.

The Objection not Specifically Alleged (or "Catch-all" Objection)

In her August 11, 2015 Notice of Hearing on Objections, the Regional Director noted that paragraph 7 of the complaint in the unfair labor practice case alleged that on March 25, 2015, during the critical period, Respondent had *posted* a letter in the break room at its facility which was coercive and in violation of Section 8(a)(1) of the Act.[14] As alleged in the complaint, language in that letter implied that selecting the Union as collective-bargaining representative was futile (the "futility allegation"). Correctly citing Board precedent, the Regional Director noted that even though this conduct was not specifically alleged by the Union in its objections, she nonetheless was obligated to include such conduct—specifically, the "futility allegation"—as an issue to be considered in the hearing on objections. In doing so, however, the Regional Director noted that the only the issues raised by Objections 1 through 6, and the "catch-all" objection "only to the extent it encompasses the futility allegation" were to be considered.[15] Thus, the Regional Director's Order setting forth the issues to be heard as part of the objections case strictly limits my authority and jurisdiction to only the issues specifically listed.[16]

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[14] As described above, the complaint was later amended at the start of the trial to allege that such letter had been mailed to employees on March 26, not posted on March 25. This in no way affected the substance of the allegation. There is evidence that a very similar letter was posted at least at one jobsite, on or about March 25 (P. Exh. 2). However, the substance of the letters is the same.

[15] The "catch-all" term refers to the language contained after the six listed objections, which states: "By these *and other acts*, the Employer interfered with the conduct of the election. ." (Emphasis added.]

[16] In light of this, I strike from the record, and will not consider, testimonial evidence regarding statements allegedly made by Foreman Joe Lansing, who may or may not be a 2(11) supervisor, to Jose Garcia and other workers, which appears to have occurred on a different date and separate occasion. The alleged conduct by Lansing is simply not directly related to nor arises out of the same incident alleged in connection to the March 26 letter. Simply put, this conduct is not covered by any of the objections set for hearing by the Regional Director, nor is it

As discussed above with regard to the allegations of paragraph 7 of the complaint, I concluded that none of the language of the March 26 letter was coercive or implied that selecting the Union as collective-bargaining representative was futile. To the contrary, I concluded that the language of the letter was permissible under Section 8(c) of the Act and cited Board precedent, and recommended that this allegation of the complaint be dismissed.

I therefore conclude that the "futility allegation" has no merit, and that the objection not specifically alleged (or "catch-all objection") should be overruled.

In light of the above, I recommend that Objections 1, 3, 5, and the objection not specifically alleged be overruled. Accordingly, because the conduct alleged in these objections does not warrant setting aside the election, I direct that Case 31-RC-147046 be severed from Cases 31-CA-149721 and 31-CA-151870 and remand Case 31-RC-147046 to the Regional Director to process the matter in accordance to this recommended Order and to issue an appropriate certification.

CONCLUSIONS OF LAW

1. Liberty Glass & Metal, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Painters and Allied Trades District Council 36 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By informing employees that those who were not satisfied with their wages, hours, or working conditions could go work elsewhere, and by announcing or maintaining a rule prohibiting employees from discussing their wages, hours, or working conditions during working hours, Respondent has interfered with, restrained, and coerced employees in their exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

4. Respondent did not otherwise violate the Act as alleged in the consolidated complaint.

5. Respondent did not engage in objectionable pre-election conduct that warrants setting aside the results of the election.

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covered by the "catch-all" language referenced above, as the Regional Director specifically limited the "catch-all" language to the "futility allegation," raised by the language of the March 26 letter. Moreover, when I asked the Union's counsel why he was introducing testimony regarding Lansing's conduct, he stated that it was because it showed "general animus," which he argued enhanced the chance that Respondent had threatened job losses, as allegedly done by Epps (Tr. 100). I note, however, that animus is usually not an element that is relevant in considering the validity of objections, which are judged instead by whether a statement or conduct is coercive, regardless of whether animus is present. In light of the above, for me to consider the alleged conduct by Lansing would raise serious due process issues. *Precision Products Group*, 319 NLRB 640 (1995).

REMEDY

The appropriate remedy for the 8(a)(1) violations I have found is an order requiring Liberty Glass & Metal, Inc. (Respondent) to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, having found that Respondent violated Section 8(a)(1) of the Act by telling employees to stop discussing their wages, hours, or working conditions during working hours, and by impliedly threatening employees with discharge by telling them that if they did not like their wages they could go work elsewhere, I shall recommend that Respondent be ordered to cease and desist from such conduct. Additionally, Respondent will be required to post a notice to employees, in English and Spanish, assuring them that Respondent will not violate their rights in this or any other related manner in the future. Finally, to the extent that Respondent communicates with its employees by email or regular mail, it shall also be required to distribute the notice to employees in that manner, as well as any other means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[17]

ORDER

Respondent, Liberty Glass & Metal, Inc., Upland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees to stop discussing their wages, hours, or working conditions during working hours.

(b) Impliedly threatening employees with discharge by telling them that if they did not like their wages, hours, or working conditions they could go work elsewhere.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

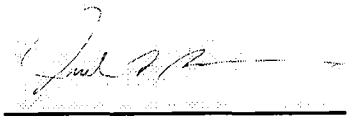
(a) Within 14 days after service by the Region, post at all its facility in Commerce, California, where notices to employees are customarily posted, copies of the attached notice

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2015.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. December 15, 2015



Ariel L. Sotolongo
Administrative Law Judge

[18] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT tell employees that they cannot discuss their wages, hours, or working conditions during working hours.

WE WILL NOT impliedly threaten to discharge employees by telling them that if they did not like their wages, hours, or working conditions they could go work elsewhere.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL inform employees that the rule prohibiting them from discussing their wages, hours, or working conditions during working hours is no longer in effect.

LIBERTY GLASS & METAL, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7351, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-149721 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.