

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

In the Matter of: :

BURNDY LLC :

-and- :

GLASS MOLDERS POTTERY
PLASTICS & ALLIED WORKERS
LOCAL 39B :

Case Nos. 34-CA-065746
34-CA-079296

BURNDY LLC :

-and- :

IUE-CWA LOCAL 485 :

Case No. 34-CA-078077

September 18, 2013

**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. PRELIMINARY STATEMENT

Burndy LLC (“Burndy”, the “Respondent”, or the “Company”) has consistently enforced its rule that “work time is for work,” regardless of whether an employee is a Union officer. Accordingly, Burndy excepts to the Administrative Law Judge’s conclusions that Burndy disparately enforced its work rules against Union officers and that it did so to harass them.

The ALJ also found that the disciplines issued in six incidents were unlawful: three incidents relating to Robert Sears; one incident concerning Sears and Robert Hing; another incident concerning Tom Norton, Michael Cavaluzzi, Michael Vaast and Dan Domeracki; and one regarding Ray Velez. All of these individuals other than Velez are Union officers. Each of the disciplines was issued because the recipient was not working during work time. In all but two instances, the recipient admitted he was not working during work time. Burndy excepts to the ALJ’s conclusions that Burndy unlawfully disciplined these employees.

II. GENERAL BACKGROUND

Burndy manufactures and sells connectors and fittings. All of the alleged unfair labor practices are purported to have occurred at the Company’s Bethel, Connecticut plant, which is a sand foundry and machine shop. Since March 2008, Edward Marczyzak has been the Plant Manager in Bethel. (Tr. 630).¹ Since April 2006, Mary Rovello has been the Human Resources Manager. (Tr. 854). Brian Butler is the Engineering Manager and supervises the three Pattern Shop employees, who are represented by the Glass, Molders, Pottery, Plastics & Allied Workers, Local 39B (“GMP”)—Michael Cavaluzzi, Dan Domeracki, and Michael Vaast. (Tr. 996-97). Joe Arnson, the Foundry Supervisor, supervises the remaining 25 employees in the bargaining unit represented by the GMP. (Tr. 1072).

¹ "Tr. ____" are references to the hearing transcript. "GC. ____" refers to AGC's Exhibits. "R. ____" refers to Respondent's Exhibits.

The charging parties are the two unions which have represented bargaining units at the Bethel plant since the 1950's. (Tr. 27, 633). The GMP represents approximately 28 foundry and pattern shop employees. The GMP's most recent labor contract was effective February 28, 2011 and expires February 27, 2015. (GC. 4). GMP officers are: Tom Norton, President; Robert Hing, Chief Steward; Michael Vaast, Secretary; and Dan Domeracki, Treasurer. (Tr. 54, 396, 636-38). Norton became the President in June 2011. (Tr. 54, 56). Hing and Cavaluzzi have held their Union positions since 2007. (Tr. 138-39, 288). Vaast and Domeracki have held their Union positions for at least two years prior to November 2012. (Tr. 396, 602). The IUE-CWA, Local 485 ("IUE") represents approximately 35 machine shop, maintenance and warehouse employees. Its most recent labor contract was effective January 23, 2011 and expires January 24, 2014. (GC. 5). IUE officers are: Robert Sears, Steward, and Herman Barnes, Committee Person. (Tr. 639). Sears has been a steward "on and off for about 20 years." (Tr. 434).

III. THE ULP CHARGES AND HEARING BEFORE THE ALJ

The instant case relates to three charges filed by the GMP and IUE:

- No. 34-CA-065746 filed by the GMP on September 29, 2011, amended on November 3, 2011 and on December 16, 2011.
- No. 34-CA-079296 filed by the GMP on April 20, 2012, amended on June 6, 2012 and on July 30, 2012.
- No. 34-CA-078077 filed by the IUE on April 3, 2012, amended on May 30, 2012, on June 8, 2013, and on July 30, 2012.

On July 31, 2012, the Regional Director of Region 34, on behalf of the Acting General Counsel (the "AGC"), issued an Order consolidating all pending matters. On November 6, 7, and 8, 2012 and January 22, 23, and 24, 2013, a hearing was held before Administrative Law Judge Lauren A. Esposito (ALJ) at the offices of Region 34 in Hartford, Connecticut.

IV. THE ALJ'S DECISION

On July 31, 2013, the ALJ issued her Decision (ALJD), finding that Respondent violated

8(a)(1) and 8(a)(3) of the National Labor Relations Act (“Act”)² by issuing these disciplines in retaliation for the employees’ union activities:

1. To Robert Sears, (a) a written counseling on February 3, 2012; (b) a verbal warning about April 12, 2012; (c) a written warning about May 3, 2012; and (d) a suspension on May 29, 2012.³

2. To Tom Norton, Michael Cavaluzzi, Michael Vaast and Dan Domeracki, a written counseling on or about February 10, 2012;

3. To Robert Hing, a written counseling on or about April 12, 2012.

4. To Radames Velez, a written counseling on or about April 13, 2012.

The ALJ also concluded that Burndy had disparately applied General Rule No. 9 which prohibits “loafing and other abuse of time” in violation of 8(a)(1) and that Burndy harassed the GMP officers in violation of 8(a)(1) and 8(a)(3). Respondent denies and hereby excepts to the ALJ’s findings/conclusions above that Respondent violated the Act.

V. FACTUAL BACKGROUND

A. “Work Time is For Work”

The Bethel plant operates one shift from 7:00 am to 3:30 pm. (Tr. 649). All bargaining unit employees are paid hourly. Burndy has negotiated break schedules with each union. (GC. 4 p. 3, GC. 5 p. 3). IUE-represented employees have a 10-minute break both in the morning and

² On November 6, 2012, after the first day of hearing, the AGC withdrew the allegations in Paragraphs 26-30 of the Consolidated Complaint (“Complaint”) concerning Burndy’s alleged failure/delay in providing requested information to the GMP, and charging the GMP the costs of copying. (Tr. 204-07). In addition, the ALJ also dismissed the following allegations:

1. Paragraph 9(a), (c), (e); 10(b), (d); and 11(a), (e) regarding surveillance and prohibiting employees from discussing the terms and conditions of their employment with other employees.

2. Paragraphs 12(a) and (b) regarding the “Protecting Group Assets” and “Dress Code” policies.

3. Paragraph 13 regarding the alleged threats by William Lochman, Director of Human Resources.

4. Paragraph 31 regarding the IUE’s use of the Company copier to copy grievances.

5. Paragraph 32 regarding payment for the costs of copying the labor contract for IUE members.

³ The ALJ also concluded that based on the same underlying disciplines, Burndy had violated 8(a)(1) and 8(a)(3) of the Act by imposing more onerous working conditions on, harassing and monitoring Sears in retaliation for his union activity.

in the afternoon, in addition to an unpaid half hour lunch break. (Tr. 691). The GMP contract provides for a 12-minute break in the morning and a 10-minute break in the afternoon along with a 32-minute unpaid lunch break. (Tr. 691; GC. 4 p. 3). The two added minutes for the GMP morning and lunch break were negotiated in the 2011 negotiations. (Tr. 693-94; R. 24). Break schedules are posted; a buzzer notes the start and end times of breaks. (Tr. 706; R. 11, 12). When not on break, employees are expected to be working. (Tr. 142-43).

Almost all bargaining unit employees operate machines. Due to the noise level in the production area, employees must wear hearing protection while working. (Tr. 658). Coincidentally, one IUE and all GMP officers are exceptions to this because they work, to varying extents, in areas which are quieter, and are not required to wear hearing protection while in these areas. (Tr. 658). The two maintenance men, Sears and Robert Murphy, work in the Maintenance Department and throughout the facility, as needed. (Tr. 432, 814-15). Norton, the Pattern Coordinator, works in the Pattern Shop, on the foundry floor, or in his office. (Tr. 53). Hing, a fork truck operator, works in the Warehouse and throughout the facility. (Tr. 290).

Marczyszak firmly believes that if Burndy is paying employees to work, they should be working unless they are on an authorized break. (Tr. 695; R. 11, R. 12). He explained:

. . . work time is for work. My expectation is when I step out that door, if it's work time and I look out to the drill press, I expect to see people working on the drill presses, if there's work on the drill press. If there's work in the assembly, I expect to look at assembly, I expect to see people assembling. I expect to see people molding. I expect to see people pouring metal. If they're not then there may be a legitimate reason. I'll go see if I can find the foreman or I'll approach the employee. If I go up to Tom Norton and he says I'm waiting. The metal is too cold. He may have an issue there. We find something else for him to do. But generally work time is for work. And if you're not at your workstation, you're not working, you're not fulfilling your end of the bargain. (Tr. 695-96).

These expectations apply to all employees, including Union officers. (Tr. 696, 1081).

Unfortunately, some employees do not share Marczyszak's work ethic. When

Marczyszak came to Bethel in 2008, he was “stunned” by the poor work ethic of some employees. (Tr. 676). Employees came to work and left when they wanted to, and came back to work if they wanted to. (Tr. 676-77). He found employees engaged in non-work related activities during work time such as reading newspapers, repairing cars, collecting soda cans, talking on cell phones, and smoking. (R. 28(a), 4(b), 25(b), 25(e), 25(f)). Marczyszak testified that the employees’ attitude seemed to be that work was “optional” and that some employees were “taking . . . advantage of every opportunity they had to not work.” (Tr. 677, 690).

During the 2011 contract negotiations, the Company made numerous proposals to both Unions to address attendance issues. Through negotiations, the parties agreed to a number of language changes. (R. 5, R. 24; Tr. 777-78). In addition, the Company pursued to arbitration both with the GMP⁴ and IUE the issue of whether employees may come to work, leave work at their discretion, return to work at their discretion, without penalty. (Tr. 635-37).

Marczyszak has used the tools available to him under the labor contracts and Company policies to ensure that employees work when they are being paid to work. Work rules have been posted on the employee bulletin board since at least 2006. (Tr. 699-700, 991, 1159; R. 13, R. 14). These rules consist of Major Rule Violations, which “may necessitate immediate termination of an employee’s employment” and General Rule Violations, such as “interfering with another employees’ performance of work duties,” and “performing unauthorized personal work on Company time or with Company property,” which are subject to varying levels of discipline depending on the circumstances. (R. 13).

General Rule No. 9, states that “loafing or other abuse of time during assigned working hours” is “a cause for disciplinary action.” (R. 14). Burndy considers employees who are not working during work time (other than breaks as provided in the labor contract) to be violating

⁴ The arbitrator denied the GMP grievance; the IUE grievance was pending at the time of the hearing. (Tr. 636-37).

General Rule No. 9 and disciplines them accordingly. (Tr. 698). Consequently, while employees may talk to one another when they are at work about any topic, they must be working while they are talking.⁵ (Tr. 697). Marczyzak testified, “They can talk – if they can talk comfortably to one another they can talk about anything. They can talk about the Red Sox, the Yankees, the Obama inaugural. I don’t care, as long as they’re working. They’re engaged in a work time activity, working.” (Tr. 822). Similarly, Butler testified, “My Pattern Shop employees are entitled to talk about anything they wish while they’re working, and anything they wish while they’re on break or at lunch time in the Pattern Shop The only provision is that during working hours they’re working while they’re talking.” (Tr. 1054).

Burndy has not applied General Rule No. 9 to prohibit the momentary stopping of work for a brief exchange of pleasantries or camaraderie, but it does apply the rule to employees who have stopped working for “extended” periods for any reason, including talking with a co-worker. (Tr. 823-24, 861-63; R. 2(c)-(d), 2(f)-(g), 3(a)-(b), 4(a)-(b), 4(d)-(e), 4(i)-(j), 25(a)-(a)(2), 28(a), 28(d)). Marczyzak testified:

. . . it’s not a gulag. So certainly people can have an exchange of pleasantries. Certainly you can walk in and say hey, great game yesterday or looks like we’re going to get a fair amount of snow. Certainly, you know, no one is interfering with that right to have an exchange of pleasantries, an exchange of general [camaraderie]...We’re certainly not preventing that. What I’m – what we’re preventing or what we’re talking about is the actual stoppage of work, for something other than work, for extended periods of time. (Tr. 823-24).

The Company has regularly and consistently disciplined employees, whether union officers or not, when they engaged in conduct that amounts to “loafing or other abuse of time,” including stopping work to talk to one another,⁶ when they should be working. (Tr. 677-79, 698, 861-63;

⁵ As a practical matter, the only employees who can carry on conversations during work without stopping work are those employees who are not stationed at a machine and wearing hearing protection. (Tr. 697).

⁶ There is no question that Burndy has not tolerated employees stopping work to engage in any kind of activity. While some disciplines refer to the specific activity and some refer to “loafing,” the reason behind the disciplines is

R. 2(c)-(d), 2(f)-(g), 3(a)-(b), 4(a)-(b), 4(d)-(e), 4(i)-(j), 25(a)-(a)(2), 28(a), 28(d)).

Burndy values each minute of work time. At the 2011 negotiations, the GMP sought additional time to wash before break since their members work with leaded product. (Tr. 694). The Company agreed to an additional two minutes for morning and lunch break. (R. 24). On February 24, 2012,⁷ Burndy disciplined Jose Freitas (not a Union officer) because he began his break at 2:07 pm when his break started at 2:10 p.m. (R. 25(a)(1)). Similarly on May 3, 2010, Burndy disciplined Barrett Parker (not a Union officer) for being in the locker room at 3:15 pm even though employees are dismissed at 3:20 p.m. (R. 25(h)). Burndy has also disciplined employees for using their cell phone during work time. (R. 3(b), 25(e), 25(g), 25(w)).

When Marczyzak sees employees who appear not to be working during work time, he approaches their supervisor to see if there is a reason why the employees are not working. (Tr. 697). If there is a legitimate reason and it is something Marczyzak can address, he addresses it so the employees can return to work. (Tr. 697-98). If their supervisor is unavailable, Marczyzak asks the employees why they are not working. (Tr. 697). In either case, if there is no legitimate reason why the employees are not working, they are violating the “work time is for work” rule, are considered to be loafing or abusing time, and may be subject to the disciplinary process, regardless of whether an employee is a Union officer. (Tr. 698; R. 25a-(a)(2)).

Likewise, Arnson testified that daily, when he sees employees not working, he approaches them and tells them to return to work.⁸ (Tr. 1085). Arnson has approached “probably almost everyone” in the GMP bargaining unit. (Tr. 1085). He has disciplined employees, none of whom are Union officers, for not working during work time. (Tr. 1088-89;

the same: “Work time is for work.” For reasons further explained in Sec. VI.D.1, Burndy’s use of the term was prompted by its efforts to better manage the grievance process.

⁷ All dates, unless otherwise specified occurred in in 2012.

⁸ Arnson testified that he does so in a joking manner by instructing the employee who is at his work station to get back to work, instead of instructing the employee who is not at his work station to do so. (Tr. 1085).

R. 25(a), 25(m), 25(o), 25(q), 25(t), 25(z), 25(a)(1)). Similarly, when Butler sees non-Pattern Shop employees in the Pattern Shop, Butler asks them why they are there and if he can assist them with something. (Tr. 1010-12, 1015-16, 1019-20).

B. Robert Sears' Disciplines For Not Working During Work Time

Sears has been a Maintenance Person at Burndy for at least 20 years. (Tr. 434). He has violated the "work time is for work" commitment numerous times:

- In April 2008, shortly after Marczyszak arrived at Burndy, while on a morning walkthrough, Marczyszak saw Sears, on overtime, taking an unauthorized break to smoke a cigarette. (Tr. 677-78). When Marczyszak asked Sears: "weren't you supposed to be working," Sears responded, "what the fuck do you want from me?" and glowered at Marczyszak. (Tr. 535). Sears received a counseling. (R. 4(a)).
- Marczyszak saw Sears fixing another employee's vehicle during work time. (Tr. 679). The Company issued Sears a discipline for this incident. (R. 4(b)-(c)).
- On January 23, 2009, Marczyszak saw Sears seated at a machine, smoking a cigarette. (Tr. 681-82). When Marczyszak approached, Sears snuffed out the cigarette on the machine and denied that he had been smoking, despite the black mark left by the cigarette on the machine and the cloud of smoke in the air. (Tr. 681-82). Sears received a verbal warning. (R. 4(e)).
- Marczyszak observed the three maintenance men (Sears, Murphy, and then maintenance man Ray Dalton) having pastries and beverages at the beginning of the shift, while on working time, despite the fact that they had been alerted that a furnace was not running and repairing the furnace was critical. (Tr. 683-84). When Marczyszak approached the group, Murphy immediately apologized. (Tr. 684). Sears glowered at Marczyszak. (Tr. 684).

Most recently, prior to the disciplines in the instant Complaint, Sears was disciplined on August 31 and October 12, 2011 for smoking during work time. (R. 4(i); R. 4(j)).

1. The February 3 Written Counseling to Sears After Marczyszak Saw Him Sitting on A Stool, Chatting With Cavaluzzi, During Work Time.

On February 3, Marczyszak and Manufacturing Manager Keith Swanhall were walking from the office to the daily scrap review meeting in the quality conference room. (Tr. 727).

Their route takes them through the locker room, which opens into an aisle way, lined with

shelving, which forms the perimeter of the Pattern Shop. (Tr. 729-30, 1063; R. 10, 17). Because the shelving is open, the Pattern Shop visible through the shelving. (Tr. 729-30, 1063).

As Marczyszak and Swanhall exited the locker room, they saw Sears seated on a stool in the Pattern Shop, chatting with Cavaluzzi, who appeared to be working. (Tr. 437, 725-26; R. 17). Sears did not have any tools with him, was not at a machine, and was not fixing anything. (Tr. 727). There was indicia of any work-related activity by Sears. (Tr. 727).

Marczyszak confirmed with Swanhall that Sears was not on break and both continued down the walkway around the Pattern Shop. (Tr. 726). When the pair reached the end of the walkway, Sears was still sitting on the stool, not working. (Tr. 726). By then, Marczyszak had observed Sears for at least three or four minutes and decided to double back to investigate why Sears was not working. (Tr. 726, 733, 735). When Marczyszak reached Sears and Cavaluzzi, he asked Sears if he was working on anything in the Pattern Shop or what he was working on. (Tr. 726). Sears responded that he was working. (Tr. 726). Marczyszak asked him, "What are you working on?" (Tr. 726). Sears replied, "I'm working on going to the bathroom," stood up and walked away. (Tr. 726-27). Burndy issued Sears a written counseling for "loafing or other abuse of time."⁹ (GC. 36). Cavaluzzi, a GMP shop steward, was not disciplined since he seemed to be working while he was speaking with Sears. (Tr. 727).

2. The April 12 Verbal Warning to Sears For Stopping Work to Chat With Hing about Non-Work Related Issues During Work Time.

On April 12, Butler was walking along the aisle adjacent to the Pattern Shop and observed Hing seated in a stationary fork truck. (Tr. 1032-33). Sears was leaning against the

⁹ Sears filed a grievance challenging the February 3 discipline. (Tr. 441-42). During the grievance process, Sears did not explain why he was sitting on the stool, talking to Cavaluzz, during work time. (Tr. 897-99; R. 29). At the hearing, Sears testified they were discussing whether Burndy paid Union officers for attending arbitrations. (Tr. 437).

fork truck and showing Hing an open Union contract booklet.¹⁰ (Tr. 1033; GC. 48). Both were supposed to be working. (R. 12). As Butler walked by, he heard Sears say aloud the words “excused absence” to Hing. (Tr. 1034, R. 33(a)-(c)). Sears testified that he was asking Hing about bereavement pay in the GMP contract. (Tr. 459). When Butler left the area, Sears and Hing were still not working, still carrying on their discussion.¹¹ (Tr. 1035). Butler had observed the pair for probably more than a minute. (Tr. 1035). Of course, Butler could not know how long they had not been working before he saw them, and how long they had continued not to work after he left the area.

Butler went to find Andy Foote, Sears’ supervisor, and Arnson, Hing’s supervisor, but could not find either and instead told Marczyzak of his observations. (Tr. 1041). Burndy issued Sears a verbal warning¹² for “loafing or other abuse of time” based on this incident. (GC. 37).

3. The May 3 Written Warning to Sears Because He Was Not Working During Work Time.

On May 3, Marczyzak was en route to the daily scrap meeting in the quality control conference room. (Tr. 741). At the meeting, Butler told Marczyzak that he had seen Sears hanging around the pattern storage area, not working. (Tr. 741, 1044). Since the pattern storage area is next to the quality control conference room, and there is a window in the conference room door, Marczyzak observed Sears through the window and saw that Sears was standing next to Norton’s bench, apparently speaking with Norton about a meeting Norton had scheduled with

¹⁰ Butler concluded that the booklet was a union contract because it is a distinctive size and color. (Tr. 1023).

¹¹ Sears filed a grievance challenging the April 12 verbal warning but refused to provide a work-related reason why he was not working and talking to Hing during work time at both the Step 2 or Step 3 grievance meetings. (Tr. 901-05). At the hearing, Sears testified that the two were discussing bereavement pay in the GMP contract. (Tr. 459).

¹² The Union members are subject to progressive discipline; the disciplinary steps are documented counseling, documented verbal warning, written warning, suspension and termination. (Tr. 856-57). Disciplines stay active for a year. (Tr. 857-58).

Board Investigator Heather Williams to discuss the charges filed by the GMP.¹³ (Tr. 481, 566, 741, 743-44). Norton was working and Sears appeared to be interrupting Norton's work. (Tr. 741; GC. 38). Marczyzak observed Sears for three to four minutes and then left the meeting to investigate. (Tr. 741-42). Marczyzak approached Sears and asked him what he was working on. (Tr. 741). Sears replied that he was not working on anything. (Tr. 742). Marczyzak asked him if he had any work in the maintenance room, and Sears replied "yeah, probably," but gave no indication he was returning to work. (Tr. 742). Marczyzak then inquired why Sears was not going back to work in the maintenance room. (Tr. 742). Sears responded that he had to get a drink of water. (Tr. 742). Marczyzak had not seen Sears get a drink of water. (Tr. 742, 566).

Burndy issued Sears a written warning for loafing or other abuse of time during assigned working hours. (GC. 38). GMP President Norton was not disciplined because he was in his work area and appeared to be working. (Tr. 123, 744).

4. The May 29 Suspension of Sears for Not Working When He Was Supposed to be Working.

On May 29, Arnson joined Marczyzak on his morning walkthrough. (Tr. 748). Marczyzak had seen the other maintenance man working on the furnace but had not seen Sears. (Tr. 748). Marczyzak wondered what Sears was working on and asked Arnson where Sears was working. (Tr. 660, 748). Arnson did not know so Marczyzak suggested that they check the maintenance room, as he usually does when he has not seen Sears on his morning walkthrough. (Tr. 654-55, 748). In the maintenance room, Marczyzak looked at the listing of jobs on the white board, but could not discern from the board what Sears was working on. (Tr. 748-49). Marczyzak then walked into the adjoining boiler room as Sears sometimes works in there. (Tr.

¹³ Sears also filed a grievance concerning this discipline. (Tr. 912) During the Step 2 and Step 3 meetings, he refused to provide any work-related explanation of why he was talking to Norton and not working during work time. (Tr. 913-915). At the hearing, Sears testified that he and Norton were discussing a scheduled meeting with NLRB Agent Heather Williams. (Tr. 481, 566, 741, 743-44).

748-49). There were no sign of Sears in the boiler room, but while in the room, Marczyzak noticed that a curtain which was usually open, was pulled closed. (Tr. 749). Marczyzak went to the curtain and drew it back. (Tr. 749). Behind the curtain, Sears was reclining in a chair, soda in hand, with a shocked expression on his face. (Tr. 749, 751; R. 19).

Marczyzak asked Sears when he started that morning and what he had worked on. (Tr. 749). Then he asked Sears what he was working on then. (Tr. 750-51). Sears replied that he was working on getting a soda. (Tr. 750). Sears did not provide any work-related reason why he was hiding behind a curtain drinking a soda. (Tr. 749-50). Marczyzak estimated that Sears had been behind the curtain for at least several minutes because Marczyzak and Arnson had been outside the maintenance room, inside the maintenance room and inside the boiler room for several minutes, and had not seen Sears. (Tr. 752). As Marczyzak exited the area, he turned to Arnson and asked Arnson if he had witnessed the encounter and told Arnson that Arnson was his witness because in the past, Sears "anytime that he's confronted, he lies."¹⁴ (Tr. 751). Arnson responded that Sears looked like a "deer in headlights." (Tr. 751, 1110). Subsequently, the Company issued Sears a three day suspension for loafing or other abuse of time. (GC. 39).

C. Hing's April 12 Discipline For Not Working During Work Time

As noted earlier, on April 12, Butler saw Hing and Sears not working, engaged in non-work activities during work time. The Company disciplined Hing for this incident as well. (Tr. 905; GC. 34). Hing filed a grievance challenging the counseling. (Tr. 906). At the Step 2 meeting, Hing admitted that he had stopped his forklift and had a discussion with Sears, but told Rovello that it was not of her business what they were discussing. (Tr. 340, 906). Hing also admitted that Sears had taken the GMP contract from his forktruck. (Tr. 906).

¹⁴ As an example, as noted earlier, when Marczyzak caught Sears putting out a cigarette on a machine, smoke swirling around him, Sears denied he was smoking. (Tr. 681).

D. Norton, Cavaluzzi, Vaast and Domeracki's Discipline For Not Working During Work Time

On February 8, GMP International Business Agent Hector Sanchez and Don Seal, the new Vice President of the GMP, arrived at the plant at 12:05 p.m. to meet with employees. They had called Rovello the day before to make the arrangements. (Tr. 864). Rovello met them in the lobby. (Tr. 865). At around 12:20 p.m., Seal asked Rovello to let the GMP leadership know that they were at the facility so that their meeting would start promptly at 12:30 p.m. when lunch began. (Tr. 865). Rovello agreed and went onto the shop floor to find Norton. (Tr. 865). He was not in his normal work area so she tried to find Hing, but was unable to do so. (Tr. 866). She then tried to find Cavaluzzi in the Pattern Shop. (Tr. 866).

As Rovello approached the Pattern Shop, she saw Norton, Domeracki and Vaast huddled around Cavaluzzi, who was seated at his desk, his desk drawer open and the GMP labor contract in his hands. (Tr. 866). None of the employees were working; there was no pattern on Cavaluzzi's bench.¹⁵ (Tr. 867, 874). As Rovello neared them, she asked what they were doing. (Tr. 866). Cavaluzzi immediately put the labor contract into his desk drawer and closed it, and responded: "I'm sorry;" Vaast and Domeracki left without answering. (Tr. 866). No one explained that they were discussing a pattern. (Tr. 875).

Rovello told Norton that Seal and Sanchez were in the lobby and then returned to the lobby. (Tr. 876). Annoyed that Norton and the Pattern Shop employees had not been working, Rovello told Seal and Sanchez that the "guys" had not been working. (Tr. 876). Seal "gave her one of these looks like I'm sorry" and Sanchez told her he was hoping he could speak with them. (Tr. 876). Rovello issued disciplines to Norton, Domeracki, Vaast and Cavaluzzi for the February 8 incident. (GC. 30, 31, 32, 35). None of the employees claimed at the time they

¹⁵ While there are thousands of patterns at the facility and Rovello is not familiar with each and every pattern, she was able to discern that there was no pattern on Cavaluzzi's desk or anywhere else in the area. (Tr. 989-90)

received the discipline that they had been working on any pattern. (Tr. 884).

The four filed a grievance challenging the discipline. (Tr. 885-86; GC. 46(a)-(b)). In the grievance, the employees claimed for the first time that they were working on a pattern when Rovello approached them. (GC. 46(b)). At the Step 2 meeting, when Rovello explained what she had observed when she walked into the Pattern Shop that day, Cavaluzzi told her she was “delusional” and that “there’s one of you, there’s four of us.” (Tr. 886-87, 1043-44).

At the Step 3 meeting on the grievance, Sanchez, Norton, Hing, Cavaluzzi, Rovello and Marczyzak were present. (Tr. 888). While Sanchez and Marczyzak were discussing the incident, Hing blurted out that the four employees had been getting ready for the meeting with Seal and Sanchez. (Tr. 888-89). Rovello asked, “you were getting ready for the meeting?” (Tr. 889). Immediately, Sanchez instructed Hing not to say anything else. (Tr. 889). The other GMP members “turned around” and told him, “Robert, shut up, you weren’t there.” (Tr. 889). After the meeting, Rovello expressed her frustration to Sanchez that the GMP employees were not telling the truth. (Tr. 890). Rather than deny her statements, Sanchez told her “they’re not trying to be dishonest . . . they just stretch the truth a lot.” (Tr. 890).

E. Velez’s April 13 Discipline For Not Working During Work Time

On April 12, Rovello was looking for Arnson and walked into the Pattern Shop. (Tr. 910). Ray Velez, who normally works in the Foundry Finishing area and is not a GMP officer, was in the Pattern Shop, not working, chatting with Cavaluzzi, who appeared to be working. (Tr. 910-11). Rovello asked Velez what he was working on. (Tr. 901). Velez responded, “Oh, I wasn’t working, I was just having a conversation.” (Tr. 910). Rovello told him that “you know better than that” and Velez apologized, “yeah, I do . . . Sorry.” (Tr. 910). Rovello issued a counseling to Velez for “loafing or other abuse of time during assigned working hours.” (GC. 33). Rovello did not issue any discipline to Cavaluzzi because he appeared to be working while

Velez was speaking to him. (Tr. 911).

VI. LEGAL ARGUMENT

A. The ALJ Erred in Concluding That The Board Had Jurisdiction Over The Case.

The Complaint should be dismissed because the Board lacks jurisdiction over the case.

1. Without a Quorum, the Board Was Unable to Properly Delegate Its Authority to the AGC and Regional Director.

The D.C. Circuit, Third Circuit and Fourth Circuit have concluded the Board did not possess a quorum to act as its members had not been properly appointed pursuant to the Recess Appointments Clause of the Constitution. Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013) (denying enforcement), cert. granted, 133 S. Ct. 2861 (2013); NLRB v. Enterprise Leasing Co. Southeast, LLC, 722 F.3d 609 (4th Cir. 2013) (denying enforcement); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203 (3d Cir. 2013) (denying enforcement). The Board's lack of quorum affects both the authority of the Board to act as well as that of its agents. As the D.C. Circuit explained in Laurel Baye Healthcare of Lake Lanier, 564 F.3d 469, 472-73 (D.C. Cir. 2009) (denying enforcement), a Board delegation "cannot survive the loss of a quorum on the Board"; "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended"; and "an agent's delegated authority is also deemed to cease upon the resignation or termination of the delegating authority."

Under the Act, the General Counsel "shall have final authority, *on behalf of the Board*, in respect of the investigation of charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board (emphasis added)." 29 U.S.C. 153(d) (2013). Under Sections 102.5 and 102.6 of the Board's Rules and Regulations, a regional director and an administrative law judge are "agents" of the Board. Thus, the authority of regional directors, the general counsel, and administrative law judges to act is conditioned upon

the existence of a valid Board quorum. That authority ceases “when the Board’s membership dips below the Board quorum of three members.” Laurel Baye, 564 F.3d at 475. In this case, all charges filed and all complaints issued occurred after the unconstitutional appointments.¹⁶

2. Because the AGC Was Not Properly Appointed, the AGC Did Not Have the Authority to Issue the Complaint or Prosecute the Case.

Pursuant to the Federal Vacancies Reform Act (FVRA), President Obama appointed Lafe Solomon as Acting General Counsel on June 21, 2010 during the second session of the 111th Congress after the prior General Counsel’s term had ended on June 18, 2010.¹⁷ Since then, Solomon has continued to serve as AGC even though his appointment has never been confirmed by the Senate. The FVRA limits the persons who may serve in an acting capacity when that person has been nominated for the position. The FVRA states that “a person may not serve as an acting officer for an office under this section, if

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person (i) did not serve in the position of first assistant to the office of such officer; or (ii) served in the position of first assistant

¹⁶ The ALJ stated that the “Board has held that because this issue has not been definitively resolved given the conflicting opinions of at least three other Circuits, the Board is ‘charged to fulfill its responsibilities under the Act.’” (ALJD 25). The ALJ cites Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004); U.S. v. Woodley, 751 F.2d 1008 (9th Cir. 1985); and U.S. v. Allocco, 305 F.2d 704 (2d. Cir. 1962) as support for her conclusion that three other Circuits disagree with Noel Canning. These cases, however, do not address the issue of appointments during Senate *pro forma* sessions, the use of which began in 2007. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1, 19 (2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf> (last visited September 16, 2013). The ALJ’s cited cases only address appointments made during intrasession recesses. Also, neither the Board’s understandable desire to keep its doors open” nor “the costs that delay imposes on the litigants” authorize the Board to act when it does not have the authority to do so.” New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010); New Vista Nursing Rehab., 719 F.3d at 210 (“the overall authority of the Board to hear [a] case under the NLRA is a jurisdictional question that may be raised at any time”) (internal citations and quotations omitted). The ALJ also concluded that “the authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints is derived from the National Labor Relations Act itself, and not from ‘any power delegated by the Board,’” citing Bloomingtondale’s, Inc., 359 NLRB No. 113 (2013), which cited NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 127-28 (1987) and NLRB v. FLRA, 613 F.3d 275, 278 (D.C. Cir. 2010). Those cases did not address whether the General Counsel had the authority to act in the absence of a Board quorum; they addressed whether the acts of the General Counsel were reviewable by the Circuit Courts of Appeal. Indeed, as the court explained in United Food & Commercial Workers Union, Local 23, 484 U.S. at 129, the drafters of the Act “added the language ‘on behalf of the Board’ to make it clear that the General Counsel acted *within the agency* (emphasis added).”

¹⁷ The General Counsel, National Labor Relations Board, <http://www.nlr.gov/who-we-are/general-counsel> (last visited September 14, 2013)

to the office of such officer for less than 90 days; and (B) the President submits a nomination of such person to the Senate for appointment to such office. FVRA § 3345(b)(1)

Solomon has never served in the capacity of Deputy General Counsel. Hooks v. Kitsap, No. C13-5470, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 13, 2013). Prior to being appointed AGC, he had not served in the General Counsel's office since 1981. Consequently, any appointment of Solomon under the FVRA is invalid and any action taken by him during his invalid appointment, including the investigation and issuance of the Complaint on July 31, 2012, and prosecution of the Complaint on November 6, 7, and 8, 2012 and January 22, 23, and 24, 2013 against Respondent is similarly invalid. 29 USC 153(d) (2013). The Complaint should be dismissed in its entirety. Hooks, 2013 U.S. Dist. LEXIS 114320 (dismissing 10(j) petition based on improper appointment of Life Solomon).

B. The ALJ Erred By Refusing to Recognize the Collective Bargaining Agreements Negotiated Between Burndy and the IUE and the GMP.

The IUE contract states: "No member of the Union shall carry on union activities during working hours on the premises of the Employer." (GC. 5 p. 18). This language waives the right of IUE members to conduct union activities during working hours. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 706-07 (1983) ("This Court long has recognized that a union may waive a member's statutorily protected rights . . ."); Local Union 1392, Int'l Bhd of Electrical Workers, AFL-CIO v. NLRB, 786 F.2d 733, 735 (6th Cir. 1986) (granting enforcement) (union may waive "[union] officials' section 8(a)(3) right to be free from disparate discipline"). Also, both the IUE and GMP labor contracts give Burndy the right to "schedule the hours of work." (GC. 4 p. 1; 5 p. 2). The GMP's contract specifically lists the duration, length and time of the breaks.¹⁸ (GC. 4, p. 3).

¹⁸ The IUE follows a similar break schedule, except staggered with the GMP's schedule. (Tr. 691).

Sears testified that he had been carrying on union business during work time in three of the four situations which resulted in his being disciplined, i.e. February 3, April 12, and May 3. The ALJ declined to “find a waiver applicable to Sears’ conduct based upon this language, as the evidence in fact indicates that union-related conversations during work time were permitted prior to fall 2011, and are ostensibly still permitted, *so long as the employees are working.*” (ALJD 38) (emphasis added). This conclusion is improper because there is no dispute that the situations which resulted in the disciplines involved Sears’ *not* working. Concerning Sears’ May 29 discipline and the GMP members’ disciplines, Burndy supervisors observed these employees not working during scheduled work time. By concluding that Burndy unlawfully disciplined these employees, the ALJ improperly failed to recognize and apply the contract language.

The two cases cited by the ALJ are inapposite. In Danzansky-Goldberg Memorial Chapels, 264 NLRB 840, 842-43 (1982), the Board concluded that the waiver in the parties’ labor contract was not broad enough to apply to the employee’s activity. However, if the waiver had been broad enough, the Board explained that “[a]ction by an employer to prevent [that conduct waived by the collective bargaining agreement] accordingly would not violate the Act.” In Marco Polo Resort Motel, 242 NLRB 1288, 1290 (1979), the Board again found that the contractual language was not broad enough to cover the employee’s activities. Thus, the issue in these two cases was whether the waiver was broad enough to cover the conduct alleged, not whether the employer could enforce the waiver.

In contrast to those two cases, on February 3, Marczyszak observed Sears sitting on a stool, not working, speaking with Cavaluzzi; these two union officers discussed whether GMP members receive pay for attending arbitrations. (Tr. 437). On April 12, Butler observed Sears and Hing, a GMP steward, not working; they were discussing the GMP’s contract provision

regarding bereavement pay. (Tr. 557-58, 560-61). On May 3, Sears stopped working to speak to Norton, the GMP President, about meeting with the NLRB agent regarding the charge the GMP had filed. (Tr. 566-67). These are “union activities”¹⁹ and are properly subject to discipline. Merritt v. Int’l Ass’n of Machinists & Aero. Workers, 613 F.3d 609, 619 (6th Cir. 2010) (“union activity” includes “contract negotiation, administration, enforcement and grievance processing”). In addition, both the IUE and GMP contracts grant Burndy the right “to schedule the hours of work,” which naturally includes the right to enforce this language. Accordingly, Burndy’s discipline of these employees was privileged by the contractual language. United Aircraft Corp., 180 NLRB 278 (1969) (employer may prohibit union-related solicitation even though it allowed other solicitations because contract language barred solicitation of union membership and conducting union business on working time).

C. The ALJ Erred in Concluding That Burndy Disparately Applied General Rule No. 9.

The ALJ acknowledged that “managers are obviously entitled to ensure that the work they are responsible for is being performed by the employees they supervise” and that “managers [] have a responsibility to oversee the work performed in the facility and to ensure that the employees are productive.” (ALJD 30, 32). The ALJ then concluded that “Marczyszak, Arnson, and Butler effectively enforced a “no-talk” rule²⁰ to preclude discussions regarding union activities, even though employees were permitted to discuss other non-work related matters on work time” and that Arnson’s “admonish[ment] to take another route to the locker room bathroom that did not go through the pattern shop, so . . . Hing would not be ‘tempted to stop’ and talk to the other GMP officers in the area” constituted disparate enforcement of the no-talk

¹⁹ The ALJ concedes that these were “union activities.” (ALJD 34:27-28)

²⁰ There is no allegation in the Complaint, the AGC never argued, and there is no evidence in the record that Burndy had a blanket “no-talk” rule. Indeed, all the record evidence is to the contrary: employees may talk about anything on work time so long as they are working, consistent with the Company’s “work time is for work” rule.

rule. (ALJD 26, 30, 32). She further concluded that “employees routinely discussed nonwork matters on work time, sometimes stopping their work for a few minutes, without disciplinary repercussions.” (ALJD 26). Burndy excepts to these conclusions because it has consistently²¹ enforced General Rule No. 9 against “loafing or other abuse of time” against any employee who has ceased working, regardless of whether the employee holds a Union position and regardless of the topic of the discussion. Burndy’s supervisors have denied in sworn testimony that the enforcement of General Rule No. 9 is in any way related to employee’s union status. (Tr. 698, 716-17, 735, 739, 744-45, 753, 918-19, 925, 1031, 1041-42, 1088, 1134).

1. Burndy Enforces General Rule No. 9 Against Employees Who Should Be Working But Are Not.

The ALJ’s Decision does not appropriately recognize the key distinction in Burndy’s disciplinary practices that if employees are working, but talking, Burndy does not consider these employees to be loafing. (Tr. 697-98). If employees are not working and are engaged in any

²¹ The ALJ stated that both Arnson and Butler did not begin approaching employees to ask what they were doing until summer of 2011 when “Marczyszak specifically instructed other managers to alter their approach to employee discussions of non-work-related issues during worktime, in response to the increased activity and more aggressive positions taken by the new GMP leadership.” (ALJD 27, 28) The record does not support this. Rather, the record establishes that both Arnson and Butler approached employees who were talking and not working prior to the summer 2011. Butler testified that it has always been his approach that “when [he] encounter[s] . . . any person in the Pattern Shop who I don’t believe has a legitimate work related reason to be in the Pattern Shop,” “he will typically . . . go forward and question Why are you here? Is there something I can help you with? What do you need from the Pattern Shop?” (Tr. 1012). He testified that he had approached Barrett Parker at least two years prior to January 2013, and Velez, whom he had observed in the Pattern Shop a number of times over a number of years. (Tr. 1018-21). He also testified that he has seen Cavaluzzi and Hing together with nonwork-related papers on multiple occasions in the last five years and has asked them what they were doing. (Tr. 1024, 1027). Further, while the ALJ found that Marczyszak told Butler to watch out for employees’ abuse of time, this conclusion was based on Butler’s response to Attorney Quigley’s question to Butler about attending meetings with Marczyszak regarding abuse of time, in which he requested Butler to “limit his answer to the time period from fall of 2011 until mid-2012.” (Tr. 1058). Arnson also testified that he had approached Norton and Hing even before any directive from Marczyszak (Tr. 1117). With respect to his comments in which he specifically referenced “union business,” he testified that he only made these comments during a two week period. (Tr. 1099). After the two week period, after a discussion in the office, he reverted back to asking Norton and Hing, as with everyone else, “What are you doing?” (Tr. 1099). That Arnson did not approach Norton or Hing when he saw them with a union contract the “approximately three times a year” prior to 2011 does not establish that Arnson had previously condoned this conduct, especially since Norton and Hing would “disperse” when Arnson appeared. (Tr. 1097-98). Also, the ALJ refers to the “more aggressive positions taken by the new GMP leadership.” (ALJD 27). Whatever type of approach the new GMP leadership may have had toward contract administration does not excuse them from complying with the “work time is for work” rule.

other non-work related conduct, including talking to another employee, then employees are subject to General Rule No. 9. (Tr. 697-98). Pacific Coast, 355 NLRB 1422, 1438 (2010) (The Act does not “prevent an employer from telling employees who have stopped work to talk to get back to work.”); Specialized Distribution Management, 318 NLRB 158, 160 (1995) (“Working time is for work and employees do not have the authority to set their own terms and conditions of when they will work and when they will not”); ADCO Electric Inc., 307 NLRB 1113, 1118 (1992) (employer did not violate 8(a)(3) by issuing discipline for discussing union activities because “[a]lthough the record shows that employees could talk about anything as they worked, there is no evidence Adco has ever tolerated employees' leaving their work to interrupt those who were working for the purpose of talking”). In the Pattern Shop, where it is quiet, employees can talk to each other about anything “as long as a pattern is being prepared . . . [and] they’re fulfilling their function.” (Tr. 697). However, as a practical matter, employees on the production floor are less able to carry on a conversation with one another during work time because they are wearing ear protection due to the noise level. (Tr. 658, 697).

2. The Record Does Not Support The ALJ’s Conclusion That Employees were Permitted To Talk to One Another Beyond An “Exchange of Pleasantries.”

The testimony of four Union officers and a fifth witness called by the AGC do not support the ALJ’s conclusions that “employees routinely discussed nonwork matters on worktime, sometimes stopping their work for a few minutes,²² without disciplinary repercussions, prior to summer of 2011.” (ALJD 26). Vaast and Domeracki work in the Pattern Shop, on benches close enough to each other that they may talk with each other while working. (Tr. 1054). Thus, their testimony that they talk every day does not establish that employees may

²² “A few minutes” is a vague amount of time. Marczyzak testified that the “exchange of pleasantries” was permitted. Anything extending beyond an “exchange of pleasantries” is subject to discipline. (Tr. 823-24).

stop work and talk to one another without disciplinary repercussions. (Tr. 409-10, 603). If they were stopping work to talk, beyond an exchange of pleasantries, no evidence establishes that Burndy was aware of or permitted such conduct. Stabilus, 355 NLRB 836 (2010) (reversing ALJ's conclusion that employer disparately enforced its food and drink rule because there was no evidence that supervisor was aware of other employees breaking the rule and had failed to discipline them).

The testimony of Velez, Norton and Sears also does not establish that Burndy permitted employees to stop work and talk with each other beyond an "exchange of pleasantries" or that Burndy was aware of these conversations and permitted them. Velez testified:

- Q. [By Attorney Quigley] . . . Do you talk to co-workers while you're at work?
A. Yes, I do.
Q. What kinds of things do you talk about?
A. Oh, we talk about sports or if it was like on a Monday, "How was your weekend?" Politics.
Q. Are you always physically working, you know, doing something when you're talking to coworkers? Do you ever stop and talk to people?
A. Yeah, we stop and talk.
Q. Okay. Is that against the rules as far as you know?
A. As far as I know, no. (Tr. 369).

- Q. [By Attorney Quigley] . . . How about Sears? Bob Sears; do you ever talk to him?
A. Yeah, of course I talk to him. (Tr. 370).

This testimony does not establish that his conversations extended beyond an "exchange of pleasantries." He did not testify that Burndy was aware of, or permitted, any of his conversations which may have extended beyond an exchange of pleasantries. Velez also testified that his non-work related conversations with Pattern Shop employees lasted only a "few seconds." (Tr. 370).

Norton's testimony also does not support the ALJ's conclusions:

- Q. [By Attorney Quigley] Do employees talk about things at work that aren't

strictly work related?

A. Yeah – we talk about everything.

Q. What kinds of things?

A. Sports, wives, lunch. (Tr. 97).

Q. [By Attorney Quigley] Did you ever see employees, members that you represent, argue with each other at work?

A. Yes, sometimes.

Q. Are there two members in particular that don't seem to get along very well?

A. Yeah, I have a couple of molders that were side by side, next to each other, that seemed to have a problem.

Q. Have you ever of them – as their union rep, have you ever heard of them being written up for arguing with each other?

A. No. (Tr. 127-28).

There is no indication from Norton's testimony whether employees had stopped working during these conversations, whether these conversations extended past an "exchange of pleasantries" or if they did, whether Burndy was aware of and permitted such conduct. There is no evidence to establish the molders' arguments were not work-related.

Similarly, Vaast also testified that although he believed he could stop work to talk to another employee for five minutes three to four times a day, no one "ever [told] [him] that it's ok" and that he just does it. (Tr. 412-13).

Sears' testimony also does not support the ALJ's conclusions:

Q. [By Attorney Quigley] Are you allowed to talk about non-work related items for a few moments at work?

A. We always have been able to. (Tr. 447).

Q. [By Attorney Soltis] . . . it seemed to me you believed that it was acceptable or appropriate for the bargaining unit employees to stop work to talk to other employees during the day. Is that your understanding?

A. It's never been a harm for a few minutes to talk to another co-worker . . . So, that's my *feeling* (emphasis added). (Tr. 546)

Again, there is no evidence that Burndy was aware of or permitted any conversations lasting beyond an exchange of pleasantries. Accordingly, the ALJ's conclusion that Burndy had or that it disparately enforced a "no-talk rule" is unsupported by the testimony cited to support it.

In contrast, the record establishes that Burndy does not permit employees to stop working during work time other than to “exchange pleasantries.” (Tr. 687-87, 823-24, 1085, 1012). When Burndy supervisors observe employees talking and not working, they approach them to determine whether they are talking about work-related topics.²³ (Tr. 695, 1012, 1014, 1016, 1019, 1085). Employees are also disciplined for engaging in non-work related conduct when they are supposed to be working. R. 2(c)-(d), 2(f)-(g), 3(a)-(b), 4(a)-(b), 4(d)-(e), 4(i)-(j), 25(a)-(a)(2), 28(a), 28(d)).

3. The Fact That Supervisors Sometimes Talk to Employees Does Not Support the ALJ’s Conclusion that Employees May Stop Work To Talk To One Another Without Disciplinary Repercussion.

The ALJ’s conclusion that the Company permits employees to stop work and talk to one another without disciplinary repercussions is based in part on testimony that supervisors sometimes talk to employees about non-work items and these employees are not necessarily working during these conversations. (ALJD 26). That testimony, however, does not establish that the Company permitted employees to take unauthorized breaks to talk with one another for extended periods of time. Norton testified:

Q. [By Attorney Quigley] Did you ever speak to Joe Arnson about fishing?

A. Yes.

Q. How often?

...

A. I talked to Joe maybe four or five times a week about fishing. And now it is bird season, so we talk about birds.

Q. And is that a problem?

A. Never seemed to be, no. (Tr. 126-27).

There is no evidence that Norton was not working during these conversations. Indeed, Norton and Arnson shared an office and Arnson testified that the conversations with Norton occurred while they were working:

²³ See n. 23.

Q. [By Attorney Soltis] . . . was there a time when you and Norton shared an office?

A. Yeah. When Tom became pattern coordinator, he kept all of the routings in a file in my office. . . . Some days we might pull 10 plates, so that means you have to pull 10 packets of routings. Some days we might pull 50 plates, which they'll spend a little more time in the office pulling paperwork.

...

A. And he had a desk right next to mine.

Q. ...And when he had a desk next to yours, did you get to spend some time together?

A. Sure, if I was at my desk, you know, while he was pulling it, you know, we'd be in there talking. (Tr. 1093).

Norton's remaining testimony also fails to support the ALJ's conclusion:

Q. [By Attorney Quigley] Do you ever talk to supervisors while you're on the clock about non-work related matters?

A. All the time.

Q. What supervisors?

...

A. Joe Arnson, Brian Butler, Angel Santos, Keith Swanhall, Ed, I say hello to Ed Marczyzak every day.

Q. Other than saying hello.

A. - I say hello

Q. I don't think they're coming down on you for saying hello to people. But do you talk to other supervisors about just general, you know, like the storm?

A. Yes

...

Q. I'm talking about discussions with your supervisors on the clock at work in the last couple of days.

A. Oh, we talk about bird hunting. We talk about fishing. We talk about all kinds of things. (Tr. 99).

Again, there is no indication whether these conversations occurred when Norton was working (permitted) or whether these conversations were longer than an "exchange of pleasantries."

Similarly, Brian Butler testified:

Q. [By Attorney Quigley] . . . And you've - you talk to them about all sorts of things at work, not just what pattern they're working on; isn't that true? You discuss sports or various interests that Domeracki or Vaast may have?

A. Yes.

...

Q. ...And when you have these conversations with Domeracki or Vaast, they're not always actually physically working in the sense of picking up something and

working on it when they – don't they stop and give their, you know, courtesy to you and respect and stop what they're doing and talk to you for a moment?

A. They typically are working when I'm talking to them.

...

Q. And but the times where you've stopped and ran into someone in the hall, say any employee there that you know, and have a brief "Hello, how are you?" for a few moments? That happens everyday in every workplace, does it not?

A. I believe so. (Tr. 1049-51).

The ALJ summarized Butler's testimony: "Butler confirmed that he discussed nonwork-related issues with Domeracki and Vaast during worktime and that they were sometimes not actively engaged in work during these conversations." (ALJD 26). However, Butler's testimony, cited above, establishes the contrary—that Domeracki²⁴ and Vaast²⁵ were "typically" working when he spoke to them.

Also, even if an employee may stop work to speak to his/her supervisor about non-work subjects, this is not evidence that employees are permitted to stop work and talk to coworkers. Cf. Hale Nani Rehabilitation, 326 NLRB 335, 338 (1998). ("[A]n employer's valid rule . . . is not rendered unlawful simply because the employer chooses to use its own premises to engage in its [conduct violating that rule]."); Sparks Nugget v. NLRB, 968 F.2d 991 (9th Cir. 1992) (denying enforcement in relevant part) (an employer could enforce a lawful distribution policy with regard to employees while violating the policy itself). A supervisor is aware of the employee's work load, understands the flow of work, and can authorize an employee to take a break, if appropriate. Also, a supervisor should be able to fully account for all the time the employee is at

²⁴ Domeracki testified that he would "stop what [he] was doing to talk to [Butler]" but there is no evidence that these conversations extended beyond an "exchange of pleasantries." (Tr. 604).

²⁵ Vaast testified:

Q. [By Attorney Quigley] Are you physically working on a pattern when you have these conversations about sports?

A. Yeah, yeah. I can work at the same time, you know, I mean it all depends, you know.

Q. Are there times when you are not physically working and you just stop and talk to him for a minute with some –

A. Yeah, for a few minutes. (Tr. 399)

Again, there is no evidence that Vaast stopped working to engage in conversation beyond an exchange pleasantries.

work but cannot unless he/she is the only individual who can authorize an employee to take a break. Conversely, if employees were able to authorize breaks for themselves to chat with one another, the result would be a breakdown of basic management oversight. For instance, Vaast testified that he believes employees could stop and chat for five to ten minutes about non-work related topics three or four times daily, which is 15-40 minutes of unauthorized breaks. (Tr. 412-13). Sears testified that he believes he can stop and talk to any employee during work time about non-work related topics and that it is “up to [him]” how long he stops. (Tr. 547).

In Hale Nani Rehabilitation, 326 NLRB at 339, Member Hurtgen specifically addressed the issue of different standards for supervisors than employees:

My colleague also suggests that rules for employees must be the same as rules for employer agents (managers and supervisors). However, there is nothing under NLRA law that requires such identical treatment. . . . The dissent argues that the Employer's conduct of allowing supervisory distribution in a work area undermines the justification for proscribing employee distribution in that area. The argument has no validity.

As in these two cases, Burndy enforced a presumptively valid rule against its employees but not its supervisors. That employees were permitted to stop working while speaking with their supervisors is not evidence that employees are permitted to stop work and talk with one another beyond exchanging pleasantries. Accordingly, the Board should reverse the ALJ's finding that Burndy violated 8(a)(1) of the Act by disparately enforcing its no-talking policy to prohibit union-related discussions.

D. The ALJ Erred in Concluding That the AGC Established a Prima Facie Case That Burndy Discriminated Against Union Officers.

The AGC must prove the legal elements of any violation by a preponderance of the evidence. 29 U.S.C. Section 160(c). To prove discrimination, the Wright Line analysis applies. Wright Line, 251 NLRB 1083 (1980). The AGC must prove 1) an adverse employment action; 2) union or protected activity and employer knowledge of that activity; and 3) the adverse action

was motivated by the protected activity. Wright Line, 251 NLRB at 1083. If the AGC establishes a *prima facie* case, the burden shifts to the employer to show that it would have taken the same action in the absence of any union activity. See Wright Line, 662 F.2d at 902. If the employer can do so, there is no violation of the Act. In the instant case, the ALJ improperly concluded that the AGC had established the third element of the *prima facie* case with respect to the disciplines issued to Sears, Velez, Hing, Norton, and the Pattern Shop employees.

1. Burndy Had Previously Issued Discipline to Employees Who Had Stopped Working to Talk to One Another.

The ALJ concluded that “the evidence does not establish that Respondent has a consistent practice of disciplining employees for speaking to one another during work time” based on the lack of documentary evidence of prior disciplines for talking during work time and because Rovello’s testimony regarding the reasons why the Company began using the term “loafing” was not corroborated by the documents. (ALJD 35-36). The ALJ’s conclusions are unsupported by the evidence.

Burndy has previously issued disciplines prior to the Complaint issued in this case to employees who stopped working to talk to their coworkers:²⁶

- On January 11, 2012, almost a month before the challenged disciplines, Burndy issued a counseling to Jose Pacheco because he had been “observed talking to Alfredo at his work station.” R-25(z). Neither employee is a Union officer.
- On April 13, 2011, approximately 10 months before the challenged disciplines, Christian Feliz (not a Union officer) was disciplined for talking to Jose Jimenez.²⁷ (R-25(q)).
- On August 11, 2010, almost one and a half years prior to the challenged disciplines, Marczyzak saw Jose Pacheco (not a Union officer) and Velez (not a Union officer) talking and not working, and he issued them a counseling. (R-3(a), R-25(m)).

²⁶ Although Rovello could not recall any disciplines given to employees for stopping work to talk to one another, the undisputed evidence establishes that Burndy had a history of issuing such disciplines. (ALJD 35).

²⁷ The ALJ improperly discounted this discipline, noting that the “discipline ... indicates that he confronted Arnson after being directed to return to his work area.” (ALJD 35). The discipline states “[t]his is a counseling for not being at your work station.” (R-25(q)). There is no indication that the discipline was based on Feliz’s reaction to it.

- On August 17, 2010 Burndy disciplined both Cavaluzzi and Hing for “conducting Union business in the Pattern Shop during work hours.”²⁸ R-2(d), R-28(d).
- On August 6, 2010, Burndy disciplined Howard Gombert (not a Union officer) because *inter alia*, he was observed “talking when he should have been on lathe.”²⁹ R-25(k).

Further, Burndy’s supervisors have denied that the enforcement of General Rule No. 9 is in any way related to an employee’s union status. (Tr. 698, 716-17, 735, 739, 744-45, 753, 918-19, 925, 1031, 1041-42, 1088, 1134). Thus, the record establishes that Burndy “made a good faith effort to consider each incident on its own merits and then exercised their best judgment as to whether or not the employee involved should be held liable for the [incident] which occurred.” Liberty Pavilion Nursing Home, 254 NLRB 1299, 1302 (1981). Accordingly, as in Liberty Pavilion Nursing Home, the ALJ’s conclusion that Burndy disparately enforced³⁰ General Rule No. 9 should be reversed.

The ALJ’s conclusion that the documentary evidence did not support Rovello’s stated reasons for beginning to refer to “loafing”³¹ in the disciplines is also unsupported by the uncontradicted testimony. The ALJ stated:

...Rovello’s testimony that she began explicitly citing to rule 2010 is contradicted by the documentary evidence Respondent introduced regarding discipline issued for loafing since 2008. . . . In addition, Rovello testified that she began using Rule 9 in 2010 in order to include all types of failing to work during worktime in one

²⁸ The ALJ improperly discounted these disciplines because “there is no information as to what they were actually doing.” (ALJD 35). These disciplines clearly indicate that Cavaluzzi and Hing were doing something other than working when they were supposed to be working. (R. 2(d), R. 28(d)).

²⁹ While the ALJ discounts this discipline because talking was only one basis of the discipline, the discipline nevertheless proves that employees were disciplined when they took unauthorized breaks to talk to coworkers.

³⁰ Even if Burndy’s enforcement of the policy was not entirely consistent,

In hindsight, it is possible to differ with the various judgments made in meting out or withholding discipline; it is possible to regard some judgments as too lenient, others as too severe, or even to conclude that Respondent’s policy was not applied in the most consistent manner. However, to recognize that there may have been aberrations in the implementation of a policy or practice, does not negate the fact that such policy or practice existed, or that it was inappropriately applied to [the union supporters].” Liberty Pavilion Nursing Home, 254 NLRB at 1302.

³¹ There is no dispute that Burndy has issued disciplines to employees who violate the rule that “work time is for work.” At times, these disciplines have referred to violations of this rule as “loafing;” at other times, the disciplines have described the circumstances of the violation. The ALJ appears to suggest that if Burndy had not referred to “loafing” in the disciplines and had just described the events at issue, that these disciplines would not be unlawful. To infer a discriminatory intent based on the use of the term “loafing” would be to elevate form over substance.

sequence of progressive discipline, after Hing argued that discipline issued to Cavaluzzi for smoking inside and outside the facility should be treated separately for progressive disciplinary purposes. However the record contains no evidence that Cavaluzzi was disciplined for smoking anywhere at any time after 2008. (ALJD 35)

Based on the purported contradiction in the documentary evidence, the ALJ further concluded:

As a result, I find that Rovello's testimony regarding the timing and motivation of the change in Respondent's disciplinary practice regarding citation to general rule 9 is not credible. It is more likely that, as Lochman admitted during his testimony, he directed Rovello to explicitly refer to "loafing" or general rule 9 in disciplinary documentation "once things got a little bit more confrontational, where we saw the increase in grievances" on the part of the Unions. It was also during this period of Marczyszak directed the other supervisors to discipline union officers found conversing amongst themselves or with other employees on the assumption that they were engaged in "union business." Indeed, the two strategies were complementary—while Marczyszak's instruction ensured that union officers would be disciplined more frequently than employees not holding union office or engaged in union activity, Lochman's idea to place all such "infractions" within the same sequence of progressive discipline would result in the imposition of more serious penalties. As a result, the evidence establishes 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 36)

There is no documentary evidence or testimony, by Rovello or any other witness, that Cavaluzzi was disciplined for smoking after 2008. This is obviously an error. To the contrary, Rovello testified that she reconsidered her disciplinary practices after she attended a grievance meeting for a discipline given to Jose Freitas:

Q. [By Attorney Soltis] Do you know for how long the plant has had the work rules that are in effect -- that are in effect today?

A. We have had these work rules since 2006. We -- we were addressing all of the different issues with each of the incidents that happened. And for example, José Freitas. José Freitas was caught smoking and he was caught smoking inside the building, and he was caught smoking outside the building. And when we sat down for Step 2 grievance with Robert Hing he said, "You can't give him a verbal for smoking outside the building because smoking inside the building is different from smoking outside the building." And I said, "We need to use this abuse of time, rather than you were eating grapes during assigned work hours. Or you were -- you were eating a sandwich during assigned work hours." The Union wanted it to be all those counseling's for each of those individual things. So that's where abuse of time and that's where that rule came from. (Tr. 991)

Freitas received a discipline for smoking outside the building on April 29, 2011.³² (R. 25(s)). Norton also testified that he spoke with Arnson on July 25, 2011 regarding Freitas being disciplined for smoking. Norton thought that Freitas should not be disciplined for smoking outside because “you’re supposed to smoke outside” and should only have been disciplined for being away from his work station. (Tr. 224). Lochman also referenced the same conversation:

Q. [By Attorney Soltis] . . . it seems like there’s a greater reference to work rules, including rule number 9, “loafing or other abuse of time during assigned work hours”, more recently as opposed to earlier.

A. Yeah.

Q. Were you at all responsible for that occurring?

A. Yes. You know, part of what we were trying to do, once things got a little bit more confrontational, where we saw the increase in grievances, I pretty much directed Mary that in her responses I wanted to see a rule cited rather than just have this, you know, we disagree with the union’s position or there’s been no violation and that’s it. What are we talking about? What policy? So that’s why you’re starting to see an actual, you know, rule discussed. . . . the union’s rep would come to us and say, “Well” -- oh, here’s a simple one, the smoking policy. You wrote him up; they were disciplined for smoking in the building, and now the second violation you got them for smoking outside.” Well, that should be a brand new number 1 violation. We said, “No, no, smoking is smoking. You’re smoking on company -- during company -- on company premises during work time. No, it’s not allowed, they’re all one type.” So I think what we’re seeing is that an increase in the use of loafing, while “loafing” is an old term, but it’s -- you have to look at the whole rule on that, is abuse of current. (Tr. 1159-1160).³³

The ALJ’s conclusions,³⁴ based on a mistaken reading of Rovello’s testimony, should be

³² While Rovello testified that she thought the grievance meeting occurred “probably sometime in 2010,” she was not certain about the date. (Tr. 992). Respondent’s Exhibit 25 and its subparts only includes those disciplines given to employees for not working during work time. (Tr. 861). If Freitas were given a discipline for smoking while working, that discipline would not be part of Respondent’s Exhibit 25.

³³ While the ALJ imputes a proscribed motive to Lochman’s instruction to refer to a broader category of offenses i.e. loafing or other abuse of time (ALJD 36), there is no allegation in the Complaint that Burndy changed its progressive disciplinary policy to penalize union officers. Further, any such change would affect all the bargaining unit members, not only the officers. Finally, there is no evidence to support the ALJ’s conclusion. Lochman’s testimony suggests that the Company reconsidered the way it would document disciplinary infractions because the unions were filing more grievances based on the belief that disciplines should not be progressive. Lochman’s attempt to address the increased grievances was not a method to impose “more serious penalties,” but to better manage the grievance process by being more specific regarding the rule that the employee had violated.

³⁴ While 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), an ALJ’s credibility resolution may be overruled if there is an utter disregard for

reversed.

2. The AGC Has Failed to Present Any Evidence of Any Similarly Situated Employee Who Was Not Disciplined.

To prove disparate treatment, the AGC must identify a similarly situated employee who was not a Union officer who received more favorable treatment. With respect to Sears, the AGC has not presented any evidence of any employee who engaged in conduct for which Sears was disciplined, who was not disciplined.³⁵ Alamo, 338 NLRB 275, 276 (2002) (reversing ALJ's conclusion that employer had violated 8(a)(3) by issuing a discipline to an employee for taking an extended dinner break because "the lack of evidence of any previous disciplinary actions for taking excessive dinner breaks does not undercut the Respondent's legitimate defenses here, in the absence of anything more than sheer speculation that the Respondent countenanced them.") Marczyzak testified that he is not aware of anyone else at Burndy who had engaged in conduct similar to that for which Sears was disciplined, who was not disciplined. (Tr. 763, 789).

Similarly, the AGC has not presented any evidence of any employee who engaged in conduct for which Norton, Cavaluzzi, Vaast and Domeracki were disciplined, who was not disciplined. Likewise, the AGC has not presented any evidence of any employee who engaged in conduct for which Hing was disciplined on April 12.³⁶

uncontroverted sworn testimony. NLRB v. Advance Transp., 979 F.2d 569, 573 (7th Cir. 1992) (granting enforcement). Here, the ALJ's assessment of Rovello's credibility was based on her mistaken reading of the transcript. Accordingly, the Board should proceed to an independent evaluation of credibility based on the weight of the evidence, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record and all other variant factors which might impact upon a witness's believability. Panelrama Centers, Inc., 296 NLRB 711, fn. 1 (1989).

³⁵ Velez agreed that an employee sitting down, drinking a soda while on work time was unacceptable. (Tr. 391).

³⁶ Also, there is no evidence of disparate treatment based on Butler and Arnson's typical method of addressing loafing and other abuse of time, as compared to that of Rovello and Marczyzak. Stabilus, 355 NLRB at 840 (evidence that "other supervisors in other departments were lax in enforcing [rules] does not prove that an exacting supervisor's enforcement of the rules in this instance was disparate"); MEMC, 342 NLRB 1172 (2004) (finding the General Counsel's proffered comparator evidence was "of little value" because it is not "expecte[d] that different supervisors would necessarily react in precisely the same way.) While Arnson and Butler generally did not discipline employees and only approached employees to instruct them to return to work, the evidence establishes that Marczyzak and Rovello have disciplined employees who stopped working during work time, unless the

The only employee identified by the AGC who was not a Union officer was Velez, who was disciplined for not working during work time and talking about sports with Cavaluzzi instead. Velez’s discipline establishes that any employee, whether Union officer or not, may be disciplined for “loafing or other abuse of time.” Somerset Valley Rehabilitation, 358 NLRB No. 146 n.3 (2012) (reversing the ALJ’s conclusion that the employer had disciplined an employee in violation of 8(a)(3) because the record established that “during the same time period, the Respondent warned another employee for a similar error.”)

3. The Incidents at Issue In This Case Establish That Discipline Is Not Based on Union Activity.

The disciplines at issue can be summarized in this table. Names in bold are those of Union officers:

<u>Incident Date</u>	<u>Description of Incident</u>	<u>Outcome</u>
February 3	Sears sitting on stool in Pattern Shop talking to Cavaluzzi	Sears ³⁷ was disciplined because he was not working; Cavaluzzi not disciplined because he was working
February 8	Norton and the Pattern Shop employees huddled around GMP contract	Norton and the Pattern Shop employees were disciplined because no one was working
April 12	Sears and Hing talking to each other	Sears and Hing were disciplined because neither was working
April 13	Velez talking to Cavaluzzi	Velez was disciplined because he was not working; Cavaluzzi not disciplined because he was working
May 3	Sears talking to Norton	Sears was disciplined because he was not working; Norton not disciplined because he was working
May 29	Sears reclining in chair drinking a soda behind a curtain	Sears was disciplined because he was not working

employees were stopping momentarily for an exchange of pleasantries. (R. 2(d), 2(f), 3(a), 25(e), 25(l)-(p), 25(a)(2), 28(a), 28(d)). Here, Rovello issued the disciplines to Norton, Cavaluzzi, Vaast, and Domeracki based on the events on February 9; she also issued the discipline for Ray Velez on April 12. Marczyszak issued the disciplines to Sears on February 3, April 12, May 3 and May 29.

³⁷ As of February 3, the GMP had filed two charges against the Company and the Board had issued a Complaint based on those two charges; the IUE had not filed any charges. According to the AGC’s theory, it is illogical that Burndy would discipline Sears and not Cavaluzzi if its intention was to retaliate for protected activity (i.e., filing of charges).

There is no reasonable interpretation of this information which supports a conclusion that the Company had an unlawful motivation to discipline Union officers. Velez, not a Union officer, was disciplined. Conversely, Union officers were not disciplined for the February 3, April 13, or May 3 incidents. The only common denominator, and the only reasonable interpretation, is that the driving factor for determining who received discipline was who was not working when he was supposed to be working. Liberty Pavilion Nursing Home, 254 NLRB at 1303 (affirming dismissal of 8(a)(3) violations because “if the dismissals of [the union supporters] were motivated by Respondent's anti-union sentiments then accidents to patients attended by [other union supporters], also could have served as justifications for their terminations. Yet, the Respondent retained these pro-union employees, finding in each case, they could not be held responsible.”)

Also, *all* of the employees in the Pattern Shop are GMP officers. *None* of them were disciplined prior to February 10 or since February 10. Accordingly, this supports the fact that Burndy disciplined them not because they were talking (because it is undisputed that they talk all the time) but because that were not working when they were supposed to be working.

4. There is No Evidence That Sears' Position As Shop Steward Was A Factor in Any of His Disciplines.

While the ALJ concluded that Burndy had displayed animus towards the GMP officers based on various independent 8(a)(1) violations, there is no similar finding with respect to Sears.³⁸ Nor did the ALJ conclude that Burndy had harassed Sears independent of the contested underlying 8(a)(3) violations.

³⁸ The ALJ concluded that Marczyzak's “actively following” Sears did not violate the Act and dismissed the only independent 8(a)(1) allegation against Sears. (ALJD 44).

Sears has been a Union steward on and off for 20 years.³⁹ (Tr. 434). The only evidence of a prima facie case the AGC has presented is the timing of Sears' disciplines, the date of the Evan Cesa⁴⁰ petition (which Sears did not sign) and the filing of the first Complaint against Burndy (based on charges brought by the GMP). (GC. 28). None of these events⁴¹ changed Burndy's relationship with the IUE. It is illogical that Burndy would decide to discriminate against Sears, the most highly skilled employee in the IUE. (Tr. 806-08). The record does not support such a conclusion. Left with only timing; the timing of events alone is insufficient to establish a prima facie case. LCF v. NLRB, 129 F.3d 1276 (D.C. Cir. 1997) (denying enforcement) ("timing of [employer's] actions is not sufficient to compensate for the other evidentiary deficiencies in the NLRB's decision"); Vulcan Basement Waterproofing of Ill. v. NLRB, 219 F.3d 677 (7th Cir. 2000) (denying enforcement) ("While in some cases, timing is everything, here timing is the only thing, and under these facts that is not enough.") (internal quotations omitted).

There are also no other claims of discrimination by IUE officers. Neither Barnes, the IUE Committeeperson, nor Henry Agramonte, the former IUE Chief Steward—both of whom signed the Cesa petition—have made any claim of unlawful discrimination. (G.C. 28, Tr. 634-35). Sears' lengthy record of disciplines, which predate the filing of any charges, and which demonstrate his disdain for the Company's rules and policies, establishes that his continued misconduct, rather than his status as a shop steward, were the reason for the disciplines in issue. Airborne Freight Corp., 343 NLRB 580, 583 (2004) (employee's long record of discipline "supports ALJ's finding that Respondent would have terminated [employee] based on his

³⁹ In the five years since Marczyzak began at Burndy in March 2008, the IUE has filed one unfair labor practice charge (other than the present charge), and pursued two grievances to arbitration. (Tr. 634-37). They have also sent at least two petitions to Burndy's upper management. (Tr. 720, 989, 1171; R. 16).

⁴⁰ Evan Cesa was an employee represented by the GMP. (Tr. 315).

⁴¹ The IUE did not file any charge against Burndy until April 3.

disciplinary record even had he not engaged in union activity.”)

E. Burndy Would Have Disciplined Sears Regardless of His Union Status.

If the AGC establishes a *prima facie* case, the burden shifts to the employer to show that it would have taken the same action in the absence of any union activity. See Wright Line, 662 F.2d at 902. To do so, an employer “*must only show that it reasonably believed*” that the employee engaged in conduct warranting the adverse employment action. Jordan Marsh Stores Corp., 317 NLRB 460 (1995) (emphasis added). Discipline based on a mistaken belief is not unlawful if the employer held a reasonable belief that the employee had engaged in the misconduct. Yuker Construction, 335 NLRB 1072, 1073 (2001).

Since Marczyszak’s arrival in Bethel, Sears has been disciplined numerous times for numerous reasons. This leads ineluctably to the conclusion that Sears flaunts work rules regularly, and either does not believe they apply to him or does not care whether they do. Sears’ most recent disciplines—those the subject of the Complaint—are a continuation of this pattern. As the prior disciplines were based on a reasonable belief that he had violated the Company’s work rules, so too are the challenged disciplines.

1. Sears Admitted That He Was Not Performing Work On The Occasions When He Was Disciplined And/Or Could Not Provide Any Explanation Why He Was Not Working.

Concerning the February 3 incident, Sears admitted at the hearing that he was not working during work time and was instead seated on a stool chatting with Cavaluzzi about whether Union members are paid to attend arbitrations.⁴² (Tr. 437). When Marczyszak approached him to ask whether he was working, Sears did not offer any work-related reason why he was seated on the stool talking to Cavaluzzi. Likewise, Sears admitted at the hearing that on

⁴² As noted earlier, the Company did not know the topic of their conversation until this hearing, and in any event, it did not matter.

April 12, he was speaking with Hing, during work time, about the Union contract, specifically about bereavement pay. (Tr. 557-58, 560-61). Again, Sears was not performing work during work time.

Concerning the May 3 discipline, Sears admitted that while on work time, instead of working, he was talking to Norton about a meeting with NLRB Agent Heather Williams. (Tr. 566-67). When Marczyzak asked him what he was working on, Sears admitted to Marczyzak he was not working on anything and when Marczyzak instructed him to return to work, Sears responded that he was getting a drink of water, which also did not explain why he had stopped working to speak with Norton.

Concerning the May 29 discipline, Marczyzak and Arnson were looking for Sears to get an update on the plant machinery. They could not find him, until Marczyzak pulled aside a curtain in the back locker room, which was normally left open. (Tr. 749). Behind the curtain was Sears, lounging in a chair, soda in hand, with an expression which Arnson described as similar to “a deer [caught] in headlights.” (Tr. 751, 1110; R. 19). When Marczyzak asked Sears what he was working on, Sears replied he was working on getting a soda, which did not explain why he was reclined in a chair taking an unauthorized break. (Tr. 749-51).

Sears’ testimony removes any doubt that Burndy had a reasonable belief that he was not working when he should have been working on these occasions. Based on Sears’ testimony, it is impossible to conclude that he was working during work time on these occasions. Based on that reasonable belief, the Company has established that it would have disciplined Sears regardless of any Union position or protected activity in which he may have engaged.

2. The Time During Which Sears Had Stopped Working Was Unacceptable.

The ALJ improperly concluded that the time periods for which Sears had ceased working on February 3, April 12, May 3, and May 29 were limited to an exchange of pleasantries based

on her assumption that the time Sears had stopped working was limited to the time that Marczyzak or another supervisor had observed him not working. (ALJD 37, 40, 42, 43). With respect to February 3, when Marczyzak first saw Sears already seated on the stool, there was no way to know how long Sears had already been sitting there. Marczyzak observed Sears sitting on the stool for 3 to 4 minutes. Also, there is no indication that Sears would have gotten off the stool had Marczyzak not doubled back to investigate the situation. (Tr. 726). The undefined period of time before Marczyzak saw Sears sitting on the stool, combined with the 3-4 minutes in which he observed him clearly extended beyond an “exchange of pleasantries.”

On April 12, when Butler first observed Sears and Hing, they were not working. As he walked around the room, he observed them for “more than a minute” and during the entire time, neither was working. When he left the area to look for their supervisors to address the situation, both were still not working. (Tr. 1035). Here also, there is no way to know how long Sears and Hing had not been working before Butler’s observation but that, combined with the period of Butler’s observations, extended beyond the time for an “exchange of pleasantries.”

On May 3, while on his way to the scrap meeting, Butler observed Sears not working and talking to Norton and informed Marczyzak of this. Marczyzak observed Sears and Norton for a few minutes more until he decided to investigate. Here also, there is no way to know how long Sears had not been working prior to Butler’s seeing him not working, but clearly more than the time necessary for an “exchange of pleasantries.”

Sears’ May 29 conduct violated General Rule No. 9. Even if employees were permitted to stop work to talk to one another for a few minutes, there is no dispute that employees were not permitted to take unauthorized breaks. On May 29, Marczyzak found Sears in a back locker room, reclining in a chair, soda in hand, taking an unauthorized break by himself. By the time

Marczyszak had located Sears, he has already been in the Maintenance area for “minutes.” (Tr. 752). Accordingly, the record establishes that Burndy would have disciplined Sears for his unauthorized break regardless of his status as a Union officer.

3. The Circumstances Leading to the Disciplines Do Not Raise Any Doubt That Burndy Would Have Disciplined Sears Regardless of His Status as Union Officer.

The ALJ concluded that Marczyszak on February 3 “purposefully extend[ed]⁴³ his path to the pattern shop in an attempt to catch Sears and Cavaluzzi talking for a sufficiently lengthy period to warrant discipline if their conversation was not work-related.” (ALJD 37). The ALJ further concluded, “[h]is actions after discovering Sears in conversation with Cavaluzzi were motivated by a desire to impose discipline.” (ALJD 37). The ALJ also found that Marczyszak’s disciplining of Sears even after he approached him and Sears left the area to be evidence of unlawful motive. (ALJD 37). The basis for the ALJ’s decision was Marczyszak’s testimony:

Q. [By Attorney Quigley] Well, let me ask you this about something that’s within Arson, or Swanhall or Butler’s scope: if they see an employee sitting on their butt for five minutes, is it within their scope to go over and correct that problem or do they have to come to you and say hey, Ed, you better see this? Can they take action?

A. The answer to that is they can in fact issue a discipline or a write up.

Q. They don’t always have to issue a discipline though do they? They can talk to the worker first to try to find out what’s going on.

A. They could unless it’s something they’ve seen taking place that’s egregious. If I walk on to people, and they’re briefly talking, and I ask them what they’re working and they break up, then they’ve gone back to work. If on the other hand someone is taking more than just a few minutes and they don’t go back to work, then obviously they’re loafing and abusing the time.

The ALJ also commented that it is “odd that the counseling does not specify the amount of time

⁴³ The diagram of the Pattern Shop area and the diagram of the facility demonstrate that Marczyszak did not “purposefully extend” his path into the Pattern Shop. (R. 10, 17). When Marczyszak and Swanhall first observed Sears and Cavaluzzi, they were in front of the locker room. (Tr. 725). They then walked along the aisle way around the Pattern Shop on their way to the conference room. (R. 10, 17). The aisle way is separated from the Pattern Shop by shelving. (Tr. 725-26, 729-30). Because the shelving is not solid, Marczyszak was able to observe Sears while he was walking from one end of the walkway to the other. (Tr. 729-30, 1063). There was no “extension” of a path at all. They followed the path created by the designated walkway, and lined with shelving.

that Marczyzak observed Sears and Cavaluzzi speaking to one another.” (ALJD 38).

Likewise, the ALJ also noted that the April 12 discipline “contains no mention of precisely how long they were speaking with one another, only that they were discussing an ‘open booklet’ and ‘nonwork related matters’” and concluded “[t]his indicates that Respondent made no meaningful effort to determine whether the employees were in fact abusing worktime, but simply intended to discipline two union officers found conversing, however briefly, regarding non-work related issues.” (ALJD 40-41). The ALJ further noted that Butler’s failure to “approach[] Sears and Hing to ask what they were doing, potentially a much more efficient means of resolving the matter” was evidence that he was “more interested in issuing discipline to the ‘union guys’ than resolving problems in an experience manner.” (ALJD 41). With respect to the May 3 discipline, the ALJ found that Marczyzak’s “watching Sears and Norton for ‘three or four minutes’ was evidence that the discipline was unlawfully motivated. (ALJD 42). The ALJ also found that Marczyzak’s disciplining of Sears even though he left the area after Marczyzak confronted him as evidence of an unlawful motive. (ALJD 42). The ALJ again also noted that Butler “did not provide any plausible reason for informing Marczyzak about Sears and Norton’s conversation, as opposed to simply approaching them himself, which would be the most direct and efficient manner of dealing with the situation.” (ALJD 42). Because the ALJ’s conclusions are unsupported by the record, they should be overturned.

Contrary to the ALJ’s conclusions, it is not unusual for Marczyzak to observe employees—other employees as well as Sears—for a few minutes prior to imposing discipline.

He does so to confirm that the employee is not working:

- On August 11, 2010, Marczyzak observed Arismendy Rodriguez (not a Union officer) standing outside the building during working time. Marczyzak walked past Rodriguez and did not approach him, but subsequently, made his way back to where he had observed Rodriguez. He asked Rodriguez what he was doing and Rodriguez responded

that he was "checking things out." Marczyzak told him to go back to work and issued him a counseling. (R. 25(1)).

- On March 12, Marczyzak observed Shinichi Niyama (not a Union officer) playing on his cell phone while sitting at the power press. Marczyzak did not approach him right away and observed him for a few minutes before walking over to him and asking him, "shouldn't you be working?" Niyama put the cell phone away and went back to work; Marczyzak disciplined him. (R-25(a)(2)).
- Marczyzak observed an employee collecting soda cans during work time: "The next incident I believe was machinist we had. As I stepped out on the shop floor and he was walking through, during work hours, and he was looking for soda cans and soda bottles. I watched him." (Tr. 678).

Even with Sears, it was not usual for Marczyzak to observe him for a few minutes before approaching him. For instance, in April 2008, while on a walkthrough, Marczyzak saw Sears at the grinding saw area having a cigarette. Marczyzak testified that he observed him for a few minutes before issuing him a discipline (Tr. 678):

I was walking through and as I stepped through -- I mentioned the opened door in the back of the grinding saw area. And I stepped out there, and I looked and I saw -- Robert Sears is our maintenance man. He was on overtime. He was out there. He was having a cigarette. So I stopped and I observed him. So I watched him for a few minutes. Finally, he finished his cigarette, got his last draw, threw it down on the ground. (Tr. 677).

Also, on February 3 and May 3, it was logical that Marczyzak would observe Sears for a few minutes before approaching him. On February 3, Marczyzak was walking on the aisle way beside the Pattern Shop en route to a meeting when he first observed Sears seated on a stool. (Tr. 727). Only after Sears had not moved on after Marczyzak had reached the end of the walkway did Marczyzak decide to double back to investigate. (Tr. 726, 733, 735). On May 3, Marczyzak was in a meeting when he observed Sears and Norton talking. (Tr. 481, 566, 741, 743-44). As he was in the middle of the meeting, he observed them for several minutes before leaving the meeting to address the issue. (Tr. 741).

Also, it is not "odd" about Marczyzak or Butler not noting the time that they observed

Sears not working. Not a single other discipline in the record issued prior to these charges, whether for stopping work to talk, or for not working during work time, specify the time period. (R. 2(d), 2(f), 2(h), 3(a)-(b), 4(a)-(b), 4(e), 4(i)-(j), 25(a)-25(a)(2), 28(a), 28(d)). The ALJ's conclusion that the failure to note the time was evidence of unlawful motive appears to place Burndy in a Catch-22 situation. It suggests that supervisors cannot discipline employees unless they first ascertain that an employee has not been working for more than a few minutes.⁴⁴ (ALJD 40-41), but the ALJ also suggests that observing employees for a few minutes prior to disciplining them is unlawful. (ALJD 37). The only alternative would be for Marczyszak to approach Sears when he is not working and instruct him to return to work, but the ALJ concluded that such conduct may be considered "insistent chiding" and unlawful harassment. (ALJD 31). Accordingly, the ALJ's decision suggests there is no lawful method to ensure Union officers are working when they are supposed to be working.

Further, Marczyszak's testified that while he doesn't always issue discipline if an employee leaves after he confronts them about not working, he does discipline employees once it becomes "egregious," even if they depart after he has confronted them. (Tr. 677). Sears has been repeatedly disciplined for not working in the past five years, yet Sears' conduct has continued unabated. His conduct is the kind of "egregious" conduct which warrants discipline. Accordingly, that Marczyszak disciplined Sears even after he dispersed does not establish that Marczyszak possessed an unlawful motive.

Also, the ALJ's observations that Butler "could have simply approached Sears and Hing to ask what they were doing," on April 12 and May 3, is not evidence that Butler's preferred

⁴⁴ The ALJ appears to suggest that employees may stop working and talk to another employee for an indefinite period of time but cannot be disciplined as long as they return to work immediately after a supervisor instructs them to return to work. This is illogical and clearly interferes with Burndy's supervisors' "responsibility to oversee the work performed in the facility and to ensure that the employees are productive." (ALJD 32).

method of dealing with the situation, i.e. attempting to find either Sears' or Hing's supervisor to address the situation with them on April 12, or informing Marczyzak of the situation on May 3, is discriminatory. While the ALJ, with the benefit of hindsight, proposed what she believed was a better way to address these situations, a failure to follow a take a different approach does not establish an unlawful motive. Park 'N Fly, 349 NLRB 1 (2007) (reversing ALJ's finding of 8(a)(3) violation based on ALJ's conclusion that the employer's investigation was "flawed" because even though employer interviewed "only" a quarter of the workplace and took statements from "only" four employees, the "investigation was not so flawed as to suggest that it was carried out for pretextual reasons"); Liberty Pavilion Nursing Home, 254 NLRB 1299 ("If [the supervisor] failed to make a more intensive inquiry, . . . it was not because she chose to ignore the truth, but because she was involved with running a nursing home, not a detective agency.") The 8(a)(3) allegations based on Sears' disciplines should be dismissed.⁴⁵

F. The ALJ Erred in Concluding That the Company Would Not Have Disciplined Hing, Except for His Union Status.

As noted previously on April 12, Butler observed Hing and Sears not working, engaged in non-work activities, during work time. The Company disciplined Hing for this incident as well. (Tr. 905; GC. 34). For the same reasons explained in Sec. VI.E., the ALJ's conclusion that Burndy unlawfully disciplined Hing should be reversed.

As with Sears, Hing had previously been disciplined for not working during work time. (R. 2(c), 2(d), 2(f), 2(g)). Also, despite the many opportunities for Hing to explain to Rovello that he had not violated the rule against loafing or other abuse of time, including at the grievance meetings, he offered no explanation for why he was not working on April 12, until the hearing, when he acknowledged that he was discussing a union issue with Sears. (Tr. 122). Accordingly,

⁴⁵ In addition to retaliatory discharge, these allegations include more onerous working conditions, monitoring and harassment. (ALJD 44).

Burndy properly disciplined Hing, regardless of his Union officer status.

G. The ALJ Erred in Concluding That the Company Would Not Have Disciplined Norton and the Pattern Shop Employees, Except for Their Union Status.

On February 8, Rovello had gone to look for the GMP leadership at the request of the GMP International Representative who was visiting the facility.⁴⁶ Unable to find Norton or Hing, she decided to look for Cavaluzzi in the Pattern Shop. (Tr. 866). There, she saw Norton, Cavaluzzi, Vaast and Domeracki huddled around the GMP labor contract.⁴⁷ When she asked what they were doing, no one responded, except Cavaluzzi, who said “I’m sorry.” No one responded to Rovello that they were looking at a pattern. (Tr. 253-254, 403-404, 611, 620). Nor did Rovello see a pattern on Cavaluzzi’s desk. (Tr. 874). Accordingly, Rovello had a good faith belief that they were not working during working time, and properly and lawfully disciplined them based on what she observed and their lack of an explanation for what they were doing, regardless of their position as Union officers.

1. **The Fact That Not One Could Recall the Pattern and Not One Could Provide Any Explanation Establishes that Rovello Reasonably Believed They Had Violated General Rule No. 9.**

While Norton, Domeracki, and Vaast claimed for the first time that they were looking at a pattern in the grievance they filed challenging their disciplines, not one of them provided any reason to Rovello prior to that why they were not working during work time, including when Rovello approached them and at the meetings when they were given the disciplines. (Tr. 884;

⁴⁶ According to the AGC’s theory, after leaving Seal and Sanchez and telling them she would alert the GMP members about their arrival, Rovello underwent a motivational transformation, where her motive changed from helping the GMP and facilitating their meeting with their international leaders to allegedly disciplining them in retaliation for their Union activities. This is inherently implausible.

⁴⁷ The ALJ found that Rovello “initially testified that she saw a GMP contract booklet in Cavaluzzi’s drawer” but “eventually admitted that she did not in fact know whether the book she saw was the GMP contract booklet.” (ALJD 39). Rovello testified that she “did “not know for a fact that it was, but [she] believe[d] it was.” (Tr. 971). Also, neither Norton nor the Pattern Shop employees disputed that Cavaluzzi put the contract back in his drawer. (Tr. 255, 421-22, 618-19).

GC. 46(b)). At the Step 2 grievance meeting, when Rovello explained what she had seen, Cavaluzzi called her “delusional” and told her it was “four against one.” (Tr. 886-87, 1043-44, 1145). At the hearing, not one of the employees present could describe or identify the pattern they were allegedly looking at. (Tr. 254, 422, 619). Accordingly, Rovello reasonably believed that the employees were not working during work time and properly issued a discipline to them.

2. Rovello’s Documentation of the Incident Is Not Evidence That Burndy Would Not Have Disciplined These Employees, Except for Their Union Status.

As evidence that the employees had been unlawfully disciplined, the ALJ explained, “there is no mention in the counselings prepared by Rovello of the amount of time that the GMP officers were allegedly engaged in non-work-related conversation on February 8.” (ALJD 39). However, as previously explained, none of the other counselings prepared by the Company have ever referenced any time period in the discipline even when such discipline was given to an employee for not working and talking to another employee. (R. 2(d), 2(f), 2(h), 3(a)-(b), 4(a)-(b), 4(e), 4(i)-(j), 25(a)-25(a)(2), 28(a), 28(d)).

The ALJ further concluded that because “none of the counselings Rovello prepared regarding this incident mention the presence of the GMP contract booklet – presumably an important piece of evidence that the GMP officers were not working, but were engaged in union activity at the time she saw them” that Rovello “simply assumed based upon the individuals involved—at the time all GMP officers—that they were ‘having a meeting’ regarding union business.” (ALJD 39). The failure to document the GMP contract booklet is immaterial. The employees were having a meeting and not working; consequently, the purpose of the meeting, unless work-related, was irrelevant. Further, Rovello’s method of documentation is consistent with prior disciplines. For instance, when she disciplined Cavaluzzi and Hing for conducting union business during work time on August 17, 2010, she did not specify the basis for her

conclusion that they were conducting union business. (R. 2(d), 28(d)). Again, the ALJ has the benefit of reviewing Rovello's actions in hindsight. At the time, Rovello, was not drafting the discipline with the intent of defending it against a Board charge. Accordingly, Rovello's documentation of the incident is not evidence of discrimination.

3. The GMP's Admissions Support Burndy's Good Faith Belief That The Employees Were Engaged in Non-Work Related Activities.

When Rovello came upon the huddle on February 8, Cavaluzzi slipped the GMP contract booklet into his desk and stated, "I'm sorry."⁴⁸ His admission establishes he was aware he understood he should be working and was not. When Rovello informed Sanchez and Seal of the employees' conduct, rather than deny her statement, they acknowledged her annoyance.⁴⁹ Similarly, at the Step 3 Grievance meeting, when Hing tried to interject that the four employees were preparing for their meeting that day with Seal and Sanchez, the other Union representatives muzzled him. (Tr. 888-90). Sanchez's admission explains why no one claimed to be working on a pattern when they received their disciplines, and supports Rovello's observation that Cavaluzzi had a union contract in his hand. Finally, Sanchez' cryptic statement to Rovello that his committee members "stretch the truth" further supports Rovello's version of events. (Tr. 890). The ALJ's conclusion that Burndy unlawfully disciplined Norton and the Pattern Shop employees based on the February 8 incident should be reversed.

H. The ALJ Erred in Concluding That the Company Unlawfully Disciplined Velez.

The ALJ acknowledged that Velez has not been a Union officer since 1999 (ALJD 41),

⁴⁸ No witness has denied Cavaluzzi's admission. (Tr. 254-55, 420-21, 619).

⁴⁹ The AGC did not call either Seal or Sanchez as a witness at the hearing. When a party fails to call a witness under that party's control and that witness may reasonably be assumed to be favorably disposed to the party, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. Int'l Automated Machines, Inc., 285 NLRB 1122 (1987). Here, an adverse inference should be drawn against the Union regarding Seal and Sanchez's acknowledgement of Rovello's annoyance and also Hing's admission during the Third Step grievance meeting that the employees were preparing for the meeting with Seal and Sanchez.

but unable to reconcile this fact with the AGC's theory that Burndy was disparately enforcing General Rule No. 9 against Union officers, she concluded that Velez had been "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 swept up" because "the circumstances of Velez's counseling are also similar to those involved in the previous counselings issued to Sears, Norton, Domeracki, Vaast, Cavaluzzi, and Hing." (ALJD 41). She reasoned that "Rovello made no attempt to determine the length of Velez's and Cavaluzzi's discussion, but immediately announced that she would be issuing discipline." Burndy excepts to the ALJ's unsupported conclusions.

There is no basis for the ALJ's conclusion since Cavaluzzi, with whom Velez was speaking, and who was then a Union officer, was not disciplined for speaking with Velez. Thus, unlike Allstate Power Vac, 357 NLRB No. 33 (2011), cited by the ALJ, Velez was not disciplined simultaneously with a group of Union officers based on the group's misconduct. Similarly, the instant case can be distinguished from McKee Electric Co., 349 NLRB 463 (2007), another case cited by the ALJ, in which the employer denied employment to the employee on the same day it denied employment to four other known union supporters from the same staffing agency. Here, Burndy disciplined Velez, and not Cavaluzzi, because Velez admitted he was discussing sports with Cavaluzzi when he was supposed to be working. (Tr. 372, 375-76).

Velez had previously received a discipline on August 13, 2010 for the same exact reason i.e. he was not working during work time because he was talking to Jose Pacheco, who is not a Union officer. (Tr. 382). That discipline, similar to the April 13 discipline, does not specify the time period for which Marczyzak observed Velez speaking with Pacheco. (R. 3(a)). Likewise, in December 2011, Marczyzak again observed Velez not working during work time, this time

using his cell phone, and Velez was disciplined on that occasion as well. (R. 3(b)). As with the April 13 discipline, there is no mention of the time period for which Marczyszak observed Velez on his phone. There is no evidence to support the ALJ's conclusion that Velez was "swept up."

I. Burndy Did Not Unlawfully Harass Norton, Hing and the Pattern Shop Employees.

The ALJ concluded that "Marczyszak, Arnson and Butler's repeated threats, statements creating the impression of surveillance, and disparate application of a no-talk rule constituted harassment which violated Section 8(a)(1) and (3) of the Act." (ALJD 31). Specifically, "their 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 31). The ALJ found the "insistent chiding" unprecedented. (ALJD 31).

Allegations of harassment are analyzed pursuant to Wright Line. See Sec. VI.D. As previously explained, Burndy has consistently approached any employee in the past and presently that does not appear to be performing work during work time, regardless of his/her status as a Union officer. See Sec. VI.C; n.23. The ALJ concluded that Marczyszak's repeated asking of Sears what he is working on was not unlawful because it "may not be apparent given that Sears' tasks and work areas fluctuate on a daily basis, and knowledge of employee work activities is clearly within Marczyszak's purview as plant manager." (ALJD p. 44). Likewise, it is not always apparent what Norton, Hing or the Pattern Shop employees are working on. Unlike the majority of the bargaining unit employees at Burndy, they do not work at a machine and Norton and Hing work in more than one area. Consequently, the AGC has failed to meet his burden under Wright Line.

In addition to past harassment, the ALJ also concluded that Burndy supervisors have continued to harass the GMP officers based on her findings that "Arnson continued to interrupt

[Norton and Hing] and ask them what was going on . . . , after he stopped explicitly referring to union activity and potential discipline” and that “Butler continued to interrupt [Hing’s] conversations with Norton and the pattern makers,” albeit with “more politesse” and “without specific references to union activity.” (ALJD 30, 31). The ALJ’s conclusion suggests Burndy can no longer approach any GMP officer and ask them what they are working on because doing so would be considered unlawful attempts to prohibit union-related discussions, albeit with “more politesse.” (ALJD 30). Accordingly, while Burndy may enforce the work time is for work rule when any employee has stopped working, there appears to be an exception for G officers who have stopped working to talk. Both these findings are contrary to the ALJ’s acknowledgement that “managers are obviously entitled to ensure that the work they are responsible for is being performed by the employees they supervise” and that “managers [] have a responsibility to oversee the work performed in the facility and to ensure that the employees are productive” and contrary to the law. (ALJD 30, 32). Accordingly, the allegations that Burndy harassed the GMP officers should be reversed.

J. The Board Should Modify the Overbroad Notice.

In the case that the Board does not grant Burndy’s exceptions, Burndy excepts to the first two “We Will Not” paragraphs because they are vague and overbroad. The two paragraphs state:

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”).

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

An employee reviewing the notice may interpret the notice to permit employees to stop working and engage in activities on behalf of the IUE or GMP during work time, which is not protected by the Act. Further, the Notice fails to confirm with the ALJ’s Order which orders in Paragraphs

1(h) and (i) that Burndy “cease and desist from (h) disciplining employees in retaliation for their union activity and (i) suspending employees in retaliation for their union activity.” Based on the foregoing, the Notice should be modified as follows:

We will not suspend you in retaliation for activities on behalf of the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, IUE/CWA Communications Workers of America (“IUE”).

We will not discipline you in retaliation for activities on behalf of the IUE or the Glass Molders, Pottery, Plastics & Allied Workers International Union (“GMP”).

Such modifications effectuate the ALJ’s order while permitting Respondent to “oversee the work performed in the facility, and to ensure that the employees are productive.” (ALJD 32). Anheuser-Busch, Inc., 337 NLRB 756 (2002) (modifying overbroad notice to conform to language of the order; otherwise it “could be interpreted as encompassing unprotected activity.”)

VII. CONCLUSION

For the foregoing reasons and based on the record as a whole, the ALJ’s conclusions/findings that Burndy unlawfully disciplined and harassed Sears, Hing, Norton, Cavaluzzi, Vaast, Domeracki and Velez in violation of 8(a)(3) should be reversed. The Board should also reverse the ALJ’s findings that Burndy disparately applied its “no-talking” rule to Union officers in violation of 8(a)(1). The records establishes that Burndy has consistently required employees to work during work time and the fact that it has applied this requirement to all employees, including Union officials, does not violate either Section 8(a)(1) or 8(a)(3) of the Act.

Respectfully submitted,

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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 18th day of September, 2013 to the following:

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