

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:	:		
	:		
BURNDY LLC	:		
	:	Case Nos.	34-CA-065746
-and	:		34-CA-079296
	:		
GLASS MOLDERS POTTERY	:		
PLASTICS & ALLIED WORKERS	:		
LOCAL 39B	:		
	:		
	:		
BURNDY LLC	:		
	:		
-and-	:	Case No.	34-CA-078077
	:		
IUE-CWA LOCAL 485	:	September 18, 2013	
	:		

**RESPONDENT'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondent Burndy LLC ("Burndy," the "Respondent," the "Company") hereby excepts to the Decision of the Administrative Law Judge ("ALJD") as follows.

1. The ALJ erred in failing to find that the Regional Director and the Acting General Counsel did not have the authority to issue the Consolidated Complaint and to prosecute the case because the Board lacks a quorum. Under the National Labor Relations Act ("Act"), all authority is vested in the Board, and while others may act on the Board's behalf by statute or delegation, the Board lacks a quorum and is, and has been, without authority to act because the President's recess appointments are constitutionally invalid. Therefore, the Board's agents lack authority to act on behalf of the Board. In addition, the Acting General Counsel was invalidly

appointed. Accordingly, he was without authority to investigate the charges, to issue the Consolidated Complaint and to prosecute the instant case.

2. The finding that “Butler reports to Arnson.” (ALJD p. 3:2)
3. The finding that Michael Vaast became Recording Secretary for the GMP in May 2011. (ALJD p. 4:24)
4. The finding that Dan Domeracki became the Treasurer in May 2011. (ALJD p. 4:25)
5. The finding that employees “discuss nonwork topics . . . amongst themselves during work time.” (ALJD p. 4:38-39)
6. The finding that “managers sometimes joined” employees’ conversations regarding nonwork topics. (ALJD p. 4:41)
7. The finding that “it was common for both employees and managers . . . [to] chat for a few minutes after entering a particular area of the facility with the employees working there.” (ALJD p. 4: 41-43)
8. The finding that Velez testified that a conversation which lasted a minute or two was “allowed” during worktime. (ALJD p. 5:40-41)
9. The finding that Vaast testified that conversations of 5 minutes were “acceptable.” (ALJD p. 5:41).
10. The finding that Sears testified that employees are “permitted” to speak to one another about non-work related matters for a few minutes at work. (ALJD p. 5:42-43)
11. The finding that Rovello testified that she began referencing General Rule No. 9 “against loafing or other abuse of time” in disciplines after Cavaluzzi was issued numerous disciplines for smoking, and Hing, as GMP chief steward, took the position that smoking inside

the facility should be treated as a different offense for progressive disciplinary purposes than smoking outside. (ALJD p. 5:23-26; 35:41-42)

12. The finding that “Lochman testified that he directed Rovello to cite General Rule 9 for all offenses involving not working during worktime ‘once things got a little bit more confrontational, where we saw the increase in grievances’ on the part of the Unions.” (ALJD p. 5:31-33; 36:6-9)

13. The finding that “during the past 5 years, changes in Respondent’s management personnel and in union leadership have resulted in a substantially altered collective bargaining relationship. (ALJD pgs. 5:37-38, 6:1)

14. The finding that Marczyzak “proved to be more aggressive and rigorous in his approach to the employees than the previous plant manager.” (ALJD p. 6:2-3)

15. The finding that when Norton was elected president of the GMP in June 2011, the relationship between the parties became even more “contentious.” (ALJD p. 6:26)

16. The finding that “Arnson confirmed that sometime between Norton’s election and May 2012, he had been specifically directed by Marczyzak to look out for employees gathered together and engaged in conversation.” (ALJD p. 6:33-35)

17. The finding that Arnson was instructed after an” initial” 2 week period in the Fall of 2011 to ask employees “What are you doing?” or “Why are you bothering him while he’s working?” (ALJD p. 8:20-25)

18. The finding that Butler began instructing Hing and the Pattern Shop employees that they should be working only after he attended a meeting with Marczyzak and Rovello. (ALJD p. 9:5-8).

19. The finding that on February 3, 2013, “instead of going to the conference room [Marczyszak] proceeded until he reached the end of the aisle along the pattern ship.” (ALJD p. 10:26-27)

20. The finding that Burndy maintained a no-talk rule. (ALJD 26:33)

21. The conclusion that “Marczyszak, Arnson, and Butler effectively enforced a “no-talk” rule to preclude discussion regarding union activities, even though employees employees were permitted to discuss other nonwork-related matters on worktime” in violation of Section 8(a)(1) of the Act. (ALJD p. 26:32-34; 36:28-31; 37:1-2; 53:38-40).

22. The conclusion that “employees routinely discussed nonwork matters on worktime, sometimes stopping their work for a few minutes, without disciplinary repercussions, prior to the summer of 2011.” (ALJD p. 26:34-37; 30:47-31:1; 31:40-41)

23. The finding that “Butler discussed nonwork-related issues with Domeracki and Vaast during worktime, and that they were sometimes not actively engaged in work during these conversations.” (ALJD p. 26:38-40)

24. The reliance on managers’ nonwork-related conversations with employees during work time to establish that employees are permitted to stop work to talk to one another during work time. (ALJD p. 26:38-39)

25. The finding that Arnson only began asking employees why they were bothering one another after Marczyszak “modified his directive to writeup ‘union guys.’” (ALJD p. 27:4-7)

26. The finding that the documentary evidence “does not establish that prior to the fall of 2011 employees were consistently disciplined for talking to one another during worktime without continuing to physically perform work.” (ALJD p. 27:10-12, 27:28-32; 35:10-13)

27. The finding that Respondent did not previously discipline employees for talking and not working during work time. (ALJD p. 27:14-15)

28. The failure to find that Respondent has consistently enforced a “work time is for work” rule and has enforced this rule against all employees who are not working. (ALJD p. 26-44)

29. The failure to find that stopping work to talk to a coworker is a violation of General Rule No. 9 against “loafing or other abuse of time.” (ALJD p. 26-44)

30. The conclusion that prior to 2011, Respondent did not prohibit all non-work related conversations if employees were not continuing to work while conversing. (ALJD p. 28:1-3; 39:23-25)

31. The finding that in the summer of 2011, Marczyzak specifically instructed other managers to “alter their approach” to employee discussion of non-work related issues during worktime, in response to the increased activity and more aggressive positions taken by the new GMP leadership.” (ALJD p. 28:5-8)

32. The finding that Marczyzak instructed Arnson in summer of 2011 to “vigilantly pursue employees’ gathering and engaging in conversation.” (ALJD p. 28:5, 15-17)

33. The finding that Marczyzak told Butler to give employees a heads up that if they are not working, the Company would assume they were doing union business and to “vigilantly pursue employees’ gathering and engaging in conversation,” or similar instructions. (ALJD p. 28:16-18)

34. The finding that in summer of 2011, as a result of a directive from Marczyzak, Butler began telling the Pattern Shop employees and Hing that they were supposed to be working if he saw them talking together. (ALJD p. 28:19-20)

35. The conclusion that Respondent “confronted employees who held union office regarding their conversations based on Marczyzak’s instruction.” (ALJD p. 28:21-23)

36. The conclusion that Marczyzak’s gave any instruction based on the “more aggressive stance with respect to investigation and contract enforcement taken by Norton and the other officers of the GMP.” (ALJD p. 28:24-25)

37. The conclusion that Marczyzak’s comment to Norton that “if he was seen talking to Hing or any of the other employee GMP officers it would be assumed that they were discussing union business, and they would be written up” was an attempt to “disparately prohibit employees from discussing union matters during work time in circumstances where discussion of other nonwork-related topics was allowed, in violation of Section 8(a)(1). (ALJD p. 28:28-31, 37-40; 34:45-46).

38. The conclusion that Arnson “prohibited discussions of union matters during worktime when other nonwork-related conversations were permitted.” (ALJD p. 29:33-34; 30:9-11)

39. The finding that Arnson’s continuing to ask Norton and Hing what was going on, what they were doing, and why they were in a particular area of the facility, without referring explicitly to union activity was “merely an alternative iteration of his previous attempts to prevent Norton, Hing, and other employees from discussing union issues.” (ALJD p. 30:10-14, 16-19)

40. The conclusion that Arnson telling Hing not to walk through the Pattern Shop on his way to the bathroom was “another attempt . . . to prevent the employee GMP officers from discussing union issues in circumstances where talk about other non-work related matters was permissible.” (ALJD p. 30:19-20, 21-23)

41. The conclusion that any comments by Butler to Norton and Hing were “motivated by a desire to prevent union activity.” (ALJD p. 30:40-41).

42. The finding that Butler’s continuing to interrupt Hing and Norton’s conversations was an effort to prevent the GMP officers from discussion union matters on worktime. (ALJD 30:46-47)

43. The conclusion that any comments by Butler “constituted . . . disparate application of a no-talk rule.” (ALJD p. 31:1-4, 9-11)

44. The conclusion that Marczyszak prohibited employees from discussion union matters during worktime in circumstances where discussion of other non-work-related topics was permitted. (ALJD p. 31:11-12).

45. The conclusion that Marczyszak, Arnson, and Butler’s “insistent chiding of Norton, Hing, and the Pattern Shop employees regarding talking ‘union business’ when discussion of other topics on worktime was permitted rose to the level of harassment.” (ALJD p. 31:33-35; 54:8-9).

46. The conclusion that Arnson and Butler’s continuing to approach Norton, Hing and the Pattern Shop employees to ask what was going on, what they were doing, or what they were talking about without explicit reference to union activity constituted harassment. (ALJD p. 31:35-37; 32:13-14; 54:8-9).

47. The conclusion that the Acting General Counsel established a prima facie case that the disciplines issued to Sears (February 3, April 12, May 3, May 29, 2012); Hing (April 12, 2012); Velez (April 13, 2012); and Norton, Cavaluzzi, Vaast and Domeracki (about February 10, 2012) were in retaliation for their union support and activities and that General rule 9 was

selectively applied to these individuals. (ALJD 34:24-26; 36:19-224; 38:25-28; 39:20-21; 40:27-29; 41:10-11; 41:20-21; 42:8-9; 42:51-52; 54:11-24; 54:26-28; 54:30-31)

48. The failure of the ALJ to place appropriate weight on the fact that Burndy did not discipline Cavaluzzi on February 3, 2012, did not discipline Norton on May 3, 2012, and did not discipline Cavaluzzi on April 13, 2012. (ALJD p. 38: 12-15).

49. The conclusion that Burndy deployed complementary strategies to impose more serious penalties on any Union officer. (ALJD p. 36:12-15)

50. The conclusion that “Respondent deliberately changed its practice in terms of citing general rule 9 in response to the increased activities of the new GMP leadership.” (ALJD p. 36:16-17).

51. The failure to conclude that the disciplines given to Sears, Hing, Norton, Cavaluzzi, Vaast, Domeracki and Velez were “motivated by legitimate considerations.” (ALJD p. 36:26-2, 41-42; 41:7-9; 42:41-43; 43:49-52; 54:11-24; 54:26-28)

52. The finding that on February 3, 2012 Sears was only “leaning” on a stool. (ALJD p. 39-40)

53. The finding that Marczyzak was taking a “longer and more roundabout way to reach the pattern shop.” (ALJD p. 37:5-7, 38:3-5)

54. The finding that Marczyzak “purposefully extend[ed] his path to the pattern shop in an attempt to catch Sears and Cavaluzzi for a sufficiently lengthy period to warrant discipline if their conversation was not work related.” (ALJD p. 37:15-18, 31-33)

55. The finding that Marczyzak’s “actions after discovering Sears in conversation with Cavaluzzi [on February 3, 2012] were motivated by a desire to impose discipline.” (ALJD p. 37:33-35)

56. The finding that Sears did not “run afoul” of the rule against loafing and other abuse of time. (ALJD p. 37:37-39)

57. The finding that the time period for which Sears was sitting on the stool, chatting with Cavaluzzi, and not working during work time was only 3-4 minutes. (ALJD p. 37:46-48)

58. The conclusion that it was “odd” that the discipline for the February 3, 2012 incident did not specify the amount of time Marczyzak observed Sears and Cavaluzzi speaking to one another and that “oddity” established that “Marczyzak was simply interested in disciplining union officers engaged in conversation, regardless of whether their conduct rose to the level of ‘abusing time.’” (ALD p. 38:1-7)

59. The failure to find a waiver applicable to Sears’ conduct based on upon Article 27(A) of the IUE contract. (ALJD p. 38:46-47)

60. The failure to find that Sears’ conduct violated Article 27(A) of the IUE contract. (ALJD p. 38:43-44)

61. The failure of the ALJ to recognize Burndy’s right to “schedule the hours of work” under both the IUE and GMP contracts. (ALJD p. 33-44)

62. The finding that “although Rovello initially testified that she saw a GMP contract booklet in Cavaluzzi’s drawer . . . she eventually admitted that she did not in fact know whether the book she saw was the GMP booklet.” (ALJD p. 39:33-35)

63. The conclusion that Rovello’s failure to document the presence of the GMP contract booklet during the February 8, 2012 incident was evidence that Rovello “simply assumed based upon the individuals involved . . . they were ‘having a meeting’ regarding union business.” (ALJD p. 39:42-44)

64. The failure to credit Rovello's testimony that Cavaluzzi said, "I'm sorry" after she came upon the huddle of GMP officers on February 8, 2012. (ALJD p. 39)

65. The failure to credit Rovello's testimony that Sanchez and Seal acknowledged her annoyance with the GMP officers because she had just observed them not working. (ALJD p. 39)

66. The failure to credit Rovello's testimony that during the Step 3 meeting for the grievance challenging the disciplines from the February 8, 2012 incident, Hing admitted that the group of employees was preparing for the meeting with Sanchez and Seal. (ALJD p. 39)

67. The failure to credit Rovello's testimony that Sanchez admitted to Rovello that the GMP officers sometimes "stretch the truth" after the Step Three grievance meeting regarding the February 8, 2012 incident. (ALJD p. 39)

68. The finding that on April 12, 2012, "Sears asked to borrow the contract to review the bereavement pay provision, and when it was not open to the page containing the bereavement pay language, stuck it in his back pocket and left." (ALJD p. 40:31-33)

69. The finding that the April 12, 2012 incident with Sears and Hing lasted only a minute or less. (ALJD p. 33-34)

70. The finding that the exchange between Sears and Hing was "within the bounds of acceptable nonwork-related conversation on worktime, even if there is no work actually being performed." (ALJD p. 40:43-45)

71. The conclusion that "Respondent made no meaningful effort to determine whether [Sears and Hing] were in fact abusing worktime, but simply intended to discipline two union officers found conversing, however briefly, regarding nonwork-related issues." (ALJD p. 40:50-52; 41:1)

72. The conclusion that Butler's failure to approach Sears and Hing to ask what they were doing on April 12, 2012 was evidence that "Respondent's managers were more interested in issuing discipline to the 'union guys' than resolving problems in an expedient manner." (ALJD p. 41:3-5)

73. The conclusion that the April 12 incident with Velez and Cavaluzzi would not warrant discipline. (ALJD p. 41:29-30)

74. The conclusion that Velez was "swept up in Respondent's disparate and retaliatory prohibition on discussion regarding union matters on worktime and changed practices regarding the application of general rule 9 prohibiting loafing or abuse of time." (ALJD p. 41:34-37)

75. The conclusion that Marczyzak's course of action on May 3, 2012 when observing Sears and Norton was "contrary to the interpretation of general rule 9." (ALJD p. 42:20-25)

76. The conclusion that on May 29, 2012, Sears was not taking an unauthorized break. (ALJD p. 43:13-23)

77. The conclusion that Sears' conduct on May 29, 2012 would "ordinarily not warrant discipline." (ALJD p. 43:42-43)

78. The conclusion that the disciplinary actions issued to Sears on February 3, April 12, May 3, and May 29, 2012 subjected Sears to "more onerous working conditions, monitoring and harassment" in retaliation for his union activities. (ALJD p. 44: 5-6)

79. The finding that the only discipline supporting Respondent's position is the counseling of Jose Pacheco on January 11. (ALJD p. 44: 12-14)

80. The conclusion that the disciplinary actions issued to Sears on February 3, April 12, May 3, and May 29, 2012 “constitute a pattern of monitoring and harassment imposed upon Sears.” (ALJD p. 44:22-24)

**EXCEPTIONS TO THE RECOMMENDED REMEDY  
OF THE ADMINISTRATIVE LAW JUDGE**

81. To the recommended remedy that Burndy cease and desist and take affirmative action to remedy its violations of 8(a)(1) and (3), unless not excepted to. (ALJD p. 54:44-46)

82. To the recommended remedy that Burndy make whole with interest Robert Sears for any lost wages he may have suffered as a result of the May 29, 2012 suspension. (ALJD p. 56:6-8)

83. To the recommended remedy that Burndy remove from the files any reference to the following disciplines issued to the following employees and within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way:

Robert Sears	February 3, 2012 counseling
Thomas Norton	February 10, 2012 counseling
Daniel Domeracki	February 10, 2012 counseling
Michael Cavaluzzi	February 10, 2012 counseling
Michael Vaast	February 10, 2012 counseling
Robert Sears	April 12, 2012 verbal warning
Robert Hing	April 12, 2012 counseling
Radames Velez	April 13, 2012 counseling
Robert Sears	May 3, 2012 written warning

(ALJD p. 55:2-6).

84. To the recommended remedy that Burndy post in its current form the Notice, in English and Spanish. (ALJD p. 55:6-7)

**EXCEPTIONS TO THE RECOMMENDED ORDER  
OF THE ADMINISTRATIVE LAW JUDGE**

85. To the order that Burndy cease and desist from harassing employees in retaliation for their union activity. (ALJD p. 55:18, 36)

86. To the order that Burndy cease and desist from disciplining employees in retaliation for their union activity. (ALJD p. 55:18, 36).

87. To the order that Burndy cease and desist from suspending employees in retaliation for their union activity. (ALJD p. 55:18, 39)

88. To the order that Burndy cease and desist from disparately applying general rule 9 prohibiting loafing or other abuse of time in retaliation for employees' union activity. (ALJD p. 55:41-42)

89. To the order that Burndy cease and desist imposing more onerous working conditions on and monitoring employees in retaliation for their union activity. (ALJD p. 55:43-44)

90. To the order that Burndy preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of Sears' backpay. (ALJD p. 56:28-33)

91. To the order that Burndy cease and desist from disparately enforcing a “no talk” rule to prohibit discussions involving union matters while permitting discussions of other nonwork-related matters on worktime. (ALJD p. 55:18, 19-20)

92. To the order that Burndy post the Notice in its current form within 14 days after service by the Region for 60 consecutive days. (ALJD p. 56:42-57:5)

**EXCEPTIONS TO THE  
NOTICE TO EMPLOYEES**

93. The overbroad reach of “We will not suspend you because you engage in activities on behalf of the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, IUE/CWA Communications Workers of America (“IUE”).

94. The overbroad reach of “We will not discipline you because you engage in activities on behalf of the IUE of the Glass, Molders, Pottery, Plastics & Allied Workers International Union (“GMP”).

Respectfully submitted,

THE RESPONDENT,  
BURNDY LLC.

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Its Attorneys

Dated: September 18, 2013  
Stamford, Connecticut

**CERTIFICATION OF SERVICE**

This is to certify that a copy of the foregoing was sent by certified mail, on this 18<sup>th</sup> day of September, 2013 to the following:

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/s/ Joan C. Luu  
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