

Olympic Supply, Inc. d/b/a Onsite News and Unite Here! Local 7. Cases 05–CA–076019 and 05–RD–001500

April 23, 2013

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On September 28, 2012, Administrative Law Judge Michael A. Rosas issued the attached decision. On November 7, 2012, Judge Rosas issued a supplemental decision, also attached.¹

The Respondent filed exceptions and a supporting brief, and the Acting General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has considered the decision, supplemental decision, and the record in light of the exceptions² and briefs and has decided to affirm the judge's rulings, findings, and conclusions³ and

¹ The judge's September 28 decision stated that the Respondent failed to submit a posthearing brief. The judge later received notice, however, that the Respondent had filed the brief erroneously with the Board's Regional Office instead of with the Division of Judges. Upon the judge's request, the Board returned the case to the judge for reconsideration in light of the Respondent's posthearing brief. Thereafter, the judge issued a supplemental decision, finding that the Respondent's brief failed to show errors in the fact findings or to raise any legal arguments that were not previously considered, and that the original decision should stand in its entirety.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In crediting employee Monae Whitehead's affidavit testimony, the judge inadvertently stated that, at the hearing, counsel for the Acting General Counsel "impeached" Whitehead's hearing testimony with her affidavit testimony. In fact, counsel introduced Whitehead's affidavit testimony as her past recollection recorded. Our decision is not affected by the judge's error.

Last, we note that the Regional Director dismissed, without a hearing, Union Objections 2, 3, 4, 5, and 6, and that the Union did not request review of these dismissals.

³ We agree with the judge that the Respondent violated Sec. 8(a)(1) by threatening employees with stricter enforcement of work rules if they supported the Union, and that these threats constitute objectionable conduct sufficient to set aside the election. "[I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election.'" *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), quoting *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). The only exception to this policy is where the Board finds that it is "virtually impossible" to conclude that the misconduct could have affected the election results. *Id.* In finding that the Respondent's con-

duct does not fall within this exception, we rely on the fact that the threats were made by a high-ranking manager and on employee Kevin Wheeler's un rebutted testimony that, before the election, he disseminated the threats to seven other employees. See *Longview Fibre Paper & Packaging*, 356 NLRB 796, 808–808 (2011); *Airstream, Inc.*, 304 NLRB 151, 152 (1991). Accordingly, we sustain Union Objection 1, and shall set aside the election and direct that a new election be held. See *La-Z-Boy Midwest*, 241 NLRB 334, 335 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, Olympic Supply, Inc. d/b/a Onsite News, Mitchellville, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with stricter enforcement of its work rules if the employees vote for or otherwise support the Union or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the 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 its facilities in Baltimore Washington International Thurgood Marshall Airport in Baltimore, Maryland, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 5, 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, 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. If 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 cur-

duct does not fall within this exception, we rely on the fact that the threats were made by a high-ranking manager and on employee Kevin Wheeler's un rebutted testimony that, before the election, he disseminated the threats to seven other employees. See *Longview Fibre Paper & Packaging*, 356 NLRB 796, 808–808 (2011); *Airstream, Inc.*, 304 NLRB 151, 152 (1991). Accordingly, we sustain Union Objection 1, and shall set aside the election and direct that a new election be held. See *La-Z-Boy Midwest*, 241 NLRB 334, 335 (1979).

⁴ We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), and to conform to the Board's standard remedial language. We shall also substitute a new notice to conform to the modified Order.

⁵ If this Order is enforced by a judgment of a 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."

rent employees and former employees employed by the Respondent at any time since February 2012.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

IT IS FURTHER ORDERED that Case 05–RD–001500 is severed and remanded to the Regional Director for Region 5 for the purpose of conducting a second election as directed below.

[Direction of Second Election omitted from publication.]

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 benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with stricter enforcement of work rules if you vote for or otherwise support the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

OLYMPIC SUPPLY, INC. D/B/A ONSITE
NEWS

Matthew J. Turner and John D. Doyle Jr., Esqs., for the General Counsel.

Charles Hildebrandt, Esq. (The Roberts Law Group), of Washington, D.C., for the Respondent.

Krista Strothmann, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Baltimore, Maryland, on August 27, 2012. The Charging Party, “Unite Here! Local 7” (the Union), filed the

charge on March 6, 2012,¹ and the General Counsel issued the complaint on May 24, 2012, alleging that Olympic Supply, Inc. d/b/a Onsite News (the Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act)² by: (1) during an unspecified time in or around mid-February 2012 at one of its Baltimore Washington International Marshall Airport (BWI) concessions, threatening employees with stricter enforcement of its work rules if they voted for the Union in an upcoming decertification election; and (2) on or about February 23, 2012, at its BWI location, again threatening employees with stricter enforcement of its work rules if the employees voted for the Union in the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments by the parties at trial and the posthearing brief filed by the General Counsel,³ I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation, with an office and place of business in Mitchellville, Maryland, has been engaged in the operation of retail concessions at BWI, where it annually derives gross revenues in excess of \$500,000. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Company's Operations*

The Company operates retail and newspaper concessions at BWI. London Perry has been the Company's general manager at BWI since 2008.⁴ The Company employs 32 employees at BWI, including 4 supervisors, 3 managers, and sales associates, stock clerks, and runners at its six airport locations.

The charges arise out of Perry's interaction with two sales associates, Kevin Wheeler and Monae Whitehead, regarding his enforcement of company rules and the role of the Union.⁵ The conversations took place at or near one of the Company's BWI concession locations known as UL-6. Wheeler has been employed by the Company at BWI since July 2011, joined the Union in October 2011, and took an active role with the Union in December 2011.⁶ Whitehead has been employed by the Company since 2010 but, unlike Wheeler, has never been a union supporter or member.

¹ All dates are 2012, unless otherwise indicated.

² 29 U.S.C. §§ 151–169.

³ Neither the Company nor the Charging Party submitted posthearing briefs.

⁴ The Company admitted in its answer that Perry has been a company supervisor within the meaning of Sec. 2(11) of the Act and agent within the meaning of Sec. 2(13) of the Act.

⁵ No written evidence of the rules was offered, but their existence is not disputed.

⁶ Wheeler conceded on cross-examination that, although he referred to himself at times as a union shop steward, he had no formal designation as such. (Tr. 39–40, 50–52.) Nevertheless, his role as a union advocate was not challenged and appeared credible.

B. The Company's Relationship with the Union

Since at least April 23, 2007, the Union has been the collective-bargaining representative of the following unit of the Company's employees (the bargaining unit):

All regular full-time and regular part-time retail and food and beverage concession employees, including lead associates, sales associates, and stock associates employed by each of the Employers at Baltimore Washington International Airport; but excluding all other employees, clerical workers, security guards, managers, and supervisors as defined in the Act.⁷

The most recent collective-bargaining agreement (CBA) between the Union and the Company was effective from April 23, 2007, through April 22, 2011, having automatically renewed on April 22, 2010, pursuant to section 26.1 of said agreement.⁸

On February 22, 2011, 2 months before the CBA expired, the Company sent the Union a written notice of termination:

After careful consideration of the present business environment, the best interest of the company and considering the employees' petition to decertify the Union filed in August 2010, pursuant to Article 26.1 of the Collective Bargaining Agreement, we hereby terminate the Collective Bargaining Agreement, with UNITE Here, Local 7, effective April 22, 2011.

Of course, we will continue to discuss proposals for a new Collective Bargaining Agreement. I am available on Tuesday, March 1, 2011, at 11:30 a.m., in my D.C. Office to speak with you to continue negotiations regarding a new Collective Bargaining Agreement.⁹

On April 25, 2011, Selena Lumpkins, a company employee, filed a petition with the National Labor Relations Board's Regional Office for Region 5 (the Regional Director). The petition, designated as Case 05-RD-001500, sought to decertify the Union as the bargaining unit's collective-bargaining representative.¹⁰

C. The Election

On May 5, 2011, the Regional Director approved a Stipulated Election Agreement in Case 05-RD-001500 executed by company and union representatives. With respect to the time and place of the election, however, the agreement noted that the "Date, Hours and Place will be determined by the Regional Director following the disposition of any blocking unfair labor practice charge."¹¹

On February 15, after the disposition of blocking unfair labor practice charges in Cases 05-CA-036588 and 05-CA-063228 and pursuant to the Stipulated Election Agreement in Case 05-RD-001500, Region 5 reopened the processing of the petition in Case 05-RD-001500. On March 2, Region 5 notified the parties of the details of the election to be held in Case 05-RD-

001500 on March 9.¹²

On March 9, a secret-ballot election was conducted under the direction and supervision of the Regional Director in the bargaining unit. The tally of ballots, which was made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	30
Void ballots	0
Votes cast for Intervenor	7
Votes cast against participating labor organization	15
Valid votes counted	22
Challenged Ballots	0
Valid votes counted plus challenged ballots...	22

A majority of the valid votes counted plus challenged ballots were not cast for the Union as Intervenor. On May 4, the Union filed six timely objections to conduct affecting the results of the election. On May 25, the Regional Director issued a Report on Objections and notice of hearing. In his report, the Regional Director found that Objection 1 raised issues of fact and credibility that were similar to the facts alleged in the instant unfair labor practice proceeding, Case 05-CA-076019. Objection 1 alleged that the Company, in or around February 2012 and prior to the election, threatened employees with stricter enforcement of rules if employees were represented by the Union. Accordingly, the unfair labor practice and representation cases were consolidated for trial.¹³

D. Perry's Conversation with Wheeler

The issue in both cases is whether Perry, during the period leading up to the election, engaged in conversations with Wheeler and Whitehead constituting unfair labor practices and conduct sufficiently objectionable to invalidate the decertification election.

In Wheeler's case, his conversation with Perry was preceded by the filing of a step-1 grievance on February 8, 2012, alleging the violation of his seniority rights under article 11.2 of the CBA. The written grievance did not provide any other details.¹⁴ The step one grievance meeting was held on February 23 in the stock room adjacent to UL-6. Union Organizer Margaret Ellis accompanied Wheeler to the meeting.¹⁵ At the meeting, she asserted that Wheeler's hours had been reduced in violation of the CBA's seniority provisions. Perry initially replied that business was slow and everyone's hours had been reduced. After Ellis responded that Wheeler's reduction in hours was attributable to his involvement in collective bargaining, Perry said that it was due to his tardiness. Wheeler, however, has never been subjected to any form of discipline for tardiness. The meeting ended after Perry refused to reinstate Wheeler's hours and provide backpay.¹⁶

⁷ Jt. Exh. 1.

⁸ Jt. Exh. 1, par. 2, attachment A.

⁹ Jt. Exh. 1, par. 3, attachment B.

¹⁰ Jt. Exh. 1, par. 4; GC Exh. 1-A.

¹¹ Jt. Exh. 1, par. 5.

¹² Jt. Exh. 1, pars. 6-8.

¹³ No evidence was submitted in support of Objections 2-6 and they were dismissed. (GC Exh. 1-L.)

¹⁴ GC Exh. 4.

¹⁵ Ellis did not testify.

¹⁶ I base these findings primarily on Wheeler's testimony. (Tr. 44-45.) He was fairly credible, while Perry was somewhat evasive in his

After the meeting, Wheeler returned to work at UL-6. Ellis followed him and they discussed the grievance meeting. Shortly thereafter, Perry approached them and stated that Wheeler was not supposed to be talking to a union representative while working. Ellis left and Perry continued the discussion. He showed Wheeler a record of instances in which he arrived late,¹⁷ but quickly pivoted to the subject of the Union. Perry advised Wheeler that, in the future, he should speak to Perry directly about any problems rather than relying on the Union. Otherwise, Perry would have to be stricter if the Union continued to be involved. Wheeler rejected the overture, insisted that Perry should have issued a written discipline if lateness was indeed a problem and asked for clarification as to what Perry meant by the Union's involvement. Perry explained that he would have to be stricter because he would have to comply with the CBA provisions. Perry concluded the conversation by noting that he would rather be lenient in such situations, but would have to strictly apply the rules if the Union remained as the employees' bargaining representative.¹⁸

E. Conversation between Perry and Whitehead

The other alleged infraction also occurred during February 2012. On that occasion, Whitehead approached Perry in the hallway area near UL-6 and told him that she did not want the Union to continue as her labor representative. Perry responded that, "if the Union came in, he would have to start going by the book. He said he had been lenient with employees, but if the Union came in, then he would have to start going by the book."¹⁹

answers and much of his testimony as a Rule 611(c) witness was nonresponsive ("e.g., that's what the paper said"). He also demonstrated a selective lack of recollection of certain events. In the case of the stockroom meeting, he initially failed to recall the encounter. Subsequently, he provided contradictory testimony as to the reason why he reduced Wheeler's hours. Initially, he testified that the reduction was due entirely to Wheeler's habitual lateness. However, as the questioning proceeded, he added that it was also a part of an overall reduction in hours for employees. (Tr. 16–17, 44–45.)

¹⁷ Wheeler conceded that Perry showed him a record detailing his lateness to work. (Tr. 47.)

¹⁸ I based this finding on Wheeler's testimony (Tr. 45–48), as corroborated by Perry's testimony. Perry conceded that he told Wheeler he could no longer tolerate lateness as he had done previously and would be documenting such infractions in order to avoid problems with the Union. (Tr. 23–24.) On rebuttal, he offered the conclusory assertion that he never told Wheeler that he would more strictly enforce the rules if the Union were to win the decertification vote. He did not, however, backtrack from earlier testimony regarding the effect of the Union's continued role on how he would address instances of lateness. (Tr. 35.)

¹⁹ Whitehead's initial testimony appeared tentative and was punctuated with frequent glances toward Perry at counsel's table. (Tr. 69–71.) The selectivity of that testimony became evident when the General Counsel, to her dismay, impeached her testimony with a sworn affidavit detailing the full extent of Perry's remark about the effects of the Union "coming in." (Tr. 74–77.) I found the statements in Whitehead's affidavit, which she did not disavow, more reliable than her testimony. Moreover, Perry, during his rebuttal testimony, did not refute either her testimony or the statements in her affidavit. (Tr. 89.)

Legal Analysis

I. THE 8(A)(1) CHARGES

The General Counsel contends that the Company violated Section 8(a)(1) of the Act by threatening Wheeler and Whitehead during February 2012 with stricter enforcement of work rules if the Union continued as their labor representative. The Company denies that Perry's remarks constituted threats and insists that he was simply conveying an intention to continue adhering to company rules if the Union continued representing its employees.

In analyzing an 8(a)(1) charge, "[t]he test is whether the employer engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Section 8(a)(1) violations do not turn on the employer's motive or on whether the coercion succeeded or failed. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991);

Perry informed Wheeler and Whitehead during February, the month prior to the election, that he would cease being lenient and have to be stricter if the Union continued serving as the bargaining unit's labor representative. These comments, which were made during the month leading up to the union decertification election, were not predictions of the effects of unionization based on objective fact; nor did they address consequences beyond the Company's control. *NLRB v. Gissel Packing Co.*, 395 U.S. at 618; *Systems West, LLC*, 342 NLRB 851 (2004).

As noted by the General Counsel, the lack of any objective basis for Perry's statements that he would have to forgo leniency is evident from both historical and representational perspectives. First, it is undisputed that Perry had been lenient previously in addressing employee lateness. Secondly, during those periods of leniency, employees had been represented by the Union. There is no evidence, however, that the Union ever grieved such a practice. Hence, there was no basis for the assertion that the Union would suddenly begin to grieve such leniency if it prevailed in the decertification election.

Accordingly, Perry's statements to Wheeler and Whitehead constituted unlawful threats to enforce tardiness rules more strictly if the Company remained unionized. See also *DHL Express, Inc.*, 355 NLRB 1399, 1402–1405 (2010) (employer violated Sec. 8(a)(1) by informing employee that, if the union prevailed in the upcoming election, he would be less flexible and be compelled to more strictly enforce tardiness policy); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1084 (2004) (unlawful for employer to tell employees that the presence of a union would cause it to be less lenient and strictly enforce breaktimes rules); *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995) (employer violated Sec. 8(a)(1) by informing employees, while waiving proposed collective-bargaining agreement, that shop would be run "strictly by union rules"); *Treanor Moving & Storage Co.*, 311 NLRB 371, 375 (1993) (unlawful for employer to tell employees that it "used to let you guys get away with this kind of stuff" but "now you are union and you guys are playing your game and the company is going to have to play by their game").

Perry's remarks are distinguishable from situations where an

employer conveys relatively innocuous statements of its intent to adhere to specific provisions in a collective-bargaining agreement. *Dish Network Corp.*, 358 NLRB 174, 174 (2012) (employer may inform its employees that unionization will bring about “a change in the manner in which employer and employee deal with each other); *International Baking Co.*, 348 NLRB 1133, 1135 (2006) (employer’s explanation that it would be unable to be flexible with lateness policy, if a disciplinary provision was included in collective-bargaining agreement, was not unlawful); *Ben Venue Laboratories*, 317 NLRB 900, 900 (1995), *enfd.* 121 F.3d 709 (6th Cir. 1997) (employer’s announcement that it would discontinue its open-door policy if employees voted to unionize not unlawful); *FGI Fibers*, 280 NLRB 473, 473 (1986) (employer’s statement that it would discontinue open-door policy if union was voted in because it would be required to go through grievance and other union procedures not unlawful); *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (employer’s remark that his “informal and person-to-person” interaction would change and operations run “by the book, with a stranger” was not unlawful); *United Artists Theatre*, 277 NLRB 115, 115 (1985) (employer’s statement that employees would vote away their right to deal with management directly if they voted for the union not unlawful).

II. THE UNION OBJECTION TO THE ELECTION

The Union’s Objection 1 asserts that the Company, in or around February, threatened employees with stricter enforcement of rules if they were represented by a union. As previously found, Perry informed at least two employees, Wheeler and Whitehead, in February that he would be less flexible and forced to be stricter in enforcing company rules if the Union continued to serve as the bargaining unit’s labor representative. In addition to constituting unfair labor practices, Perry’s remarks amounted to conduct that destroyed the laboratory conditions during the critical period and should be sustained. *Eaton Technologies, Inc.*, 322 NLRB 848, 853–854 (1997); *Peck Incorporated*, 269 NLRB 451, 459 (1989).

Perry’s remarks to two people in different scenarios—one a union supporter, while the other was opposed to the Union—during the month leading up to the election, strongly suggests that his comments were not limited to those employees. Under the circumstances, the March 9 election must be set aside and a second election ordered. It is the Board’s usual policy to direct a new election whenever an unfair labor practice occurs during the critical period where an 8(a)(1) violation of the type here interferes with the exercise of free speech and untrammelled choice in an election. *White Plains Lincoln Mercury*, 288 NLRB 1133, 1137–1138 (1988).

CONCLUSIONS OF LAW

1. The Company, Olympic Supply Inc. d/b/a Onsite News, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, UNITE HERE! Local 7, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, London Perry has been a supervisor of the Company within the meaning of Section 2(11) of the Act and an agent of the Company within the meaning of Section

2(13) of the Act.

4. By threatening employees with stricter enforcement of work rules if they supported the Union, the Company violated Section 8(a)(1) of the Act.

5. The aforementioned unlawful conduct engaged in by the Company constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. By the foregoing violations of the Act, which occurred during the critical period before the March 9 election, and by the conduct cited by the Union in Objection 1, the Company has prevented the holding of a fair election, and such conduct warrants setting aside the election in Case 05–RD–001500.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

Matthew J. Turner and John D. Doyle Jr., Esqs., for the General Counsel.

Charles Hildebrandt, Esq. (The Roberts Law Group), of Washington, D.C., for the Respondent.

Krista Strothmann, for the Charging Party.

SUPPLEMENTAL DECISION

MICHAEL A. ROSAS, Administrative Law Judge. On August 27, 2012,¹ this case was tried in Baltimore, Maryland. On September 28, a decision issued (the decision), which found, *inter alia*, that Olympic Supply Co. d/b/a Onsite News (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act). On October 2, an erratum issued. In footnote 3, the decision noted that the Company did not submit posthearing briefs. On October 19, however, my office received a letter from the Company’s trial counsel, dated October 10, explaining that he complied with the applicable service and filing requirements by emailing a brief to the General Counsel and Charging party, and electronically filing it with the Judges Division in a timely manner. He also attached a copy of the electronic certificate received upon filing the brief. The electronic filing indicates, however, that the brief was E-Filed with “NLRB Region 05, Baltimore, Maryland,” not the Judges Division.

Having reviewed the Board’s Rules and Regulations, as well as the Board’s current instructions to parties for E-filing, I found that neither provision provides litigants with any direction as to which of the various E-rooms to file particular documents with. Accordingly, I requested that the Board’s Executive Secretary transfer the case from the Board back to me for reconsideration of the decision based on the Company’s brief.²

¹ All dates are in 2012, unless otherwise indicated.

² With the assistance of administrative staff, I was shown how an E-Filer enters the Board’s electronic filing system and is then presented with a choice of offices with whom to file a document. Such offices include the Board’s Regional Offices and the Judges Division. In this case, it appears that the Company chose the option of filing its brief with the Baltimore Regional Office instead of the Judges Division. While one can wonder why counsel did not select the Judges Division,

In an Order, dated October 24, Deputy Executive Secretary rescinded his office's previous order transferring proceeding to the Board and transferred the case back to me in order to "consider the brief and issue a revised Decision and Order."

Based on the entire record, which now includes the Company's filed brief, I find that the decision remains correct and should stand in its entirety. The brief failed to raise any new matters that were not previously considered. In its brief, the Company contends that none of the witnesses provided testimony in support of the alleged violations. That is incorrect.

The General Counsel presented testimony by London Perry, the Company's general manager, and two employees, Kevin Wheeler and Monae Whitehead. The Company called Perry as its only witness. The testimony of all three witnesses established that Perry spoke with Wheeler and Whitehead in February about his enforcement of company rules and the Union's relationship in that regard.

an argument could be made that counsel chose to E-File with the Baltimore Regional Office because the hearing was conducted there.

As fully explained at footnotes 16 and 18, I found Wheeler fairly credible, while Perry's testimony was fraught with evasiveness and inconsistencies. As explained at footnote 19, I found both Whitehead and Perry less than credible. Although an extremely reluctant witness, Whitehead was impeached by her prior sworn statement, which I credited, detailing Perry's threat to strictly enforce the rules if the Union prevailed in the election. Perry did not, however, refute the portion of Whitehead's testimony that I credited when called as a witness by the Company. After distilling through the testimony, the facts clearly revealed that Perry informed Wheeler and Whitehead in February that he would have to be stricter in enforcing employee rules if the Union remained as the employees' bargaining representative.

I find, therefore, that the Company's brief failed to demonstrate that the findings of fact contained in the decision were flawed or should otherwise be revised. I also find that the Company's brief, which relies on *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1084 (2004), failed to cite any legal precedent or advance any connected argument, which was not previously considered or addressed. I find, as a result, that the decision should stand in its entirety.³

³ 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.